



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 416 of 2011

SHAMSA WANJUKI NJAGI.....CLAIMANT

VS

THE CHAIRMAN

THE SECRETARY

THE TREASURER as officials of

SUPREME COUNCIL OF KENYA MUSLIMS..... RESPONDENT

AWARD

Introduction

1. By a Statement of Claim dated 17th March and filed in Court on 18th March 2011, the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Memorandum of Reply on 27th April 2011 and the matter proceeded for hearing before Chemuttut J (as he then was). When the parties appeared before me on 3rd December 2012, the Claimant had given her evidence in chief and was due for cross examination by Counsel for the Respondent.

2. By consent of the parties, the case proceeded from where the former Judge had stopped with Ms. Muriu instructed by Wanjiku Muriu & Company Advocates appearing for the Claimant and Mr. Wafula, instructed by E. Wafula & Associates appearing for the Respondent. The parties were to file written submissions by 27th February 2013 but when the matter came up for mention on 6th March 2013, only the Claimant had filed her submissions.

The Claimant's Case

3. According to the Claimant, she was employed by the Respondent on 10th November 2009 in the position of Monitoring and Evaluation Officer in the Global Fund Round 7 HIV/AIDS Program at a monthly salary of Kshs. 40,000 and a travel allowance of Kshs. 5,000. It was the Claimant's case that the tenure of her contract was pegged on the Program which was set to expire on 31st March 2011 (letter of appointment, contract of service and identification card are marked pages 1,2 & 3 in the Claimant's documents).

4. The Claimant worked for the Respondent until 8th November 2010 when her employment was terminated. The Claimant told the Court that she was not issued with a letter of termination nor was she given any reason for her termination. She further testified that during the currency of her employment, she had not been issued with any warning letter. She denied losing any money belonging to the Respondent in the course of her employment.

5. In response to the Respondent's claim that she was not an employee of the Respondent, the Claimant made reference to Clauses 3 and 6 of her contract appearing on page 2 of the Claimant's documents which referred to her as an employee of the Supreme Council of Kenya Muslims (SUPKEM). The Claimant added that prior to her termination no allegation was made against her and she was not given an opportunity to defend herself.

6. The Claimant therefore claimed the following:

- a) Salary due till end of the Global Fund Program.....Kshs. 200,000
- b) Transport allowance till March 2011.....25,000
- c) Salary in lieu of notice.....40,000
- d) Unpaid leave.....40,000
- e) Salary for 2 days worked in November 2010.....9,000
- f) Accommodation costs incurred in Mombasa.....2,500
- g) Certificate of Service
- h) Unpaid NSSF and NHIF dues
- i) General damages for unfair termination

The Respondent's Case

7. In its Memorandum of Reply, the Respondent denied that the Claimant was its employee as envisaged in the Employment Act, 2007. It was the Respondent's case that the contract annexed at page 2 of the Claimant's document was a forgery. In particular, the Respondent took issue with the phrase "**Your contract commences on 5th November 2009**" appearing in Clause 3 which according to the Respondent replaced the contract term of 20 days per month (the Respondent's version of contract are marked SUPKEM 1, 2 and 3 in the Respondent's documents).

8. The Respondent also produced the program contract between itself and the donor, Care International which indicated that the program would engage a consultant to assist in conducting day to day monitoring and evaluation activities as the program lacked funding for a Monitoring and Evaluation Officer (the contract is marked SUPKEM 4 in the Respondent's documents).

9. The Respondent accused the Claimant of violating the Respondent's religious and organisational protocol by confronting the Respondent's National Chairman with claims that the Respondent was being surcharged for disallowed expenses to the tune of Kshs. 995,000.

10. Latif Shaban testified on behalf of the Respondent. He told the Court that the Claimant was employed as a consultant to perform the duties of a Monitoring and Evaluation (M&E) Officer. As an M&E Officer, the Claimant would verify activities on the ground. She would also carry out field activities as per work plan. It was Shaban's evidence that the Claimant would double up as a Program Officer, executing program activities as well as an M&E Officer, verifying implementation of program activities. Although these are distinct roles, it seemed to work for the Respondent. The Claimant would work for 20 days in a month and was to be paid at the rate of Kshs. 2,000 per day. The Claimant had her own work plan and was not confined to an 8.00 am -5.00 pm work schedule. Her contract was issued on a monthly basis.

11. Shaban further told the Court that the Program in which the Claimant was working ran into financial accountability difficulties leading to expenses amounting to Kshs. 685,000 being disallowed. Shaban stated that the employment card produced by the Claimant, which was unsigned, was not issued by the Respondent.

12. The Respondent issued the Claimant with a certificate of service, which she declined to

receive. On the Claimant's claim for leave, Shaban responded that this was not part of the terms of the Claimant's contract. The Respondent sought to settle this matter with the Claimant but she refused to reciprocate.

13. Shaban admitted in cross examination that Clause 6 in the contracts marked SUPKEM 1 and SUPKEM 2 in the Respondent's documents referred to the Claimant as an employee of SUPKEM. He further admitted that the Claimant worked for the Respondent from November 2009 to September 2010, adding that in November 2010, she had undertaken some work at the invitation of Care International, the donors of the Program. Shaban also acknowledged having signed the Claimant's work sheet activity report for the month of October 2010 (SUPKEM 2B). He could not remember whether the Claimant was paid for this month.

14. In response to a question by Counsel for the Claimant as to why the Respondent had produced contracts for only 3 months, Shaban testified that no other contracts were issued but it was understood as between the Claimant and the Respondent that the Claimant's engagement was monthly. The Claimant was not given notice of termination of her contract because she was on a monthly contract. Shaban added that he had informed the Claimant that her contract would not be renewed verbally. Her replacement was recruited in November 2010. According to Shaban, although the Claimant was not issued with a termination letter, she knew the reason for her termination, being her involvement in fraudulent activities.

