



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1518 of 2011

DAVID MBUGUA MBURU CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE

PRESBYTERIAN

CHURCH OF EAST AFRICA.....RESPONDENT

JUDGEMENT

This is a claim dated 7th September 2011 for wrongful and unfair termination of the claimant David Mbugua Mburu by the respondent the Registered Trustees of the Presbyterian Church of East Africa. By a response dated 3rd October 2011, the respondents admit having employed the claimant but deny unfairly terminating the services save that in terminating him they complied with sections 35 and 36 of the Employment Act.

The claimant stated that he was employed by the respondent as an Assistant Projects Co-coordinator Director on the 1st March 2003 where he served with dedication and loyalty but on 9th September 2010 he was sent on 3 months compulsory leave and subsequently terminated on 17th February 2011. That he was not given any reason for termination despite being diligent in his duties and service to the respondent. That failure to give him reasons for his termination caused him to speculate that the reasons could have been due to respondents politics due to new leadership or a matter related to a Social Responsibility Church Drilling Rig project.

That on the project issue the claimant noted that in December 2007 the respondent received a donation of a water drilling rig from the Presbyterian disaster assistance (PDA), a relief and development agency of the Presbyterian Church in the united States of America (PC USA) the same intended to assist the Board Social Responsibility Project and an income generating activity. when the water project started it was between the respondent and Northern Frontier Construction Company (NFCC) which had been contracted by some companies in Southern Sudan.

That this Rig was to be run by the Director of the project and not the claimant who was the assistant Project Coordinator and his responsibilities were mainly based on delegation from the Project Director. That he had no role in this project as the Project Coordinator had delegated this to another assistant projects director running the day-to-day activities. The drilling work was assigned to the project officer who was reporting to the Project Director, but the project failed due to operational challenges and logistics where the claimant was sent to address these challenges that led to the demobilization of the water drilling truck in July/August 2007. These challenges were reported to the General Assembly.

The claimant further stated that under these circumstances he was unfairly laid off without any due cause

without giving him any opportunity or reasons for it to be able to defend himself. That under the respondent Practice and Procedure Manual he was not treated fairly. That he seeks a declaration that his termination was null and void and that he was unfairly terminated and the respondent be directed to reinstate him back to his position or in the alternative that he be paid compensation for unfair termination, severance pay, 6 months' pay in lieu of notice, unpaid allowances, costs and interest.

In evidence the claimant stated that the Assistant Project Coordinator to Director he worked diligently and never received any warning letter in writing or verbally. On 9th September, 2009 he was sent on compulsory leave on the reasons that from a meeting that was held, it was agreed that he should be sent on leave. Three months later he was called back to work and proceeded with his duties. From the leave he never got any reasons or outcome of any investigations.

Later on 17th February, 2011 he got a letter of termination. There were no reasons given nor was he called for any disciplinary hearing. That at this time there were two issues in his department, there was a donation of water drilling project that was not making profit to respondent but this was not under the responsibility of the claimant. There were meetings on the project but there was no omission on the part of the claimant. Also his compulsory leave came after a change of leadership of the respondent and that there were a lot of politicking.

That the claimant earned kshs.66,287.00 per month and from the termination he was not given notice and seek to be paid for 6 months in lieu of notice and the court to find that he was unfairly terminated and get compensation. He also seeks severance pay.

He is not sure if the respondent hired somebody else to replace him since there was no restructuring. There were unpaid allowances as the respondent would pay allowances based on one's job group. He had a responsibility allowance and in a letter dated 13th July 2011 there was a review from Kshs.6, 000.00 to kshs.15, 000.00 he was not owed any travel allowance, only the responsibility allowance was due. That these outstanding dues had been acknowledged by the respondent Secretary General on 26th April 2010.

The claimant also claimed reinstatement.

On the other hand the respondent stated that the claimants claim has no basis faulting the background of his alleged unfair termination. That the claimant failed to follow the established channels recognized by law so as to establish the reasons for his termination instead of speculating. That at the time of termination the respondent did not owe the claimant any dues save those that were held pending his clearance from PCEA Sacco. That the claimed outstanding allowances were all paid out to him and there are pay slips as attached to the memo of claim. That in the contract of employment it was clear that any party could terminate the same upon payment of 3 months' salary in lieu of notice where it failed to afford the claimant notice.

That in terminating the claimant's employment, the respondent complied with section 35 and 36 of the Employment Act which provide for the bare minimum. That 3 months pay was given in lieu of notice and that the respondent used their practice and Procedures manual in dealing with the claimant.

The respondent witness was Samuel Waweru Njoroge, a Secretary with the Presbyterian Foundation. That he knew the claimant well, they are neighbours at home and knew each other before he joined the respondent but by the time he started his employment with the respondent, the claimant had been terminated. His evidence was therefore based on the records he found with the respondent. The witness works at the Church Foundation, while the claimant was in a different department.

From the records with the witness, he observed that the termination was not unfair, due process was followed and he had a good relationship with the Social Responsibility Board. He was cleared by the Finance department and there are no outstanding dues from the respondent. That the termination was not based on any politics but noted there was a problem with the water drilling project.

