



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.486 OF 2016**

**WYCLIFFE MUNYASIA MANYONGE.....CLAIMANT**

**VERSUS**

**AGRICS FARM INPUTS & CREDITS (K).....RESPONDENT**

**JUDGEMENT**

The claimant is an adult male. The respondent is a registered non-governmental organisation under the Societies Act.

The claim is that The claimant was initially engaged by the respondent as a partner on 23<sup>rd</sup> January, 2015 which partnership was to enable the claimant support farmers. As a partner, the claimant was only remunerated on what the respondent terms as stipend of Ksh.10,000 and a further Ksh.2,000 for air time and transport per month.

The respondent started operations in Western Province in the year 1994 then called ICS and changed name to Agrics in early 2015.

The claim is that In the partnership, this was in reality employment and appointment running from 1<sup>st</sup> January, 2015 to 30<sup>th</sup> September, 2015 and which was the contract period.

That despite the partnership contractual employment ending on 30<sup>th</sup> September, 2015 the claimant continued working for the respondent and was paid for October to December, 2015 meaning there was continuity of employment.

The claim is also that sometime in January, 2016 the respondent issued the claimant with an appointment letter which confirmed employment. The contract was for a fixed term employment of 12 months ending December, 2016 at a gross wage of Ksh.30,000 per month on organisations grade 4.

On 26<sup>th</sup> May, 2016 the claimant was suspended from work to allow for investigations on allegations of fraud. The suspension was also for unpaid leave to run until 9<sup>th</sup> June, 2016.

On 26<sup>th</sup> May, 2016 the respondent's Field Officer Mr Maxwell Simiyu and Silvanus baby called the claimant and asked about the air time and transport given to field offices for the month of March, 2016 to which he noted these had been given to Mss Nowel Mukhohe who received and issued to the field officers. The two noted there was no money issued which meant the claimant had not paid the field officers.

The claimant was directed to surrender all office tool and issued with the letter of suspension/unpaid leave.

On 7<sup>th</sup> August, 2016 the finance officer Roseline Wamalwa called the claimant with instructions to attend at the office on 9<sup>th</sup> August, 2016 where he found the officer together with Mr Simiyu and Mbwavi who had what they called Kakamega North input reconciliations and indicated the investigations on the accounts. the claimant protested the findings and noted in his work region of Kakamega North there were 12 field coordinators and assistants who could collect goods from the warehouse or stores and take to farms in their locations. The list handed to him show the claimant had collected goods from various locations to which he had collections certificate to confirm the same. In the reconciliations, all information was not covered.

Following the meeting, the claimant was issued with letter terminating his employment. He asked to see the general manager Mr John Otiri but was not allowed. The claimant learnt the general manager was misinformed that he had resigned from his employment.

Upon termination of employment the respondent demanded that the claimant should pay ksh.831,750 within 14 days. There was no evidence of owing such monies. The region had 12 employees who were not required to give account save for the claimant. There was no fair action

leading to termination of employment and a demand to pay the sum of Ksh.831,750. The due process under section 41 and 45 of the Employment Act were not followed.

The claim is for a finding that there was unfair termination of employment; there be reinstatement; after the reinstatement the claimant be paid salaries unfairly withheld from May to August, 2016 all at Ksh.120,000; a return of the motor bike for which the claimant was paying for on a monthly basis and there was no default.

The claimant is also seeking the payment of notice pay, leave for 2 years and balance of life period of 5 months not covered from August to December, 2016; compensation, certificate of service and costs.

The claimant testified that upon employment by the respondent he was suspended on 26<sup>th</sup> May, 2016 over alleged fraud. The suspension was also stated to be unpaid leave. He resumed duty on 9<sup>th</sup> June, 2016 but was sent home until 7<sup>th</sup> August, 2016 when he was called and directed to attend the office the next day which he did and found 3 officers of the respondent who interrogated him over alleged reconciliations of his region and said there were airtime and farm inputs not accounted for but the claimant had not been allowed time to understand the charges and the alleged reconciliations and he also noted that he had a team of 12 other employees who had signed for collected goods.

