



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 735 OF 2015

ANTHONY MWANGI IRUNGU.....CLAIMANT

VERSUS

REGISTERED TRUSTEES OF THE AGRICULTURAL

SOCIETY OF KENYA.....RESPONDENT

JUDGMENT

Introduction.

1. The Claimant filed this suit on 04/05/2015 claiming terminal benefits arising from his contract of service with the respondent plus compensation for unfair and unlawful termination of the said contract. In brief, he averred that he was employed as Internal Auditor by the respondent through a written contract of employment dated 14/06/2012 and diligently carried out his responsibilities until 19th November 2014 when the Respondent unfairly terminated his services. He further averred that the reasons cited for termination were not valid and they included unsatisfactory performance and unethical conduct while on duty. He further averred that the termination was in breach of the contract of service, the Employment Act, Respondent's Code of Regulations and Disciplinary Grievance Handling Procedures as well as the principles of natural justice. He therefore prayed for the following reliefs: -

- a. A declaration that the termination of his employment by the Respondent was irregular, unfair and unlawful.**
- b. Salary arrears for the months of June 2014 to November 2014 of Kshs. 701,282/=; and Leave and Travelling allowances of Kshs. 389,462/= totalling to Kshs. 1,090,744/=.**
- c. General damages for unfair and wrongful termination.**
- d. Reinstatement of the Claimant to his previous office or to an equally suitable position.**
- e. Costs of the suit plus interest thereon.**

2. The Respondent filed its Memorandum of Defence dated 05/08/2015 admitting that she employed the Claimant as alleged for a basic salary of Kshs. 130,000/= and a house allowance of Kshs. 31,050/= per month. She however denied the alleged unfair termination of the claimant's employment and averred that the termination was fair because the claimant had committed gross misconduct and failed to perform his duties as expected. She further averred that before the termination, the claimant was served with a show cause letter to defend himself in writing after which he was called to defend himself orally before a staff disciplinary committee. She therefore prayed for the suit to be dismissed with costs.

Evidence

3. The claimant testified as Cw1 and basically adopted his written statement which he had filed earlier and served the defence. He stated that after his appointment, he put in place a risk matrix for internal audit and it was duly adopted by the respondent's National Staff and Finance Committee. Thereafter he embarked on conducting the 2013 audits which were discussed and approved by the respondent's National Staff and Finance Committee without any complaint.

4. He further testified that in March 2014 the respondent's CEO, Mr. Batram Muthoka, called him to his office and told him that he was working with his enemies and gave him an afternoon off to write down a list of the people he was working with against him. He complied by

writing his response denying the CEO's allegation but when he went to see the CEO the following morning he found that he had travelled and he never raised the matter again.

5. He further testified that on 10.4.2014, the CEO wrote a letter telling him that his audit report for Eldoret ASK Show dated 15.3.2014 was substandard and it did not indicate the list of the debtors for the show. He however responded that the report was in the format that had been adopted all through but nevertheless he promised to upgrade the same in future shows.

6. He further testified that around the same period, Citizen Weekly, gutter press, in its 7th-13th April 2014 edition, published an article about Corruption in the Agricultural Society of Kenya. In reaction to the newspaper publication, the CEO called for a management meeting on 15/04/2014 which seemed to point an accusing figure on him as the source of the information to the press. However, he denied that he was the source of the information to the press and stated that he did not even know the journalist. Thereafter he started receiving memos and phone calls threatening him with dismissal for spreading rumours against the employer.

7. The claimant further testified that on 19.5.2014, he was interdicted on half pay to pave the way for investigations for his alleged unsatisfactory performance and failure to submit the Eldoret Show Report on time. On 30.7.2014, he was summoned to appear before the National Staff and Finance Committee to on 11.8.2014 to defend himself against to nine charges of which he was supposed to tender a written defence before then. Thereafter the CEO called him to the office and asked him to resign but when he refused to resign the CEO told him to come for a dismissal letter that day in the evening. He however never went for the letter and it was posted to him.

