



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1164 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SAMMY ITHALI NTOITI.....CLAIMANT

VERSUS

LOKI FOREX BUREAU LIMITED.....1ST RESPONDENT

NAIROBI FOREX BUREAU LIMITED.....2ND RESPONDENT

JUDGMENT

The claim herein was instituted vide the claimant’s memorandum of claim dated and filed on 15th July 2014. It is the claimant’s averment in the memorandum of claim that he was employed by the respondents on or about February 2009 as a cashier with a starting salary of Kshs.10,000 which was increased to Kshs.15,000 on 1st June 2009. The salary was paid monthly subject to deduction of NSSF and NHIF but without payment of house allowance. The claimant avers that he was arrested and arraigned in court and was subjected to a criminal trial which culminated in his acquittal for lack of evidence. It is further the claimant’s averment that in the course of his arrest and incarceration at the police station, he sustained injuries from beatings and suffered harassment and torture in the hands of the police which was instigated by the 2nd respondent and was ill motivated.

The claimant further contends that during his incarceration the 2nd respondent went to his house and forced his wife to surrender the claimant’s personal file containing personal documents including the letter of appointment and bank statements among other documents.

The claimant prays for the following remedies against the respondents –

- (a).. Payment of salary in lieu of notice (one month)..... Kshs.15,000
- (b).. Leave for Six Years..... Kshs.90,000
- (c).. House allowance for (Accrued)..... Kshs.162,000
- (d).. Commuter Allowance..... Kshs.270,000
- (e).. Un remitted NHIF..... Kshs.7,200
- (f)... Un remitted NSSF..... Kshs.28,800
- (g).. Full Compensation for wrongful loss of employment..... Kshs.180,000
- (h).. Underpayment per year
 - Year 2010 Kshs.2,592
 - Year 2011 Kshs.25,416
 - Year 2012 Kshs.52,320

- Year 2013 Kshs.84,840

Total Kshs.165,168.

Grand Total demanded Kshs.828,168

(i) Cost of this suit plus interest at court rates

(j) Certificate of Service

(k) Alternatively, the court do order for immediate reinstatement without loss of benefits and without victimization at all.

The 2nd respondent filed response to the claim on 26th August 2014 in which it denies ever entering into an employment relationship with the claimant or having incurred any liability in respect of the claimant. It prays that the claim be dismissed with costs.

The 1st claimant did not file a response to the memorandum of claim, or participate in these proceedings, it's licence having been revoked by the Central Bank of Kenya vide Gazette Notice No. 9569 of 17th November 2015 with effect from 11th November 2015.

At the hearing only the claimant testified, the respondent opting to close its case and to rely on its pleadings and written submissions. Both parties filed written submissions after the close of the hearing.

The claimant testified that the 1st and 2nd respondents were sister companies. He signed a contract with Nairobi Forex Bureau Limited, the 2nd respondent but was immediately deployed to Loki Forex Bureau Limited, the 1st respondent. That Nairobi Forex Bureau Limited was operating in Nairobi CBD while Loki Forex Bureau Limited operated from Lokichogio. He worked with Nairobi Forex Bureau Limited for one week only immediately after signing the employment contract before he was sent to work at Loki Forex Bureau Limited in Lokichogio. He thereafter alternated between the two, working two (2) months in Nairobi and one (1) or two (2) months in Lokichogio. He testified that the two respondents were under one management.

The claimant testified that he was charged with the offence of stealing by servant in which Nairobi Forex Bureau Limited was the complainant. That while he was in custody the respondents went to his house and confiscated everything. He states that during the hearing in the criminal case Michael Mugo Kimani a Director of both respondents, testified that the claimant worked for both respondents. That Michael also recorded a statement with the police where he confirmed that the claimant worked for both respondents. Both the proceedings and the statement are annexed to the claimants' list of documents dated 27th June 2017 and filed on 11th July 2017. He testified that his letter of appointment was produced by PW1 in the criminal proceedings who is Michael Mugo Kimani.

He testified that his salary was paid through petty cash vouchers. That he stopped working on 17th August 2010 when he was arrested and was not allowed back to work after his acquittal.

He testified that in addition to salary he was paid Shs.6,000 commuter allowance. That the company paid his contributions for NSSF and NHIF which was not recovered from his salary. He referred to statements of both NSSF and NHIF in his bundle of documents. He testified that NSSF was remitted once in December 2009 in the sum of Kshs.400 as reflected in the statement.

He testified that he never went for annual leave from the time of employment.

The claimant testified that he was not issued with notice of termination or certificate of service.

Under cross examination the claimant testified that his salary was paid by Nairobi Forex Bureau Limited.