At the end of the meeting the claimant was issued with letter terminating his employment and a demand that he should pay back the sum of ksh.831,750. There was no audit to confirm the allegations and demand for payment of the loss.

### **Defence and Counter-Claim**

The defence is that the claimant had an agreement with the respondent to be a facilitator in the community from 1<sup>st</sup> January to 30<sup>th</sup> September, 2015 for provision of extension services and community support. There was no employment as alleged over this period.

The claimant was issued with a letter of fixed term contract on 1<sup>st</sup> January, 2016 as Field Coordinator in Kakamega North/Lugari. The terms of employment were outlined including a wage of Ksh.30,000 per month. Such employment would be terminated upon gross misconduct.

Employment was terminated on 9<sup>th</sup> August, 2016 for gross misconduct.

The defence is also that in the months of April and May, 2016 the respondent received complaints from field officers on the issue of unpaid airtime and transport money. It was that the claimant failed, refused and or neglected to hand over airtime and transport money to these officers.

During the same period the respondent discovered discrepancies with regards to the accounts the claimant was handling. These related to;

- a) The whereabouts of the goods he had collected from the respondent's warehouse valued at ksh.636,000 were unknown;
- b) The whereabouts of 5 solar lamps he had picked from the respondent's warehouse valued at Ksh.107,00 were unknown; and
- c) The whereabouts of the airtime and transport money for the field officers the respondent had handed over amounting to Ksh.88,000 were unknown.

On 26<sup>th</sup> May, 2016 the claimant was summoned to explain the disputed issues but had no satisfactory answers. He was suspended for two weeks. He did not return until 7<sup>th</sup> August, 2016 when he was invited to a disciplinary hearing on 9<sup>th</sup> August, 2016 but was unable to account for the lost goods and the airtime and transport money.

A decision was taken to terminate the claimant's employment on the grounds of discrepancies in inputs he had picked and unaccounted for; for unaccounted 5 solar lamps; and field officers airtime for the month of March, 2016 not accounted for.

The claims made are without merit and should be dismissed.

### **Counter-claim**

In counter-claim, the respondent's case is that the claimant was involved in fraud and loss of its property and following an audit it was noted the claimant collected money for airtime and transport for 44 field officers at ksh.88,000 and was not paid or accounted for. the respondent also discovered from the audit that the claimant collected from the warehouse various good including fertilizers, seeds and 5 solar lamps for delivery to farmers but there was no delivery or an account for them all amounting to ksh.743,500.

In the month of October, 2016 the respondent carried out an audit and found the data in the receipts by the claimant were not tallying with the amount the farmers had paid.

The claimant together with another worker fraudulently collected from the farmers monies that belonged to the respondent and failed to hand over an amount of ksh.50,740.

The counter-claim is for the payment of Ksh.872 due and owing from the claimant to be paid with interests and costs.

In response to the counter-claim, the claimant's case is that the alleged fraudulent receipt of monies was discovered after an audit in October, 2016 way after the claimant's employment had been terminated. Where the amount of Ksh.88,000 was collected for airtime and transport for filed officers this was done by s Nowel Makokha.

The allegations that the claimant collected goods from the warehouse and failed to account for them is without proof. There is no complaint made by any farmer in this regard. The alleged goods worth Ksh.743,500 are not stated to justify a demand of such monies from the claimant.

The defence to the counterclaim is that it should be dismissed with costs.

Jackline Shitawa Jeremiah an employee of the respondent in the sales team and in charge of filed officers testified that she was being supervised by the claimant as his field assistant and thus worked closely with the claimant in the year 2016. In Kakamega North they had two offices at Kambi under John Maina and in Lwandeti where she was in charge. There were 44 field officers with 19 at Kambi and 25 at Lwandeti and her role was to train them and in return they were to train the farmers.

The claimant was overall in charge. He disbursed airtime and transport monies to the filed officer.

Ms Jeremiah testified that in February, and March, 2016 they were delivering goods to farmers and collecting what they had received in credit. She received complaints that the field officers had not been paid airtime and transport monies.

