



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 18 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ONDICHO MESHACK RAKAMBA.....PETITIONER

VERSUS

KULDIP SINGH.....1ST RESPONDENT

PATRICK MUGO.....2ND RESPONDENT

DAVID NYACHOTI.....3RD RESPONDENT

JOSEPH AMOLO.....4TH RESPONDENT

ST. EDWARD' HIGH SCHOOL LIMITED.....5TH RESPONDENT

JUDGMENT

Ondicho Meshack Rakamba filed a Petition dated 10th March 2017 against 4 Defendants, Kuldip Singh, Patrick Mugo, David Nyachoti and Joseph Amollo. As directed by court on 2nd July 2018, he amended his Petition to include his former employer St. Edward's High School as the 5th Defendant. This was done with the consent of all parties.

In his Amended Petition dated 5th July 2018, he avers that the 1st to 4th Defendants are former employees all working for the 5th Defendant as Director, Inspector, Auditor and Accountant/ Administrative Assistant respectively. That in 2003, he was employed by the 5th Defendant as a Teaching Staff, Head of Science Department and Deputy Head Teacher and was promoted to Head Teacher in 2012 on a monthly gross salary of Kshs.16,000/- until November 2013. That while in the cause of his duties on 15th November 2013, the 1st to 4th Defendants alleged he had stolen Kshs.497,800/- and had forged the 5th Defendant's receipt serial number 20275. That he was apprehended from his office to Parklands Police Station. That he was arraigned in court but his innocence was proved when he was set free on 19th September 2016 by the court.

He avers that the implied terms of the contract between him and the 5th Defendant was that the Defendants had a contractual duty to take reasonable precautions and provide proper systems to enable him conduct his duties safely and effectively. That due to the negligence of the Defendants who were to supervise his work, he has suffered. That prior to the aforementioned legal challenge, he was a happy 33 year old with one daughter to care for. He contends he has consequently been unable to resume his duties and cannot engage in any other gainful employment. He particularizes the Defendants' negligence, false pretense, corruption and breach of contractual duty and his welfare to include: failure to improve his working conditions; failure to remit his PAYE as procedurally required by law; failure to provide basic training; deduction of his dues for unjustified cost reduction; and taking him to court without notice, among others. He also gives the particulars of damages to include fungal infection contracted while in the police cells; defamation; intentional infliction of psychological stress; loss of entitlement dues; and general damages for pain and suffering among others.

When the matter was heard on 13th November 2018, this Court ruled that the Petition is deemed to be a Claim and the Claimant went on to file two Statements of Claim dated 22nd January 2019 and the other one dated 11th February 2019.

In the Claim dated 22nd January 2019 against only the 5th Defendant, the Claimant amends his monthly gross salary to Kshs.16,500/= and avers that the 5th Defendant's actions of failing to facilitate his access to work amounted to summary dismissal and which was unlawful, unconstitutional and inhumane because:

- i). No notice to show cause was served upon the Claimant demanding him to answer to any charges.

- ii). The Claimants had done nothing wrong to warrant the summary dismissal.
- iii). No hearing ever took place before the decision to send the Claimant away was reached.
- iv). Due process was not adhered to throughout the process of dismissing the Claimant.

He thus seeks for payment of his terminal dues and compensatory damages as follows:

- i). Unpaid salary from 15th November 2013 to
19th September 2016 Kshs.580,673
- ii). One month's salary in lieu of notice Kshs.16,500
- iii). Overtime Kshs.49,296
- iv). PAYE reductions not remitted (2,000 x 12) Kshs.24,000
- v). Compensatory Damages for the wrongful, unlawful and
unfair termination calculated at 12 months gross salary
(16,500 x 12 months) Kshs.198,000

Total Kshs.868,469

He further lists the particulars of breach as unfair, unlawful, unconstitutional and wrongful dismissal of the Claimant on grounds of accusation of theft; failure to pay the Claimant's terminal arrears and salary; and failure to issue notice and conduct a hearing before termination. The Claimant prays for judgment against the 5th Defendant for a declaration that the termination of his services by the Respondent was based on false accusation of theft, and therefore unfair, unlawful and in violation of the Employment Act, the contract of employment and the Constitution of Kenya.

