



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 263 OF 2018

KENYA UNION OF COMMERCIAL

FOOD & ALLIED WORKERS.....CLAIMANT

VERSUS

MARUMI FARMERS CO-OP SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent seeking recompense for the alleged unlawful dismissal of the Grievant Michael Wanjugi Kariuki a coffee recorder from 1997. The Claimant averred that the Grievant worked hard and was promoted to the position of senior recorder of the Respondent and later to the position of secretary manager. The Claimant averred that on 28th December 2015 the management committee of the Respondent was dissolved and all the committee members' services were terminated by way of a Special General Meeting and that on the same day a new management committee was elected in office. It was averred that the Grievant remained and worked till 25th January 2016 when he was granted 6 months annual leave since he had accumulated leaves for 12 months. On resumption he was granted a further 6 months leave to exhaust the remaining leave days and was to resume on 26th July 2017. It was averred that when the Grievant reported on duty on 26th July 2017, the full management committee was in the office but he was not allocated duty despite his repeated appearance at the office. The Grievant was informed by the chairman of the management committee on 29th July 2017 that he could not resume work as there was need to investigate why the Grievant was earning Kshs. 28,879/- as salary. On 2nd August 2017 the Grievant was notified that the Respondent would reduce the salary to Kshs. 26,625/- a month but he refused. The Claimant attempted to intervene but the efforts were spurned by the Respondent and ultimately the Respondent's management committee managed to coerce the Grievant to accept the reduced salary on 25th August 2017. The Claimant averred that the Respondent's chairman dismissed the Grievant on 8th September 2017. The Claimant averred that the Grievant reported the matter to it and efforts to meet the management committee were frustrated leading to the Claimant reporting the existence of a trade dispute to the Cabinet Secretary for Labour. The conciliator appointed by the Minister called parties for a meeting on 18th January 2018 but parties were unable to agree despite a second effort being made by conciliator to broker an agreement. It was averred that the conciliator issued a referral certificate on 24th May 2018 after the parties failed to agree hence the claim before court. The Claimant averred that the Grievant was entitled to receive payment as per the CBA in force and that there ought to have been warnings or suspension before the dismissal. The Claimant averred the Grievant was dismissed contrary to Section 41 of the Employment Act and the Claimant thus sought the unconditional reinstatement of the Grievant to his position without any loss of his benefits or position and in the alternative for payment of an order of separation from the judgment date, payment of one month's salary as notice, payment of arrears as per the CBAs – Kshs. 186,142.50, salary for 36 days he was called to work while still on leave – Kshs. 39,985/-, underpayment for 3 months in July, August and September 2017 – Kshs. 24,000/-, gratuity – Kshs. 1,732,740/-, annual leave for 2017 – Kshs. 42,207.75, maximum compensation – Kshs. 422,784/-, interest on the sums claimed, payment of damages for the breach of the Grievant's invaluable rights and loss of future earnings, costs of the suit and any further order the court may deem fit to grant in the circumstances.

2. The Respondent filed a response and averred that while the Grievant worked for it from 1st December 1997, he worked dishonestly and employed underhand methods to earn undeserved salaries for the period he worked as its secretary manager leading to financial loss incurred by the Respondent. The Respondent averred that the misconduct involved misleading the employer about the contents of the collective bargaining agreements and application of various laws and orders to increase his salary to an undeserved level and earning undeserved allowances. It was averred that the new management of the Respondent was elected in December 2015 with the mandate of cleaning up the society. The Respondent averred that the Grievant never took leave over the years so as to cover up his misdeeds and that is how he accumulated leave extending to more than 15 months. It was averred that to enable the management committee to carry out its investigations unhindered, the Grievant was directed to take six months leave starting 26th January 2016 during which period investigations into the management of the Respondent would be undertaken uncovering various anomalies for which the Grievant was responsible. The Respondent averred that after the expiry of six months the management committee decided that the Grievant should take the balance of his leave days to

enable the society recover from the damage caused to it by the Grievant and also to enable it to put structures in place which would enable the society to run smoothly without any interference from the Grievant or his networks. The Respondent averred that the Grievant always proposed the current secretary manager as the person best suited to stand in for him. The Respondent averred that upon his resumption of duty after the second leave the Grievant was not allocated any duty as the Respondent was establishing how the Grievant had managed to earn more than he was entitled to thus occasioning the Respondent financial loss by stealing his employer's property. The Respondent averred that the Grievant appeared before the management committee of the Respondent several times to answer the charge of gross misconduct even if the summoning of the Grievant was oral and not written. The Respondent averred that the Grievant admitted to committing gross misconduct and voluntarily accepted to have his illegal salary adjusted to what he was entitled to but that did not erase or minimize his guilt. The Respondent averred that the Grievant deserved summary dismissal and that he was given a fair hearing before the dismissal and the circumstances of the slight oversight of not serving an actual letter upon him is understandable and excusable in the circumstances. The Respondent averred that the claim on underpayment was untenable as the Grievant deliberately misled the Respondent to overpay him and on discovery of that fact the Grievant voluntarily agreed to adjust his emoluments to the correct level. The Respondent averred that it was however amenable to recalculation of the emoluments if the court deems it necessary to do so. It sought the dismissal of the suit with costs as it averred that all the claims by the Grievant were not valid or merited.