Of the 444 field officer, airtime and transport monies would be paid at Ksh.2000 in advance. There was no payment. The claimant would receive these monies from the office for disbursement which was not done.

The witness informed the claimant who noted that the office had not issued the monies. When similar complaints arose in April, 2016 she decided to inform the office where she learnt the claimant had been issued with these monies and failed to disburse to the filed officers. All amounted to ksh.88,000.

Ms Jeremiah also testified that in August, 2016 in the process of reconciling issuance of good with farmers it was discovered that the data and receipts did not reconcile. The farmer's passbooks and the data given by the claimant did not tally. The claimant had received money from farmers and did not submit to the respondent or account for it all at Ksh.50,740.

At the close of the hearing both parties filed written submissions.

From the pleadings, the evidence and written submissions, the issues which emerge for determination can be summarised as follows;

Whether there was unfair termination of the claimant's employment;

Whether there should be reinstatement;

Whether the remedies sought in the alternative should issue;

Whether the counter-claim is with merit and

Who should pay costs.

As noted by the claimant in his pleadings, his engagement with the respondent was initially under a *partnership* vide letter dated 23<sup>rd</sup> January, 2015 noted to be *this is a 3 – months renewable temporary fixed term assignment* from 1<sup>st</sup> January, to 30<sup>th</sup> September, 2015 as a *community representative/facilitator*.

It was also agreed that *to facilitate your effort, you will be entitled to a monthly stipend of KES 10,000*. Effectively the terms of the *partnership* were clear.

By letter dated 1<sup>st</sup> January, 2016 the claimant was appointed as an employee of the respondent in the position of Field Coordinator Kakamega North/Lugari and reporting to the Business Manager. His duties were outlined among others to;

1. *Sales and customer relationships of Agrics*
2. *Credit management;*
3. *Forging relationships and networking with relevant shareholders*
4. *Monitoring and documentation*
5. *Supervision of community facilitators in the assigned geographical location.*

By letter dated 26<sup>th</sup> May, 2016 the claimant was suspended to allow for investigations regarding allegations that;

*... of fraud and non-policy compliance in your region, Kakamega North. In order to ensure that the region continues to function smoothly and that the investigations are carried out in an unbiased way, you are placed on **unpaid leave of absence** until Thursday 9<sup>th</sup> June, 2016. ...*

The claim is that the claimant complied and remained at home until 7<sup>th</sup> August, 2016 when he received a call and was invited to attend a meeting on 9<sup>th</sup> August, 2016 when his employment was terminated.

The defence is that the claimant failed to report back to work on 9<sup>th</sup> June, 2016 as directed and only called at the office on 7<sup>th</sup> August, 2016 when he was invited for disciplinary hearing on 9<sup>th</sup> August, 2016 where he failed to give satisfactory responses to the allegations outlined against him. This led to termination of employment.

Where the claimant failed to report back to work on 9<sup>th</sup> June, 2016 as directed, there is no action taken by the respondent. He was not recalled back or issued with a notice to show cause why his employment should be terminated for being absent from duty without due cause as required under the provisions of section 44(4)(a) read together with section 41(2) of the Employment Act, 2007 (the Act). An employee who fails to attend work or remains absent from duty without permissions and is notified of this gross misconduct is subject to summary dismissal. There is inaction here by the respondent. They allowed the claimant to remain at large.

The claimant is equally to blame. He does not give account of himself after the 9<sup>th</sup> of June, 2016. His letter of suspension and *unpaid leave* lapsed on 6<sup>th</sup> June, 2016. He did not report back to work or seek for clarification as to his employment status.

As submitted by the respondent in the case of **Donald C. Avude versus Kenya Forest Service [2015] eKLR**, the employer is allowed to suspend the employee for purposes of undertaking an investigation. This is an administrative action taken by the employer for the given reason(s).

Such then allows the removal of the employee from the shop floor to allow for investigations. See **Kenyatta University & another versus Fred Obare [2017] eKLR**.

In this case, the claimant was also directed that his suspension would be for unpaid leave and he was to keep off the programmes he was running for the respondent.

