



REPUBLIC OF KENYA



**KENYA LAW**  
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**Masinde v Society Limited (Cause 1 of 2020)**  
**[2022] KEELRC 4084 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4084 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**  
**CAUSE 1 OF 2020**  
**JW KELI, J**  
**SEPTEMBER 22, 2022**

**BETWEEN**

**CLEOPHAS MASINDE ..... CLAIMANT**

**AND**

**FARIDI SAVINGS AND CREDIT COOPERATIVE SOCIETY  
LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant *vide* a memorandum claim dated January 11, 2020 and filed in court on the January 24, 2020 against the respondent alleging unfair termination and seeking payment of salary arrears, gratuity, allowances as well as general damages for termination of employment.
2. Together with the memorandum of claim, the claimant filed verifying affidavit, claimant's witness statement, list of witnesses all dated January 11, 2020. The claimant in addition filed his list of documents of even date together with the bundle of documents.
3. The claim is opposed. The respondent entered appearance through the law firm of Kimanga & Company Advocates and filed its response dated February 18, 2019 received in court on the February 24, 2010 together with the respondent's list of witnesses, witness statements and list of documents and the bundle of documents.
4. The claimant on the November 2, 2021 filed affidavit in support of his claim sworn on the October 28, 2021.



## **The evidence**

### **The claimant's evidence**

5. The claimant during the oral hearing of case testified as witness of fact (CW1) on oath and was cross-examined by ms Kiage advocate for the respondent. CW1 adopted his witness statement dated October 28, 2021 as his evidence-in-chief and produced as his evidence documents under list of documents dated January 11, 2020 and marked claimant's exhibits 1 -4.

### **Respondent's evidence**

6. The respondent called the following witnesses of fact:-
  - a. Felix Omalalu Emojong (RW1) testified on oath on the November 29, 2021 and adopted his witness statement dated February 18, 2020 as his evidence in chief and produced documents under respondent's list of documents dated February 18, 2020 marked as respondent's exhibits '1' to '18'.
  - b. Higgai Paul Obuya (RW2) testified on oath on the May 11, 2022 and adopted his witness statement dated of February 18, 2020 as his evidence in chief.

### **Claimant's case in summary**

7. The claimant's case as per his witness statement dated October 28, 2021 is that he was employed as CEO of the respondent on the November 1, 2012 and on December 31, 2018 send on compulsory leave with a plotted design to terminate his services without justification. That the compulsory leave resulted in termination of his employment with respondent. That he was subjected to police investigations on trumped up allegations of misappropriation of funds of which the police on investigations found to be false. That he was earning gross salary of kshs 218,862/- and benefits under the memorandum of agreement. That since the termination he had not received any of his salary arrears and terminal dues which he now claims. That the respondent did file a suit against him in Busia High Court which he claimed was hopeless and had never kicked off.

### **Defence case**

8. The respondent denied the averments by the claimant and stated that the claimant opted to resign from his job thereby voluntarily terminating his services vide letter dated October 1, 2018. The respondent stated that it had legitimate reasons to suspect the claimant of misappropriating its funds and the suspicion was never malicious. The respondent admitted it had a civil case against the claimant pending before High Court Busia to wit HCC No 5 of 2019.
9. The respondent denied the claim for salary arrears and terminal dues and stated that it communicated to the claimant on his gratuity vide letter dated October 17, 2018. The respondent stated that the process to pursue investigations was within the law as explained in the letter of August 30, 2018. That the claimant's extended compulsory leave was due to the weight of the investigations. That it issued the claimant with a further notice to show cause of October 13, 2018 of which after receipt the claimant opted to resign by a backdated letter dated October 1, 2018 and received by the respondent on the October 15, 2018. In the upshot is that the entire claim is opposed.



## **Written submissions**

10. After closure of defence case hearing the court gave directions for the parties to file submissions. On the June 28, 2022, the time for filing having lapsed, it was confirmed that only the claimant had filed their written submissions received in court on the June 3, 2022. The respondent did not file written submissions.

## **Determination**

### **Issues for determination**

11. Neither party filed list of issues for determination in the instant suit. The court having considered the evidence placed before it and the reliefs sought in the claim finds that the issues placed by the parties before it in determination of the dispute are as follows:-
  - a. Whether or not the claimant resigned or his employment was terminated by the respondent.
  - b. Whether the compulsory leave was legal and justified.
  - c. Whether the claimant is entitled to reliefs sought.

