



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CASE NO. 345 OF 2016**

**(Before Hon. Justice Mathews N. Nduma)**

**DAVID MATANGA MBIRIKA.....CLAIMANT**

**VERSUS**

**COSMOPOLITAN CLUB.....RESPONDENT**

**JUDGMENT**

1. The suit was filed by the claimant on 21<sup>st</sup> November 2016 the claimant seeking the following reliefs:

- (i) Maximum compensation for unlawful termination.
- (ii) One-month salary in lieu of notice.
- (iii) Unpaid salary from 5<sup>th</sup> May 2014.
- (iv) Service pay.
- (v) Provision of certificate of service.
- (vi) Unpaid pension.
- (vii) Costs and interest

2. The claimant further sought general damages for injurious falsehood.

3. The claimant (CW1) testified under oath and he adopted a witness statement attached to the statement of claim as part of his evidence in chief.

4. CW1 testified that he was employed by the respondent as a swimming pool attendant at Cosmopolitan club on 1<sup>st</sup> March 2000. That he worked continuously until 8<sup>th</sup> May 2014 when his employment was terminated on allegations of theft of pool chemical named 'algicide'.

5. The claimant reported to the police and was arrested and detained in custody. The claimant was charged with the offence of theft by servant and was released on bond. The claimant was subsequently tried and discharged upon a finding of no case to answer on 19<sup>th</sup> May 2016.

6. CW1 testified that he was falsely accused by his workmates. CW1 testified that he was not given a show cause letter at work nor was he subjected to any disciplinary hearing before the termination of his employment.

7. CW1 stated that he was paid Kshs. 18,480 per month and he produced a pay slip to that effect. CW1 testified that he was not paid in lieu of notice and was owed arrear salary as pleaded in the statement of claim. The claimant sought payment of service pay and provision of certificate of service. The claimant also sought to have his unremitted pension dues paid.

8. CW1 was cross examined by Mr. Mshidi for the respondent and insisted that he was charged on false allegations by the employer. That he was vindicated by the court. That he was dismissed from work whilst the case was pending in court. CW1 stated that statutory dues were deducted and remitted including NSSF. CW1 stated that he had wished to be reinstated as per the demand letter he wrote to the respondent. CW1 prayed to be awarded as prayed.

9. The claimant closed his case on 22<sup>nd</sup> October 2018.

10. Defence hearing was scheduled on 2<sup>nd</sup> May 2019 but counsel for respondent sought adjournment on grounds that he has been unable to trace his two witnesses. The application for adjournment was opposed by Mr. Odeny for the claimant but same was granted and the matter set for defence hearing on 5<sup>th</sup> December 2019.

11. On 5<sup>th</sup> December 2019 Mr. Oduor for the respondent sought further adjournment on the grounds that defence witness Mr. J. Bodalika was out of the country and one Stephen Odhiambo had left the employment of the respondent. The application for adjournment was again opposed by Mr. Odeny for the claimant. The court upon hearing both parties refused any further adjournment of the defence case and ruled that the defence to proceed with their case as scheduled.

12. Counsel for the respondent left the matter to court and the court deemed the defence case as closed and gave directions for filing of final submissions. Both parties filed their respective submissions.

### **Determination**

13. The testimony by the claimant is not controverted, the respondent having failed to provide any witness to testify on its behalf. The court therefore makes a finding of fact and law that the claimant has proved his case that he was dismissed from work following framed up charges against him at the behest of the respondent which charges were dismissed by the trial court and the claimant was discharged for no case to answer.

14. The court finds that the claimant has proved on a balance of probabilities that his dismissal from work was for no valid reason and no fair procedure was followed in dismissing him from work.

15. The respondent therefore violated *sections 36, 41, 43 and 45 of the Employment Act, 2007* in dismissing the claimant wrongfully and unfairly. The claimant is entitled to compensation in terms of *Section 49 (c) and 4 of the Act*.

16. In this regard the claimant had served the respondent diligently for over 13 years. The claimant was dismissed from work on false allegations of theft to his loss and detriment. The claimant was not paid any terminal benefits upon dismissal nor was he compensated for the sudden job loss.

17. The claimant suffered embarrassment and hardship attending to a criminal case based on false allegations for a period of two years. The claimant suffered loss and damages and the court finds that the claimant did not contribute to his dismissal from work. The court has considered the case of *Kenya Corporation vs Geoffrey Wakio, Court of Appeal Civil Appeal 352 of 2017(2019) eKLR* where Court of Appeal awarded 12 months' salary in compensation for unlawful dismissal in substitution of an award of global general damages by Nduma –J. The case is similar to the present one and in addition to all the factors above awards the claimant the maximum compensation under the provisions of *Section 49 of the Employment Act*, being equivalent to 12 months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. 221, 760. The claimant is also awarded Kshs. 18,480 in lieu of one-month notice.

### **Terminal benefits:**

18. The claimant worked until the 5<sup>th</sup> May 2014 when he was dismissed from work on allegations of theft. The claimant however received a letter of dismissal dated 30<sup>th</sup> May 2014. The claimant is therefore entitled to salary for the 25 days between the 5<sup>th</sup> May 2014 and 30<sup>th</sup> May 2014 in the sum of Kshs. 15,400 and is awarded accordingly.

19. The claimant was registered with NSSF and the respondent remitted all statutory dues on his behalf. The claim for service pay lack merit therefore and is dismissed.

20. The claimant had not pleaded properly and did not prove a case for malicious prosecution. The court does not therefore award the claimant the sought general damages for injurious falsehood for want of proof. The claim for unpaid salary after the date of dismissal on 30<sup>th</sup> May 2014 lack merit and is also dismissed.

21. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- (i) Kshs. 18,480 being one-month salary in lieu of notice.
- (ii) Kshs. 221,760 being the equivalent of 12 months' salary in compensation.
- (iii) Kshs. 15,400 being arrear salary between the 5<sup>th</sup> to 30<sup>th</sup> May 2014.
- (iv) Interest at court rates from date of judgment till payment in full.

(v) Costs of the suit.

**Judgment Dated, Signed and delivered at Kisumu this 15<sup>th</sup> day of October, 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Odeny for claimant

Mr. Maganga for respondent

Chrispo- Court clerk