The duty thus was on the respondent to summon the claimant following his suspension over various allegations to allow him answer to the same and to give his responses/defences. This is the import of section 41 of the Act that;

*(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or*

*physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and*

*the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

This is in essence that, upon suspension of an employee, the employer has the duty to outline any allegations made against the employee following the investigations and where there is nothing arising from such investigations allow the employee back to work. The rationale is that pending investigations, the employee is innocent until he fails to give satisfactory responses as otherwise where there is gross misconduct, the employer is allowed under the provisions of section 44 and 41(2) of the Act to issue summary dismissal from employment.

In **Grace N Akinyi versus Narok County government Cause No.67 of 2019 (Nakuru)** the court held that;

*... the employer has the prerogative of taking administrative action in form of a suspension, forced leave or interdiction to allow for investigations or as the case may require and the purpose is to remove the employee from the workplace to allow for investigations. Upon investigations, the employee may be issued with a show cause notice or where found not culpable be returned to work as held in **Bernard Mwaura Mbuthia versus Nyahururu Water Sanitation Water Company Limited & another, Cause No.53 of 2019** and where the court reiterated findings in **Elizabeth Cheronu Kurgat versus***

**Kenya Literature Bureau [2014] eKLR.**

On the defence that the claimant was invited to attend a disciplinary hearing on 9<sup>th</sup> August, 2016 when he happened to call at the office on 7<sup>th</sup> August, 2016 there is no notification and the required safeguards outlined under the provisions of section 41 of the Act as cited above. Even where the respondent had made findings from the audit that the claimant had failed to reconcile his account, due process required adherence to the mandatory provisions of the law under section 41 of the Act.

The resulting termination of employment on the same date, 9<sup>th</sup> August, 2016 is fraught with illegality. Due process required the claimant be notified of his alleged misconduct, allowed to attend and give his defences in the presence of another employee of his choice.

For the failure to abide the mandatory provisions of the law, the court finds there was procedural unfairness contrary to section 45 of the Act.

Had the claimant been allowed the due process, which was not done here, he may have had a fair chance to respond to the allegations against him with satisfactory responses. He was denied such chance.

Compensation is due under the provisions of section 49 of the Act. on the matters before court, noting the defences given, compensation at 3 months gross wage is found appropriate all at ksh.90,000.

Without due process and notification required under section 41 of the Act, notice pay is due all at ksh.30,000.

The claimant is seeking reinstatement back to his employment. Employment terminated vide letter dated 9<sup>th</sup> August, 2016. It is since over 3 years and under the provisions of section 12 of the Employment and Labour Relations Court Act, 2001 read together with section 49(4) of the Act and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 the court is required to take into account the lapse of such time.

There are alternative remedies sought which the court shall consider on the merits.

On the claim for unpaid salary for 4 months from May to August, 2016 the claimant was sent on unpaid leave to allow for investigations. He was to return on 9<sup>th</sup> June, 2016 which he failed to do and does not give an account of himself over this period. For the period ending 9<sup>th</sup> June, 2016 the claimant is entitled to his wages unpaid all at ksh.30,000 wage for May + 9 days at Ksh.9,000 all at ksh.39,000.

Section 19 (1) (c ) of the Employment Act, 2007 allow an employer to deduct from the wages/salary paid to an employee for every day the employee is absent from work without permission, approval or consent of the employer as held in **Francis Kariuki Gatu versus Teachers Service Commission, Cause No.142 of 2017 (Nakuru)**. This is stated in the following terms;

*(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;*

For days the claimant remained absent from work for no due course, having failed to report back as directed in his letter dated 26<sup>th</sup> May, 2016 no salary is due.

On the claim for annual leave for 2 years, employment commenced on 1<sup>st</sup> January, 2016 and terminated vide letter dated 9<sup>th</sup> August, 2016. Effectively the claimant only worked for the respondent from 1<sup>st</sup> January to 6<sup>th</sup> June, 2016 when he failed to return to work.

