



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1246 OF 2015
(FORMERLY HCCC 705 OF 2006)

WALTER ONYANGO ODAGO.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS (HEAD QUARTERS)1ST RESPONDENT

KENYA NATIONAL UNION OF TEACHERS (MIGORI BRANCH)2ND RESPONDENT

JUDGMENT

Introduction

1. The claim was originally instituted in the High Court on 5.07.2006 but was later transferred to this Court for determination pursuant to an order issued on 25.05.2015.

2. The Claimant avers that he was a branch executive secretary of the 2nd Respondent employed on 29.04.2001 and earning a basic salary of KShs. 24,095.00. Vide the letter of 2.07.2002, he was stopped from him from performing his duties by the 2nd respondent and on 11.07.2002, he received a suspension letter following the 2nd Respondent's resolution. On 13.03.2005, the 2nd Respondent held a special general meeting which resolved to dismiss him. He averred that he was not given an opportunity to be heard before the suspension and the subsequent dismissal, and that he was not paid his salary from the day he was suspended until his dismissal. He appealed the decision on 22.03.2005 but has never received a response to date, hence this suit where he seeks the following remedies-

a. A declaration that the 2nd Respondent's letters of 2nd July 2002 and 11th July 2002 were written without lawful authority and the purported general meeting of the 1st Respondent of 13.03.2005 was irregular, unprocedural and the decision to dismiss the Plaintiff was null and void and of no legal consequence.

b. A declaration that the Respondents are under a duty and are liable to correctly calculate and pay to the Plaintiff all his withheld salaries, for 33 months, leave allowance for 3 years and underpaid salaries for 13 months and all allowances withheld by the Respondents together with interest thereon.

c. An order directing the Respondent to correctly calculate and pay to the Plaintiff the said withheld and underpaid salaries and allowances within 30 days of the date of the judgment of the Court herein.

d. General damages for wrongful interference with the Claimant's employment together with interest thereon.

e. Costs of this suit together with interest thereon.

3. On 04.08.2006, the 2nd Respondent filed a Defence and Counterclaim denying the allegation that the Claimant's suspension and dismissal were unlawful, unprocedural or irregular. She averred that the meeting which resolved to have the Claimant suspended had been lawfully convened and the Claimant attended both meetings and was accorded a hearing. She further averred that there were justifiable reasons for its officials to report the Claimant of theft by servant as KShs. 1,080,000/= disappeared while in the Claimant's possession.

4. The 2nd Respondent further contended that the Claimant's acquittal did not change the fact that he had failed to account and refund KShs.

960,000.00 which had been in his possession. She denied the allegation that the Claimant instituted an appeal or that the same is provided for in article 10 (3) (1) her constitution. She therefore prayed for the suit to be dismissed with costs because it is frivolous, vexatious and incompetent.

5. On the other hand, the 2nd Respondent counterclaimed against the Claimant for the sum of KShs. 1,080,000/= that had disappeared while in his possession and which he failed to reimburse save for KShs. 120,000.00 which was banked into her bank account. In particular, they seek the following remedies-

a. KShs. 960,000/=.

b. Interest on the said sum of KShs. 960,000/= at the rate of 20% per annum with effect from 21st June 2002 until the date of judgment.

c. Further interest on (a) and (b) above at Court rates from the date of judgment until payment in full.

d. Any other relief which the Court may deem fit and just to grant.

6. On 18.08.2006, the Respondents filed a joint defence denying the contents of the plaint. The defence reiterated the averments made in the 2nd Respondent's defence and counterclaim. They contend that the Claimant was not entitled to the allowances pleaded at paragraph 7 of the Plaint as he was dismissed from employment and noted that the Claimant had failed to plead it and give its particulars.

The Claimant's Case

7. The Claimant testified as CW1. He told the Court that he employed was for a 5- years term for a monthly gross pay of kshs.75000; that he was charged, tried and acquitted of theft by servant but thereafter the 2nd Respondent dismissed him from employment; and that he appealed against the dismissal to the KNUT Appeal Council.

8. On cross examination by the defence counsel, he maintained that he sent the appeal by registered post but conceded that he did not have the certificate of posting before Court. He contended that his ground of appeal was the issue of double jeopardy considering the outcome of the criminal case.

9. He denied having knowledge of the meeting held on 10.02.2002 which discussed his suspension but admitted that there was in a meeting on 13.03.2005 in which the vote taken related to his suspension and not theft. He admitted that the union constitution allowed the Branch office to suspend him. He confirmed that he attended the special general meeting but contended that he was not given the opportunity to speak and challenged the Respondent to produce the minutes to show what transpired. Finally, he confirmed that his suspension letter indicated that he was on suspension without pay.

10. The Respondents did not call any witness and as such they did not prosecute their defence and counterclaim. After the hearing, the claimant and the 1st respondent filed written submissions.

The Claimant's Submissions

11. In his written submissions filed on 18th October 2019, the Claimant submits that the termination of his employment was unlawful because he did not participate in the meeting that resolved to terminate his employment, and as such he given the opportunity to defend himself. Further, he submitted that his employment was terminated despite the fact that he had been acquitted in his criminal case.