In the Claim dated 11th February 2019 against all the five Defendants, the Claimant further prays for judgment for:

- (a) The contractual honor amounting Kshs.103,767.00 for 2013 agreement.
- (b) The full debt settlement of Kshs.47,000.00 dated June 2013 on the account of the 1st Defendant.
- (c) Cash bail refund amounting Kshs.5,000.00 for Ibrahim Hassan Noor KCSE candidate 2040309048 of 2013.
- (d) Personal items left in the Head teacher's office amounting Kshs.5,000.00
- (e) Medical cost amounting (Kshs.70 x 4 x 12 x 6) = Kshs.20,160
- (f) Punitive for extortion, negligence and conspiracy to hide the truth with the intention of harming the claimant.
- (g) The cost of Cr 1890/13
- (h) Certificate of Service
- (i) Any other damages the court may assess.
- (j) Payment of the Claimant's debt totaling to Kshs.180,927.00
- (k) Interest on (a) to (d)

The 1st to 4th Defendants filed their Joint Answer to the Petition dated 13th April 2017 denying that they were instrumental and/or instigated the Claimant's arrest or that he suffered any injury, loss of damage at work, police station or elsewhere. They further deny that the Claimant was assigned duties he was not familiar with, contending that it is he who presented himself as capable of doing the said duties. They aver that even though he was acquitted in the aforementioned criminal case, the same was a mistrial as key witnesses never testified nor crucial documents produced and that in liaison with the ODPP, they are in the process of appealing against the Claimant's acquittal. They further averred that the Petition as drawn and filed is defective as it does not disclose any cause of action against the 2nd, 3rd and 4th Defendants who were mere employees like the Claimant and that their names ought to be struck out of the suit with costs. That this case is an abuse of court process and intended to embarrass them and they thus pray for the same to be dismissed with costs.

Upon being enjoined to the suit, the 5th Defendant filed its Statement of Defence dated 24th July 2018 averring that it indeed lost money as revealed by its internal audit and made a lawful complaint to the police for appropriate investigations and action. It also avers that if the Claimant suffered bodily injuries while at the police station, then the same is not attributable to it or the other Defendants and that he should address his complaint with the relevant authorities. It denies that the Claimant is entitled to any of the claims he seeks or that it was negligent in any way such as to expose him to any danger of fungal skin infection nor provide a conducive working environment as alleged by the Claimant. It further denies overcharging any student and avers that it is the Claimant who misused money paid by the students and thus failed to register them for examinations as is expected of him. That it is he who actually owes them money he misappropriated and that even though he was acquitted in the criminal case, it has taken up the matter with the relevant authorities. Further, that the burden of proof in criminal cases differs with that of civil matters. It denies the jurisdiction of this Court stating that this is a case for damages for malicious prosecution. It prays for this suit to be dismissed with costs.

The five Defendants also filed their individual Statements and the 1st Defendant who is the Managing Director of the 5th Defendant states that in 2013, they discovered that the Claimant registered about 9 students for examinations without any corresponding money being paid to the school. That the examination fee for each student was Kshs.7,500/= meaning the school lost Kshs.497,800/= in total and that when the auditor detected the loss, the Claimant was asked to account and/or explain the same but he was unable to do so. That the Claimant was rude to everyone and it was no longer tenable to retain him in employment and that his services were thus terminated after following all laid down procedures.

