



Shibira v Board of Directors Vihiga County Farmers Sacco Society (Cause 78 of 2021) [2023] KEELRC 190 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 190 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 78 OF 2021
JW KELI, J
JANUARY 26, 2023**

BETWEEN

EMMANUEL SHIBIRA CLAIMANT

AND

**BOARD OF DIRECTORS VIHIGA COUNTY FARMERS SACCO
SOCIETY RESPONDENT**

JUDGMENT

1. The Claimant following indefinite suspension from duty by the Respondent filed the instant suit dated February 3, 2015 and received in court on even date seeking the following reliefs:-
 - a. A declaration that the decision to suspend the Claimant indefinitely is fundamentally wrong, irregular and should be set aside.
 - b. An order that the Claimant be reinstated and paid full salary and other benefits with effect from the date of his suspension until the final determination of this cause.
 - c. An order that the amount claimed in the IOU to be repaid by monthly installments of Kshs.8,000/- until full payment thereof.
 - d. The Respondent to pay the costs of this cause.
 - e. Any other relief that this Honourable court may deem just and expedient to grant.
2. The Claimant in addition to the claim on even date filed his verifying affidavit to the claim, Claimant's list of documents and the bundle of documents. The Claimant filed his witness statement dated June 8, 2022 received in court on the June 17, 2022.



Defence and counterclaim

3. The claim was opposed. The Respondent entered appearance through the law firm of Nyanga & Company Advocates and filed Defence and Counterclaim dated April 9, 2015 received in court on the April 10, 2015. The counterclaim sought the following reliefs against the Claimant :-
 - a. The Claimant's claim be dismissed
 - b. The full payment of the sum of KES 118,157/-.
 - c. The cost of the defence and counterclaim
 - d. The indefinite suspension of the claimant be upheld.
4. In addition, the May 30, 2016 the Respondent filed Respondent's list of witnesses, witness statement of Edward Busaka and Kenneth Musera Mujumba, Respondent's list of documents and the bundle of the documents.

The hearing

5. The Claimant's case was heard on the July 5, 2022 with the Claimant as witness of fact. The defence case was heard on the October 26, 2022 with one witness of fact Kenneth Musera Mujumba.
6. On close of defence case the court issued directions for filing of written submissions. The claimants' written submissions drawn by Amasakha & Company Advocates were dated November 15, 2022 and received in court on the November 16, 2022.
7. The Respondent's written submissions drawn by Ben Aduol Nyanga & Company Advocates November 28, 2022 were received in court on the November 30, 2022.

Claimant's case in summary

8. The Claimant was an employee of the Respondent confirmed to appointment as a book keeper on the January 1, 2006 and was promoted to the position of accountant on January 1, 2010. On the January 29, 2014, the Respondent issued the Claimant with a warning letter regarding the sum of KES 118,157/- which the Respondent alleged he took irregularly in form of IOU and was required to pay the same in 30 days. The Claimant alleged he was not heard before the decision was made. That on the March 26, 2014 the respondent issued a letter suspending the claimant from work indefinitely with effect from March 27, 2014 until the money obtained vide IOU had been paid in full. That the claimant requested in writing to pay the money by monthly installments of KES 4000 which proposal was rejected by the board and that the claimant continued to serve on suspension. The Claimant claimed the decision to suspend him without pay indefinitely was unfair labour practice and sought for restatement to job and the unpaid salary.

The Respondent's case

9. The Respondent's case was that the Claimant as the accountant took funds from the tellers without authority and signed IOU'S totaling KES 118,157/-. That the CEO advised him to refund the money failing which the matter was reported to the board. That the board summoned the claimant and after hearing the claimant was granted 30 days to refund the money but failed to do so. That that the claimant had taken other loans with the society not repaid. That the payslip could not allow other deductions. That the board's decision was that the claimant has engaged in illegal conduct and



was suspended from work indefinitely until he refunded the money before further action. That the claimant had not refunded the money hence remained on suspension.

