



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2129 OF 2014

DAVID WEKESA NAMBAFU.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LTD.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed this suit on 27.11.2014 contending that he was employed by the respondent on 1.5.1997 as a Clerk in Operations earning kshs.30500. He averred that on 31.1.2006, he was suspended from work without pay until he cleared himself from criminal charges he was charged in Criminal case number 532 of 2006 following a report made to the police by the BM Sacco on 21.1.2006. He further averred that on 25.1.2012, he was acquitted of all the charges in the said case but the suspension was not lifted nor was his salary arrears paid. He contended that the suspension and /or unlawful dismissal has exposed him to loss and prayed for the following reliefs: -

a) Salary for the suspension period of 9 years, compensation for malicious and unfair suspension, earned leave, leave travel allowance, one month's salary in lieu of notice, payment for 62 days and service gratuity totalling to kshs. 4,160,883.

b) Certificate of service.

c) Costs and interest.

2. The Respondent filed defence on 23.1.2015 contending that she employed from 30.9.1992 as a security guard until 1997 when his role changed to that of a Clerical Officer Operations and on 16.2004 he became Operational Accountant Supervisor. However, she denied that she suspended and/or dismissed him unlawfully. and averred that due to the position he was holding, she lawfully suspended him after losing trust in him following his arrest and arraignment in court for alleged misappropriation and theft of money for the BM Sacco. In addition, she averred that the claimant went to work for another company during the suspension period and as such he is not entitled to the salary and other prayers in respect of that period. Finally, she contended that the suit is statute barred and it should be dismissed with costs.

3. The suit was heard on 30.5.2019 and 25.7.2019 when both parties tendered evidence and thereafter filed written submission.

Claimant's case

4. The claimant testified that he was employed by the respondent in 1992 as casual and in 1997 he became permanent earning kshs 30500 per month. On 31.1.2006, he was served with a suspension letter by a Respondent's officer Mr. Kaimenyi who ordered him to vacate the workplace immediately. The suspension was to continue until he cleared his name in the Criminal case number Kibera CMC 532 of 2006. The suspension was without pay which according to him it was unlawful and unjustifiable. He therefore prayed for the reliefs set out in his Claim.

5. On cross examination, he admitted that he was not served with any termination letter but a suspension letter. He contended that after the acquittal from the criminal case he was not reinstated to work. He confirmed that he was employed as the Operations Accounts Supervisor as per the letter dated 27.5.2004 which required him to do his duties with high integrity. He further confirmed that he was dealing with the respondent's money. He also confirmed that he was also elected as the Treasurer for BM Sacco and that in 2005 issues of misappropriation of Sacco money were raised and an audit was done.

6. He admitted that after the audit, a report was made to the police and he was arrested and charged in court. He further admitted that the reason cited for his suspension was loss of trust because of the charges he was facing. He admitted that his integrity was put into question

and the suspension was until the criminal case was determined. He contended that he was acquitted by a judgment dated 7.10.2011 but delivered on 25.1.2012 by a different magistrate.

7. He contended that after the acquittal, he went back to the respondent's office and gave a copy of the judgment to Mr Ojuku Deputy HR Manager and Mr. Ngetich the HR Manager but he was not called back to work. He reiterated that his services were never officially terminated after the acquittal but he contended that he was denied access to the office. However, he admitted that he did not serve demand letter for reinstatement but he instructed his lawyer to serve the demand letter dated 15.10.2015 after waiting to be called back in vain. He denied receipt of the respondent's letter dated 27.8.2010 which inquired about the progress of the case and the whether he had secured another job.

8. He however admitted that he did casual jobs to fend for his wife and six children during the suspension but clarified that it was not continuous employment. He admitted that he never notified the respondent that he was employed elsewhere because it was just casual employment. He confirmed that NSSF contributions were remitted in some months between July 2010 and April 2014 but denied knowledge of the person who remitted the same. He contended that his employment by the Dominion Training Institute was also casual.

9. He maintained that he is entitled to salary for the 9 years he was on suspension from 31.1.2006 to 25.1 2012 when he was acquitted. He also contended that he is entitled to leave for 2005. He admitted that the respondent remitted NSSF and Pension for his benefit. He admitted that the appointment letter did not provide for Leave travelling allowance but contended that as an accountant he was processing that allowance for all the employees going for their annual leave.

