



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1985 of 2011**

**MAHASIN ELBASHIR ABDALLA ..... CLAIMANT/APPLICANT**

**VERSUS**

**LIBYA OIL KENYA LTD..... RESPONDENT**

**JUDGMENT**

The Claimant Mahasin Elbashir Abdalla commenced this cause by filing the memorandum of claim on 23<sup>rd</sup> November, 2011 through M/S E.K. Mutua & Company Advocates. The Respondent Libya Oil Kenya Limited filed the memorandum of Response on 16<sup>th</sup> December, 2011 through Ochieng', Onyango, Kibet and Ohaga Advocates. The case was heard on 23.04.2012. The Claimant's written submissions were filed on 03.05.2012 and the Respondent's submissions were filed on 15.05.2012. On 23<sup>rd</sup> May, 2012, both parties were represented in court when it was ordered that award would be on notice.

The Claimant prays for judgment against the Respondent for:

- (a) Permanent injunction to restrain the Respondent from terminating the Claimant's employment.
- (b) A mandatory injunction for the Respondent to reinstate the Claimant to her position in employment.
- (c) Alternatively damages amounting to 270,000 Euros comprising:
  - (i) Service pay for 18 years - 90 Euros
  - (ii) Year's salary up to the retirement age - 120,000 Euros
  - (iii) Maximum 12 months compensation for wrongful and or malicious dismissal - 60,000 Euros

The Respondent prayed that the claim against it be dismissed with costs.

The facts of this case are as follows:

The Claimant applied to be employed by the Respondent as a Safety Health & Environment Coordinator by completing the Respondent's application for employment form dated and signed by the Claimant on 3.11.2010. By a letter dated 1<sup>st</sup> November, 2010 titled "**Kenyan Assignment**" the Respondent employed the Claimant as Safety Health and Environment (SHE) Coordinator. In the circumstances it would appear that the completion of the application for employment form was a mere formality coming long after the letter of employment dated 1<sup>st</sup> November 2010. Be it as it may, the letter of employment stated that the effective date of the assignment and duration was "**1<sup>st</sup> December 2010, for one year**". It stated that the Claimant's monthly all inclusive remuneration, in Kenya shillings, would be equivalent to Euors 4,000 (four thousand Euros) net to pay. In addition, the letter of appointment in clause 10 provided that the assignment would be governed and construed in accordance with the laws, rules and regulations in force in Kenya.

By the letter dated 14<sup>th</sup> October, 2011, the Respondent Managing Director addressed the Claimant as follows:

***"Dear Mahasin***

***END OF CONTRACT AGREEMENT***

***This is to inform you that your contract agreement will expire on November 30<sup>th</sup> 2011. Having received no further instructions on your assignment contract will not be renewed.***

***As per your contract agreement please make arrangement to formally hand over any company property in your possession to your supervisor before your final day of office. You are also required to make arrangements to settle all outstanding debts you may owe the company prior to your departure.***

***You are reminded that you are prohibited from disclosing any proprietary information that may have come to your possession by reason of your employment with the company.***

***Attached is a clearance form, which must be completed and handed over to your supervisor. Your final dues will be paid to you once you have cleared with the company.***

***We wish you success in your future endeavours.***

***Yours faithfully,***

***SIGNED***

***RIDA HASSAN ELAMIR  
MANAGING DIRECTOR"***

It is the Claimant's case that the Respondent's action amounted to an unfair and an unlawful determination of her employment without any reasonable cause or justification. The Claimant avers that the letter ending her contract was done at a time when she was out of the Country for Haji, having left Kenya on 29.10.2011. She stated that she had been employed alongside her two other colleagues for whom the Respondent had sought instruction for continued employment in a malicious and discriminatory of exclusion the Claimant. The Claimant further alleged that her termination was actuated by political consideration and without advice from the Libyan government under which she had served as an instructor and nanny of the Gadaffi family. Accordingly, the Claimant argued, following a political revolution in Libya the Respondent's Managing Director deliberately decided to punish her by determining her employment.

It was submitted for the Claimant that she had worked for Education Ministry of Libya as a private teacher, the Gadaffi International Foundation and Uganda Telecom all of which, including the

Respondent Company, were wholly owned by the Libyan Government and all the Respondent's investments were from Libyan Government's revenue. The Claimant's case therefore was that by failing to renew her contract, the Respondent would thereby occasion her to lose her pension benefits of 18 years' service to the Libyan Government under the Libyan laws. Hence this case and claims made by the Claimant.

