



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1238 OF 2012

(Before D.K.N. Marete)

DANIEL OKOTHCLAIMANT

Versus

KENYA COMMISSION OF HUMAN RIGHTSRESPONDENT

JUDGEMENT

By a statement of claim dated 9th July, this matter was brought to court. The issue in dispute is not outrightly stated but is discernible from the pleadings as;

“Unlawful termination of employment and nonpayment of terminal dues”

The respondent vide a Response to Statement of Claim and Counter-Claim dated 11th October, 2012 denies the claim and prays that the claim be dismissed with costs and counter-claim to herself.

The claimant’s case is that at all material times relevant to this cause, he was employed by the respondent as Principal Human Rights Officer in charge of Media & Communication and his terms and conditions of employment were regulated by the Human Resource and Administration Manual and the employment contract dated 28th September, 2010.

That by a letter dated 21st February, 2012, the respondent interdicted the claimant on the ground that the claimant’s attitude towards his supervisors and colleagues were unpleasant and had exhibited negligence of duty on tasks assigned to him. This was denied by the claimant but despite such denials the respondent by a letter dated 24th February, 2012 proceeded to

dismiss the claimant from employment with effect from 21st March, 2012.

This was allegedly in pursuance of Section 16.1.1 of the Human Resource & Administration Policy. It is also the claimant's case that this termination of employment was unlawful and in breach of the terms and conditions of the employment contract and the Human Resource & Administration Policy.

He faults the termination as follows;

- a. *Failure to determine the appeal filed by the claimant within a period of 2 months or at all as per the Respondent's Human Resources Administration Policy.*
- b. *Failure to demonstrate the basis of terminating the Claimant's employment.*
- c. *The Claimant appealed against the said termination but the Respondent failed to determine the said appeal as stipulated or at all contrary to terms and conditions of employment.*
- d. *Failure to grant 2 months' notice or payment of 2 months' salary in lieu of notice as per the employment contract.*
- e. *Terminating the Claimant's employment on allegations which it knew or ought to have known that the said allegations and/or information were baseless, false and devoid of merit.*

He prays for:

- a. *Special damages in the sum of Ksh8,650,999/=*
- b. *General aggravated and exemplary damages*
- c. *Costs of the suit*
- d. *Interest on (a) (b) and (c) above at court rate*
- e. *Any other and further relief as the court may deem apt to grant.*

The respondent's case in denial is that he terminated the employment of the claimant with effect from 21st March, 2013 through a letter dated 21st February, 2012 on ground of repeated instances of misconduct, failure to perform his duties and exhibiting gross negligence, insubordination and behaving disrespectfully towards his seniors and other employees of the respondent in total disregard of the respondent's Human Resource & Administration Manual.

The respondent further submits that an exhaustion of the claimant's appeal process, provided under the exercised the Human Resource &

Administration Manual, the appeal panel exercised its discretion and on 14th May, 2012 confirmed the termination of the employment of the claimant in light of repeated violation of his terms and conditions of service as aforesaid expressed in the Human Resource & Administration Manual.

The respondent makes a counter-claim for loss and embarrassment to herself as a consequence of the claimant's negligence. This was in the handling of preparatory work for the respondent's annual Human Rights and Democracy Awards initially set for 15th December, 2011 but postponed to February, 2012 but which were altogether cancelled on 21st January, 2012.

Particulars of Negligence

- i. *As the head of the respondent's public affairs and communication department that was primarily responsible for the awards, the claimant failed to ensure that the correct nomination criteria, for 2011 instead of for 2010, seeking for nomination of potential awardees by members of the public was sent to the local newspapers for publication.*
- ii. *As the head of the respondent's public affairs and communication department, the claimant failed to detect that a wrong advertisement, for 2010 as opposed to for 2011, had been published in the local newspapers, since it is another officer of the respondent, and not the claimant, who detected the wrong advertisement.*
- iii. *As the head of the respondents public affairs and communication department, the claimant failed to ensure that all the important preparatory work ahead of a retreat to Lukenya Getaway on 20-22/1/2012 were ready.*