Findings and Determination

15. The first question for determination is whether or not the Claimant was an employee of the Respondent. The Claimant maintained that she was a regular employee while the Respondent took the position that she was a consultant. The bona fide contract in force was in contention with the Respondent questioning the authenticity of the contract produced by the Claimant in particular Clause 3 which provided as follows:

Your contract commences on 5th November 2009.

16. The corresponding clause in the contracts produced by the Respondent provided as follows:

Your contract will be renewed monthly.

***This contract is for the month ofwith a total number
ofworking days.***

17. Section 2 of the Employment Act, 2007 defines an employee as:

a person employed for wages or a salary and includes an apprentice and indentured learner

18. The same section defines an employer as:

any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual

19. A contract of service is defined as:

an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership

20. Black's Law Dictionary (Ninth Edition) defines a written contract as:

A contract whose terms have been reduced in writing. Written contracts are also commonly signed but a written contract may consist of an exchange of correspondence, of a letter written by the promisee and assented to by the promisor without signature, or even of a memorandum or printed document not

signed by either party.

21. It is not in dispute that there was a contract of engagement between the Claimant and the Respondent running from month to month. According to the contracts produced by the Respondent, the Claimant would work for 20 days in a month at a daily rate of Kshs. 2,000. This is ordinarily the number of working days in a month. In the documents produced in Court, the Claimant was referred to as a consultant and M&E Officer interchangeably. Clause 6 of the contracts marked SUPKEM 1 and SUPKEM 2 in the Respondent's documents referred to the Claimant as an employee of SUPKEM.

22. In determining whether an employment relationship exists it matters not the terms used in reference to the parties to the contract. In the case of **Daniel Inyangu Dungani Vs Mary Khagali Lumula (Industrial Court Cause No 1541 of 2011)** this Court stated that:

In administering justice, the Court is expected to go beyond mere terminologies employed by parties in their pleadings or live testimony.

23. Having taken all the circumstances of this case into account, I have reached the conclusion that the Claimant, though referred to as a consultant, was actually an employee of the Respondent on a contract of service renewable from month to month.

24. Having established the status of the Claimant's engagement with the Respondent, I now turn to the remedies sought. For coherence, I will begin with the claim for damages for unfair termination of employment. The Claimant told the Court and the Respondent confirmed that the Claimant's employment was terminated verbally. The Claimant went further to state that no reason was advanced for her termination. Shaban testified that the reason for termination of the Claimant's employment was her involvement in fraudulent activities, an accusation that was not substantiated.

25. Section 43 (1) of the Employment Act, 2007 provides that:

(43)(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45

26. Section 45 (2) of the Act further provides that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason -

(i) related to the employee's conduct, capacity or

Compatibility; or

(ii) based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure

27. Shaban told the Court that the Claimant's employment was terminated because she was involved in fraudulent activities. This would ordinarily fall under misconduct. Section 41 of the Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make

28. From the evidence on record, the allegation against the Claimant was not proved and the procedure set out in Section 41 was not followed. I therefore find the termination of the Claimant's employment to have been unfair within the meaning of Section 45 of the Employment Act, 2007 and award her 3 months' pay in compensation. I also award her one month's salary in lieu of notice as well as unpaid leave for the period worked. In calculating this award, the monthly salary of Kshs. 45,000 (inclusive of travel allowance) will be adopted.

29. Having awarded compensation for unfair termination, the question remains whether the Claimant would also be entitled to salary up to the end of the Global Fund Program. An award in this regard would effectively amount to an order for specific performance, a remedy to be granted sparingly in employment cases.

30. In the case of **Southern Highlands Tobacco Vs McQueen (1960) EA 410**, the court held that:

A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the plaintiff would have received.

31. In view of my finding that the Claimant's employment was based on renewable monthly contracts, I find that the only remedy available to the Claimant is compensation for unfair termination and pay in lieu of notice. I therefore decline to grant the prayer for salary for the unexpired period of the Global Fund Program.

32. With regard to the claims for salary for 2 days worked in November 2010 and accommodation costs incurred while on duty in Mombasa, the Respondent took the position that the Claimant had traveled to the field on the request of Care International, the donors of the Program and not the Respondent. It was however not in dispute that the Claimant's travel was on account of the Respondent's Program work, though on the request of the donor. I therefore allow the Claimant's claims on this account. The claim for unpaid NSSF and NHIF dues was not proved and is hereby dismissed.

33. In the written submissions filed on behalf of the Claimant, Counsel asked the Court to rule on the issue whether in view of the Respondent and the Claimant professing the Islamic faith, this dispute ought to have been brought before this Court. This issue is well settled and does not need much debate since employment matters are regulated by Kenyan employment law, not by religious law or personal law. However, Article 159(2)(c) of the Constitution, 2010 enjoins the Court to promote Alternative Dispute Resolution (ADR) and since the Claimant did not demonstrate the extent to which she availed herself of the opportunity for ADR offered by the Respondent, I decline to grant her prayer for costs and direct that each party with bear their own costs.

34. The cumulative effect of this award is as follows:

- a) 3 months' pay as compensation for unfair termination.....Kshs. 135,000
- b) Salary in lieu of notice.....45,000

d) Unpaid leave.....	45,000
e) Salary for 2 days worked in November 2010.....	4,500
f) Accommodation costs incurred in Mombasa.....	2,500
Total.....	232,000

35. The Respondent is directed to re-issue the Claimant's certificate of service in the format set out in Section 51 of the Employment Act, 2007.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF APRIL 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**