



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 737 OF 2012

RONNIE ODIWUOR ASINO.....CLAIMANT

VS

NYANZA REPRODUCTIVE HEALTH SOCIETY.....RESPONDENT

AWARD

Introduction

1. The Claimant commenced this claim by way of a Memorandum of Claim dated 2nd May 2012 which was amended on 14th November 2012. The Respondent filed a Statement of Response on 9th July 2012 and the matter was heard on 5th June 2013 with Mr. Omari instructed by Mang'erere J. & Co. Advocates appearing for the Claimant and Mr. Mbaluto instructed by Oraro & Co. Advocates appearing for the Respondent. The Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Ferdinand Kizito Osama. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent on 21st October 2008, initially as a Clinical Officer. He worked as such until February 2010 when he was given a contract to serve as a District Coordinator for Kisumu/Nyando. This contract was to run from 1st February 2010 to 31st July 2012.

3. The Claimant worked for the Respondent until 19th January 2012 when his employment was terminated, ostensibly on the ground of poor performance. It was the Claimant's case that the termination of his employment was unfair, wrongful and unlawful. He was not afforded any opportunity to be heard.

4. The Claimant told the Court that on 25th March 2010, he had his first performance evaluation for period between October 2008 to March 2010, which returned very positive results. In October 2011, the Claimant met with the Respondent's Director, Dr. Walter Obiero for another performance review. It was the Claimant's testimony that Dr. Obiero asked the Claimant several questions as he wrote on the review form, which he gave to the Claimant to take home, read and sign. On realizing that Dr. Obiero had not written his comments on the space provided, the Claimant did not sign the review form. He therefore returned it unsigned.

5. On 19th January 2012, while on off duty, the Claimant was called by Ezra Okello who introduced himself as the new Human Resource Manager of the Respondent. Okello asked the Claimant to see him in his office in Kisumu on 20th January 2012. At this meeting, Okello told the

Claimant that the Respondent's Management had decided that his employment be terminated on the ground of poor performance and that the Claimant should collect his termination letter at the Reception.

6. The Claimant told the Court that the issue of his performance had not been brought to his attention previously. He therefore did not understand the reason for the termination of his employment. The Claimant made an appeal against his termination on 6th February 2012 vide which he asked for a hearing with the Respondent. There was no response to the Claimant's appeal.

7. The Claimant's monthly salary as at the time of his termination was Kshs. 118,000. He however told the Court that he was entitled to a 3% increment from October 2011. The Claimant further testified that he did not go on leave in 2011.

8. The Claimant therefore claimed the following:

- a. 1 month's salary in lieu of notice.....Kshs. 118,000
- b. Pay in lieu of 22 days' leave.....118,000
- c. Leave allowance at 50% of salary.....59,000
- d. Salary increment due prior to termination.....23,000
- e. Salary for unexpired term of the contract.....708,000
- f. Costs
- g. Any other remedy the Court may deem just to grant

The Respondent's Case

9. In its Statement of Response, the Respondent stated that the Claimant's contract of employment was subject to satisfactory performance and availability of funds. The Claimant's performance having fallen below expectation and the issue having been brought to his attention on several occasions with no improvement being recorded, his employment was terminated.

10. According to the Respondent, the Claimant was paid all salary increments awarded during his employment. He was also paid one month's salary in lieu of notice as well as days worked in January 2012 and an additional Kshs. 118,000 in February 2012.

11. The Respondent denied that the termination of the Claimant's employment was unlawful, wrongful or unfair.

12. The Respondent's witness, Ferdinand Kizito Osama who had joined the Respondent's employment on 2nd January 2013 based his testimony on the Claimant's personal file. Osama told the Court that at termination, the Claimant was paid one month's salary in lieu of notice, 22 days' leave and 19 days worked in January 2012. Kshs. 14,345 being float advanced to the Claimant was recovered.

Findings and Determination

13. The Respondent both in its Statement of Response and written submissions pointed out that the Claimant's claim which is brought against a society rather than its registered officials is bad in law and should therefore be struck out since a society is not a legal entity capable of suing or being sued.

14. A number of authorities were cited to support this position. Nevertheless, the Court took notice that the Claimant's employment contract which was drawn by the Respondent is between the Nyanza Reproductive Health Society as the employer and the Claimant as the employee. The registered officials of the Society are not named anywhere in the employment contract. If then the Respondent made the omission at the point of drawing the contract, it cannot in my view use this

as a means of defeating the Claimant's claim.

15. More importantly, we are in the constitutional era and it is my considered opinion that the requirement that the registered officials of a society be specifically named as defendants falls within the realm of procedural technicality, within the meaning of Article 159 of the Constitution, which should not override an otherwise competent claim. I have therefore elected to read down this procedural requirement and will now proceed to determine the Claimant's claim on merit.

16. The Claimant's claim is anchored on his plea that the termination of his employment on the ground of poor performance was unfair. He told the Court that the performance review undertaken in October 2011 which was used as a basis for termination of his employment was incomplete since he did not sign the appraisal form.

17. Section 45 (2) of the Employment Act, 2007 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 employees conduct, capacity or compatibility; or

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

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

18. Section 41 of the Act deals specifically with procedural fairness 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** (Emphasis added)
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** (Emphasis added)

19. The Employment Act, 2007 does therefore recognize poor performance as a legitimate ground for termination of employment of an employee. However, the procedure adopted in the termination must be in compliance with the law.

20. In the case of **Jane Wairimu Machira Vs Mugo Waweru and Associates [2012]eKLR**

This Court held that:

“A credible performance appraisal process must be evidently participatory. A comment made by a supervisor without the participation of an employee cannot pass for a performance appraisal. Even where there may be disagreement between an employee and their supervisor on the verdict of a performance appraisal, the disagreement must be documented to show that an appraisal did indeed take place.”

21. The Claimant told the Court that he was handed an appraisal form by the Respondent's

Director, Dr. Walter Obiero which he declined to sign. He disowned a signature appearing on the last page of the appraisal form which the Respondent attributed to him. However, no expert evidence was adduced to prove this point.

22. Nevertheless, even assuming that the Claimant did indeed sign the appraisal form in issue and that his performance was indeed poor, there was no evidence on record that the termination of his employment on the ground of poor performance was ever discussed with him.

23. I therefore find the termination of the Claimant's employment unfair within the meaning of Section 45 of the Employment Act, 2007. The Claimant asked for salary for the remainder of his employment contract period. To grant this prayer would amount to an order for specific performance, a remedy to be granted in very exceptional circumstances which have not been made out in this case. I however award the Claimant four months' salary as compensation for unfair termination.

24. The Claimant further claimed salary increment which had allegedly been awarded to him prior to termination of his employment and attached a Memo dated 18th October 2011 addressed to all staff MCP by Dr. Walter Obiero. According to this Memo salary increment was to be effected at the end of October 2011. The Court did not however find any specific salary increment figure due to the Claimant. Salary due to an employee must be specific. An all staff circular promising some salary increment may create hope and anticipation. However, until this promise is translated into a specific sum of money payable to a specific employee, it is not a salary. The Claimant's claim in this regard therefore fails and is dismissed.

25. From the evidence on record, the Court was satisfied that the Claimant was paid one month's salary in lieu of notice as well 22 days' leave. These claims are therefore unjustifiable and are dismissed. The Court found no basis for the claim for leave allowance.

26. In the final analysis, I award the Claimant Kshs. 472,000 being four months' salary as compensation for unfair termination of employment. I also award him the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF SEPTEMBER 2013

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JUDGE

In the Presence of:

.....***Claimant***

.....***Respondent***