In the submission filed on behalf of the claimant, he states that there was no justification for termination of his employment. The claimant relies on the case of **Judicial Service Commission –V- Gladys Boss Shollei** in which the court cited with approval the following passage from the Canada Supreme Court decision in **Mc Kinlev –V- B.C.Tcl. (2001) 2 S.C.R. 161**

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

The claimant submits that he did not commit a fundamental breach of his contract and did not deserve a summary dismissal, relying on the case of **Walter Ogal Anuro –V- Teachers Service Commission (2013) eKLR** where the Court held that;

“... for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

He submitted that there was no fairness in his dismissal, relying on the decision in the case of **Alphonse Machange Mwachanya –V-**

Operation 680 Limited (2013) eKLR and the case of **Nicholus Muasya Kyula –V- FarmChem Limited Industrial Cause Number 1992 of 2011; (2012) LLR 235 (ICK)** where the court held that;

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

For the 2nd respondent it is submitted that it did not call any witness as there was no proof of an employment relationship between the 2nd respondent and the claimant, that the claimant testified that he was employed by the 1st respondent who issued him with an employment contract. The 2nd respondent relied on the judgment in the claimant’s Criminal Case No. Nairobi CR. 1461 of 2010 in which the Hon. P. M. Ndwiga (SPM) at page 3 of the judgment stated –

“The court noted that the letters of appointment produced in court were from Loki Forex Bureau and not Nairobi Forex Bureau.”

That the court in Nairobi CR. C. No. 1461 of 2010 found that the claimant was not an employee of the 2nd respondent.

It is submitted that the claimant failed to prove that the 1st and 2nd respondents were sister companies with same Directors as stated in his testimony in chief.

The 2nd respondent prays that the claim be dismissed with costs.

Determination

I have considered the pleadings, evidence and submissions on record. The issues for determination are whether the claimant was employed by both the 1st and 2nd respondents or the 1st respondent, whether the termination of his employment was unfair and if he is entitled to the prayers sought.

I have gone through the proceedings in Nairobi CM CR. C No. 1461 of 2010 in the claimant’s bundle of documents. At page 12 thereof, PW1 Michael Mugo Kimani testified as follows –

“My name is Michael Mugo Kimani for a businessman doing clearing and forwarding which business I have done since the year 2004.

We have one office at Tom Mboya Street called Nairobi Forex and at Mombasa called Nairobi Forex.

Business is a limited liability company.

At the material time, directors were MaryAnne Muthoni and Others.

Currently there are four directors namely

- James Muchai*
- Paul Maingi,*
- Esther Gichane*
- David Gichane*

These are Directors of Nairobi Forex.

Around August 2010, I was a Director of a sister company to Namanga Forex. We also had Loki Forex located at Lokichogio Town, At the moment the latter is not running. It was closed- June 2010.

As at August 2010 we had 7 employees at the Nairobi Forex. The employees include letters, back office and messenger staff.

We buy and sell foreign currencies.

The two accused were employed by Loki Forex, Since Lokichogio in a hardship area, after 3 months they would come to Nairobi to work for a month. After closure of Loki Forex we redeployed them to Nairobi Forex. At Loki they were both letters and back office staff.

At Nairobi office they were back office staff back office duties involved reconciling the accused and doing banking.”

I have also looked at the statement of Michael Mugo Kimani recorded at Pangani Police Station on 18th August 2010 in which he states"... SAMSON, MULINGE and SAMMY who are our employees in the back office..."

From that evidence and the testimony of the claimant which was not rebutted by any evidence from the respondent, I am satisfied that the claimant was an employee of both the 1st and 2nd respondents and that the two were managed by the same Directors.

The second issue is whether the claimant was unfairly terminated. From the evidence on record, the claimant was not allowed to go back to work after he was arraigned in court. Criminal prosecution in itself is not tantamount to misconduct for purposes of termination of employment nor synonymous with termination of employment. An employer is under a duty to formally bring the employment relationship to an end in the manner set out in the Employment Act by subjecting the employee to a disciplinary hearing and issuing a letter of termination if the employee is found guilty of misconduct. In the present case there was no formal termination process or letter making the termination unfair for being in violation of the procedure set out in the law.

Is the claimant entitled to the prayers sought?

The claimant having been terminated unfairly is entitled to one month's salary in lieu of notice. Since the respondent did not submit employment records to rebut the claimant's testimony that his salary was Kshs.15,000, I award him the same in lieu of notice.

I also award him leave for the same reason that no employment records were produced nor evidence adduced to rebut the claimant's evidence that he did not take leave for the period he was in the respondent's employment. He was in employment from February 2009 to August 2010, a period of 19 months and not 6 years as prayed in the memorandum of claim. I award him 33.25 days' leave which translates to Kshs.19,183 which I award him.

The claimant did not prove that his salary was not inclusive of house allowance

nor that he was paid commuter allowance of Kshs.6,000 per month. The two prayers thus fail as not having been proved.

The unremitted NSSF and NHIF are not payable to the claimant as the same can only be followed up by the statutory bodies which are charged with the collection and management thereof, that is, National Social Security Fund and National Hospital Insurance Fund. The claimant is advised to follow them up with the two statutory bodies.

I have considered the circumstances under which the claimant lost his job and in my opinion it would be an insult to the respondents to award the claimant damages as the claimant admitted to losing the respondent's money. The fact that he was acquitted of the charges of stealing the money does not absolve him from the liability of loss of the money while in his custody. He lost USD71,422 which at current exchange rates amounts to Kshs.7,142,200, which was the respondent's money in his custody.

The claimant has not proved underpayments and his claim for the same is dismissed.

In conclusion I award the claimant the sum of Kshs.36,183 being salary in lieu of notice and salary in lieu of leave.

In view of my finding in this case, each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE