



Obare v Faridi Savings and Credit Cooperative Society Limited (Employment and Labour Relations Claim 2 of 2020) [2022] KEELRC 12845 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12845 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM 2 OF 2020**

JW KELI, J

OCTOBER 6, 2022

BETWEEN

DENNIS NALIALI OBARE CLAIMANT

AND

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

JUDGMENT

1. The Claimant filed a memorandum of claim dated January 11, 2020 against the Respondent seeking payment terminal benefits and unpaid gratuity for years of service at 3 months for each year served, unpaid leave for one year, unpaid leave allowance, one month salary, unpaid salary during compulsory leave, transport and subsistence reimbursement attending audit committee total of Kshs 4400/-.
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 respondent's list of witnesses, witness statements and list of documents together with the bundle of documents.
4. The Claimant on the September 30, 2021 filed notice of change of advocates appointing Ouma-Okutta & Associates Advocates.
5. On November 2, 2021 the Claimant filed affidavit in support of his claim sworn on the October 28, 2021 annexing further bundle of documents.



The Evidence

The Claimant's Evidence

6. The Claimant case was heard on the 11th May , 2022 where he was a witness of fact (CW1) and testified on oath and was cross examined by Ms Kiage Advocate for the Respondent. CW1 adopted his witness statement affidavit sworn October 28, 2021 together with the exhibits as marked under the affidavit therein as his evidence-in-chief and further produced as his evidence documents under list of documents dated January 11, 2020 and marked Claimant's exhibits 1 -3. He was cross-examined by counsel for the respondent.

Respondent's Evidence

7. The Respondent called two witnesses of fact.
 - a. Felix Omulalu (Rw1) as witness of fact who testified on oath on the May 11, 2022 and adopted his witness statement dated of February 18, 2020 as his evidence in chief. He was cross-examined by counsel for Claimant. RWI produced as evidence of Respondent document under list of documents dated February 18, 2020 marked as exhibits 1 to 15.
 - b. Higgai Paul Obuya (RW2) as witness of fact who testified on oath on the May 11, 2022 and adopted his witness statement dated of February 18, 2020 as his evidence in chief. He was cross-examined by counsel for Claimant.

Claimant's Case In Summary

8. The Claimant's case as per his witness statement dated October 28, 2021 is that he was issued with offer of employment as Accountant by the Respondent on the 1st April 2013 which after two months(sic) he took up the employment and was issued with employment letter on April 12, 2013 on the November 1, 2012 (exhibit 1 Employment letter).
9. That he was guided by his job description during his employment (exhibit 2 – job description letter)
10. That he served for 5 and ½ years diligently under the board of management when the respondent without reasonable cause sent him on compulsory leave on the 30th August 2018 (exhibit 3 copy of letter)
11. That he was subjected to baseless police investigation on complaint that the society had lost Kshs 22 million which complaint was investigated and found to be baseless and malicious in intent.
12. That the investigations came several years after in previous annual general meetings held and the respondent's external auditor exonerated any malpractice in financial engagement of the society and even declared profit and member dividends which would not have been the case had there been any loss.
13. That due to the incessant witch-hunt from some board members of the society the claimant said he tendered his resignation(exhibit 4 copy of the letter).
14. That he was entitled to a monthly salary at Kshs 99,476/- and allowances as stated in claim.
15. That during the compulsory leave which was unprocedural he was paid ½ month salary and the balance is not paid update.
16. That he has not been paid any terminal benefits and salary arrears.



17. In the statement the claimant prays for damages for unlawful extension of compulsory leave.
18. That the Respondent did file a suit against him in Busia High Court which he claims is a ploy to deny him his benefits and is not pegged on benefits he is entitled to.

