



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 105 OF 2013
(Formerly Nairobi Cause No. 512 of 2012)

MOSES JOSEPH OKIYA.....CLAIMANT

-VERSUS-

TRACOM COLLEGE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th July, 2013)

JUDGMENT

The claimant **Moses Joseph Okiya** filed the memorandum of claim on 28.03.2012 through Maragia Ogaro & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **A declaration that the claimant's dismissal was unlawful, unjust and discriminatory and the same amounted to unfair dismissal.**
- b. **A declaration that the claimant's dismissal without settling all salary and other arrears was unfair and discriminatory.**
- c. **A declaration that failure by the respondent to issue a certificate of service is unlawful, unfair and attracts penal consequences as provided by section 51 of the Employment Act, 2007.**
- d. **Kshs.636,053/= being salary arrears, part time claims and other terminal benefits as provided by law.**
- e. **General damages.**
- f. **Cost of the suit and interest thereof at court rates.**
- g. **Such other and further relief that the court may deem fit to grant.**

The respondent **Tracom College Limited** filed the memorandum of response on 06.06.2012 through Kilonzo & Company Advocates and prayed that the claim be dismissed with costs and in alternative a

contract between the parties through their respective advocates superseded the employment contract between the claimant and the respondent. The claimant filed the reply to the memorandum of response on 23.10.2012.

The case was heard on 24.06.2013 when the claimant gave evidence to support his case and the respondent's Principal Zebedy Omondi Muga gave evidence to support the respondent's case.

The claimant was employed as a lecturer by the respondent in the Tourism Department with effect from 28.01.2009 at a monthly salary of Kshs.15,000/= and at 35% of the salary being Kshs.5,250/= being the house allowance. The letter of appointment is exhibit 1 on the memorandum of claim.

The claimant on 5.01.2012 received the shocking termination letter without any prior warning, notice or hearing. The termination letter dated 5.01.2012 being part of exhibit 1 on the memorandum of claim and addressed to the claimant stated as follows:

“RE: DISMISSAL NOTICE

Dear Madam,

It is with regret that we inform that the management has considered your continued employment with this institution has been found necessary to separate. In this regard, we hereby give you the statutory one month notice running from 5th January 2012 to 5th February 2012.

You are being dismissed due to the continued complaints by your students in regard to curriculum delivery, which most recently includes non-attendance of classes.

It is the policy of this company to protect its trade secrets, customer lists and other confidential or proprietary information as vigorously as possible. We remind you that we consider our clients, our business procedures and our business plans to be proprietary.

We request that you return any property that was generated or obtained during your employment with this company, including any documents, handbooks, manual, staff ID card, Computer programmes, software etc.

Finally, should a prospective employer call this company for a reference, they will be provided with your dates of employment and final job position. We wish you all the best in your future endeavours.

Sincerely,

Signed

Zebedy O. Muga

PRINCIPAL”

The respondent had by the earlier letter dated 11.10.2011 congratulated the claimant for outstanding performance for 100% students' score in the two units the claimant taught for the Institute of Commercial Management (ICM) June, 2011 results. The appreciation letter is exhibit 2 on the memorandum of claim.

The claimant claimed Kshs.241,047/= being salary arrears for 2010 and 2011 as he had been paid salary by installments and there was outstanding pay. The claimant relied on the bank statement for May 2011 to 19.01.2012 being exhibit C1.

As per the letter of appointment, the claimant was entitled to contributory pension being 5% by self and 10% by the respondent but which RW admitted was never effected. He also claimed Kshs.179,047/=

being unpaid allowances, Kshs.62,000/= for overtime worked and not paid, he never took leave and he claimed Kshs.45,000/= and a severance pay of Kshs.270,000/=.

The claimant admitted that there was no agreement to earn for working overtime but there were written claims given to and in custody of the respondent.

The respondent admitted that he had received Kshs.111,547/= as per consent on settlement of arrears being the without prejudice letter dated 3.1.2012 between the parties' advocates at folio 3 on the respondent's documents. The respondent confirmed that his lawyer signed the consent upon his personal instructions but he decided to file suit when one of the installments delayed. The consent was to the effect that parties would dispense with recourse to court battles. In view of the letter, the claimant testified that his claim was less the Kshs.111,547/= in the consent. The claimant admitted taking 7 leave days over the period of service.

RW told the court that the claimant worked throughout the termination notice of 5.01.2012 to 5.02.2012 and the termination was due to leaking of the trade secret given out by the claimant as per reports given to management by the students. The students were 27 and 6 according to RW, gave the reports. RW also confirmed that the claimant's gross salary was Kshs.20,250/= at termination.

The first issue for determination is whether the claimant was unfairly dismissed. The court finds that the reason for termination was not genuine as RW alleged leakage of trade secrets and the termination letter alleged failure to deliver on the curriculum. As held by *the Honourable Justice Ndolo in Angeline Malia Kamunzyo –Versus- Vegpro (K) Limited Industrial Court Cause No. 437 of 2011 at Nairobi.* inconsistent and contradictory evidence must be rejected. The court finds that the reason was not valid and the termination was unfair under section 43 of the Employment Act, 2007. The court further finds that the termination was unfair because the claimant was not given any notice and heard in view of the alleged misconduct or poor performance as envisaged in section 41 of the Act. The court has considered the willingness of the respondent to negotiate at all material time as a mitigating factor and the court finds that **Kshs.121,500/=** being six months gross salaries will serve justice in view of the unfair termination.

The second issue is whether the claimant is entitled to the other remedies as prayed for. The court makes the following findings:

- a. The without prejudice letter of 3.1.2012 served to bar the claimant to claim in court on the issue of salary arrears and the court finds that the claimant having confirmed the agreement before the court and having received the Kshs.121,547/= as agreed, the claim for salary arrears and part time shall fail. The letter, in the opinion of the court, did not bar the claimant from suing especially on matters not covered by the letter.
- b. On leave for three years, the claimant has admitted to have taken 7 days leave and the court finds he is not entitled to as prayed because the respondent's case that the claimant rested during the institute's vacations was not rebutted.
- c. As for claims on contribution for pension, the court finds that parties by their own conduct in failing to implement the agreed contributions are deemed to have abandoned the agreement. The claimant did not urge the case that despite demands, the respondent had refused to implement the contributions and the court finds that the claim is a mere after-thought.
- d. As this was not a case in redundancy, the court finds that the claim for severance pay shall fail.
- e. The court finds that the claimant is entitled to a certificate of service and the costs of the case.

In conclusion, judgment is entered for the claimant against the respondent for:

1. **A declaration that the termination was unfair.**

2. **The respondent to pay the claimant Kshs.121,500/= by 1.9.2013, failing interest to be paid at court rates from the date of the judgment till full payment.**
3. **The respondent to deliver to the claimant the certificate of service by 1.9.2013.**
4. **The respondent to pay costs of the case.**

Signed, dated and delivered in court at Nakuru this Friday, 19th July, 2013.

BYRAM ONGAYA

JUDGE