8. He contended that the dismissal was unfair and prayed for reinstatement to his employment or be awarded general damages. He further prayed for salary arrears of half salary for the 6 months he was under interdiction on half pay, leave allowance and pension not fully paid. That his provident was Kshs. 23,595/= but during interdiction it went down to Kshs.11,798/= per month and that the pension contribution by the employer was also halted.

9. In cross-examination, he stated that as the internal auditor, he was supposed to provide assurance that the facilities of the respondent were properly utilized. He admitted that it was his duty to identify risks and give advice, and also to review controls. He further admitted that one of the charges against him was un-surrendered floats (imprest) some dating back to 2011. He however stated that the matter had earlier been raised by the CEO through a memo and he responded to him by the memo dated 26.11.2013 and suggested measures to be taken to prevent a repeat of such delays in un-surrendered floats. He further stated that he disclosed the branches and their managers who were involved in the anomalies and also discussed the matter with the CEO and Acting Accountant and the Branch officials involved were summoned to address the matter.

10. He further stated that he was never given the report of the external auditor to see the alleged discrepancies with the internal reports. He further contended that the external auditor is facilitated by the CEO and the Chief Accountant. He stated that in 2013, he did seven internal audit reports and sent them to the CEO, the last one being 15.3.2014 for Eldoret ASK Show. He therefore maintained that he was not shown any appraisal report upon which he was judged as a poor performer. He however admitted that he told the committee that he was a mere watchdog.

11. He further admitted that he received the charges against him through the letter dated 30.7.2014 but contended that the charges in the interdiction letter were different from the ones in the letter dated 30/07/2014. He further contended that he was not allowed the chance to bring another employee to the hearing or to call a witness. He also contended that the committee never dismissed him after the hearing but later the CEO told him to resign and when he refused, he was dismissed.

12. Mr. Eric Ngetich, a Senior Accountant for the respondent testified as Rw1 and he also adopted his written statement as his evidence and produced the documents annexed to the defence as exhibits. He stated on 31.3.2014, the CEO noted that the audit report presented by the claimant for placement before the Staff & Finance Committee was not substantive and served the claimant with a Show cause letter to explain why the report was not substantive. He further stated that on 10.4.2014, the same issue was once again noted about the claimant presenting reports without factoring crucial details like growth of un-surrendered float and over expenditure on various votes in the respondent's branches.

13. Rw1 stated that on 28.4.2014, the claimant was summoned to appear before the Staff & Finance committee for an inquiry into the adverse media publication against the respondent. Thereafter the claimant was interdicted for poor performance, lack of satisfactory improvement or adequate explanations and a hearing was done on 11.8.2014 when he was given an opportunity to defend himself orally before a committee. Rw1 contended that the claimant was fairly dismissed for the said misconduct and poor performance and after being accorded an opportunity to defend himself both in writing and orally.

14. Rw1 further stated that after the dismissal of claimant, she computed his terminal dues totalling to Kshs.692,270 less 296,599 tax and forwarded to him as per the exhibit 16B & C annexed to the defence. That the dues paid included three months' salary in lieu of notice, 27 leave days and gratuity. He contended that clause 6.1.B of the respondent's **Code of Regulations** barred an employee from receiving his half pay that is withheld during interdiction if he ends up being dismissed as opposed to being reinstated. He therefore prayed for the suit to be dismissed with costs.

15. In cross-examination, he stated that there was another Internal Auditor before the claimant was appointed but he was transferred to another department. He denied any knowledge of a committee that was set up to investigate the publication made against the respondent by Gutter press. He admitted that he never attended the disciplinary hearing and as such he did not know what transpired in the meeting. He further admitted that in page 9 of disciplinary proceedings, the committee recommended termination of the claimant on account of redundancy, as one of the options, because his position had been abolished and removed from the respondent's new organogram. He also admitted that **Clause 2 of the Manual** limits suspension to 3 months but the Claimant was suspended for more than 3 months.