For the Respondent it was submitted that the Claimant's employment was strictly for a term of one year from 1<sup>st</sup> December 2010 and expiring on 30<sup>th</sup> November, 2011. That the letter of 14<sup>th</sup> October, 2011 had been issued by the Respondent in line with the letter of appointment. The Respondent submitted that the employment relationship was purely governed by the contract and allegations and claims for 18 years of service to the Libyan government were unfounded since the Respondent was a limited company independent from the government. However the Respondent admitted the salary in payment of due terminal benefits attributable to the Claimant's failure to comply with Respondent's handing over procedures. The final dues as admitted by the Respondent included:

- (a) The pro-rated 13<sup>th</sup> salary in accordance with paragraph 4 (b) of the contract.
- (b) Airline tickets to the Claimant's country of origin.
- (c) Door to door shipment of the Claimant's household effects and one passenger car to her country of origin in accordance with clause 4 (c) of the contract.

The issues for determination in this case are as follows:

- (a) Whether the Claimant was on secondment from the Libyan Government to the Respondent Company
- (b) Whether the Respondent unfairly terminated the Claimant's contract of employment
- (c) Whether the Claimant is entitled to the remedies as prayed for.

On the first issue it was submitted for the Claimant that she was a Sudanese national who worked for the Respondent from 1<sup>st</sup> December 2010 to 23<sup>rd</sup> November 2011. That employment by the Respondent was a secondment since the letter was headed "**Kenyan assignment**" and it was therefore not a letter of employment or contract of employment.

With reference to Public Service, secondment refers to temporary leave of absence from service of government to serve any other employer as the government may grant permission for such temporary absence. During the secondment, the person proceeding to secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of an agreement to that effect, transfer to the employer, government liabilities for pension of the person on secondment with respect to the Public Service prior to the secondment.

In the present case, the Claimant has not produced any evidence to prove her prior engagement in the Libyan Government and an agreement between the government and the Respondent for the Respondent to be held liable for such alleged service in the Libyan Government. The Claimant did not produce any evidence to prove the alleged secondment. Even if the secondment were to be proved, the Claimant would be required to provide evidence for transfer of the government liabilities to the Respondent company.

Accordingly, the court finds that the Claimant was not on secondment from the Libyan government to the Respondent company. This finding would not change even if the Respondent company were wholly owned by the Libyan government because as a limited company the Respondent enjoyed a legal personality independent from the government.

The second issue for determination is whether the Respondent unlawfully or unfairly terminated the Claimant's contract of employment. The letter dated 14<sup>th</sup> October, 2011, speaks for itself. It is not a letter of termination of the contract. It is a reminder letter by the Respondent to the Claimant that the contract of employment was due to expire on 30<sup>th</sup> November, 2011. The Court finds that the Respondent did not unlawfully or unfairly terminate the contract of employment.

The final issue is whether the Claimant is entitled to any of the remedies prayed for. The prayer for an order to restrain the Respondent from terminating the Claimant's employment cannot stand. First the court cannot restrain the Respondent from doing that which the Respondent never embarked or intended to do. Secondly any such order would have been overtaken by effluxion of time, the Claimant's contract of employment having lapsed on 30<sup>th</sup> November, 2011.

Similarly the prayer for a mandatory injunction for the Respondent to reinstate the Claimant to her position in employment is not sustainable. This court cannot impose employment relationships in circumstances where the contract of employment did not provide for renewal and both parties knew the contract was for a fixed term of one year. The court finds that the Claimant had illegitimate expectations for renewal of contract or continued employment by the Respondent.

Having found that the Claimant was not on secondment and in view of the consequences of the transaction of secondment as explained in this judgment, the claim for 270,000 Euros for service pay, salary up to retirement age and maximum 12 months compensation cannot be granted. The same fails and the Claimant is not entitled as claimed.

However, the Claimant is entitled to the claims as admitted by the Respondent. Consequently the court makes the following orders:-

1. The Respondent to pay the Claimant final dues including:
  - (a) Pro-rated 13<sup>th</sup> salary in accordance with paragraph 4(b) of the contract being 5,000 Euros
  - (b) Airline tickets to the claimant's country of origin.
  - (c) Door to door shipment of the Claimant's household effects and one passenger car to country of origin in accordance with clause 4(c) of the contract.
  - (d) Salary for November – 5,000 Euros.
  - (e) 17 days balance of leave – 3,542.80 Euros.
2. Interest on (1) above at court rates from 1<sup>st</sup> December 2011 until full and final payment.
3. The Respondent to pay costs of the cause.

**DATED** and **DELIVERED** at Nairobi this 5<sup>th</sup> day of October, 2012 in the absence of both parties.

**BYRAM ONGAYA**  
**JUDGE**