The 2nd Defendant who is an Inspector at the school states that in April 2013, he was informed by the 3rd Defendant, the accounts clerk about something being wrong with the registration of students for exams and when he asked the Claimant, he said he would rectify the anomaly. That he noted there were several discrepancies with some students being repeated twice in the register and the Claimant was not willing to give him the exact figure of the students he had registered for the exams. That when the exams began, he went to the supervisor who gave him the Nominal Roll which the Claimant had refused to give to him and he noted that index number 10 had been booked by a forged certificate. That the Claimant stated he had given the money to the school Director who denied the same. That on 13th November 2013, he called for a meeting to discuss the issue of funds. He contends that the Claimant became hostile and went to the labour office but they told him that the school did not owe him anything.

The 3rd Defendant states that when he was given the list of candidate registered for exams on 28th May 2013, he noticed it had some repetitions and informed the Director who in turn instructed the 2nd Defendant to investigate the same. That the Claimant had promised to refund the money but he never did and when some students like Mwangi Denis came for the results and was asked for receipts to prove payment, he produced a fake one and said he was given by the Claimant.

Evidence

The Claimant testified that he would rely on documents No. 28 -9 stating that none of the receipts were proved to be authored by him and that it could not be established how much was stolen from the complainant other than the figure stated in the charge sheet. He stated that his basic salary was Kshs.16,000/= and that he received Kshs.14,900/= with the difference being tax. He confirmed that in 2013, his salary was Kshs.16,500/= as filled by the auditor and requested this court to consider the same as his basic salary. Under cross-examination, he stated that the school did not remit tax and referred the court to document dated 22nd October 2018 filed in court on the same date, which shows that the tax column was blank. That the Respondent confirmed it did not pay. He denied reporting his termination to the labour office.

RW1, PATRICK MUGO testified that he is a retired inspector of schools and that some of the matters he would be testifying about are related to his work and career. He stated that the Claimant had a break of service when he was terminated for allegedly exaggerating the cost of trips but was reinstated. That the list of candidates allegedly registered for exams was 56 while the identity of 11 students could not be established. That when they asked the Claimant to explain he became arrogant. He gave an example of a student index number 10 who was an IGCSE student and was registered by the Claimant without authority of the management. He stated that on 15th November 2013, the Director instructed him and Amolo, the 4th respondent to physically identify who had not paid fees but the Claimant refused and almost fought them. That they had a meeting on 19th November 2013 together with the Claimant who refused to sign. That prior to the said meeting, the Claimant had told him he was prepared to pay the missing registration money but at the meeting he denied he was holding any school money. That the Claimant's services were terminated for insubordination, inefficiency and embezzlement of school funds. Under cross-examination, he confirmed that the Claimant collected money from students when the secretary to the bursar was not present and that he handed over the same to the secretary who wrote the receipts.

Claimant's Submissions

The Claimant submitted against the 5th Respondent only. He submits that his employment was terminated without justification and that when he was acquitted in the criminal case, Respondent should have paid him all his dues and allowed him to continue working. That the Respondent should have conducted a fair hearing before terminating him and as such, **section 41 of the Employment Act** was violated. That it is trite law that termination of employment will be declared unfair and unlawful unless there is a valid and fair reason for the same, reached after following a fair procedure as was held in the case of *Barasa Paul Isaac vs. X for Security Solutions (Ke) Ltd [2015] eKLR*.

That it is also settled law as under **sections 43 and 45 of the Employment Act** that the employer has the burden to prove that the reason for terminating an employee's employment was valid and fair. That in *Fred A. Odhiambo -v- Attorney General & another [2013] eKLR*, the court held that the employee has to establish a prima facie case that there was wrongful/ unfair termination and once that is done, the evidential burden shifts to the employer to show on a balance of probability that the reason for termination was valid. That in this case, the Respondent did not discharge its burden and prove that his dismissal was justified and did not also adduce any evidence that it afforded him a chance to be heard before it dismissed him. Further, that the Respondent failed to establish the offence of fraud and forgery on the Claimant's part.