12. He urged that since the termination of the Claimant's employment was unfair and wrongful, he is entitled to 12 months' salary compensation by dint of section 25 of the Trade Disputes Act (Repealed), salary in lieu of notice plus his withheld salaries, unpaid leave allowance, underpaid salaries, costs and interest thereon. Finally, he contended that the Respondents did not adduce evidence to disprove his assertion that he was earning a consolidated salary of KShs. 75,000.00.

The 1st Respondent's Submissions

13. The 1st Respondent submitted that the termination of the Claimant's employment was lawful as it was done pursuant to the resolution of the Branch Executive Committee of 13th March 2005 and in accordance with the union constitution. She contended that the Claimant was present at the meeting, made his representations but abstained from voting, a fact he allegedly admitted during cross examination.

14. The 1st Respondent also submitted that the outcome from the criminal proceedings had no bearing in the disciplinary process as was held in *James Mugeru Igati vs. The Public Service Commission [2014] eKLR*.

15. As regards the reliefs sought by the Claimant, the 1st Respondent submitted that he was not entitled to remuneration for the unserved period since his employment had been terminated. For emphasis, they relied on the case of *Elizabeth Wakanyi Kibe vs. Telkom Kenya Limited [2014] eKLR* where the Court of Appeal held that employees whose employment had been terminated were not entitled to remuneration for work, they had not done.

16. She further submitted that general damages cannot be awarded for breach of contract as it would amount to unjust enrichment of the

Claimant. The 1st Respondent submitted that in the event the termination of the Claimant's employment is declared unlawful then he is only entitled to the remedies under the repealed Employment Act, Cap 226. She relied on *Mary Wakhabubi Wafula vs. British Airways Plc [2015] eKLR* where Court of Appeal observed that the appellant was only entitled to the remedies that existed when the contract of employment was terminated which was, 3 months' salary in lieu of notice.

Analysis

17. I have carefully considered the pleadings filed by the parties, their evidence as well as submissions and it is not in contention that the Claimant was sent on suspension by a resolution made by the 2nd Respondent's BEC. It is also common ground that the Claimant was charged, prosecuted, acquitted and thereafter dismissed by a majority decision of the special general meeting of branch members. Finally, it is obvious that the respondent's counterclaim was not prosecuted as such it stands dismissed for lack of evidence. The issues for determination are—

- a. Whether the Claimant's suspension and dismissal was unlawful and irregular.
- b. Whether the Claimant is entitled to the reliefs sought.

Unlawful Suspension and dismissal

18. The Claimant averred that he was not given an opportunity to present his case before the decision to suspend and dismiss him was made. On the other hand, the Respondents contended that the Claimant was present in the meeting that resolved to suspend him and was given an opportunity to be heard. During the hearing the claimant testified that he was not heard by the Special General Meetings that voted for his suspension and dismissal as required under the union constitution. That evidence was not rebutted by the respondent as no witnesses were called to produce minutes of the meetings to prove what transpired. The bundle of documents filed by the respondent were not produced as exhibits by a witness and as such they have no evidential value herein.

19. In *Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR* the Court of Appeal expressed itself as follows regarding documentary evidence –

“16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?...”

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

22. A document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness...

24. In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification...” (Emphasis added).

20. Guided by the foregoing binding precedent, I must make a finding of fact that the claimant has proved on a balance of probability that his suspension and dismissal from employment by the respondents was procedurally irregular and unlawful.

Reliefs

21. The Claimant sought a declaration that the 2nd Respondent's letters of 2nd and 11th July 2002 were written without lawful authority and the purported general meeting of the 1st Respondent of 13.03.2005 was irregular, unprocedural and the decision to dismiss the Plaintiff was null and void and of no legal consequence. However, the dismissal cannot be declared null and void because it is a fact that the parties separated. Consequently, I only make declaration that the dismissal was procedurally irregular and unlawful.

22. The Claimant has also sought a declaration that the Respondents are under a duty and are liable to correctly calculate and pay him all his withheld salaries for 33 months, leave allowance for 3 years and underpaid salaries for 13 months and all allowances withheld by them together with interest thereon. The suspension letter served on him indicated that he was suspended without pay. No justification was given for the withholding of his salary and there was no legal basis for that action. Therefore, I make declaration that the claimant is entitled to the salary withheld from him by the respondents during the said period of suspension from 10.2.2002 to 13.3.2005. The period equals to 37 months but the claimant prayed for 33 months.

23. However, the claim for leave allowance for 3 years, underpaid salaries for 13 months and all allowances withheld by the respondent is declined for lack particulars. In my view, nothing barred the claimant from quantifying that claim and specifically pleading the same as special damages, then prove the same by evidence.

24. The claim for general damages for interference with the claimant's employment by the respondents is declined for lack particulars and

legal basis.

25. In conclusion I enter judgment for the claimant against the respondents as follows: -

- a. The suspension and dismissal of the claimant by the respondents is declared irregular and unlawful.
- b. The claimant is entitled to payment of his full salary for the period he was on suspension for 33 months from 10.2.2002 to 13.3.2005 and the respondents are hereby directed to calculate the withheld salary and pay the claimant within 30 days of this judgment.
- c. The amount awarded is less statutory deductions but it shall attract interest at court rates from the date of filing suit.
- d. The Claimant is awarded costs of the suit together with interest from the date of filing the suit.

Dated, signed and delivered at Nairobi this 2nd day of July 2020.

ONESMUS N. MAKAU

JUDGE