



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1000 of 2010

FREDRICK COLLINS AFWANDE APPLICANT

VS

SUSTAINABLE HEALTHCARE FOUNDATION..... RESPONDENT

JUDGMENT

The Claimant herein filed his memorandum of claim dated 26th August, 2010 on 2nd September 2010 through the firm of Tim Okwaro & Company Advocates. The Claimant sought orders for payment of Ksh.1,291,146/=, issuance of letter of service, compensation for underpayment and costs and interest.

The Claimant case is that he was employed by the Respondent herein on 24th January, 2005 as a Logistics Clerk. Initially this was a three months contract but he was subsequently employed by the Respondent in May 2005 as Regional Logistics Clerk in charge of Western Region. This was now on a one year renewable contract, at a gross salary of Ksh.18,500/=. The Respondent renewed this contract in 2006, 2007 and 2008 as per the contracts annexed as FCA₂, FCA₃ and FCA₄ with gross salaries of Ksh.21,275/=, Ksh.22,340/=, and Ksh.22,340/= per month respectively.

The Respondent closed its Western Regional offices and moved the Claimant to Nairobi in October 2007. The claimant states that as per the Respondent's service manual FCA₅ the claimant was supposed to pay him an annual bonus at the end of the contract period of 10% of his basic salary. That further, the said service Manual provided that in the event of redundancy the claimant would be given a 3 month notice of termination of contract as 3 months salary in lieu.

The Claimant states that from August 2008, he served as Regional Logistics Officer and Procurement Officer but was not paid accordingly. That the salary for Regional Logistics Officer was 50,192/= per month and of Procurement Officer was 52,178/= per month.

The claimant further contents that he was not paid his bonuses for the years 2006, 2007 and 2008. Further, the Claimant contends that considering that his prior contract expired on 31st December 2008, giving him notice from 1st January, 2009 to 31st January 2009 was not commensurate with the 3 months notice or 3 months salary in lieu that he was entitled to and this amounts to a redundancy.

He therefore seeks orders that be paid terminal dues as follows:

- (a) 3 months salary in lieu of notice on the scale of Regional Logistics officer Ksh.50,192/= per month total Ksh.150,576.00 Plus Procurement Officer at Kshs.52,178 total Ksh.156,534.00

(b) Unpaid substantive salary for Regional Logistics Officer from August 2008 to 31st January 2009 Kshs.50,192/= per month Ksh.301,152.00

Plus Procurement Officer @52,178/= Ksh.313,068.00 Less salary earned in the period Ksh.164,288.00

(c) Unpaid bonuses for the years 2006, 2007 2008 @ 10% of salary per year @ Kshs.34,615 per month) Ksh.124,615.00

(d) Salaries for unexpired term of contract Feb, Mar, April, May 2008 @ Kshs.50,192/= per month as Regional Logistics Officer and Kshs.52,178/= per month as Procurement

Officer	<u>Ksh.409,481.00</u>
Total	<u>Ksh.1,291,146.00</u>

When Respondent were served with the Memorandum of Claim, they filed a Memorandum of Reply on 29th September, 2010, through the firm of Soita and Sande Advocates. They state that at all times as per the contracts entered into with the claimant, he was a Logistics Clerk and at no time was he Regional Logistics Officer and Procurement Officer.

They further state that the claimant was never appointed to act in the said positions as such appointments are made in writing and according to the Manual SHF-1, persons are paid an acting allowance if they are made to perform duties of a post in a higher grade.

In their reply the Respondent's also state that the department where the claimant was working in was transferred to a private entity called Surgipharm and the Respondent facilitated in that company as per their annex SHF – 2. Further, the Respondent state, that the claimant was paid his terminal dues and redundancy pay despite the Respondent being under no obligation to pay the same as per Annex AHF – 3.

Both Claimant and Respondent agreed that the court would rely on their respective memoranda to reach a decision and they filed their submissions.

The claimant reiterated their above evidence in their submissions and asked court to note that the claimant worked for Respondent as Logistics Officer as per Respondent's letter for service to claimant dated 31st January, 2009. The Respondents aver that the Respondent has already paid the claimant his dues on account of redundancy and therefore the case should be dismissed with costs to the Deponent.