Particulars of financial loss

- i. The respondent spent about Ksh.1,485,101 in the abortive awards:
 - a. *Ksh 2,500: payment to Kenyaweb.com on 31/10/2011 for web hosting services for the awards*
 - b. *Kshs 432,390: payment on 18/11/2011 for advertisement of nomination in the Daily Nation newspaper of 2/11/2011*
 - c. *Kshs 338,368: payment on 18/11/2011 for advertisement of nomination criteria in The Standard newspaper of 2/11/2011*
 - d. *Kshs 51,200: payment to Sarova Panafric Hotel for conference facilities on 21/11/2011 for the awards committee*
 - e. *Kshs 30,800: payment on 8/12/2011 to Lazarus Humo Munyao*
 - f. *Kshs 28,660: payment on 14/12/2011 to Mediamax Network Ltd for radio (Kameme FM) advertisement for human rights awards*

- g. Kshs 34,800: payment on 15/12/2011 to West FM for radio advertisement for human rights awards
- h. Kshs 27,840: payment on 15/12/2011 to Ghetto Radio for radio advertisement for human rights awards
- i. Ksh. 168,750: payment on 15/11/2011 to Afri Gift Centre Ltd for modeling logo and mounting mementos for the awards
- j. Kshs 50,000: payment of honoraria on 20-22/1/2012 to five external members of the Human and Democracy Awards committee
- k. Kshs 133,423.20: payment on 2/2/2012 for advertisement of extension of nomination dates to January 2012 in The Standard newspaper
- Kshs 34,800: payment on 20/4/2012 to Capital FM for radio advertisement for human rights awards
- m. Kshs 87,570: payment to Lukenya Gateaway on 3/2/2012 for conferencing and accommodation on 20-21/1/2012 over nomination for human rights awards
- Kshs 14,000: payment to Pat Cabs on 3/2/2012 for dropping and picking conference participants to Lukenya Getaway on 20-22/1/2012.

Particulars of Public Embarrassment

ii) *Cancellation of the 7th Human Rights and Democracy Awards on 21/1/2012 even after investment of significant resources including involvement of the respondent's external stakeholders, mainly due to few nominations received from the public as a result of the wrong advertisement in the media and shoddy or half-hearted preparatory work by the claimant.*

The respondent in the penultimate submits that the claimant and or his agents planned and executed a negative media campaign against the respondent arising out of this termination on 26th July, 2012 which was three days after filing this suit thus casting doubt on the motives of this sort.

She prays for:

- a. *Dismissal of the claimant's suit.*
- b. *Judgement against the claimant in respect of the Respondent's Counter Statement of Claim for Kshs 1,485,101.*
- c. *Costs of the suit and counter-claim.*
- d. *Interest at court rates on prayer (b) and (c) above until payment in full.*
- e. *A permanent injunction against the claimant restraining him and/or his agents from planning or executing a negative campaign against the respondent, in whatever form or medium, arising out of termination of his employment by the respondent.*

f. *Any other and further relief as the court may deem fit and just to grant.*

The issues for determination therefore are;

1. Was the termination of the claimant's employment unfair, unlawful and wrongful?
2. Is the claimant entitled to the relief sought?
3. Is the respondent entitled to the counter-claim?
4. Who bears the costs of this suit?

The matter variously came for hearing and on 6th May, 2013 when the parties agreed to dispose off the suit by way of written submissions.

On record now are the written submissions of the respondent. On 4th June, 2013 the respondents submitted that they had not been served with the written submissions of the claimant. These are to date not traceable.

The respondents written submissions reiterate the respondent's case. This is a vehement denial of the claim. That the claimant was subjected to disciplinary proceeding on the following terms of reference;

- i. ***Conduct of Dan Okoth in terms of work performance and deliverables as Head of Department:*** *Dan Okoth failed to undertake the 7th Human Rights and Democracy Awards as required, thereby occasioning the Commission a loss of Kshs 1,503,385 and cancellation of the Awards.*
- ii. ***Conduct of Dan Okoth in relation to working with others and giving them the support they require from the Public Affairs and Communications Department:*** *Dan Okoth did not provide adequate support to other departments of the Commission, such as the Reproductive Health Inquiry where his conduct towards the Commissioner-In-Charge, Winfred Lichuma, and team members was disrespectful, which led to his being removed from the Reproductive Health Inquiry team; he failed to demonstrate qualities such as self restraint and leadership expected of a Head of Department.*
- iii. ***Review his disciplinary records for the period he had worked with the Commission as Head of Department:*** *The officer served well during his probation period but in the next 11 months he had received communications and letters registering displeasure in his performance, conduct and attitude towards his superiors and colleagues, such as a first warning letter dated 5/7/2011, a communication on his disrespectful conduct on 19/7/2011 from Commissioner Winfred Lichuma, a show cause letter on negligence of duty dated 24/1/2012; the officer held documented and undocumented meetings with his supervisors to discuss his performance and conduct; he is always defensive; the officer had not made noticeable effort to improve his conduct and work performance as a whole.*
- iv. ***Recommendations:*** *final written warning which would lead to other forms of disciplinary action is the conduct recurs; or demotion; or termination of employment.*