Defence case

10. The respondent's Chief of Staff Mr. Dennis Michieka testified as Rw1. He confirmed that the claimant was employed by the respondent as a Security Guard in 1992 and in 1997 he was promoted to Clerical Officer Operations. In 2004 he was again promoted to the position of Operations Accounts supervisor by the letter dated 27.5.2004 which required him to be of high integrity because he was dealing with the employer's money. He further confirmed that the claimant was also the treasurer of the BM Sacco and the custodian of the Sacco money.

11. He further testified that in 2005, a report of misappropriation of money was made and after an audit was done some money could not be accounted for and a report was made to the police. In January 2006, the claimant was arrested with others and charged with stealing and fraudulent accounting. As a result, the respondent served the claimant with the suspension letter dated 31.1.2006 citing the reason as loss of trust after his integrity was put into question. The suspension was without pay and it was until the determination of the criminal case. He admitted that the case ended with an acquittal on 25.1.2012.

12. He contended that they never heard from the claimant during the suspension despite serving him with the letter dated 27.8.2010 through his referee Mr. Nicholas Chemobo. He contended that the claimant never notified the office about the death of the said referee in 1995 or ever updated the records. He further contended that the claimant served letter dated 4.3.2012 notifying the respondent that the criminal case had been dismissed and in response the respondent served the letter dated 14.3.2012 requesting for a copy of the judgment. However, the claimant failed to do so.

13. He stated after the claimant failed to confirm that he had secured another job, the respondent verified the NSSF and NHIF information and confirmed that during the suspension period remittances were made for the claimant by other employers as per the statements obtained. He confirmed that the respondent remitted NSSF contributions for the claimant from 1999 and stopped in February 2006 but in June 2006, August 2006, July to September 2010, May to August 2012 and October to December 2012 remittances were made on behalf of the claimant. He contended that the NHIF statement indicated that the claimant's employer after the criminal case was Dominion Training Institute.

14. He denied ever serving the claimant with a termination letter and contended that it is the claimant who terminated his employment without prior notice. He denied the claim for leave and contended that the claimant either took his leave or he encashed the same as per the documents produced as exhibits. He further denied claim for leave and salary during the suspension period contending that the claimant was not working for the respondent. He admitted that the claimant was not given a Certificate of service but blamed that on the claimant's desertion. He therefore contended that the claimant is not entitled to the reliefs sought.

15. On cross examination, Rw1 admitted that BM Sacco was separate legal entity from the claimant's employer. He further admitted that the claimant was charged with other Sacco officials and they were all acquitted. He also admitted that he was the first to testify in the criminal case against the claimant but thereafter the case delayed for 5 years before the judgment. He reiterated that the suspension was until the end of the case but when he reported back after the acquittal he failed to bring a copy of the judgment as requested. He contended that there was no reason to bar the claimant from reporting back after the acquittal. He admitted that Mr. Ngetich was the Head of HR while Mr. Ojuku was HR Officer for the respondent in 2012.

16. He stated that when they sent the letter dated 27.8.2010, the claimant had not provided any other address other that of his referee. He contended that the suspension was without pay because the company expected the criminal case to end within a short period. He admitted that the claimant was a human being who had a family to provide for.

Calimant's submissions

17. The claimant submitted that he was suspended pending determination of criminal case number 532 of 2006 and because he was acquitted, he is entitled to resume work or he be paid be paid his rightful dues. He contended that the respondent's conduct of barring the claimant access to workplace after the acquittal from the said criminal case amounted to constructive dismissal. He contended that the fact that he sought alternative employment after the respondent failed to provide sustenance does not disentitle him the reliefs sought.

18. For emphasis, he relied on **Coca cola East & Central Africa Ltd v Maria Kagai Ligaga [2015] e KLR** where the Court of Appeal held

that in any contractual relationship, there is a duty to mitigate losses and as such the employee mitigated her losses by securing another job. he contended that he sought temporary jobs to feed and shelter his family and also pay fees for his children.