### **Whether or not the claimant resigned or his employment was terminated by the respondent**

12. The claimant under paragraph 2.2 of his memorandum of claim states that during his employment as the CEO of the respondent he duly performed duties as per his terms of service until December 31, 2018 when his services were unlawfully and unprocedurally terminated by the respondent.
13. The claimant in his witness statement dated October 28, 2021 adopted as his evidence in chief under paragraph 5 stated that on December 31, 2018 the respondent decided to send him on forceful and compulsory leave which was a plotted design to terminate his services without giving him reason to justify the move. Under paragraph 6 of the witness statement, the claimant states that the said compulsory leave resulted in his termination of employment with the respondent and again being subjected to unnecessary police investigations on trumped up allegations of misappropriated funds which the police found were false.
14. During cross-examination the claimant admitted that he was informed of irregularities on finances during his tenure. The claimant told the court that he attended the audit committee meeting where he was told of the investigations and missing documents in the office. That the committee could not access the documents during the audit, they did not get the laptop which was in his custody and which he returned, the minute book for the AGM was not available and he told them where it was.
15. During further cross-examination CW1 admitted that the issue of missing payment vouchers and unaccounted for money was raised at the meeting with the audit committee. CW1 recalled the date of the meeting was on the December 20, 2018. CW1 admitted he was then suspended.
16. The claimant on further cross-examination told the court the first suspension was on August 30, 2018 and not December 30, 2018 as stated in his claim and added that the first suspension was for 30 days and extended by further 15 days.
17. The claimant during further cross-examination admitted that he received show cause letter dated October 13, 2018 but did not respond as he had resigned on the October 1, 2018. CW1 told the court that he sent the resignation letter twice. First on the October 1, 2018 and upon confirming that that



the email was not sent he resent it around October 3, 2018. CW1 reiterated he resigned on the October 1, 2018 as per his resignation letter (defence exhibit No 5).

18. The court finds and determines that the claimant resigned from employment of the respondent vide his letter of resignation dated October 1, 2018. The court on evaluation of the testimony of the claimant and the said resignation letter finds and determines that the claimant terminated his own employment with the respondent vide resignation.

### **Whether the compulsory leave was legal and justified**

19. The claimant averred in his affidavit of October 28, 2020 that on the December 31, 2018 (which he corrected at the hearing on cross-examination to read August 31, 2018) the respondent decided to sent him on forceful and compulsory leave which was a plotted design to terminate his services without giving him reason or justification to justify such a move.
20. During cross-examination CW1 told the court that he was suspended after meeting with audit committee where several issues were raised including missing AGM book, his laptop, missing documents pertaining to payment vouchers and unaccounted for money. CW1 told the court that the meeting with the audit committee was on the December 20, 2018 and that the first suspension was on the August 30, 2018.
21. CW1 was referred by counsel for respondent to the memorandum agreement by employer. CW1 agreed that the document provides for suspension in case of suspicion of irregularity and that on suspension an employee was entitled to half salary. CW1 admitted he was aware there were complaints against him to the police and that there were investigations. CW1 told the court that the investigations were on missing vouchers which according to him were maintained by the chief accountant. CW1 admitted he was aware of insurance fraudulent claims based on forged signature.
22. On re-examination the claimant told the court that circumstances forced him to resign, that when on compulsory leave he was paid half salary which was the practice as per the policy, that he resent the resignation letter as it was not acknowledged on the first time. CW1 told the court investigations were still ongoing.
23. The claimant produced the memorandum of agreement which was admitted by both parties to apply. The claimant told the court that the extension of the suspension beyond 30 days was improper. The respondent admitted to the extension of the compulsory leave beyond the 30 days.
24. Clause 25 of the memorandum of agreement, the last paragraph states:- ‘The suspension period shall not exceed thirty days consecutive days except where the investigation is being done by the police or the case is pending before the court.’
25. The respondent vide letter dated October 1, 2018 wrote a letter of extension of compulsory leave for 14 days with effect from 1<sup>st</sup> October 2018 to allow the board to finalize concerns raised by the special audit committee.
26. The claimant told the court that he resigned on the October 1, 2018.
27. The court finds that the extension of compulsory leave was not allowed under the agreement as there was no pending investigations before the police or a case in court to justify the extension as at October 1, 2018. On the other hand, the claimant told the court he resigned on the October 1, 2018 hence the reason he did not respond to the show cause of October 13, 2018.



28. The court finds that the claimant is not candid on the date of resignation. CW1 did not disclose the resignation letter in his sworn affidavit of October 28, 2020 nor did he produce evidence of having sent the said letter by email.
29. If the claimant resigned on the October 1, 2018 then it is as if the extension of the compulsory leave never happened. The court however finds evidence of the stamp of the employer on his resignation letter of receipt on October 15, 2018 (defence exhibit 5).
30. To answer the issue, the court finds that the compulsory leave extension by the employer was in breach of the agreement between the parties.