The hearing, in which the claimant was involved came up with the following findings;

- i. ***Whether Dan Okoth failed to perform his work and whether he had misbehaved while performing his work:...****regarding his delay to submit a quarterly report, his behavior was*

inappropriate and not conducive to effective performance of the Commission's functions to the extent that he refused to respond properly to his supervisor and was rude to her, particularly since he proceeded to walk out of the meeting with the deputy Secretary; with regard to the reproductive health inquiry, the officer was asked to apologize, and he apologized, over his disrespectful conduct towards Commissioner Winfred Lichuma; over the Human Rights Awards, which was a fairly complex matter, institutional failings were as much responsible for the Awards failure as the actions or non-actions of the Dan Okoth, his liability would definitely not be 80% as claimed by the Commission Secretary relative to the liability of the institution, he failed to confirm that his role as Head of Department in relation to the Awards activity meant that he had the key responsibility of ensuring its success by providing leadership, the advertisement in the newspaper of the nomination criteria of the Awards had material errors since it referred to the 2010 Katiba Awards instead of nine awards for 2011m, and the technical errors in the nomination criteria were such that Dan Okoth should not have made in the first place....

- ii. ***Whether the disciplinary course against the Dan Okoth followed due process:***...we do find in favour of Dan Okoth in one key aspect, that is, that careful assessment of the record from the disciplinary panel shows that the panel acted both as prosecutor and judge...even though the panel may have arrived at the correct decision the Commission Secretary should have been more prudent in constituting the panel...
- iii. ***Whether Dan Okoth's inadequate work performance and misbehavior amounted to major misconduct:***...Dan Okoth was liable for major misconduct since clause 15.2 of the Manual provides that major misconduct include behaving disrespectfully towards seniors or other employees, insubordination that undermines authority, and failing to perform duties or exhibiting gross negligence.
- iv. ***Whether the Commission Secretary's decision to dismiss Dan Okoth was commensurate to Dan Okoth's liability:***...the option to demote Dan Okoth would not have been feasible since he had been employed to head a department, a final warning letter would also not have been feasible since his demeanor and may run-ins with various members of the Commission indicated he was unlikely to learn from his past conduct and so the Commission would not have benefited from further coexistence with him.

This resulted in the termination of the claimant's employment with effect

from 21st March, 2012 vide a letter of 21st February, 2012.

The claimant thereafter exercised his right of appeal and did appeal on the

following grounds;

- i. *Improper constitution of the disciplinary panel*
- ii. *Wrong determination that he had not performed his work*
- iii. *Wrong determination that he had misbehaved towards supervisors and colleagues*
- iv. *Inordinately harsh punishment by the Respondent*

This was disallowed on the following findings;

- i. *Whether Dan Okoth failed to perform his work and whether he had misbehaved while performing his work:*...regarding his delay to submit a quarterly report, his behavior was inappropriate and not conducive to effective performance of the Commission's functions to the extent that he refused to respond properly to his supervisor and was rude to her, particularly since he proceeded to walk out of the meeting with the Deputy Secretary; with regard to the reproductive health inquiry, the officer was asked to apologize, and he apologized, over his disrespectful conduct towards Commissioner Winfred Lichuma; over the Human rights Awards, which was a fairly complex matter, institutional failings were as much responsible for the Award's failure as

claimed by the Commission Secretary relative to the liability of the institution, he failed to confirm that his role as Head of Department in relation to the Awards activity meant that he had the key responsibility of ensuring its success by providing leadership, the advertisement in the newspaper of the nomination criteria of the Awards had material errors since it referred to the 2010 Katiba Awards instead of nine awards for 2011, and the technical errors in the nomination criteria were such that Dan Okoth should not have made in the first place.....

