



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 210 of 2010

SIKOLA BENJAMINCLAIMANT

VERSUS

NEW KENYA COOPERATIVE CREAMERIES LTD.....RESPONDENT

JUDGEMENT.

This matter proceeded before Hon. Justice. Kosgey who has since left the Court. I have gone through the proceedings that were short and clear and reached the conclusion that doing justice to the parties and for purposes of expediting resolution of the dispute I should prepare the award based on the proceedings recorded by my predecessor.

By a memorandum of claim filed on 9th March, 2010, the claimant alleged that he was employed by the respondent in the position of Assistant Accountant on 30th October, 2008. A letter of appointment (marked SB 1) was annexed to the memorandum of claim in support of thereof. He was subsequently confirmed for the position vide a letter dated 16th July, 2009 (SB3) after serving a probation of period of six months. He was however suspended on 8th October, 2009 (SB4) and eventually dismissed from the services of the respondent following allegations that he neglected his responsibilities leading to loss of respondent's funds. The nature of the neglect was that he accepted accountable documents with alterations from the reconciliation clerks as a result of which the respondent lost colossal amounts of money through manipulation of sales and stock returns. Prior to his dismissal he was given a chance to show cause why disciplinary action should not be taken against him (SB 4). He gave his response (SB5) which the respondent felt was not satisfactory and proceeded to terminate his services. He felt aggrieved by the termination and brought brought the present proceedings claiming that the termination was harsh, inhuman, unfair, unjust and contrary to tenets of natural justice and equity and a cover up by the respondent's senior officers. He therefore seeks a declaration by this court that his dismissal was unlawful and that the court awards him one month's pay for every year worked from October, 2008 to 22nd January, 2010. He further seeks damages for unfair dismissal equivalent to 12 months pay being Kshs. 528,000 and finally a declaration that the respondent is under obligation to pay all accrued leave days since 2007 being Kshs. 176,0000.

The respondent in their memo of reply filed on 24th October, 2010 refutes the claimant's allegations and maintain that the dismissal was harsh, unfair and inhumane and contrary to the rule of natural justice.

After several adjournments initiated by the respondent, the Court finally ordered the matter to proceed in the absence of the respondent although counsel for the respondent was present in court and was granted an opportunity to cross examine the claimant.

In his oral testimony in court the respondent informed the court that he worked in Kisii. He repeated the

averments contained in his memo of claim and maintained that he was employed in the accounts department and not the stores and that the altered documents were initiated by the stores and not accounts department where he worked. He stated that his work did not involve the supervision of the depot manager but that he was responsible for ensuring all monies received were banked and all cheques received from credit sales were entered to the stipulated credit period of 15 days.

He lamented that he was never given audience by the head of Human Resource to explain himself. He stated that the Depot Administrator was also suspended. He conceded that he was on half pay until the time of his dismissal. He maintained that his dismissal was outrageous and therefore prayed that the court awards him the prayers sought in his statement of claim. It was his evidence that he never took leave for the time he worked hence should be compensated accordingly.

The issues for determination by this court are:

Was the dismissal of the claimant lawful and justifiable under the circumstances? If so, was the procedure followed fair and in accordance with rules of natural justice? Is the claimant entitled to the prayers sought in the statement of claim?

In reaching the conclusion favourable to the claimant he must of course discharge the first essential hurdle in any contested claim; that is to say he must adduce sufficient evidence to persuade the court that there is a case for the respondent to answer. If there is insufficient evidence, then there is no case to answer and the court would dismiss the case.

In his evidence in chief, the claimant maintained that he was employed at the accounts department and not the stores and that all the altered issue notes were initiated by the stores department. His testimony was that the stores department was the one charged with overseeing the movement of stock in and out of the stores. He stated that the stores department had a manager, depot administrator and stores clerk under the supervision of the depot manager and not him. It was his position that the allegations against him were outrageous.

Although the reason for terminating the claimant's employment was hinged on the allegations of colossal financial loss that was unearthed in an audit report, neither the claimant nor the respondent tabled the report in evidence nor attached the same in their memorandum of claim or response. The court therefore cannot make any observations or deductions on these allegations. To this extent the claimant's contention remain uncontrovered.

