



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1635 OF 2013

(Formerly Machakos HCCC No. 203 of 2008)

(Before Hon. Lady Justice Hellen S. Wasilwa on 5th February, 2019)

LUCAS KITAVI KING'OO CLAIMANT

VERSUS

MASAKU TEACHERS SAVINGS &

CREDIT CO-OPERATIVE SOCIETY LIMITEDRESPONDENT

JUDGEMENT

1. The Claimant initially filed this Claim at the High Court in Machakos as CC No. 203/2008 through the firm of Mwangangi & Company Advocates. On 28/5/2013 vide an order of Hon. Jaden J, this Cause was ordered transferred to this Court and registered as ELRC No. 1635/2013. On 15.3.2017, the Claimants filed an Amended Statement of Claim.
2. The Claimant testified before this Court that he was employed by the Respondent in 1990 as a Cashier and served the Respondents Front Office Savings Activity Department (FOSA) from 2000 to 2003 or thereabouts.
3. He avers that he was a permanent and pensionable staff and served dutifully, diligently, competently and with all due honesty discharged all his duties. His salary was Kshs.60,000/=.
4. He contends that on 11.4.2008, he was summary dismissed by the Respondent without any hearing. He contends that there was no reasons for the dismissal and he was not informed the reasons/allegations against him nor was he given an opportunity to be heard.
5. He avers that he had previously been sent on compulsory leave vide a letter dated 19.9.2007 for an unspecified term and then for another 3 months from 18.9.2008 which was extended again on 25.1.2008 for a further 3 months.
6. The Claimant contends that the Respondent's action of sending him on compulsory leave was unprocedural. He also avers that the Respondent's action of sending him on compulsory leave and subsequently dismissing him was unwarranted, illegal, irregular and in breach of the contract of employment and of the procedure and regulations of the Respondent and was therefore malicious and in bad faith.
7. The Claimant avers that the Respondent breached his constitutional rights and disregarded principles of natural justice when dealing with him and also without any justifiable cause in breach of his legitimate expectation of remaining in employment until normal retirement.
8. He avers that the Respondent also confiscated his documents and breached their own employment regulations and procedure sending him on compulsory leave and later dismissing him.
9. The Claimant therefore prays that he be paid special damages of 3,388,044 as enumerated in paragraph 9 of the Plaint. He also seeks a declaration that he was normally retired vide the Plaintiff's letter of 10.4.2008. He prays also for damages, costs and interest.
10. The Respondents filed their Defence and Counter claim on 4.12.2008 through B.M Musau and Company Advocates. They aver that during the time of his tenure, as an employee, the Claimant served dishonourably, dishonestly, incompetently and disregarded core work regulations, procedures and ethics leading to his summary dismissal from employment.

11. They aver that following investigation, the Plaintiff was informed of all findings of misconduct against him and was afforded a fair and adequate opportunity to defend himself before the decision to dismiss him was reached.
12. They aver that the Plaintiff made unauthorised payments for recurrent expenditure amounting to Kshs.17,340,189 and capital expenditure amounting to Kshs.61,939,199.70, received money for and on behalf of the Respondent but failed to bank it on the Respondent's bank account as required and misappropriated it, failed to keep proper records, altered payment voucher and falsified records to conceal shortfalls and also made payments for no stated purposes contrary to work regulations and the ethics of financial accountability.
13. The Respondents aver that they suffered financial loss as a result of the Plaintiff's professional improprieties and accounting failures. They therefore contend that it was necessary to have Plaintiff sent on compulsory leave during investigations to ensure expediency and for meaningful, fair and conclusive investigations.
14. They deny the Claimant's allegations of unfairness and breach and deny that they have any obligation to pay as prayed. They deny that the Claimant is entitled to payment of terminal dues of Kshs.3,388,044 as prayed.
15. The Respondent want the claim dismissed accordingly and also deny receiving any demand for payment or settlement as prayed. The Respondent also made a counter claim for Kshs.80,174,366.25 being the amount they aver the Plaintiff misappropriated while as their employee.
16. I however note that the Respondent did not pay any Court fees on the Counter claim and so the Counter claim is deemed not filed at all and therefore would not be considered by this Court. The Claimant however opposed the defence and Counter claim.
17. On 26/11/2010, the firm of J.M Mutua & Company Advocates filed a Notice of Change of Advocates for the Respondent.
18. During the oral hearings before Court, the Claimant testified and reiterated the averments made in his Amended Statement of Claim dated 14th March, 2014 and filed in Court on 15th March 2017.
19. He testified that on 31.1.2008, he was called to a meeting for 1/2/2008 and questioned about his day to day work. He avers that he was not however given an opportunity to explain anything. He contends that an Inquiry was made about this case by the Ministry of Cooperative and he was surcharged but the Inquest proceeded after this case was filed. He avers that he appealed the surcharge before the Corporative Tribunal and the Tribunal found out that the Inquiry was wrong and he was paid costs.
20. In cross-examination, he told Court that he was on leave from 18/9/2007 to December 2007 and was not paid during the said period, hence the claim for 4 months' salary.
21. He also denies he was given any hearing but was asked to respond to allegations against him. He avers that an Inquiry was done by the Ministry of Corporative and he was not given any hearing during the Inquiry either. He states he filed an appeal over the Inquiry which was successful.
22. The Respondents also called 2 witnesses who reiterated evidence in their Memorandum of Response.
23. In cross-examination, RW2 indicated that the Claimant appropriated 6,579,724 for which he was to be surcharged but the Co-operative Tribunal dismissed this order.
24. The Parties also filed their respective submissions. I have considered all the evidence and submissions of the Parties. The issues for consideration are as follows:-