16. In re-examination, he stated that the dismissal letter referred to itemised charges referred in the various letters as the reasons for dismissal and that the letters included the interdiction letter and the disciplinary hearing invitation letter. He confirmed that that the Claimant was not

suspended but interdicted and as such the 3 months' suspension period does not apply to the Claimant. That the Claimant has not produced evidence to prove that he attended the criminal case hearing.

Claimant's Submissions

17. The Claimant submits that there was no valid and fair reason nor was fair procedure followed in terminating his employment and that his dismissal was therefore unfair under **Section 45(2) of the Employment Act**. He relied on **Isaac W. Wekesa v Kenya Forest Service [2019] e KLR**. He contended that he was not given evidence of his accusers, any information that had been gathered against him or given the option to bring a fellow employee to the disciplinary hearing and that the committee ignored this crucial aspect of natural justice.

18. He further submitted that there was a clear intention to get rid of him, since the Staff committee recommended in page 9 of its proceedings (appendix 12) that he be called upon to resign and/or his position to be declared redundant because the position of Internal Auditor had been abolished. He maintained that the termination letter did not contain any reasons for the dismissal and that the procedure for Appeal as set out in **Clause 3.8 of the Respondent's Disciplinary and Grievance Handling Procedures** was not followed since the Staff Appeals Committee met to consider his appeal.

19. He maintained that he was unfairly dismissed and contended that he is entitled to the salary withheld during his interdiction. For emphasis he urged the court to adopt the approach in **Vicky Kemunto Ocharo –v- Independent Policing Oversight Authority [2018] eKLR** where the court upon finding the dismissal to have been unfair, stated that the claimant was entitled to all half salaries and allowances withheld from the date of interdiction to the date of the dismissal letter.

20. He observed that the Respondent admitted in its letter dated 05/12/2014 that she erroneously tabulated his leave days as 27 instead of 31 thus omitting 4 days and had promised to pay the same but did not do so. He further contended that the Respondent computed the leave days based on the basic pay of Kshs.157,300 instead of the gross pay of Kshs.238,759 resulting to an underpayment by Kshs.350,137. He sought assistance from **Section 28 of the Employment Act** which in his view entitles him to gross pay in lieu of the leave days not utilised as opposed to basic pay. The section provides that

“An employee shall be entitled after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay.”

21. He further submitted that under the terms of his appointment letter, he was entitled to leave travelling allowance at 25% of his monthly basic salary (*being* $25\% \times 157,300 = \text{Kshs. } 39,925/=$) and contended that he was not allowed by the Respondent to take his leave.

22. On the issue of reinstatement, the Claimant submitted that the remedy is no longer available given that 3 years have already lapsed but he prays that the Court considers awarding him compensation for unfair termination which would be sufficient as was held in the **Vicky Kemunto Ocharo case** aforesaid.

23. The respondent never filed submissions after the close of the hearing.

Analysis and determination

24. There is no dispute that the claimant was employed by the respondent as Internal Auditor from June 2012 until 19.11.2014 when he was dismissed by the respondent. The issues for determination are:

- a. Whether the Claimant was unfairly dismissed from his employment by the Respondent.
- b. Whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim.

a. Whether the Claimant was unfairly dismissed

25. Under section 45 of the Employment Act, termination of the employee's employment is unfair if the ground upon which it stands is not valid and fair and if a fair procedure was not followed. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Under section 47(5) of the Act, the burden of proving unfair termination lies with the employee.

Reasons for the dismissal

26. In this case, the Claimant has submitted that he was terminated from his employment without a reason and that the disciplinary process conducted by the Respondent did not meet the legal threshold for procedural fairness. The Respondent on the other hand has pleaded that the Claimant was first lawfully interdicted before he was summarily dismissed for gross misconduct and poor performance after according him an opportunity to defend himself both orally and in writing.