Under the provisions of section 28(1)(a) of the Act, for the 5 full months at work, the claimant is entitled to 1.75 leave days for each month;

*(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.*

This amounts to 8.75 days. Assessed in costs this amounts to ksh.8, 750.

As noted above, with the court award for the period he was sent on suspension doubled up as *unpaid leave* to award in lieu of taking leave would be double payment. With the payment of his wages due for the time away from work, the claimant is adequately compensated.

On the claim for the balance of contract term at 5 months, on the compensation for unfair termination of employment and the notice pay, such is addressed. The employment contract dated 1<sup>st</sup> January, 2016 envisaged termination of employment upon notice which is addressed with notice pay and the unfairness is addressed with compensation.

On the claim that the claimant had his motor bike taken away for which he was making repayments of Ksh.7,500 per months he did not account for how he acquired such item and his need to repay the respondent for the same at an instalment. Where this was a facility advanced to him as part of his employment and he was required to redeem it and take ownership by paying in instalment.

Without details on the requirement placed upon the claimant over this facility, no orders shall issue.

Certificate of service should issue under the provisions of section 51 of the Act.

### **Counter-claim**

On the counter-claim, the respondent's case is that in the months of April and May, 2016 there were complaints by filed officer and farmers with regard to the claimant where he failed to pay their airtime and transport and received monies from farmers without giving account and also collected goods from the warehouse without delivery or giving a satisfactory response to the whereabouts.

That in March, 2016 the claimant collected Ksh.88,000 for payment to the field officers but this was not paid. He collected goods worth Ksh.743,500 and there was no delivery.

Ms Jeremiah testified that she received complaints that 44 field officers were into paid their airtime and transport moneys by the claimant. In

his defence the claimant testified that there is no complaint from the alleged field officers whose airtime or transport funds were not remitted. That Ms Makokha was responsible for such disbursements.

From the letter of appointment, the claimant was responsible for the programme and where there were complaints that he did not pay the filed officer the sum of ksh.88,000 in airtime and transport he was responsible. To pass blame on another junior employee whereas he remained the responsibly officer is not a good defence. For failure to account for the Ksh.88,000 and this matter having been addressed with him in the meeting of 26<sup>th</sup> May, 2016 and then on 9<sup>th</sup> August, 2016 and without satisfactory responses, the claimant is responsible. The sum of ksh.88,000 is due from him in this regard.

On the counter-claim for ksh.743,500 in goods said to have been collected by the claimant and not accounted for, at paragraphs 25 and 27 of the defence and counter-claim the respondent avers that an audit was carried out in October, 2016 and it was found that the data in the receipts did not tally and thus the claimant could not account for the monies together with what he had collected from the farmers at Ksh.50,740.

The audit in October, 2016 was at a time when the claimant had already left the employment of the respondent. employment had terminated on 9<sup>th</sup> August, 2016 over these matters. This in effect means the reason(s) leading to termination of employment had not been fully and conclusively addressed with the claimant as of 9<sup>th</sup> August, 2016. Why then was the need to suspend the claimant to allow for investigations? What investigations were conducted for the alleged disciplinary hearing on 9<sup>th</sup> August, 2016?

These are grey areas which do not support the claims made in this regard in the counter-claim.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

- (a) Compensation awarded at ksh.90,000;**
- (b) Notice pay Ksh.30,000;**
- (c) Wages withheld May/June 2016 ksh.39,000;**
- (d) Certificate of service shall be issued in accordance with section 51 of the employment Act, 2007; and**
- (e) Dues above shall be paid in accordance with section 49(2) of the Employment Act, 2007.**

**Counter-claim**

**Judgement is hereby entered for the respondent against the claimant in terms of the counter-claim in the following terms;**

- (a) There shall be payment of ksh.88,000 for airtime and transport unaccounted for;**
- (b) Monies (a) above shall be paid with interest from the date of filing counter-claim until paid in full;**

**Each party shall pay own costs.**

**Delivered at Nakuru this 6<sup>th</sup> day of February, 2020.**

**M. MBARU**

**JUDGE**

In the presence of: .....