



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO. 50 OF 2019

NAFTAL PRIVA KITATU..... CLAIMANT

- VERSUS -

JITEGEMEE SACCO SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 11th June, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 16.08.2019 through Birir & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of the claimant's employment was illegal, unlawful, unfair and contrary to provisions of the Employment Act.
- b) An order that the respondent to pay the claimant termination dues as calculated herein.
- c) An order the respondent to issue the claimant's certificate of service.
- d) Costs and interest thereon.
- e) Any other relief the Honourable Court may deem fit to issue.

The claimant claimed terminal dues and benefits including:

- a) One month's salary in lieu of notice Kshs. 193, 426.00.
- b) Salary arrears for February, March and April 2017 Kshs. 75, 687.00.
- c) House allowance arrears for February, March and April 2017 Kshs. 25, 290.00.
- d) Salary for five years being remaining years prior to claimant attaining retirement age 193, 426 x 12 x 5 Kshs. 11, 605, 560.00.
- e) Gratuity calculated at 2 months' salary for every year completed 193, 426 x 12 x 25 Kshs. 9, 671, 300.00.
- f) 12 months' damages for unfair or unlawful termination Kshs. 193, 426 x 12 Kshs. 2, 321, 112.00.

The claimant's case is pleaded as follows. He was employed by the respondent in 1994 on permanent and pensionable terms and served in several managerial positions until May 2018 when he was unfairly terminated from employment. His last monthly pay was Kshs. 193, 426.00. The claimant states that his dismissal was unfair, unlawful and contrary to the Employment Act. He claims and prays as already stated above.

The respondent filed the memorandum of response on 11.09.2019. The respondent admits that the claimant was initially employed as a bookkeeper effective 18.03.1994 on probationary service and he served until the summary dismissal on 25.05.2018. The service was governed by the respondent's Human Resource and Administration Policy 2011; respondent and staff memorandum of agreement on salaries

and terms and conditions of service; respondent's Regulatory Authority Regulations known as Sasra Regulations, terms in the letter of appointment and the Employment Act. The respondent further pleads that the claimant's summary dismissal on 25.05.2018 was on account of gross misconduct and in strict adherence to the law and rules governing the claimant's employment. The claimant was dismissed for gross-misconduct, gross misappropriation of funds, carelessness and abuse of office. In particular, on 15.03.2017, contrary to respondent's policies, the claimant requested for his pension or retirement benefits from the respondent's Pension Scheme, Pan Africa Life Assurance without giving any notice or receiving authorization from the respondent's board. On 21.03.2017 the said Pan Africa Life Assurance paid the claimant a sum of Kshs. 2.5 Million being the claimant's pension or retirement benefits. Thereafter the claimant remained in the respondent's employment from 21.03.2017 drawing salaries and benefits, an act which constituted gross misconduct. The Board deliberated the issue on 27.03.2018 and decided that the claimant goes on compulsory leave to investigate the matter. The investigations were completed and the claimant invited to a meeting on 03.05.2018 for a hearing and the meeting considered the committee's investigation, the evidence by Sanlam Manager, and the claimant's evidence including his own letter received on 09.04.2018. The respondent further pleads thus, "**13. The Respondent made a decision to summarily dismiss the claimant on 25th May 2018 as it was established that while the Claimant was illegally in office he abused his position and fraudulently with ill intent withdrew all his retirement/pension benefits amounting to Ksh. 2.5 Million without giving any notification or authorization of the Respondent's board.**" The respondent's case is that the claimant is not entitled to the reliefs prayed for.

The respondent further counterclaims that as an employee the claimant was involved in misappropriation of funds and abused his office. The claimant withdrew Kshs. 2.5 Million as his pension and effective 15.03.2017 he ceased to be the respondent's employee but he continued to draw salary after his act of retirement as he is deemed to have retired from 15.03.2017. The respondent counterclaims Kshs. 2, 321, 112.00 being salaries paid to the claimant after he continued in service despite having withdrawn all his pension benefits.

The respondent prayed for:

- a) The claimant's claim be dismissed with costs plus interest.
- b) Judgment against the claimant for payment of Kshs. 2, 321, 112.00.
- c) Alternatively, the claimant be deemed to have retired after illegally withdrawing his retirement or pension benefits.
- d) Interest on (b) above.
- e) Costs of the suit.

The claimant filed on 09.10.2019 a reply to the counterclaim. The claimant stated that the payment he received from his insurance fund was well provided for by the staff terms and conditions having attained the age of 45 years as required and was duly sanctioned by the respondent. Further upon attaining the age of 45 years he ceased to be an active contributor to the fund and he was eligible to withdraw from the fund. Further, withdrawing from the fund did not automatically terminate his employment with the respondent. His employment was terminated unfairly and he states he is entitled as prayed for in the memorandum of claim.