#### **Whether the claimant is entitled to reliefs sought**

31. The court found the claimant resigned from his employment while on suspension by the employer.

#### **Claim for unpaid leave allowance**

32. The claimant prays for unpaid leave allowance for 3 years. In his affidavit he does not explain the basis of the claim.
33. The claimant repeated the claim for leave during evidence in chief. The respondent under section 74 of the *employment Act* has duty to produce employee records. The record was produced as exhibits 12-16. There is no record before the court on the claimant's annual leave for year 2018.
34. The claimant was on compulsory leave for 30 days in 2018 which was extended by 14 days. The court finds that the claim for leave allowance in 2017 cannot lie as there is evidence he proceeded on leave. The court has no basis to doubt that the leave allowance was not paid during the period the claimant proceeded on leave.
35. The court finds the claimant is not entitled to annual leave for 2018 as he proceeded on compulsory leave. In so finding the court upholds the decision by Justice N Nduma in *Zachary Okungu v United Nations Sacco Limited* [2018] eKLR where the court held a similar view to wit, 'the claimant therefore is not entitled to payment in lieu of leave. The claimant is entitled to leave allowance since he was already on leave but the same was not paid.'
36. The court finds no evidence of payment of leave allowance in 2018 which the court awards at 17% of the basic salary thus  $17/100 \times 149,034 = \text{kshs } 25,336/-$

#### **Prayer for 3 months' salary**

37. This prayer is not particularized or justified. It only appears as a prayer. The court cannot award that which is not justified.

#### **Unpaid salary during compulsory leave.**

38. The claimant during cross examination told the court it was the practice as per the policy to pay half salary during compulsory leave. The claimant admitted he was paid. He resigned from employment as per his testimony on October 1, 2018.
39. The respondent produced the payroll for month of September 2018 when the claimant was on compulsory leave. There is evidence of payment of the claimant half salary for the sum of kshs 123,380/-



40. The claim for unpaid salary during compulsory leave is disallowed.

Claims for transport and subsistence reimbursement attending audit committee and unpaid communication allowances

41. The court finds the above prayers to be in the nature of special damages which require strict proof. The claimant did not produce evidence of the expenditure before the court. The claims for transport and subsistence reimbursement and unpaid communication allowance are disallowed.

#### **Claim for gratuity for years of service**

42. The claimant prays for gratuity for 3 months' salary for each year served. Clause 21 of the memorandum of agreement by employer on terms of service dated July 15, 2013 provides for provident fund upon 2 years of service. The agreement is effective January 1, 2014. The claimant was employed effective November 15, 2012. The last paragraph of the clause 21 reads: 'All employees who were in employment prior to commencement of the provident fund will be paid their years of service by way of gratuity at four months salary for every year completed.'

43. The court finds and determines the claimant having been in service for a complete year in 2013 with the fund being effective in 2014, he was only entitled to gratuity for the year 2013 which the court awards as follows:  $3 \times 218,862(\text{Last salary}) = \text{kshs } 656,586/-$ . The court applied 3 months as pleaded.

44. The claimant is awarded gratuity for year 2013 for the total sum of kshs 656,586/-.

Prayer for compensation of wrongful termination due to forceful compulsory leave for 30 days and consecutive extension of 30 days which is against the employment policy

45. The court already found that the claimant voluntarily resigned from employment of the respondent while on compulsory leave. The court on evaluating the evidence before it is satisfied that the suspicion of irregularities by the respondent against the claimant was justified. The claimant admitted that suspension on basis of suspicion of irregularities was allowed under the memorandum of agreement.

46. The court found the extension of the compulsory leave on the October 1, 2018 was in breach of clause 25 of the memorandum agreement. The claimant told the court he resigned on the October 1, 2018. The court then finds that the claimant maintaining he resigned on the October 1, 2018, then he cannot benefit from the breach by the respondent of the memorandum agreement by extension of leave on October 1, 2018. The court is of the considered opinion that the show cause of October 13, 2018 triggered the resignation which was backdated to October 1, 2018. The English would say the claimant cannot have his cake and eat it too. The court declines the request to punish the employer for the extended compulsory leave due to the conduct of the claimant. The claim for wrongful termination compensation is disallowed.

#### **Conclusion and disposition**

47. The Court holds that the claimant voluntarily resigned from employment and in final determination of the claim enters Judgment for the claimant against the respondent with respect to terminal dues as follows:-

- a. Award of leave allowance for year 2018 at 17% of the basic salary thus  $17/100 \times 149,034 = \text{kshs } 25,336/-$
- b. Award of gratuity for the year 2013 which the court awards the equivalent of 3 months' salary  $3 \times \text{kshs } 218,862 (\text{Last salary})$  for total sum of kshs 656,586/-.



(Award amounts subject to statutory deductions)

- c. Award of interest at court rates from date of judgment until payment in full.
- d. No order as to costs as there was no evidence of demand notice before filing of the claim.

48. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 22<sup>ND</sup> SEPTEMBER, 2022.**

**J. W. KELI,**

**JUDGE.**

**In The Presence Of:**

**Court Assistant : Brenda Wesonga**

**claimant:- Absent**

**Respondent: Absent**

