



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1764 OF 2011

JACOB OKAL ODEROCLAIMANT

VERSUS

THE KENYA INSTITUTE OF MANAGEMENT LTD.....RESPONDENT

JUDGMENT

The claim herein was commenced by a Memorandum of claim dated 17th October 2011 and filed in court on 19th October 2011 by the Claimant JACOB OKAL ODERO who alleges that he was wrongfully unlawfully and unfairly dismissed from his employment by the Respondent. He seeks the following orders.

- a. A declaration that he was wrongfully unlawfully and unfairly dismissed from his employment and/or was constructively dismissed.
- b. Compensation in the sum of Kshs.2,639,635.
- c. Certificate of service for seven (7) years.
- d. Gratuity entitlements for 7 years at the rate of one month salary (payable at the time of termination of employment) per every year worked.
- e. Interests in item (b) and (d) above at court rates.
- f. Costs of the suit.
- g. Damages.
- h. Any other relief that his Honourable court shall deem fit to grant.

The case was originally before Hon. Justice E.K. Mukunya who heard the Claimant's testimony on 15th May 2012. The file was reallocated to me after the retirement of Justice Mukunya and the parties decided to start the case denovo. The parties appeared before me on 2nd October 2012 when the case was adjourned. The case was finally heard on 10th December 2012 and 5th February 2013.

The Claimant testified that he was employed by the Respondent in 2004 as Branch Officer Kisumu where he worked until 2007 and rose to the position of Branch Manager. He was thereafter promoted to Branch Manager Nakuru where he worked for 1 year before being promoted to the position of Liaison and Linkages Manager at Kenya Institute of Management School of Management in Nairobi where he worked until the time of his termination on 8th February 2011. Before termination he was given a suspension letter. He was called by telephone to attend a disciplinary hearing which took place on 7th February 2011. His employment was terminated by letter dated 8th February 2011.

The reasons for termination of his employment was that he had expressed unwillingness to teach. He denied ever expressing the unwillingness to teach. He testified that he had not been paid his terminal

dues.

Under cross examination he stated that he was terminated unprocedurally. He denied unwillingness to take up teaching lessons. He confirmed attending the disciplinary hearing. He stated that he was entitled to pay in lieu of notice according to the Respondents Human Resources Policies and Procedures Manual at clause 45(3) at page 129 of the Manual. He stated that his job as Liaison and Linkages Manager did not include teaching. He was asked by the Executive Director to take up some teaching. He was not paid for teaching. He admitted being offered 3 months salary in lieu of notice but refusing to take it. He also admitted being offered and refused to accept payment in lieu of 35 days annual leave. He stated he has further claimed salary to retirement age of 55 years as he expected to work for the Respondent until he reached retirement age.

In re-examination the claimant stated that he had only asked for restructuring of the time table as he was teaching a diploma class in town from 10 am to 12 pm, still had to do his work as Liaison and Linkages Manager and then teach the Executive Diploma class at the Respondent south C Campus from 4.30 to 6.30 pm on Fridays, that he was using public means and reached South C feeling fatigued and sometimes he would arrive late. That he also had to prepare for the lessons. That this was the reason why he asked for the time table to be adjusted. That on the day he is alleged to have expressed unwillingness to teach he actually taught the MBA class. He referred the court to Appendix Joo-10 which has a form filled by students who attended the class. That the Diploma class had by then not been constituted. He further stated that he is not a teacher by profession and teaching was not his core duty. He had just taken a loan which he defaulted to pay and has been blacklisted. He also stated he had not collected his certificate of service.

The Respondent called RW1 MICHAEL OROTO NGALA who was in charge of the time table and ensuring that lectures are teaching at the time they are supposed to be in class. It was his duty to put the time table on the notice board and call lecturers. That when he called the Claimant to remind him, the claimant told him he was not going to teach. That the Claimant told him to remove him from the time table of Emperor Plaza. That when schools opened he briefed his Manager so that they could get an alternative Lecturer. He denied that the Claimant asked him to reschedule the time table. He testified that he was later called to attend the disciplinary committee to explain what happened. The claimant was later terminated. He said from 12 to 4.30 pm is sufficient time for claimant to travel from Emperor Plaza to South C. In cross Examination RW1 stated that he was aware the claimant was the Liaison and Linkages Manager, that he did not know whether the claimant was relieved of some of his duties when he was made a part time lecturer, that he did not know whether the claimant requested for proper teaching arrangements in future, that when a lecturer has a problem they only reallocate if there is free time.