The claimant testified to support his case. The respondent's witness (RW) was Dola Mbale, Board Director and Secretary to the respondent's Board. Final submissions were filed for the parties. The Court has considered all the material on record and makes findings as follows.

To answer the **1st issue** for determination the Court returns that there is no dispute that the parties were in a contract of service as per their respective pleadings.

To answer the **2nd issue** for determination the Court returns that there is no dispute that the claimant's employment with the respondent was terminated by the letter of summary dismissal for gross misconduct dated 25.5.2018. The letter addressed to the claimant stated as follows:

"Dear Sir,

RE: SUMMARY DISMISSAL FOR GROSS MISCONDUCT

You attended a disciplinary hearing on 3rd May 2018. The outcome of the board considered the following.

- a) The committee Investigation Report;**
- b) The evidence produced by Sanlam Manager;**
- c) The evidence produced by you, including evidence of mitigation.**

It was proved to the satisfaction of the board that you were paid your pension retirement benefit. It was the board's decision that your conduct constituted gross misconduct. Your explanation that you never retired after being paid your full contribution and 50% (fifty per cent) of employer pension contribution was not acceptable because pension benefit is paid to a staff upon retirement or leaving employment. The board on 15th May 2018 decided that your employment should be terminated on grounds of your conduct.

It is the board's decision:

- **Your employment will terminate with effect from 31.05.2018.**
- **You will be paid one month salary of May 2018 in lieu of notice and 2018 leave allowance.**
- **Your shares of Kshs. 446, 500.00 will be used to offset your loan arrears of Kshs.439, 070.66.**
- **You will be entitled to your pension balance of Kshs.771, 355.80.**
- **You will be issued with a certificate of service.**
- **You must return all company property under your hands. You will remain bound by any confidentiality and restrictive covenant clauses in your contract of employment.**

Do note that the Sacco reserves the right to recover an outstanding amount of Kshs. 2, 321, 112.00 being the illegal salary earned, from the time you deemed retired (15.03.2017).

Yours Sincerely,

Signed

ABDULLAH H GUNYU

CHAIRMAN”

The 3rd issue for determination is whether the termination was illegal, unlawful and unfair as urged for the claimant. It is submitted for the claimant that the claimant was sent on compulsory leave on 27.03.2018, he was invited for disciplinary hearing and he attended and defended himself, but he was summarily dismissed on 25.05.2018. On 13.06.2018 he appealed against the summary dismissal but the respondent failed to respond whereas clause 9.6 of the Human Resources and Administration Policy had entitled the claimant to such appeal and determination. It is further submitted that no notice and hearing was given and it was unfair.

For the respondent it was submitted that there was no dispute that both parties contributed, on behalf of the claimant, to the Sanlam Insurance as per the retirement plan for the respondent’s employees. The funds were to be paid upon retirement (either on optional retirement at 45 years or upon attainment of 55 years). The claimant confirmed he withdrew his pension dues without knowledge of the respondent’s board or authorization of the board. At the time he withdrew the funds he was the acting Chief Executive Officer for the respondent and it was absurd that a junior officer, the Chief Accountant, is the one the claimant relied on as authorizing the withdrawal. It was further submitted that whereas the claimant could withdraw the pension at 45 years of age, the same was preconditioned to his retirement but which he never did. It was further submitted that on 21.03.2017 the claimant received Kshs. 2,500,000.00 without knowledge of the respondent’s board and the claimant confirmed as much at the hearing. Thus clause 9.12 (a) of the respondent’s Human Resources and Administrative Policy 2011 provided, **“a) The normal retirement age for all employees shall be 55 years or 45 years optional. Retirement benefits shall be made as per the provisions of the Pension and Provident Funds’ scheme rule.”** Further, section 44(3) of the Employment Act, 2007 provides that an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. It is submitted that the claimant withdrew the pension benefits without the knowledge of the respondent’s board and without opting to retire and therefore he continued in office illegally receiving the monthly salary and the same amounted to gross misconduct. It is submitted that the reason for termination was fair and genuine.

On procedural fairness, it is submitted that the per section 41 (2) of the Employment Act, notification and a hearing was accorded. Compulsory leave was imposed on 17.03.2018 and the claimant invited for a hearing on 03.05.2018 and dismissed on 25.05.2018. Clause 9.6 of the respondent’s Human Resources and Administrative Policy 2011 provides, **“An employee served with disciplinary action shall have the right to appeal in writing within 48 normal working hours from the receipt of the disciplinary action in accordance to the laid down procedure.”** The claimant says he submitted appeal on 13.06.2018 and the termination had been on 25.05.2018 and it is submitted for the respondent that it was time barred. It is submitted the respondent, per section 45(2) of the Act, has shown that, the reason for termination was valid; the reason for the termination was a fair reason related to the claimant’s conduct or capacity or based on the operational requirements of the respondent; and the termination was in accordance with the fair procedure.