Respondent's submissions

19. The respondent submitted that the suit herein is statute barred because the claimant brought it to challenge the suspension after 9 years from 31.1.2006 when he was suspended. He contended that under section 90 of the Employment Act, employment claims are supposed to be instituted within 3 years after the act or within 12 months after cessation of a continuing injuries. She urged that nothing prevented the claimant from filing suit within 3 years from 31.1.2006 or within 12 months after 25.1.2012 when the suspension ended. She also relied **Attorney General & another v Andrew Maina Githinji & another [2016] e KLR** where the court of Appeal held that an employee does not need to wait for the outcome of a criminal case before filing suit to challenge dismissal.

20. Without prejudice to the foregoing objection, the respondent submitted that the suspension of the claimant on 31.1.2006 was lawful and in accordance with the terms of his contract. He contended that the claimant admitted in evidence that as an Accountant, he was employed to handle money and he was required to be of high integrity. He further admitted that his integrity was put into question by the criminal charges he faced in respect of the Sacco money. She therefore urged that it was reasonable to suspend the claimant until his culpability was determined.

21. She relied on **Evans Mutungi Musyoka v County Government of Makeni [2019] e KLR** where the court held that under the Employment Act (repealed in 2007) an employer could suspend an employee at will. She further relied on **Caleb Chola Ogecha v Seb Estates Ltd [2017] e KLR** where the court held that an employer can suspend his employee for investigations provided the employee is informed of the reason for the suspension, the period and the terms of the suspension.

22. On the other hand, the respondent submitted that the claimant did not comply with the terms of the suspension by failing to avail a copy of the judgment and by seeking alternative job during the period of suspension. She contended that the claimant failed to provide a copy of the judgment and proceedings after a request vide the letter dated 14.3.2012. She further contended that the claimant did not plead and prove that he served any copy of the judgment on Mr. Ngetich and Mr. Ochuku as alleged in his testimony. She relied on **Daniel Otieno Migore v South Nyanza Sugar Co Ltd [2018] e KLR** where the court held that parties are bound by their evidence and if the evidence is at variance with the pleadings, it must be rejected.

23. As regards the issue of alternative employment, the respondent contended that the NSSF and NHIF statements produced as exhibits, is proof that the claimant was employed elsewhere during the period when he was under the suspension. She contended that the claimant ought not to have sought employment elsewhere while serving the suspension. She relied on **Richard Kisiang'ani Wepukhulu v Taidy's Restaurant [2013] eKLR** and **David Otunga Kenani v Office of the Controller General & Another [2015] e KLR** where the court held that the suspended employee ought to remain loyal to his employer and not to seek employment from another employer.

24. The respondent further submitted that the issue of constructive dismissal was not pleaded but only raised in submissions. However, she contended that the claimant did not prove any case of constructive dismissal against her because he admitted in evidence that he was not receive any termination letter. She further urged that the claimant did not prove that the suspension was malicious and unlawful.

25. Finally, the respondent submitted that the claimant is not entitled to the reliefs sought. and contended that the claim for salary for the suspension period amounts to unjust enrichment because the claimant was not working for her but for other people. She relied on **Evans Mutungi Musyoka v County Government of Makeni [2019] e KLR** where the court held that a claim for salary for unlawful suspension that lasted for 104 months and filed 12 years later was time barred.

26. She objected to the claim for leave up to 2005 because it time barred coming after 9 years and also because she has produced documentary evidence to prove that the leave was either taken or encashed. As regards the leave January 2006 to August 2014, she contended that the claim must fail because the claimant was not working for her. She further objected to the claim for leave travelling allowance because it was not provided for in the contract.

27. She further objected to the claim for compensation and salary in lieu of notice because she did not terminate the contract. She also objected to the claim for gratuity contending that the same was not provided for in the contract and also because the claimant a beneficiary of the NSSF.

28. She denied ever terminating the claimant's services to warrant issuance of Certificate of Service but submitted that she ready to issue the certificate to the claimant. Finally, she objected the prayer for reinstatement because it is now 14 years since the claimant stopped working for her. She therefore prayed for the suit to be dismissed with costs.

Issues for determination

29. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent and that he was suspended without pay on 31.1.2006 until the end of his criminal case number 532 of 2006. The issues for determination are:

- a) Whether the suit statute barred.
- b) Whether the suspension was unlawful.
- c) Whether suspension amounted to constructive dismissal.

d) Whether the claimant is entitled to the reliefs sought.

Whether the suit is time barred.