RW2 AUGUSTINE KITUKU NZIOKI the Head of Department of Human Resources stated that the Claimant was the Liason and Linkages Manager, that in his employment contract the Claimant signed that the was to perform any other duty assigned to him by the Director and coordinator of the Respondent's school of management.

That in January 2010, the claimant was assigned classes to teach. That in January 2011 when students had started reporting the claimant said he was not willing to teach. The claimant was suspended for insurbodination by letter dated 19th January 2011. The claimant was later called for a disciplinary hearing.

That after the disciplinary hearing the recommendations of the committee were sent to the Executive Director who after considering the report and previous cases of 2008 when students protested and another incident of misappropriation of funds, decided to terminate the employment of the claimant. The claimant was offered payment for days worked, notice, leave and pension. He was also offered certificate of service. That the claimants termination was fair, that he was supposed to be summarily dismissed but the Executive Director reduced the case to normal termination.

Under cross examination RW2 stated that the claimant was on a 4 months renewable contract as part time lecturer at a fee of kshs.3000 per session of 2 hours. RW2 did not know whether the claimant was paid

for the teaching. That the claimant was still doing his work as Liaison and Linkages Manager, that he was not present when the claimant expressed his unwillingness to work, that the Claimant expressed this to Mr. Ngala who was at the same rank as the claimant, that this was considered to be insubordination to the claimant's supervisor. He stated that the disciplinary meeting recommended that the claimant be warned. He confirmed stated that when Claimant was transferred to Kisumu it was on promotion and when he was transferred to Nakuru it was on higher salary. He stated that claimant was found guilty of fueling riots which were protesting his transfer to Nakuru. That the claimant was not told he was fueling hostilities. The RW2 further stated that the Claimant was found guilty of misappropriating funds but he did not know whether any funds were recovered from claimants salary. That the claimant was suspended on 20th January 2011, the same day when the time table Manager said he was called on telephone. RW2 called the claimant by telephone to attend the disciplinary committee.

I have considered the pleadings, the testimony of the witnesses the submissions filed by both parties and the law. The issues for determination are in my opinion the following;

1. Whether or not the claimant was unfairly terminated.
2. Whether the claimant is entitled to the prayers sought.

1. WHETHER THE TERMINATION OF THE CLAIMANT'S EMPLOYMENT WAS UNFAIR

The claimant was on 19th January suspended from duty for ***“your unwillingness to undertake the responsibilities that you have been assigned to lecturing students at Nairobi Branch. This is an expression of insubordination that has now argued well with all concerned”***.

On that basis the claimant was suspended from duty effective 20th January 2011 to 7th February 2011.

I have checked the Respondents Human Resources Policies and Procedures Manual which is attached as Appendix Joo-26 to the Memorandum of Claim and to the Respondents Reply to the Claim as Appendix 8 at pages 18 to 86. There is no mention of suspension therein. Suspension is also not provided for in any employment legislation.

Before the suspension the claimant was not asked to explain what happened so that a decision could be reached as to whether what transpired was an issue that could be resolved without resorting to disciplinary action or one that required a disciplinary hearing. The wording of the disciplinary letter show that the Claimant had already been condemned before the disciplinary process began.

Secondly the suspension letter states that the Claimant's unwillingness to undertake teaching responsibilities amounted to insubordination. Insubordination is failure to obey a lawful order from a person placed in authority. Refer to Section 44 (4) (e) of Employment Act which describes insubordination. Being a teaching institution that carries out training in human resource management as shown at pages 56 and 57 of the Human Resources Policies Manual, the Respondent does not have any excuse for misinterpreting the term insubordination.

Both the claimant and RW2 testified that the claimant was summoned to the disciplinary hearing by telephone. There is no record that the claimant was informed of the charges for which he was to defend himself or given an opportunity to prepare for the hearing and informed of his right to be accompanied to the hearing by a fellow employee or a union official if he was a member of a union.

At the hearing, the claimant gave one version of what transpired while his accuser, who also sat as a member of the panel to decide his case, one Mr. Ngala, gave a different version. No explanation is given why Mr. Ngala's version was preferred to the Claimants. At the hearing the charges against the claimant were different from the reasons given in the letter of suspension.