- ii. Whether the disciplinary course against the Dan Okoth followed due process...we do find in favour of Dan Okoth in one key aspect, that is, that careful assessment of the record from the disciplinary panel shows that the panel acted both as prosecutor and judge...even though the panel may have arrived at the correct decision the Commission Secretary should have been more prudent in constituting the panel....*
- iii. Whether Dan Okoth's inadequate work performance and misbehavior amounted to major misconduct:...Dan Okoth was liable for major misconduct since clause 15.2 of the Manual provides that major misconduct include behaving disrespectfully towards seniors or other employees, insubordination that undermines authority, and failing to perform duties or exhibiting gross negligence.*
- iv. Whether the Commission Secretary's decision to dismiss Dan Okoth was commensurate to Dan Okoth's liability...the option to demote Dan Okoth would not have been feasible since he had been employed to head a department, a final warning letter would also not have been feasible since his demeanour and may run-ins with various members of the Commission indicated he was unlikely to learn from his past conduct and so the Commission would not have benefitted from further coexistence with him.*

Dissatisfied with the decision of the appeals panel the respondent made a demand letter and also filed this suit in court. The rest, as they say, is history.

The respondent submits that in his dealings with the claimant, he fully awarded him his right in accordance with Article 41 Constitution of Kenya, 2010, which entitles every person a right to fair labour practices and reasonable working conditions. She was also observant of Article 47 that stipulates the right to fair administrative action.

The respondent also complied with S.41 and S.43 of the Employment Act, 2007 that require that termination of an employment contract must be on notice and the employee shall be afforded a hearing before termination ensues. S. 43 burdens the employer to give reasons for such termination failure to which such termination shall be deemed unfair and unjustifiable.

This was all had in the correct circumstances.

S.45 Employment Act, 2007 stipulates factors underlying unfair termination

of employment. The respondent disputes the same and I agree. The

claimant through his clearly demonstrated misconduct and other disabilities

burnt his bridges. A case for unfair termination of employment is not established and this answers issue No. 1 above.

The 2nd issue is whether the claimant is entitled to relief sought. He is not.

Having lost a case for unfair termination, his case for relief collapses *in toto*.

The 3rd issue for determination is whether the respondent is entitled to the

counter-claim. The respondent submits as follows;

(c) *Did the claimant contribute to the financial loss and public embarrassment that the Respondent suffered as a result of the cancellation of its 7th Annual Human Rights and Democracy Award?*

As the head of the Public Affairs and Communications Department,

coordination of activities leading to the successful presentation of the Awards

fell squarely within the duties of the Claimant. However, the 7th Human

Rights and Democracy Awards, initially schedule for 15/11/2011 then

postponed to February 2012, did not take place after it was cancelled in

January 2012 by the Respondent in consultation with its stakeholders.

The Respondent submits that the Claimant contributed to the failure of the 7th

Human rights and Democracy Awards by:

- i. He negligently prepared and allowed the wrong nomination criteria to be advertised in the Daily Nation and the Standard newspapers on 2/11/2011. The nomination form that was advertised referred to the Human rights Awards and Democracy Awards of 2010, whose theme was constitutional reforms. As already highlighted in Part 1 above, the Appeal Panel noted that the technical errors in the nomination criteria were such that Dan Okoth should not have made in the first place, even if the Commission Secretary saw and approved the said nomination criteria it was advertised. In fact, the claimant had on 24/11/2011 apologized for the error in the nomination criteria and undertook to correct it. However, the damage of his error had already been done since the wrong nomination criteria contributed to the Commission receiving few nominations of awardees, which was one of the key factors that necessitated the cancellation of the Awards.*
- ii. He negligently prepared the score cards for the Awards with the result that there was a disparity between score card and the nomination forms, thus making it difficult for the voting committee to score the nominations. This was confirmed during a meeting of the Awards nominations committee on 21/1/2012.*

The negligence of the claimant visited as demonstrated above massive

financial loss to the respondent. The claimant does not in any way attempt

a defence on the counter-claim. The respondent on his part concedes to some part of this loss and disagrees with the 80% liability assessed by the Commission Secretary. He therefore leaves the determination of the matter to this court. The respondent raises a counter-claim for Ksh.1,485,101. I find that the respondent is entitled to 60% of this counter-claim and order payment as such.

I therefore dismiss the claim with costs to the respondent. I order that the respondent is entitled to 60% of the counter-claim as follows;

$60\% \times \text{Kshs.}1,485,101.00 = \text{Kshs.}891,060.60.$

It is so ordered.

Dated, delivered and signed the 20th day of December, 2013.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Ndege instructed by S. Ndege & Company Advocates for the claimant.
2. Mr. Okello instructed by Gad, Kiter & Okello Associates for the respondent.