27. I have carefully considered the evidence and the submissions tendered. The Claimant was summarily dismissed by the letter dated 19.11.2014 which partly stated as follows:

“We refer to the above matter and formally communicate the decision of the society on 19.11.2014 to dismiss you from its service with effect from the same date.

This decision follows your interdiction through letter Ref. No. ASK/PER/AMI/439/VOL.I/16 dated 19.5.2014, itemizing charges levied against you vide Ref. ASK/PER/AMI/439/VOL.I/25 dated 30th July 2014, your written representations/defense vide letter dated 7th August 2014, statements from fellow staff members and your appearance before the Staff and Finance Committee on 12th August 2014 where you made oral representations in your defence.

In arriving at the decision the Society addressed itself to all the above.

The Society will pay you three (3) month's salary in lieu of notice and issue you with a certificate of employment, both being in line with the Employment Act.

Yours sincerely,

CHIEF EXECUTIVE OFFICER

28. The letter did not specifically state the reason for the dismissal but it referred to the charges served upon the claimant on 30.7.2014. The charges were nine and they included the following:

- i. Inability to submit comprehensive audit reports for consumption by the Society Management and committee to assist in decision making.
- ii. Inconsistency of Internal Audit reports in comparison to the External Audit Reports, a reflection of incompetence on the claimant.
- iii. Failure to carry out regular audits to monitor un-surrendered floats, over expenditure and unsupported payments.
- iv. Failure to draw management attention on crucial operational issues and make regular follow up on remedial action like in the case of Kitale and Kisii which had old outstanding audit issues.
- v. Failure to recommend appropriate policy measures and strategies to be put in place in managing the Society stocks and assets.
- vi. Inability to draw an effective and workable Audit Plan with set time limits.
- vii. Spread of malicious and negative sentiments against the Society including telling the management trainees that they had chosen the wrong place to work since there was no room for career growth.
- viii. Inability to manage confidential information within his custody.
- ix. Inability to handle responsibilities bestowed upon the audit department with the seriousness it deserves.

29. The respondent found the defence by the claimant unsatisfactory and despite several options recommended by the Staff and Finance Committee, the respondent opted to dismiss him summarily. After considering the evidence adduced by the claimant before the said committee and the response he made in writing to the show cause letter, I find that he had portrayed himself as an incompetent, inadequate and powerless Internal Auditor. In his letter dated 31.3.2014 he expressly admitted that he prepared a substandard internal audit report for the Eldoret, without indicating the unpaid exhibitors due to his incapacity and apologised after the CEO raised concern about his competence in the audit function. In the said letter he responded to the CEO as follows:

“Previous audit reports have not had unpaid exhibitors included as part of the internal audit reports scope. However, after the concerns raised by your office, I am finalizing the list of unpaid exhibitors to incorporate the same to the Eldoret internal audit report. In addition, going forward, unpaid exhibitors will always form part of the internal audit scope.

I apologize for the omission which was not due to lack of capacity on the internal auditor's part.

Thank you for the guidance and constant support.

Yours faithfully,

Antony M. Irungu

Internal Auditor”

30. In view of the foregoing, I find that under **Section 44 (4) (c) of the Employment Act** and Section E clause 3.1 (c) of the **Respondent's Code of Regulations**, the respondent had valid and fair reason for dismissing the claimant namely, negligent or careless performance of work which was his duty under his contract of service to have performed carefully. However, the court does not find any merits in the allegation that the claimant was unable to manage confidential information within his custody. I have further found no merits in the allegation that he spread malicious and negative sentiments against the Society including telling the management trainees that they had chosen the wrong place to work since there was no room for career growth. Such unmeritorious allegations were not supported by any evidence from any concerned witnesses either here or during the disciplinary hearing.

Procedure followed

31. Section 41 of the Employment Act, 2007 provides in mandatory terms the procedure to be followed while terminating the services of an employee for a cause, thus:

“41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity, explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make.”