Mr. Ngala explained that by 19th January 2011 the business class had not formed and that he could not conclude how the claimant would have behaved if the class had been formed. No complaint was levelled

against the claimant in respect of the EMBA classes which he was infact teaching on 19th January 2011 at 8.30 am when he was called and informed to collect the suspension letter the following day on 20th January 2011.

The recommendations of the disciplinary hearing was that the claimant be issued a warning. The Executive Director who was not at the meeting enhance the punishment to terminations. The Respondents Human Resources policies and Procedures manual at page 49 under paragraph 25.2(b) provide that the Executive Director determines appeals from the disciplinary committee. This means that he cannot change the decision of the committee as his powers in respect of those decisions were in respect of determination of appeals. Otherwise he would be sitting on appeal against his own decision which is indeed what he did in this case.

The letter of termination gives the reasons for termination as follows;

“During the disciplinary committee meeting held on 7th February 2011, the management did not understand why you unprodedurally expressed your unwillingness to take up your teaching duties at Nairobi Branch”.

The letter further states

“In view of the above and your past behavior while in employment, the institute has lost trust and confidence on you and decided to terminate your contract”

I have looked at the Respondent’s Human Resources procedure manual and there is no offence known as ***“expression of unwillingness”*** to work. A person is guilty only if they fail to work and not for merely expressing the desire not to work.

The decision also seems to have been informed by the Claimants undisclosed ***“past behavior”*** the nature of which were never raised at the disciplinary hearing or in the letter of termination. The only disciplinary issues, that were disclosed during the hearing of this case are the hostile reactions to his transfer from Kisumu to Nakuru in 2008 which was on promotion and alleged misappropriation of funds both of which were dealt with conclusively without any punishment of the Claimant..

From the foregoing reasons the termination of the claimant’s employment was both substantively and procedurally unfair. The Respondent did not comply with sections 41, 43 and 45 of the Employment Act.

I therefore declare that the claimant’s employment was unfairly terminated.

2. IS THE CLAIMANT ENTITLED TO THE RELIEF’S SOUGHT

The claimant prayed for the following;

1. Compensation equivalent to 12 months salary.
2. Cetficate of service
3. Gratuity
4. Interst
5. Costs
6. Damages.

In the letter of termination, the Respondents offered to pay the claimant the following;

1. Salary for days worked.
2. 3 months salary in lieu of notice
3. Leave days earned
4. Pension

The Respondent has also offered to issue a Certificate of Service in the Response to the claim and by RW2 through his testimony in court.

I therefore award that the Respondent pays the Claimant the sum of Kshs.479,335.71 being the amount admitted by the Claimant broken down as follows;

- | | |
|--------------------------------|-----------------|
| i. 3 months notice | Kshs.326,100.00 |
| ii. Leave (35 days) | Kshs.120,750.00 |
| iii. 8 days worked in February | Kshs. 32,485.71 |

Total **Kshs.479,335.71**

iv. Certificate of service.

I now look at the other items of the claim.

COMPENSATION

Having found that the Claimant was unfairly terminated, he is entitled to compensation as provided in Section 49(1) (c). I have considered the factors enumerated in Section 49(4) and specifically the Claimants length of service, the circumstances under which he was terminated, his reasonable expectations and the amount of terminal benefits payable to him.

I find that maximum compensation is reasonable in the circumstances and award him Kshs.1,364,400 being 12 months gross salary.

GRATUITY

The Claimant has prayed for gratuity but has not specified the amount claimed or the legal basis for claiming the same. This being the case, I find that the claimant has not made out a case for payment of gratuity and dismiss the claim.

DAMAGES

The claimant has not specified the amount of damages claimed or justified the legal basis for the claim.

I find that the prayer is not proved and dismiss the same.

COSTS AND INTEREST

I award the claimant costs of this case to be taxed by the Registrar.

The amount awarded should be paid within 30 days from today failing which the decretal sum will accrue interest at court rates from date of Judgment.

In summary therefore I enter Judgment for the claimant against the respondent as follows;

1. A declaration that the termination of the Claimant's employment contract was unfair.
2. Payment of Kshs.1,843,735.71.
3. Costs
4. Interest payable after 30 days.

Orders accordingly.

Read in open Court this 16th day of July 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms Chidagaya h/b Mr. Katwa for Claimant

Ms Muendo for Respondent