30. The respondent contended that the suit is time barred by didn't of section 90 of the Employment Act because the claimant did not challenge the lawfulness of the suspension within 3 years from 31.1.2006 when it was communicated, or within 12 months from 25.1.2012 when the continued suspension ended with his acquittal. Section 90 of the Employment Act on the other hand states that: -

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap 22), no civil action or proceedings based or arising out of this Act or contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

31. Applying the foregoing provision to the facts of this case I am of the view that the suit is not time barred because as at the time when the Rw1 testified, the claimant's services had not been terminated nor had the suspension been lifted by the employer. Although Rw1 disputed that the claimant reported back to work and gave copy of the judgment to the two HR officers, he admitted that the claimant did in fact serve the letter dated 4.3.2012 to report about his acquittal and the suspension was not lifted and instead he was served with another letter requesting for copy of the judgment and proceedings. Instead it continued until the suit was filed on 27.11.2014 to claim accrued benefits under the contract of service. I therefore return that the claimant had the right to bring suit to challenge the lawfulness of the suspension at any time from the day it was communicated up to 12 months from the day when it ceased or sue for any benefit accruing during the suspension period within 3 years next after the date when the criminal case ended. In this the suit was filed before the suspension was lifted and within 3 years after the acquittal and therefore it is not statute barred.

Whether the suspension was unlawful

32. The issue of suspension of employee from service has not yet been specifically legislated and as such it has mainly been left for the parties to agree on the same under their contract of service or the employers HR Policies and Procedures Manuals. The jurisprudence emerging from the courts is that an employer generally has the right to temporarily remove an employee from the shop floor for a cause, mainly to pave the way for investigations or pending criminal proceedings. Suspension is at the initiative of the employer and as such it must be done in accordance with the contract of service or HR procedures Manuals or else it is challenged in court.

33. In this case the claimant was suspended pending determination of his criminal case because the employer had lost trust in him. The charges involved theft and misappropriation of money in BM Sacco and according to the respondent, she was not comfortable to have him continue serving at her account in the company. I agree with the respondent that the reason for the suspension was justified considering the role played by the claimant in the company as an accountant handling money. The procedure followed was also fair because the suspension was communicated in writing and the terms were clearly stated therein.

34. In **Caleb Chola Ogecha v Seb Estates Ltd [2017] e KLR** Mbaru J expressed herself as follows: -

“The respondent as the employer had the right to suspend the claimant on good basis which I find was set out in the letter of suspension.”

35. However, I must add that, after the acquittal from the criminal case, the respondent had no right to continue suspending him for criminal proceedings which had ended. She ought to have recalled him to work and in case she wished to take disciplinary action against him, she ought to have done so while the claimant was back in office or serve him with fresh suspension pending the disciplinary proceedings. In this case she did not recall the claimant for over two years after learning of the acquittal forcing the claimant to bring this suit. Consequently, I find and hold that the continued suspension of the claimant after his acquittal was unfair and unlawful.

Whether suspension amounted to constructive dismissal.

36. The respondent objected to the issue of constructive termination being brought up during submissions contending that it was not raised in the pleadings. I agree with the respondent that the claimant did not raise that issue in his pleadings and as such he did not invite the court to determine that his suspension without pay amounted to constructive dismissal. In **Daniel Otieno Migore v South Nyanza Sugar Co Ltd [2018] e KLR** Mrima J held that: -

“It is now well settled by precedent that parties are bound by their pleadings and that evidence which is at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence however strong that tends to be at variance with the pleadings must be disregarded.

37. The Court of Appeal fortified the foregoing view in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] e KLR** where it cited with approval the decision of the **Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002** where it was held that: -

“It is trite principle in law that parties are bound by their pleadings and that any evidence led by the parties which does not support the averments in the pleadings goes to no issue and must be disregarded...”

In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled a settled legal

proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration... Therefore, it is neither desirable nor permissible nor permissible for a court to frame an issue not arising on the pleadings.”

38. Applying the foregoing authorities to the facts of this case, I am satisfied that the claimant did do plead constructive dismissal and as such any evidence and submissions that are at variance with the said pleadings are disregarded. Consequently, I make no determination on the alleged constructive dismissal because it is not part of the pleadings.

Whether the claimant is entitled to the reliefs sought.