3. The Grievant testified as did the acting secretary manager Peter Irungu Kimani. The Grievant testified that he earned a basic pay of Kshs. 28,879/- and house allowance of Kshs. 6,353/-. He stated that he was given leave on 23rd January 2016 to start on 25th January 2015 as he had leave accumulated of 228 days. He stated that he could not go on leave without the authority of the chairman of the management committee. He testified that after reporting to work upon expiry of the leave he was given the balance of his leave and on completing the leave he was not allocated fresh duties as the Respondent's chairman had stated that there were issues with the Grievant's salary. The Grievant testified that he addressed the Respondent during the management committee meeting where it was disclosed they were investigating how he was earning a salary that was not tallying with other employers. He stated that he was verbally summoned and was required to accept a reduced salary without a valid reason. He stated that there was a CBA that was used to pay salary. He testified that the Claimant was not involved in the dispute and the salary was reduced. He said that he tried to have the union involved but the chairman tore up his letter. He was cross examined and testified that he did not agree that his salary was inflated. He stated that after deduction the salary did not go back to the correct figure. He stated that he had accumulated leave over 12 years and that it was not true that he did not request for leave from the former management committee in order to cover up mismanagement. He testified that he appeared before the management committee but had been summoned verbally. He stated that he was not claiming acting allowance and was claiming responsibility allowances. It was during his cross-examination that the court noted that the Grievant was being prompted by the Claimant's representative on how to answer the questions. He stated that he was summoned and they spoke about the salary. In re-examination he testified that he wrote the letter for reduction of his salary. He stated that the letter was not freely done and that he did not decline to ask for leave. He stated that a secretary manager does not earn overtime but responsibility allowance.

4. The Respondent's witness testified that the previous management committee was disbanded due to mismanagement. He stated that the Grievant's salary was inflated as shown by the tabulation presented by the Respondent in evidence. He testified that the Grievant earned Kshs. 38,993/- which was much higher than that of other employees thus causing the query by the management committee. He stated that the salary disparity was discussed with the Grievant and he accepted the reduction to Kshs. 26,625/-. He testified that the audit report showed irregular payments during the Grievant's tenure as secretary manager. He testified that the Grievant accepted that he should not have combined his salary with responsibility allowance. He was cross-examined and stated that the secretary manager was to earn Kshs. 35,000/- before deduction. He stated that he was ware of other clauses in the CBA that were not applied. He stated that the Grievant was invited verbally for the meetings. He denied receiving the copies of letters from the Claimant at the office. He stated that the Grievant was entitled to a responsibility allowance and that the salary the Grievant earned was not correct. He stated that the Grievant was not called and given the reason for the dismissal before the dismissal. He was re-examined and he stated that the reasons for the dismissal were in the letter of dismissal which was copied to the Union. That marked the end of oral testimony.

5. The Claimant submitted that the Grievant was dismissed without a show cause notice and that the issue of overpayment of salary should have been raised with the Claimant as it was a party to all the collective bargaining agreements. The Claimant submitted that the Respondent's witness had admitted that the laid down procedure was not followed while dismissing the Grievant. The Claimant submitted that the dismissal of the Grievant was unfair, unlawful and against the provisions of the Employment Act, 2007. The Claimant submitted that the Grievant was entitled to all the terminal dues in his claim including gratuity.

6. The Respondent submitted that the Grievant deserved the dismissal for his dishonesty and that the court should disregard the inadvertent skipping of minor procedural steps. The Respondent submitted that the Grievant was involved in misconduct and as CEO he ought not have joined the union but he misled the management committee on his salary and joining of the union. The Respondent submitted that the Grievant caused payment of sums that were not due to him such as responsibility allowance when he was on leave. The Respondent submitted that it had cause to dismiss and admitted that the Grievant was entitled to receive Kshs. 225,055.95 being the Grievant's annual leave computation and arrears owed to the Grievant. The Respondent urged the dismissal of all other claims.

7. The Grievant was dismissed for good cause. He was a non-unionisable member of staff but apparently he was a member of the Claimant. He procured payment of a salary that was not supported by the CBA which did not provide for the sum he earned. He admitted as much in his letter to the Respondent. He additionally accumulated leave days beyond what was permissible and was found culpable in mismanagement of the Respondent. He however was not paid his proper terminal dues after the dismissal. The Respondent concedes a sum of Kshs. 225,055.95 is due. That will be the sum he will be entitled to recover as he is not entitled to any damages for his dismissal. He was a coached witness from the observation of the court during the cross-examination when the court noted the representative of the Respondent gesturing to the witness to prompt an answer. He would not need prompting if he was telling the truth. In the final analysis I enter judgment for the Grievant against the Respondent for Kshs. 225,055.95. Each party will bear their own costs for the suit.

It is so ordered.

Dated and delivered at Nyeri this 7th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a
true copy of the Original

Deputy Registrar