The Court has considered the parties’ rival submissions.

The claimant testified that he was put on compulsory leave, he was invited for a hearing, he was heard and later he received the letter of summary dismissal. In view of that evidence and as submitted for the respondent the Court finds that the respondent accorded the claimant a fair procedure prior to the termination. It is true that the claimant appealed but received no response and it is also true that the appeal was time barred. The Court considers that the best human resource practice was that the respondent replies to the appeal informing the claimant that it was time barred but in view that the initial summary procedure had complied with a notice and a hearing per section 41 of the Act, the procedure was not unfair.

On merits of the summary dismissal, the Court returns that claimant testified that after he withdrew the pension he wrote a letter to the respondent but the same had not been filed. He confirmed that at the time he withdrew pension benefits (on 15.03.2017) he was the acting Chief Executive Officer and the Chief Accountant one Noordin had approved the withdrawal. The claimant further testified that after the withdrawal, he continued to work. The Court has considered the evidence and finds that the claimant by his evidence confirms that he withdrew the pension without having retired and without notifying the respondent’s board as only the Chief Accountant was aware. The letter the claimant says he wrote to the respondent is found, on a balance of probability, not to have existed at all. The Court returns that in

the circumstances, the reason for summary dismissal is found to have existed as at the time of the dismissal and as per sections 43 and 45 of the Act. It was not an unfair reason.

Thus the Court returns that the dismissal was not unfair in procedure and merits. The Court further finds that the claimant is not entitled to the declaration that the termination was unfair and unlawful and is not entitled to compensation in that regard.

The 4th issue for determination is whether the claimant is entitled to the other remedies as prayed for. The Court finds as follows:

a) A month's pay in lieu of termination notice is not justified because the claimant testified that he was duly paid and further, as submitted for the respondent, the respondent was entitled to dismiss with a shorter notice on account of gross misconduct per section 44(1) of the Act or notice had been given in view of the compulsory leave.

b) Salary and house allowance arrears for February, March and April 2017 Kshs.75, 687.00 and Kshs. 25, 290.00 respectively are found unjustified because, as submitted for the respondent, the claimant was paid a consolidated salary per payslips on record. The Court in finding the claims as unjustified has considered the claimant's evidence thus, **"I see payslips. Payslips show I was paid February, March and April 2017. Payslips show I was paid house allowance for February, March and April 2017. I dispute amount paid."**

c) As submitted for the respondent, the claim and prayer for 5 years pending retirement lack contractual and statutory or other basis. The claimant has not established a ground to show that he would have remained in the respondent's service for that period and nothing attributable to the respondent has been shown to have stopped him from engaging in alternative gainful employment, after the summary dismissal.

d) It is submitted for the claimant that he is entitled to 2 months' salaries in gratuity for each completed year of service per clause 30 of the memorandum of agreement between all employees and the respondent. It is submitted that the claimant is deemed to have retired at age of 45 years and is entitled as prayed for and for the service of 25 years. Clause 30 (iv) of the agreement on gratuity states that upon normal retirement, the employee shall be eligible to (2) months' current salary on every year in service. It further provides, **"Upon normal retirement or voluntary retirement, after having completed five (5) years in service, the employee shall be eligible to two (2) months current salary on every completed year in service."** It is submitted that the agreement became effective on 01.02.2014 and the claimant had not served for 5 years per the provision. It is also submitted that the gratuity is discretionary on the part of employer and further the claimant was summarily dismissed and did not retire. The Court has considered the submissions and finds that the claimant is not entitled because he was summarily dismissed and did not normally retire as contemplated under the clause.

The 5th issue for determination is whether the respondent is entitled to counterclaim in monthly salary inclusive house allowance earned after the withdrawal of the pension benefits and making a sum of Kshs. 2, 321, 112.00. The Court finds that the counterclaim is based on a related claim that the claimant is deemed to have retired on 15.03.2017 when he undisputedly withdrew the pension benefits. The clear and rather obvious answer is that the evidence is that the claimant never retired on 15.03.2017 but was later in time emplaced on compulsory leave and subsequently summarily dismissed. The Court finds that the counterclaim is clearly inconsistent with the summary dismissal and the claimant having actually worked for the amount now subject of the counterclaim, the amount was actually paid for the work done and the Court finds that the counterclaim was unfounded and unjustified. The same will be declined.

The Court has considered parties' margins of success and returns that each will bear own costs of the suit and the ensuing counterclaim.

In conclusion, judgment is entered for the parties for:

- 1) Dismissal of the claimant's memorandum of claim.
- 2) Dismissal of the respondent's counterclaim.
- 3) Each party to bear own costs of the entire proceedings herein.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 11th June, 2021.

BYRAM ONGAYA

JUDGE