Determination

Issues for determination

10. The Claimant relies on the issues listed under its memorandum of claim being :-
 - a. Whether the Respondent's letter dated March 26, 2014 purporting to indefinitely suspend the Claimant from duty without any pay is contrary to laws of employment, fair labour practices and principles of natural justice.
 - b. Whether the Respondent is entitled to salary arrears from the period he was indefinitely suspended up to the time of final determination of this matter.
 - c. Whether the demand by the Respondent that the Claimant pays the IOU money taken from it, in full is unfair and contrary to laws of employment.
 - d. Whether the Claimant ought to be reinstated in his employment on full salary and afforded an opportunity to offset the money obtained on IOU by reasonable monthly installments.
11. The Respondent identified the following issues for determination:-
 - a. Whether the claimant's indefinite suspension is fundamentally wrong and irregular
 - b. Whether the Claimant is entitled to reliefs sought
12. The court having heard the case and read the parties' pleadings was of the considered opinion that the issues placed by the parties before the court for determination of the dispute were as follows:-
 - a. Whether the act of indefinite suspension of the claimant by the respondent was contrary to fair labour practices, wrong and irregular
 - b. Whether the claimant was entitled to reliefs sought

The counterclaim issues for determination

13. The sole issue to be determined is whether the counterclaims are merited.

Determination on the claim

Whether the act of indefinite suspension of the Claimant by the Respondent was contrary to fair labour practices, wrong and irregular

14. It was not in dispute that the claimant was placed on indefinite suspension from work by the respondent vide letter dated March 26, 2014(claimant's exhibit 4). The letter addressed to the claimant by the Hon. Secretary, George Sabwa stated:-

“Re: Indefinite Suspension

Reference is made to our letter dated January 29, 2014.

The board sitting on March 26, 2014 resolved that you be indefinitely suspended from duty w.e.f March 27, 2014 until you pay Kshs.118,157.00(one hundred and eighteen thousand



one hundred fifty seven) you irregularly took from the Sacco. Kindly receive and respect the order”

15. On receipt of the letter the Claimant on the March 28, 2014 wrote to the chairman of the respondent as follows:-

“Dear Sir,

Re: Indefinite Suspension

In reference to the above subject, I do hereby acknowledge receipt of your letter dated March 26, 2014. I therefore reaffirm that I have I.O.U s with the Sacco duly documented and signed for by myself.

Following your letter dated 29th January I could have wished to have been reminded of the expiry period and deduction to have been affected immediately from my February pay.

I do therefore humbly request you to start effecting deduction of Kshs.4,000 from my monthly pay as from the month of April and also pledge that I will have paid Kshs.50,000 as at the end of May 2014 from my other external source. Owing to my above plea, I do humbly request for the uplifting of the indefinite suspension.

Please communicate favorably soonest so as to enable me resume my normal duties as I need to familiarize myself with the new software that we are developing and installing in the society.

Thank you

Yours faithfully,

Emmanuel Shibira

CC.1 D.C.O Sabatia District

2 County Labour Commissioner”.

16. The Respondent by letter dated April 10, 2014 wrote to the Claimant and rejected his offer to settle the money in installments and informed that he was to be on indefinite suspension until he paid the money in full. RW told the court that the claimant was still on suspension having failed to pay the money a position which was not disputed by the claimant. It was not in dispute that the claimant owed the employer the money.
17. During cross-examination the Claimant admitted he took KES 118,517 from the SACCO vide IOU's. He told the court the payment was authorized by the CEO and treasurer and that they were in custody of the evidence. He told the court he had not invited the said persons for questioning in court. The Claimant admitted he was informed to pay the IOU's after the board meeting. The claimant admitted he had a loan with the respondent of KES 352,000/- with KES 8000 being deducted from his salary.
18. RW during cross-examination told the court the issue was that the Claimant took the money without approval. That RW discovered money had been taken without approval through one of the tellers he identified as Gedina Amoito who indicated the claimant had taken money and given IOU'S. The said teller had not recorded a statement. That the indefinite suspension was unpaid.
19. On re-examination, RW stated that the Claimant had admitted he had IOUs and had proposed to settle the owed money vide KES 4000 monthly instalments which proposal was rejected by the board and



the act was an illegality. That it was a practice for the IOUs to be paid in 48 hours. That the Claimant had not attempted to pay the money and remained their employee.

Analysis And Findings

20. The court on analyzing the facts makes the following findings of fact:-
 - A. That the Claimant was still an employee of the Respondent.
 - B. That the Claimant admitted to having taken the money without approval by employer under his letter dated 28th March 2014 when he wrote, ‘ I therefore affirm that I have IOUS with the Sacco duly documented and signed by myself .’ The court finds and determines that this was unequivocal admission of the charge of having taken the money without approval.
 - C. That the lifting of the indefinite suspension was on condition of payment of the owed money. That the Claimant had not paid the owed money sum of KES 118,157.00/- as stated under the suspension letter.
 - D. That the indefinite suspension was unpaid.