Salary for 9 years

39. The claimant prayed for his unpaid salary for 9 years. The respondent objected to that claim contending that the claimant was not working for her but for other persons. I have already made a finding of fact that the respondent had the right to suspend the claimant from work pending determination of the criminal case in court. Rw1 confirmed that the claimant was not paid any salary during the suspension. According to him the suspension was without pay because the criminal trial was not expected to last for long.

40. The contract of services between the parties herein was silent about the procedure and the terms of suspension. The suspension letter suspended the claimant until he cleared his name from the charges of theft and misappropriation of funds. He was cleared by an acquittal on 25.1.2012. I therefore find that the claimant is entitled to his salary for the period he was on suspension pending the criminal case. From 31.1.2006 to 25.1.2012 is 6 years. His right to salary for that period is sure. He was however bound to mitigate losses by seeking other ways to earn a living after the employer withheld all his salary and allowances. He cannot have died for 6 years and resurrect after the acquittal. Life had to continue.

41. In **Coca cola East & Central Africa Ltd v Maria Kagai Ligaga [2015] e KLR** the Court of Appeal held that

“In any contractual relationship, there is a duty to mitigate losses and it is our considered view that the respondent in this case mitigated her loss by securing another job at Mumias Sugar Company.”

42. The question is, how much earnings did he make to mitigate the losses? The respondent did not adduce any evidence of the figures earned. The claimant contended that he did temporary casual jobs to feed, shelter and educate his family. The NSSF statement produced by the respondent shows that the claimant’s NSSF contributions were remitted only in two months in 2006 and three months in 2010. The rest came after the acquittal in 2012. The NHIF statement produced only shows one contribution remitted in December 2014. I will therefore award the claimant salary for February 2006 to February 2012 equalling to 72 months less the 5 months worked on temporary basis as per the NSSF statement produced by the respondent. Hence kshs. 30500 x 67 months = kshs. 2,043,500.

Compensation for malicious and unfair suspension

43. The claimant prayed for compensation of 12 months’ salary as compensation of unfair suspension under section 49(1) (c) of the Employment Act. However, the said claim lacks merits because I have already held herein above that the suspension was lawful and justified. The claim is also not well founded because the provision of law cited as the basis does not deal with suspension but termination of employment.

Leave earned and leave travel allowance up to 2005

44. The claim for leave earned up to 2005 lacks particulars and evidence and I dismiss the same. The leave records produced by the respondent is proof that the claimant took some of his leave days and encashed the others. That evidence was not rebutted by the claimant.

Leave earned from January 2006 to August 2014

45. Again no particulars were pleaded for this claim. I also agree with the respondent that during the period between 2006 and 2014, the claimant was not working. In my view it is irrational for an employee to earn any leave when he is on suspension unless the contract of service states so.

Salary in lieu of notice

46. The claimant did not prove that he was wrongfully or unfairly dismissed. Consequently, I dismiss the claim for one month’s salary in lieu of notice.

Payment in respect of 62 days.

47. The claim for payment in respect of 62 days lacks particulars and supporting evidence and I dismiss it.

Service gratuity for 17 years

48. Again no particulars were pleaded and no evidence was tendered in support of this claim. Whereas the relevant regulations governing the private security sector entitles employees to service gratuity, the claimant has not proved that he qualifies for that benefit considering the

evidence that respondent remitted NSSF contributions for him from 1999. I therefore decline the claim for service gratuity.

Certificate of Service

49. The claimant seems to accept that his employment has come to an end and as such prayed for a Certificate of service. The respondent is ready to issue the certificate and therefore grant that prayer.

conclusion and desposition

50. I have found out that the suitherein is not statute barred under section 90 of the employment Act .I have futher found that the suspension of the claimant pending his criminal trial was lawful but the claimant is entiteled to his salary for the period of his suspension after his acquittal . I have also found that an employee has a right to mitigate losses by engaging in income generating occupation when suspended without pay. Finaly, i have dismissed all the reliefs sought by the claimant save for the salaryfor the period of 6 years he was on suspension and the claim for certificate of service . Consequently , I entre judgement for the sum **of Kshs. 2,043,500 plus costs and intrests at court rates from the date of filing this suit** .The sum is however statutory deductions.

Dated, Signed and delivered in open court at Nairobi this 29th April 2020.

ONESMUS N MAKAU

JUDGE