The Respondents cited the C.A. in **Central Bank of Kenya Vs Matin Kingori C.A. No. 334/2002** where C.A. made a finding that

“damages for wrongful termination of employment is equivalent to the period of notice provided in the contract for termination of employment”.

That therefore the claim by claimant for 3 months notice has no basis at all.

Having considered evidence adduced by both parties by way of their respective memorandum and submissions for both Counsels, this court frames the issues for determination as follows:

1. Whether the Claimant was paid what was due to him upon termination of his contract.
2. If not, what is he entitled to.

On the first issue, the evidence shows that the claimant was employed as a Logistics Officer and this is premised on the letter of appointment exh PCA2 which states in part:

“Job Title: As Logistics Officer you will work and report directly to the Manager, Products and

Logistics....”

This is the letter dated 24th January, 2006. This contract was for one year. Subsequently, in the contract renewal of 19th June 2007 the claimant was engaged as a Logistics Clerk. However the wording of the contract shows it is a renewal from the previous contract of 2006 as the contract states:

“After successful completion of your contract and receipt of satisfactory rating on your performance, I am happy to inform you that your contract is now renewed up to 31st December 2007. As Logistics Clerk, you will report to the Products and Logistics Manager”.

The subsequent contract dated 12th May 2008, shows that he was still holding the title of Logistics Clerk. When the claimant states that he served in other capacities as Regional Logistics Officer and Procurement Officer; there is need of proof of this and a careful scrutiny of the contracts produced in court show that this is not the position.

Having established that claimant worked as Logistics Officer/Logistics Clerk, the issue of his payments/salary is as per the contracts presented as evidence and the salary was paid accordingly. The claimant had claimed that he was entitled to a bonus of 10% period as per FCA 5. Exh FCA 5 is however a termination of contract letter from the Respondent to claimant and does not bear any detail on bonus. Exhibit FCA 2 and 3 which bears the provision on bonus states as follows:

“At the end of each year, you will be eligible for a bonus at the sole discretion of SHF. Bonuses will be based on individual performance and always subject to SHF’s overall results and resources. Please note that the bonus is a discretion payment on approval by the Board of SHF, and is not payable if employment is terminated for any reason before the end of your contract period”. (Emphasis is mine)

A look at the wording of this provision shows that, it was discretionary at the sole whim of the Respondent. It cannot be forced out by the claimant. The claimant’s insistence that he is entitled to bonus payments for the 4 years worked is a prayer that is unenforceable.

The claimant also sought orders that he be paid 3 months salary in lieu of notice. I will refer again to the contract and the paragraph on termination reads as follows:

“your appointment under this contract may be terminated at any time before the expiry of the period in either of the following events:

1. If either party shall have previously given the other one month’s notice, in writing or one month’s pay in lieu of notice to terminate the contract.

2.”

The acceptable notice period therefore under this contract was one month which the claimant accepted and signed. The claimant cannot now claim 3 months notice pay as this is not one of the terms of the contract and therefore his claim for 3 months salary in lieu of notice must also fail.

The claimant also sought payment of salaries for unexpired term of contract February, March, April, May 2008 at rate Ksh.50,192 per month as Regional Logistics Officer and Ksh.52,178/= per month as Procurement Officer. The contract for 2008 commenced on 12th May 2008 up to 31st December 2008. There is no evidence that the Claimant was not paid his salary for the period he worked up to 31st December, 2008. I have already addressed the issue of which post the claimant occupied in the Respondent organization and therefore the issue of payment for a nonexistent post for which he never served does not exist.

The Respondent had already submitted that claimant was already paid what he was entitled to and was even paid redundancy for 15 days for each year worked. I do find that the Respondent was paid all he was

entitled to under the contract submitted by the Respondents. The Respondents had cited **Central Bank of Kenya – Vs – Martin Kingori CA 334/2002** which for purposes this case does not apply. In any case, the cited case relate to the old labour laws before amendments of 2007 which brought in a new Labour regime and are not in the current cause operative.

That being the case, I find that the claimant was paid what was due to him upon termination of the contract and is therefore entitled to nothing else. He will be issued with a certificate of service. I will therefore dismiss his case accordingly. Each party will bear their costs.

Dated, signed and delivered this 24th day of October, 2012 before Court Clerk Rachel Gichuki, Okwaro for the Claimant and no appearance for the Respondent.

HELLEN WASILWA

JUDGE