Decision on the validity of the indefinite suspension

21. The duty of the employee under contract is to work and the role of the employer is to pay salary. Whereas it is the right of the employer to carry out disciplinary action against its employees, indefinite suspension would be against fair labour practices as the employee was willing to work but was denied the opportunity to do so and is left in limbo of being an employee without salary and work indefinitely. The employee is tied and has to be available to return to work when the employer so wishes. The proper practice then would be for the employer to take steps towards the termination of employment if the employer employee relationship was no longer tenable rather than placing the employee on indefinite suspension.
22. The Court of Appeal (Kisumu) considered the issue of indefinite suspension in Philemon Musembi Muhindi v Chairman Board of Management Keveye Youth Polytechnic [2015] Eklr (CORAM: Musinga, Gatembu & Murgor, JJA) where the claimant had been suspended pending the outcome of a criminal case against her. The employer failed to lift the suspension of the appellant after conclusion of the criminal case. The court in finding unfair labour practice stated:- ‘In our view, the respondent identified a definite period during which Philemon was to remain on suspension, and having done so, we take it that, the respondent at that time intended to retain him as an employee, and was prepared to await the outcome of the criminal proceedings irrespective of the time it would take. Otherwise, it had the option to dismiss him or terminate his employment during the intervening period. Consequently, we are satisfied and find that, by the time he was suspended, the respondent did not intend to dismiss him summarily, but to instead await the outcome of the case before determining the fate of Philemon’s employment.’
23. In the instant case the court found that the Respondent gave condition of return to work by payment of the money. The Claimant did not return the money and remained on suspension.
24. The question that lingers on the mind of the court is whether there was legal or contractual basis as to why the claimant could not have received his salary during the period of suspension. The Court of Appeal (supra) cited with approval the foregoing authorities on the issue: “Likewise in the case of Donald C. Avude vs Kenya Forest Service [2015] eKLR the Employment and Labour Relations Court citing the Supreme Court of Canada in the case of Cabiakman vs Industrial Alliance Life Assurance Co. [2004] 3SCR 195 SCC 55 where there were similar facts as the instant case stated thus; “Gilbert



Cabiakman (“Cabiakman”) was a sales manager at Industrial Alliance Life Insurance Co. (“Industrial Alliance”). Three months after Cabiakman was hired, he was arrested and charged with conspiracy to extort money. Once Industrial Alliance got wind of these charges, it suspended Cabiakman because of the connection between the nature of the charges and Cabiakman’s position. Cabiakman had been on an indefinite suspension without pay for two years while the charge was pending. After Cabiakman was acquitted of all charges, he was reinstated in his position at Industrial Alliance. Cabiakman commenced proceedings against Industrial Alliance for lost wages during the period of suspension and for moral and punitive damages. The Supreme Court of Canada (“SCC” or “Court”) upheld the decision of the Quebec Court of Appeal that ruled that Industrial Alliance was not justified in suspending Cabiakman without pay and awarded him \$200,000 in damages. However, the SCC affirmed the employer’s right to suspend an employee for administrative reasons. The court stated that employer conducted itself properly, however, since the suspension remained administrative in nature at all times, there was no reason to refuse Cabiakman’s salary as he remained available to work.” Whilst in *Transport Workers Union vs African Safari Diani Adventure* [2013] eKLR it was stated thus; “Unless there is a contractual or statutory basis for withholding salary during a period of suspension it is not open to an employer to suspend an employee without pay. The legal obligation at common law on an employer is to pay wages not to provide work. Unless it is varied by statute or contract the obligation continues even during suspension.”

25. The Court of Appeal(Supra) applying the above authorities then held:- ‘The period of suspension in this case was from 5th April 2004 to 27th May 2007. No contractual or statutory basis for withholding Philemon’s salary during that period was evident from the record. As such, from the a forestated excerpts, the findings of which we adopt, there was no reason why Philemon could not have received his salary for the period of suspension which was three years. Accordingly, we find that Philemon was entitled to his salary for the period of suspension stipulated in the suspension letter which commenced from the date of suspension, upto the date when the case was decided.’(emphasis given)
26. The court finds the foregoing authorities relevant to the instant case. The indefinite suspension was based on reason of taking money without authority and conditional to refund of the said money. The Respondent submits and relied on the provisions of Section 92(5) of the Public Finance and Management Act which stipulates:- ‘(5) A holder of a temporary imprest shall account or surrender the imprest within 7 working days after returning to the station.’ The respondent submits that the IOUs were not paid on time as admitted by the claimant. The court does not find the cited law to answer the issue of the legal basis of indefinite suspension without pay.
27. Applying the cited decision of the Court of Appeal in *Philemon Musembi Muhindi v Chairman Board of Management Keveye Youth Polytechnic* [2015] Eklr, I find that the indefinite suspension of the Claimant without pay amounted to unfair labour practice and was irregular and that the the Claimant was entitled to his salary for the period of suspension stipulated in the suspension letter which commenced from the date of suspension, upto the date of the judgment.