Defence Case

19. The Respondent denies the averments by the Claimant and states that the Claimant opted to resign from his job thereby voluntarily terminating his services which resignation the respondent accepted. That the claimant gave 3 months' notice on June 30, 2016 vide letter of equal date hence last month of employment was in the month of September 2018.
20. That while serving resignation notice it was discovered some irregularities and suspicion of funds misappropriation following which the board ordered special audit. That the special audit confirmed that Kshs 22 million could not be accounted for.
21. That before the audit was carried out the board sent the accountant(claimant) and the chief executive officer on compulsory leave on the August 30, 2018 which was to run for 30 days and could be extended on need basis.
22. On the September 20, 2018 the claimant was invited before the audit committee as part of the investigations. That claimant's response was vague hence letter of September 23, 2018 seeking for explanation in writing. That the Claimant said he did not have access to documents to prepare response. That vide letter of October 23, 2018 the respondent granted access to the claimant who did a written response dated October 29, 2018, that by this time claimant had already left employment under his resignation letter which was accepted on the October 1, 2018. The Respondent states that it had legitimate reasons to suspect the Claimant of misappropriating its funds and the suspicion was never malicious and admits it had a civil case against the Claimant pending before High Court Busia to wit HCC No 5 of 2019.
23. The Respondent denied the claim for salary arrears and terminal dues stating the claimant was paid all his salary while in employment and half salary while on compulsory leave that he took all his leave including 2018 (page 28 of Response is leave form for 2018).

Written Submissions

24. 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 submissions 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

25. 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

26. The Claimant under paragraph 2.2 of his memorandum of claim states that during his employment as an Accountant of the Respondent he duly performed duties as per his terms of service until September 30, 2018 when his services were unlawfully and unprocedurally terminated by the Respondent on malicious and false allegations of having misappropriated funds which allegations were dismissed by the investigating agency and the police. The claimant adopted his witness statement affidavit of October 28, 2019 and document annexed as his evidence. The claimant relied on his claim.

Evidence at Cross -Examination of the Claimant

27. During cross-examination the Claimant stated his duties were to prepare banking reconciliation receipts, annual financial reports and verification of loan applications. The claimant admitted that he was informed of irregularities on finances within his department. The claimant told the court by the time of resigning he was not aware of any irregularities. The Claimant told the court he was informed to appear before the audit committee which he attended. The committee informed the claimant of unaccounted cash inquiry. He could not recall the exact figure and that he provided satisfactory explanation. The claimant told the court that he did not get communication after the audit committee meeting. That he went home as he had resigned. On being asked if he was sent on compulsory leave the claimant told the court he had already resigned in June 2018 and had served 3 months notice.
28. The Claimant on further cross examinations told the court he was sent on compulsory leave after the audit committee meeting on ground of ongoing investigations. The claimant further admitted to having received notice to show cause which he responded to and appeared before the board. The claimant's response to the board was that according to him no funds were lost during his tenure as accountant. The Claimant told the court he provided a response that the part he could not deal with was because it was in documents as he had handed over.
29. On further cross-examination the Claimant denied receipt of letter by former employer of October 23, 2018 to access documents required to respond, he also denied writing to request access to documents. The claimant told the court the reason for his resignation was to proceed for further studies and not because of missing funds.
30. The Claimant admitted to being paid ½ salary while on compulsory leave, said he was earning Kshs 99,000 and had not produced payslip. The court noted the payroll for months August and September 2018 was produced by the respondent (Respondent's exhibit No 15).
31. On the terminal benefits sought the Claimant relied on clause 3 of the union agreement. The claimant admitted there was a pending civil case on the missing funds and admitted he was never cleared of the allegations.
32. During re-examination the claimant said he was being paid Kshs 99,000 by time of resignation. That he responded to the allegations during his terminal leave and has never received response.
33. That clause 25 of the agreement with employer talks of suspension and had never been suspended by employer and there was no court order that he should not be paid.

Determination

34. The Court finds and determines that the Claimant resigned from employment of the Respondent vide his letter of resignation of June 30, 2018 as per his evidence at cross examination and served 3 months notice. The claimant told the court he resigned to further studies. That the said resignation happened



before the accusation of misappropriation of funds. The respondent accepted the resignation letter vide letter dated October 1, 2018 (respondent exhibit 5) The court finds determines that the Claimant terminated his own employment with the Respondent vide resignation.