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether the Claimant was accorded due process before the dismissal.

3. Whether the Claimant is entitled to remedies sought.

25. As explained in his evidence by the Claimant and as per the dismissal letter, the Claimant was dismissed for gross misconduct. The summary dismissal letter read as follows:-

“Dear Sir,

Re: Summary Dismissal

The CMC has decided to summarily dismiss your from working in Masaku Teachers Sacco with effect from the date of this letter.

Your dismissal comes as a result of gross misconduct in your docket.

Thank you”

26. The nature of the gross misconduct was however not explained to the Claimant. Under the Repealed Employment Act Cap 226, under which the Claimant was dismissed, there was not mandatory provision to give reasons for any termination or dismissal. However, it was still important that an employee must have had valid reasons before terminating an employee.

27. From the chronology of events pertaining before the dismissal of the Claimant, he had been placed on compulsory leave ostensibly to reorganise the Society and later for investigation to be carried out. The Respondent promised to communicate to him after the report of their investigation was ready. This was on 18/9/2007. The suspension was for 3 months, which was further extended for another 3 months.

28. He was thereafter summoned to attend a Management meeting to be held on 1/2/2008 at the Society Boardroom starting at 10.30 a, to clarify a few issues.

29. On 11.4.2008, he was dismissed. Whereas the Respondents did not need to explain the reason for dismissal due process was still to be followed. This is because adherence to rules of natural justice are a cardinal principle in any democracy.

30. The Respondents' Terms and Conditions of service of September 2006 provided for suspension of an employee where he is guilty of a serious offence warranting dismissal. In the case of the Claimant, he was not placed on suspension as envisaged but on compulsory leave. Compulsory leave was not provided for in the Terms and Conditions of service of the Respondent. This therefore points to an illegality being meted against the Claimant. The Claimant is therefore justified in seeking his 4 months' salary during the period of the compulsory leave.

31. The Claimant also indicated that the Ministry of Cooperatives had decided to surcharge him for over 6 million that he was said to have misappropriated. He appealed this decision and the appeal was allowed by the Tribunal vide their Judgment of 8/3/2013.

32. It is my finding that the Inquiry made did not have a bearing on the Claimant's dismissal as it was made after the dismissal. The Inquiry however revealed misappropriation of funds of the Respondent, which were not accounted for by the Claimant.

33. Given that under the repealed law, giving reasons for dismissal was not mandatory so long as notice was given, I will find that the Claimant is only entitled to payment of the salary withheld during the compulsory leave and 1 month salary in lieu of notice which translates to $5 \times 60,000 = 300,000/=$.

34. The Respondent will also pay costs of the suit plus interest at Court rates with effect from the dates of filing this suit.

35. As earlier indicated, the counter claim was not filed as filing fees was not paid and was not presented and so the same is dismissed accordingly.

Dated and delivered in open Court this 5th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwenga holding brief Liko for Respondent – Present

Munyao holding brief Mwangangi for Claimant – Present