The claimant admits that he was given a notice to show cause to which he responded to but still the respondent went ahead and dismissed him. Can it therefore be said that his dismissal was unfair, inhumane, unjust and contrary to the tenets of natural justice as alleged in his memo of claim? The question can only be answered in the negative or at least qualified or mitigated if the respondent tendered evidence during the trial however, this was not the case hence the court is left with no option but to believe the claimant's testimony that the stores department was the one charged with overseeing the movement of stock in and out of the stores and that the stores department had a manager, depot administrator and stores clerk under the supervision of the depot manager and not him.

Section 45(1) of the Employment Act, 2007 provides that no employer shall terminate the employment of an employee unfairly and under subsection (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 ;

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

Whereas the court does not have a problem with the procedure adopted in terminating the claimant's employment but in the absence of controverting evidence to the claimant's plausible testimony, the reason for terminating his services were neither valid nor can be said to be a fair reason as contemplated under section 45(2) of the Employment Act, 2007. The court so finds.

On the question of leave, the claimant's letter of appointment provides as follows at clause 13:

You will be entitled to 30 working days leave per year. If the employment is terminated after completion of two (2) or more consecutive months of service any unutilized leave will be paid for on pro-rata basis. ***Leave will not be carried forward except with the approval of the Managing Director. Any leave not taken, unless authorised with be forfeited. (emphasis supplied)***

On this clause alone, the court is unable to grant the claimant's prayer under this head. No evidence, documentary or otherwise, was tendered to show that he never took leave or if he did not, he sought and obtained the approval of the Managing Director to carry forward his leave days. The inevitable result is that any leave not taken became forfeited as provided under clause 13 of his employment contract. A contract of employment like any other, once entered into by the parties is binding and cannot be varied or set aside without the consent of the parties or by an order of court following the laid down principles for setting aside contracts. The court therefore disallows this head of claim.

The court having found that the reason for terminating the claimant's services were neither valid nor can be said to be a fair reason as contemplated under section 45(2) of the Employment Act, 2007, the issue that requires to be addressed is what remedy if any is the claimant entitled to?.

Section 50 of the Employment Act, 2007 provides:

50. In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.

Section 49 of the Employment Act, 2007 provides:

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b)

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

(3)

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c)

(d)

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h)

(i)

(j) any expenses reasonable incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.

The claimant's services were engaged on 30th October, 2008 and terminated on 22nd January 2010. This implies he had worked for for 16 months by the time he was dismissed. However between 8th October,2009 and 22nd January, 2010 he was on suspension and put on half pay. The claimant therefore had not worked for the respondent for such a long time besides he testified that he was at the time the trial came up working for Ministry of Finance based in Kisii. The claimant in the circumstances had not worked for the claimant for too long and had again taken steps to mitigate his loss as envisaged under section 49 of the Employment Act, 2007.

Regarding the length of time and legitimate expectation, Justice Ojwang stated in the case of **Menginya Salim Murgani v Kenya Revenue Authority HCCC No. Civil Case 1139 of 2002** reported in **2008 e-KLR** that:

“In so far as the employee spends the bulk of his or her time in the service of the employer, littleother livelihood, in most cases, is earned by the employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status quo of the employment relationship, inherently vests in the employee both normal rights, and legitimate expectations.”

The claimant's circumstances cannot be said to be similar to the one described by my brother Judge above. In the circumstances the court will in applying the principles enunciated in section 49 generally and more particularly section 49 (1)(c) award the claimant the equivalent of six months salary at the time of his dismissal, as reasonable compensation for his unfair termination by the respondent.

The Court further further orders the respondent to pay the claimant the balance of half salary for the period when he was in suspension and eventually dismissed. That is to say between 8th October, 2009 and 22nd January, 2010.

The court noted that in the termination letter the respondent had indicated that the claimant would be paid his terminal dues if any less any liability he may have owed the company after completing clearance procedure and handing over any company property in his possession to the Human Resource Department. In the event these have not been paid, the hereby orders that the same be paid. If they have not been paid, this portion of the judgment shall become spent.

All the payments hereby ordered shall be subject to taxes and other statutory deductions.

In summary the court awards the claimant the sum of Kshs. 352,000/- made up as follows:

- | | |
|---|---------|
| 1. Six month's salary | 264,000 |
| 2. Half pay from 8th October 2009- Jan, 2010 | 88,000 |
| 3. Payment of terminal dues if not already paid | |

Dated and Delivered at Nairobi this 26th day of October 2012

Abuodha J

Judge

Delivered in open Court in the presence of for the Claimant and
..... for the respondent.