



REPUBLIC OF KENYA

Industrial Court of Kenya

Civil Case 472 of 2012

NICHOLAS GITAHU NDEGWA.....
.....CLAIMANT

VS

AGA KHAN UNIVERSITY HOSPITAL.....
.....RESPONDENT

Mr. Mwanthi for Claimant

AWARD

The claimant filed this claim on 21st March 2012 praying for;

- | | | |
|--------------|---|------------------|
| (i) | Salary arrears for 22 months at the rate of 34,068 per month – | 762,696 |
| (ii) | 4 months salary in Lieu of Leave | - 138,672 |
| (iii) | Lost salary increment at the rate of Kshs,2,268 per month
for four years beginning 1 st January, 2011 | - 27,608 |
| (iv) | 1 lost increment per the period 1/1/2012 to 1/3/2012 | - <u>13,608</u> |
| Total | | = 980,318 |

- (v) Subsequent salaries from day of filing this suit till day of judgments @ Kshs.39,204 per month.
- (vi) Contribution to staff pension and Life Assurance Scheme at the rate of Kshs.1,733 per month from date of filing this suit till date of judgment.
- (vii) Interest at court rates.
- (viii) Costs of the suit.

The claim is based on the following allegations;

That he was employed on 9th January, 2008 by a letter of offer dated 6th March, 2008 annexed to the claim as “NGN 1”, in the capacity of Accounts Clerk in the Finance Department at a monthly salary of Kshs.30,000. That he proceed to discharge his duties diligently and was rated highly by the Respondent in the annual review for the years 2009 and 2010. That on 3rd June 2010, the Claimant was charged before the Nairobi Chief Magistrate’s Court under criminal case P/1027 of 2010. The particular charges were; forgery contrary to Section 349 of the penal code and stealing contrary to Section 275 of the penal code. These charges arose in the cause of his employment with the Respondent.

The Claimant was acquitted on both charges on 31st January, 2012 and the full text of the judgment is attached to the claim. From the time the claimant was charged and released on bail around 9th June 2010, he was not allowed back to work. Upon his acquittal, he reported to work on 2nd February, 2012 and was informed that a decision had not been made about his continued employment. The Human Resource Manager however confirmed that he was still an employee of the Respondent. His salary was however not paid since the month of June 2010. His contribution to the Staff Pension Scheme and Life Assurance Scheme were also stopped. Various annual increments were affected during this period which he lost by fact of the stoppage of the salary. Upto the time he filed this case, he had not received a letter terminating his services nor a response to the letter of demand written by his advocate on 20th February 2012 and 1st March 2012.

In his memorandum of reply filed on 25th May 2012, the Respondent admits that the claimant was an employee of the Respondent.

The Respondent further admits paragraphs 4 to 9 of the Memorandum of Claim regarding the terms of service of the Claimant.

In response to paragraphs 10, 11 and 12 of the Memorandum of Claim, the Respondent state that they were informed by the Banking Fraud Investigation Department of the Criminal Investigation Department of the Respondent that the Claimant with others not party to this suit was a prime suspect in a massive fraud against the Respondents and that the Respondent should co-operate with the officers in Criminal Case No.1027 of 2010.

The Respondents further deny paragraphs 13 – 15 (a) – (e) inclusive of the Memorandum of Claim stating that the Claimant ceased to be an employee of the Respondent with effect from 3rd June 2010. No documentation was filed in support of this allegation nor was the Respondent’s case supported by any documentary evidence. When the matter came before me for hearing on 4th December, 2012 the Respondent did not appear and the Claimant’s Advocate, Mr. Mwathi had filed a return of service of the hearing notice for the date. The Advocate dispensed with oral evidence and asked the court to determine the matter on the basis of papers filed. Written submissions were to be filed on or before the 17th December 2012, but to date no such submissions were filed.

The issues for determination in this suit are;

- (1) Whether the employment of the Claimant was terminated by the Respondent and if so what was the date of termination?
- (2) Whether the Claimant is entitled to the claims sought?

The Claimant alleges that his services were never terminated by the Respondent in that he was arrested and charged with a criminal offence on 3rd June 2012. That he was released on Bond pending the hearing of the case and he returned to work on 9th June 2010 but was told to await further communication from the Respondent. That no such communication came from the Respondent until he was acquitted from the criminal allegations on 31st January 2012. He again presented himself at the Respondent’s place but was told again to await communication and was assured by the Human Resource Manager that he was still an employee of the Respondent.

That to date he has received no communication at all from the Respondent. The Respondent has offered no tangible answer to these allegations by the claimant. Indeed no letter of termination has been presented before court. A bare statement by the Respondent in paragraph 7 of the claim is to the effect that the Claimant “ceased being an employee of the Respondent with effect from 3rd June 2010”. This is the date the claimant was arrested and charged. No letter of suspension pending the hearing and determination of the case was presented to the court and indeed non exists.

The Respondent has accordingly offered no tangible defence whatsoever to the claim brought by the Respondent. To the contrary, the Respondent has admitted all the particulars of employment and terms and conditions of service of the claimant.

To this end, the court finds that the claimant has on preponderance of evidence proved the following claims against the Respondent;

- (1) Payment of 22 months arrears salary at the rate of Kshs.34,664 per month total – 762,699.
- (2) 4 months’ salary in lieu of leave at Kshs.34,668 per month – 138,672; and
- (3) 22 months’ contribution towards Staff Pension and Life Assurance Scheme at the rate of Kshs.1,733 per month – Kshs.38,126 and is awarded accordingly.

The hypothetical last salary increments in clause 16(d) and (e) are refused.

The court also declines to award salary arrears from the date of filing this suit. As at that time, the employment of the claimant is deemed to have ceased, however he is entitled to his salary upto and including 2nd February 2012 when he presented himself to the Respondent upon acquittal by the court and was not taken back. The court deems this to have been the date of termination of his services. He was not in suspension as earlier said and therefore he is entitled to the full pay as claimed and awarded herein above in terms of paragraphs 16(a), (b) & (c) of the Memorandum of Cl.

No claim for compensation for unfair dismissal is made against the Respondent. The conduct of the Respondent however, amounts to an unfair termination of service of the Respondent in that no reasons were provided to him for the termination. These infringements are contrary to Sections 43(1) as read with Section 45(1) & 45(2)(a), (b)(i) and (c) of the Employment Act, 2007.

In the final analysis the Respondent is to pay a total of Kshs.939,494/= as itemised in paragraphs 16(a), (b) & (c) of the Memorandum of Claim. The Respondent is to pay interest of the decretal amount at court rates from the date of filing the suit until payment in full and cost of the suit. **It is so ordered.DATED and DELIVERED** at Nairobi this 10th day of April, 2013.

Mathews N. Nduma

PRINCIPAL JUDGE