32. Applying the facts of this case to the foregoing mandatory provision, I find that the respondent followed a fair procedure before dismissing the claimant from service. He was severally given opportunity to explain his unsatisfactory performance in writing. Thereafter he was served with nine charges on 30.7.2014 and invited to disciplinary hearing before the Staff & Finance committee on 11.8.2014 to make his oral defence. He cannot therefore correctly allege that he was dismissed without following a fair procedure just because he was not accompanied by fellow employee of his choice during the hearing. In any event, the claimant was a senior officer of the respondent who is presumed to be well informed about his rights in relation to disciplinary process both under the law and the Code of Regulations which he produced as an exhibit herein. He never protested that he was denied the right to call a witness to accompany him during the hearing.

33. Finally, the respondent has proved that she complied with the procedure under Section F clause 1.2 (b) & (c) of the **Respondent’s Code of Regulations** by offering to pay the claimant salary in lieu of notice. The said clause stated as follows:

“(b) An employee whose services are terminated due to unsatisfactory performance shall be entitled to any benefits that accrued to him.

(c) Such an officer shall be paid salary in lieu of notice.”

34. Having found that the respondent had a valid and fair reason for dismissing the claimant from service, namely unsatisfactory performance of his duties; and that the dismissal was done after following a fair procedure, I find and hold that the claimant has failed to discharge his burden of proving unfair termination of his employment as required by section 47(5) of the Employment Act.

Reliefs sought

35. In view of the finding herein above that the claimant has not proved that he was unfairly and unlawfully dismissed, I decline to make declaration that his dismissal was irregular, unfair and unlawful as prayed. Flowing from the foregoing, I dismiss the claim for reinstatement and the alternative prayer for general damages for unfair termination.

36. The claimant has prayed for half salary withheld during his interdiction which he contended that it was unreasonably extended for over the maximum period of three months allowed by clause 3.5.5 (2) of the respondent’s **Disciplinary and Grievance Handling Procedures**. The respondent has, however contended that under **Clause 6.1 (b) (i) of the Respondent’s Code of Regulations** an employee is only entitled to receive the balance of the withheld half salary if he is reinstated after the interdiction. In her view therefore, the Claimant having been dismissed from service is not entitled to the withheld half salary.

37. The court finds that the extension of the interdiction period beyond the three months from 19.5.2014 was not justified since investigation was completed and disciplinary hearing concluded on 11.8.2014, before the expiry of the said period of three months. Consequently, I find and hold that the respondent breached clause 3.5.5 (2) of her **Disciplinary and Grievance Handling Procedures**, which formed part of the claimant’s contract of service and proceed to award the claimant the half salary for the period of interdiction beyond the three months. Counting from 19.5.2014, three months ended on 19.8.2014. From that date to 19.11.2014 when he was dismissed is 3 months which multiplied by Kshs.122,408 equals to Kshs.367,224.

38. I further award the claimant 4 days leave as prayed since the Respondent admitted in its letter to the Claimant dated 05/12/2014 that it would pay him 4 days’ leave, which she erroneously omitted while computing his dues. The same is calculated using basic pay of Kshs.157,300, hence $4/26 \times \text{Kshs.157,300} = \text{Kshs.24,200}$. The claim for leave travelling allowance is however dismissed because he never travelled for any leave.

Conclusion and disposition

39. I have found that the dismissal of the claimant from service was not unfair and unlawful as alleged. I have however found that he is entitled to some of the reliefs sought. Consequently, I enter judgment for him in the following terms:

Half salary for 3 months	kshs. 367,300
4 leave days	<u>kshs. 24,200</u>
Total	<u>kshs. 391,500</u>

40. The award is subject to statutory deduction but in addition to costs plus interest at court rates from the date of filing the suit. It is so ordered.

Dated, Signed and Delivered in Open Court at Nairobi This 11th day of October, 2019

ONESMUS N. MAKAU

JUDGE