Whether the Claimant is entitled to reliefs sought

28. The court holds that the indefinite suspension amounted to unfair labour practice and was wrong and irregular.
29. On prayer for restatement and payment of full salary and other benefits with effect from date of suspension until final determination of the case. The court held the indefinite suspension was unlawful and that applying the decision of Court of Appeal in *Philemon Musembi Muhindi v Chairman Board of Management Keveye Youth Polytechnic* [2015] Eklr, the Claimant was entitled to his salary



for the period of suspension stipulated in the suspension letter which commenced from the date of suspension, upto the date of judgment. The court so holds.

30. On reinstatement prayer. It was not in dispute that the claimant was still an employee of the respondent. The prayer of reinstatement is thus misplaced. That prayer is dismissed.
31. The court considered the act of taking money from employer as an illegality. The act of taking money by virtue of the position held of accountant the claimant betrayed the trust of the employer and his act was tantamount to gross misconduct under section 44(4)(g) of the *Employment Act* to wit :’an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer’s property.’”
32. Taking into account the lapse of time, 8 years and 9 months counting since the indefinite suspension, the apparent broken employer employee relationship trust, it would be unreasonable to order for return to work of the claimant. The court finds constructive dismissal. The court finds that the act of taking money from employer without authority would fall under summary dismissal of which only notice pay of one month is payable under letter of appointment of 30th July 2004(claimant’s exhibit 1)
33. On the prayer for order that the amount claimed and taken under IOU be repaid by monthly instalment of Kshs.8000/-, the court having found the employer employee relationship not tenable and granted notice pay upon finding constructive dismissal, then the prayer to settle the debt in installments is unreasonable and unfair. The court orders that the money to be set off from the salary arrears.

The claim awards in summary

34. The last salary paid to the claimant under March 2014 Payslip (Respondent’s document no. 2) indicated gross salary of KES. 27,942. He was suspended effective 27th March 2014. Thus award of arrears from April 2014 to 27th January 2023(date of judgment). The claimant submits that he had loan liabilities total KES 367,000 which he states ought to be deducted. The court notes that the amount did not reflect the accrued interest rate todate. The total period of award April 2014 to 27th January 2023 (date of judgment) amounts to nine months and 8 years(96months) total 105 months and 26 days in January. Thus 105 months x27,942 plus 26/31x27,942 total KES 2,957,345.23/.
35. Notice Pay awarded for sum of KES. 27942/.
36. The Claimant is awarded costs of the claim.
37. The Claimant to be issued with certificate of service under section 51 of the *Employment Act*.

The counterclaim

38. The court found that the act of taking money vide the IOUs (Respondent’s document 3 and Claimant’s exhibit 4 admitting to have taken the money)without authority was an illegality deserving of summary dismissal. The employee employer relationship having broken down it is only fair the counterclaim is granted for full payment of the owed sum of KES.118,157/-. The indefinite suspension was found to be unfair labour practice and must cease. The court declines to award costs for the counterclaim having found the indefinite suspension to have been unfair labour practice which also denied the claimant income to settle the debt.

Conclusion and disposition

39. The court enters judgment for the Claimant against the Respondent as follows:-



1. A declaration is issued that the indefinite suspension of the claimant without pay amounted to unfair labour practice.
 2. Notice pay of KES. 27,942/-.
 3. Award salary arrears for entire period of suspension upto judgment date thus April 2014 to 26th January 2023 calculated as follows:- 105 months x27,942 plus 26/31x27,942 total KES 2,957,345.23 /-
(The award of KES 2,957,345.23/- is payable less PAYE, less debt of KES118,157 awarded under the counterclaim, less any outstanding SACCO loan, salary advances or loans as at time of suspension including the accrued interest on the loans to repayment date.)
 4. Interest at court rates on award of KES2,957,345.23/-. Less KES118,157/- from date of judgment until payment in full.
 5. The Claimant is awarded costs of the claim.
 6. The Respondent to issue the Claimant with certificate of service pursuant to provisions of section 51 of the Employment Act.
40. Stay is granted for 30 days.
41. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 26TH JANUARY, 2023.

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant:- Amasakha

Respondent: Willie (Ms)

JUDGMENT IN ELR CAUSE NO. 78 OF 2021	0
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