That the incoming leadership had nothing to do with the termination of the claimant, his terminal benefits

were paid but some dues were withheld as the Sacco had pending issues and when he cleared he was paid. That under the claimant's contract, there was no requirement that before termination an investigation be conducted as the respondent retained their right to terminate.

That the claim should be dismissed with costs to respondent.

On cross-examination the witness confirmed that he is conversant with employment laws and that he was aware that before any termination, reasons must be given as under the Employment Act. That the contract between the claimant and respondent was clear in that no reasons were required to be given before termination. That the claimant speculated on the reasons and the water project was the main reason to his termination. The witness also admitted that the claimant was never called for any meeting, all issues were addressed but there was no record kept after the committee that investigated the water project. That even though the claimant gave his reasons for the challenges of the project, the investigation report were not shared with him.

That the claimant cannot be reinstated as the respondent closed the department where the claimant was employed. That the positions in that department were declared redundant and there is no more work.

That the claimant outstanding allowances were to be paid. That these allowances were to be paid based on performance of the department. The witness had no records of the payments or the performance.

Under section 43(1) of the Employment Act, 2007, in any claim arising out of termination of a contract, the employer must prove the reason or reasons for the termination and if the employer fails to do so the termination shall be deemed to be unfair. In the instant case the letter of termination does not state the particulars of the termination. No reason or reasons are given by the respondent as to why they took the decision to terminate the claimant. Even though he had been sent on compulsory leave pending investigations, no report of the investigations was mentioned or other reasons stated in the termination letter.

Termination of a contract of employment is a serious decision with far reaching consequences on the employee. This is their daily bread, their life is disrupted and their finances thrown into disarray. It affects their income and the general welfare of their families. It is a very serious decision to give an employee who has no other source of income. For any employer to treat this decision so casually is something that this Court finds flawed. The mere fact that the contract of employment stated that the employer could terminate without giving reasons for this action is subjection to the applicable law that make it mandatory to an employer to give reasons for termination. It will not suffice that the employee had signed his contract agreeing to this kind of treatment. The law here ranks in priority whatever the parties have agreed to do. If this is contrary to written law, the same becomes invalid *ab initio*. It is of no consequence at all. One cannot be bound to an illegality.

The employer is bound to, in clear terms, to inform the employee the particulars of the acts complained of and leading to the termination. The reasons for termination cannot be an after-thought or a subject of speculation like in the instant case where the allegations for poor performance resulting in the closure of the water drilling project were suggested to be the reasons for the termination. Nothing was done to link the claimant to the losses, failure or poor management of the water drilling project. In any event, he was not the project manager he was only involved in a delegated position as the assistant in the project. Any investigations conducted on the project did not involve the claimant or attribute any wrongdoing to him to warrant the respondent to rely exclusively on this project toward the termination. Otherwise if this was the case, this should have been clearly outlined in the letter of termination issued to the claimant.

The court therefore finds that the termination of the claimant's employment by the respondent was unfair termination as envisaged in section 45 of the Act.

In assessing this case, the court recognizes that the right to fair termination has constitutional basis as provided for in Article 47(1) of the Constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial

decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action. Thus, in the instant case, the respondent was bound to accord the claimant the right to a fair administrative action through observance of the rules of natural justice and as expressly envisaged in section 45(5) of the Employment Act.

The remedy for unfair termination is governed by the provisions of section 49 of the Employment Act, 2007. In particular subsection 49(4) provides for the factors to consider in arriving at the remedy and subsection 45(1) (a) provides that the employer may be ordered to pay the employee the equivalent of a number of months of wages not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal. Accordingly, the court finds that the claimant is entitled to be paid by the respondent ten months gross salary being 10 times Kshs. 66,287.00 all amounting to Kshs, 662,870.00. This is a fair and adequate remedy in the circumstances of this case.

No notice was given prior to termination. Under the contract of employment, three months notice was the highest available and I will grant payment in lieu of notice equivalent to three months pay at Kshs.66,287.00 x 3 all amounting to Kshs. 198,861.00

On the claim for severance pay, I note from the evidence, this was not a case of redundancy. This did not stand out as one such case. Even though the project under which the claimant was working on was would up, there are other projects of the respondent ongoing and with his skill he could have been absorbed had it not been the termination. This coupled with the claim for reinstatement will not be granted noting that the relationship between the claimant and the respondent was already strained by the time of his termination.

It is the duty of the employee to keep all employees record as outlined under section 10 of the Employment Act. Where an employee claim to have their dues outstanding and unpaid, the burden is on the employer to give the record of such payment. Otherwise the court will take it that this is due and outstanding and unpaid as at the time of termination. I will therefore confirm the claim for outstanding allowances all amounting to kshs.500, 000.00.

The court therefore enters judgment for the claimant against the respondent as follows:

- 1. A declaration that the respondent unfairly terminated the claimant's contract of employment;**
- 2. The respondent shall pay the claimant the following**
 - a) Compensation for unfair termination at Kshs. 662,870.00;**
 - b) Notice pay at kshs.198,861.00; and**
 - c) Unpaid dues and allowances at Kshs.500, 000.00.**

Total amount dues Kshs.1,361,731.00.

- 3. The respondent to pay the costs of the case.**

Delivered in open court this 17th day of May 2013

M. MBARU

JUDGE

In the presence of:

Court Clerk: Jacob Kipkirui

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