The Claimant urges this court to hold and find that absence of notice in his case was a clear contravention of the law. He cites the case of

Mary Chemwono Kiptui –v- Kenya Pipeline Company Limited [2014] eKLR where the court in finding that the claimant’s termination was unfair and unlawful after being terminated without notice, held that:

“...This is absurd as the very purpose of due process, natural justice and fair labour practices now demand that before a termination, even in a case where the employer is ready and willing to pay in lieu of notice, a hearing must be conducted where an employee is given a fair chance to defend self in the presence of a union representative and if not unionized, in the presence of a fellow employee of the employee’s choice. This is a provision core to fair labour practices that each party to an employment relationship must respect...”

He further urges this Court to find and hold that termination of his employment was unfair, unlawful, null and void *ab initio*. He submits that he has demonstrated that the Respondent did not adhere to procedural requirements in dismissing him. He prays that this court grants him all the prayers sought in the amended statements of claim dated 22nd January 2019 and 11th February 2019.

Respondents’ Submissions

The Respondents submit that the Claim filed by the Claimant on 23rd January 2019 did not disclose any cause of action. They urged the Court to have the 1st to 4th Respondents removed from the suit as the Claimant was employed by the 5th Respondent only. They further submit that this court lacks jurisdiction to award damages for malicious prosecution as fronted by the Claimant and that the court should dismiss the claim.

They submit that nevertheless, the Claimant was lawfully summarily dismissed from employment for gross misconduct after due process was followed. That his claim for monthly salary from when he was sacked until the matter is heard and determined is over ambitious and the same cannot be awarded by a court of law. They further submit that the dismissal was warranted as envisaged under **Section 44 of the Employment Act** and they cite **Civil Appeal No. 62 of 2015, Bamburi Cement Ltd –v- William Kilonzi** where the Court of Appeal stated the grounds that warrant summary dismissal with one of them being: *“If an employee commits or on reasonable and sufficient grounds, is suspected of having committed a criminal offence against or to the substantial detriment of the employer or the employees property.”* That in the instant case, the Claimant received and kept money meant for the employer. That his actions fall under the category stated in the **Bamburi case** above.

Analysis and Determination

The first issue for determination is whether the 1st to 4th Respondents are properly suited. The second issue for determination is whether the 5th Respondent followed due procedure before terminating the Claimant’s employment. The third issue for determination is whether the Claimant is entitled to the reliefs sought in his Statements of Claim.

The 1st Respondent who is the 5th Respondent’s Managing Director is in my opinion properly suited. In **Kenya Hotels And Allied Workers Union –v- Well-Come Inn Hotels T/A Malindi Investments Ltd & Another [2015] eKLR** Makau J made a determination on misjoinder of parties as follows:

“...The Court has however been persuaded by the Claimant’s submissions that an employer includes his agents and managers like the 2nd Respondent. This dispute is governed by the provisions of the Employment Act Cap 226 (repealed) Section 2 of which defined employer to mean:

“...any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”.

The foregoing definition is not ambiguous at all. It is clear that an Agent or Manager of a Company or even a Firm is equal to the actual Employer (Principal) when it comes to obligations created under an employment contract between an employee and the company or firm. The Court therefore, finds on a balance of probability that the 2nd Respondent is properly enjoined to this Suit in his capacity as Director or Managing Director of the 1st Respondent. He is not immune from the 1st Respondents’ contractual obligation in these proceedings by dint of section 2 of the repealed Employment Act. There is therefore no misjoinder of parties in the Suit.

The 2nd, 3rd and 4th Respondents are employees of the 5th Respondent. I find that they are properly suited as agents of the 5th respondent and they contributed to the incidents that led to his dismissal from the 5th Respondent’s employment. In the case of **Mombasa Bricks & Tiles Ltd & 5 others v Arvind Shah & 7 others [2019] eKLR** the Court of Appeal in finding that the parties were well suited for purposes of the determination of the dispute in issue based on the circumstances surrounding the dispute, observed that:

“It is equally settled that a party is deemed to be properly joined in a suit if his/her presence is necessary for the determination of the real issue(s) in controversy. Black’s Law Dictionary 19th Edition page 1232 defines a necessary party on more or less similar terms as:

“A party who, being closely connected to a lawsuit, should be included in the case ...”