Whether the Compulsory Leave was Legal and Justified

35. The Claimant was sent on 30 days compulsory leave on the August 30, 2018 to pave way for investigations. It was not in dispute that there was audit investigation, police investigations and that the claimant had been sued in a civil case at Busia High Court to wit HCC No 5 of 2019.
36. The Court finds on balance of probabilities that the investigations were justified by the employer and the allegations of witch-hunt are unfounded. The Claimant alleged that the compulsory leave was extended beyond 30 days during which period he was earning ½ pay. On the October 1, 2018 his resignation was accepted.
37. No evidence was placed before the court on extension of the compulsory leave on basis of investigations beyond the 30 days. The agreement states that the suspension shall not exceed 30 days unless were done by police. The Claimant said he was not suspended.
38. 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.’
39. The Court finds and determines that the compulsory leave for investigation purpose is equivalent to investigations under clause 25 of the agreement. The Court finds that the employer having reported the matter to the police had no control over the delay in charging the claimant. The court took notice that there is a pending civil suit on the alleged lost monies to wit Busia High Court HCC No 5 of 2019.
40. The Court finds and determines that the compulsory leave was legal and justified.

Whether the Claimant is Entitled to Reliefs Sought under the Statement of Claim Dated January 11, 2020

Claim for Unpaid Leave Allowance for 1 Year

41. The Claimant prays for unpaid leave allowance for 3 years. In his affidavit he does not explain the basis of the claim.
42. The Claimant repeated the Claim for leave allowance 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 8-13. There is record before the court on the Claimant’s annual leave for year 2018 (exhibit 13 of respondent’s evidence)
43. The Claimant was on compulsory leave for 30 days in 2018.
44. The Court finds the Claimant is not entitled to annual leave for 2018 as he proceeded on leave in 2018 and had nil balance days(respondent’s exhibit 13). Further the claimant was on compulsory leave for 30 days hence would still not be entitled to annual 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.
45. The Court finds that the Claimant having proceeded on leave before proceeding on compulsory leave, on a balance of probabilities he was also paid the leave allowance. The claim for leave allowance



was pegged on the unpaid leave which the court established was taken in 2018 (exhibit 13 by the Respondent).

46. The claim for leave allowance is disallowed.

Prayer for 1 Month Salary Notice Pay

47. This prayer is not justified as the claimant resigned from employment.

Unpaid Salary During Compulsory Leave

48. The Claimant during cross examination admitted he was to be paid ½ salary while on compulsory leave. The Claimant admitted he was paid. The Claimant resigned from employment as per his testimony on June 30, 2018 and served notice of 3 months. His resignation was accepted on the October 1, 2018.

49. The claim for unpaid balance ½ salary during compulsory leave is disallowed as the same was found to have been justified.

Claims For Transport And Subsistence Reimbursement Attending Audit Committee and Unpaid Communication Allowances

50. 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

51. 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 April 12, 2013. 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.’

52. The Court finds and determines the claimant having been employed on April 12, 2013 with the fund being effective in 2014, he was not entitled to gratuity as he did not serve for a complete year in 2013. For the rest of the years served he was under provident fund hence his social security is covered as envisaged under section 35(5) of the *Employment Act* to wit

‘An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. (6) This section shall not apply where an employee is a member of- (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*’.

53. The Claim for gratuity is disallowed as the Claimant was under the provident fund of the employer effective year 2014.

Conclusion And Disposition

54. 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. A declaration that the claimant is entitled to access his provident fund terminal benefits.
- b. The respondent to issue the claimant with certificate of service within 14 days of this judgment in terms of the provisions of section 51 of the *Employment Act*.
- c. Each party to bear own costs.

55. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 6TH OCTOBER, 2022.

JW KELL,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant:- Okutta

Respondent: Absent