While **Section 44** provides for summary dismissal for gross misconduct, **Section 41** provides that before an employee is summarily dismissed under **section 44(4)**, the employer must comply with the stipulated procedure thereof. The 5th Respondent did not rebut the

Claimant's averments that it summarily dismissed him without notice and holding a disciplinary hearing or giving him an opportunity to defend himself against the allegations of gross misconduct. In **Donald Odeke –v- Fidelity Security Ltd, Cause No.1998 of 2011**, the court observed that an employee facing disciplinary action must be given adequate opportunity to respond to any charges before action is taken against them and it does not matter what offence the employee is charged of, if the employee is not heard, the termination is ipso facto unfair. For that reason, I find that the Claimant in the instant case was unprocedurally dismissed by the Respondent.

On the reliefs sought by the Claimant, he is entitled to notice pay and compensation for unfair dismissal. The Claimant is also entitled to a Certificate of Service as under **section 51 of the Employment Act**. He is however not entitled to the claim for overtime and PAYE deductions since he did not adduce any evidence to prove the same. The salary he claims for the period after he was dismissed cannot be awarded to him as it is not provided for in law or in his terms of employment.

In determining the compensation for the claimant, I am guided by the provisions of Section 49(4). Having worked for 10 years and taking into account the manner and circumstances under which his employment was terminated, further taking into account the rate of pay of Kshs.16,500, I award the claimant maximum compensation of Kshs.198,000/=.

The claimant further prayed for –

- (a) The contractual honor amounting Kshs.103,767.00 for 2013 agreement.
- (b) The full debt settlement of Kshs.47,000.00 dated June 2013 on the account of the 1st Defendant.
- (c) Cash bail refund amounting Kshs.5,000.00 for Ibrahim Hassan Noor KCSE candidate 2040309048 of 2013.
- (d) Personal items left in the Head teacher's office amounting Kshs.5,000.00
- (e) Medical cost amounting (Kshs.70 x 4 x 12 x 6) = Kshs.20,160
- (f) Punitive for extortion, negligence and conspiracy to hide the truth with the intention of harming the claimant.
- (g) The cost of Cr 1890/13
- (h) Payment of the Claimant's debt totaling to Kshs.180,927.00

The claimant proved that he was owed Kshs.47,000 by the 5th respondent which I award him. The claimant is entitled to refund of Kshs.5,000 for items he left in his office at the school which he was not allowed to collect and which were also not returned to him. This prayer was not contested by the respondent.

He however did not prove the sum of Kshs.103,767 is payable by the respondents. He further did not prove that he paid cash bail for a student by the name Ibrahim Hassan Noor for which he is entitled to a refund by the respondents.

The claimant did not prove the prayer for medical expenses. He further did not prove that he is entitled to punitive and exemplary damages.

Further, the respondents are not liable to refund the legal fees for the claimant's criminal trial as the claimant did not prove malicious prosecution. All the prayers not proved are dismissed.

The claimant prayed for costs. In view of the fact that the claimant represented himself, I award him costs assessed at Kshs.50,000 to cover reasonable disbursements and incidental expenses of the suit.

I thus enter judgment for the claimant against the respondents as follows –

- (1) Notice Kshs.16,500
 - (2) Compensation Kshs.198,000
 - (3) Refund of Kshs.47,000 owed to the claimant.
 - (4) Kshs.5,000 being value of claimant's property left in respondent's office.
 - (5) Costs of Kshs.50,000
- Total Kshs.316,500.00**
- (6) Certificate of service

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE