



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO 268 OF 2018

KENYA SEED COMPANY.....APPELLANT

VERSUS

ZAKAYO CHERUIYOT.....RESPONDENT

J U D G E M E N T

1. By a Complaint filed on 13th April, 2005, the plaintiff pleaded that the defendant was its employee until 2004 when his employment was lawfully terminated by the plaintiff.
2. During the defendant's employment, he from time to time applied for and was granted various financial accommodation and or assistance by the plaintiff. At the time of termination, the defendant had an outstanding loan amount of Kshs. **2,617,183/=** and further that his terminal dues and benefits were **Kshs. 577,401/10**.
3. The plaintiff applied the terminal dues and benefits to offset the debt leaving a balance of Kshs. 2,039,782/05 which the plaintiff claimed from the defendant.
4. The defendant on the other hand pleaded that save for the fact that he was an employee of the plaintiff he denied that the plaintiff lawfully terminated his employment. According to the defendant, the plaintiff unlawfully terminated his employment.
5. The defendant denied that he owed the plaintiff a loan of Kshs. **2,617,183/15** or any money at all. The defendant denied the plaintiff offered him any loan facility as alleged. In the alternative the defendant averred that if any loan facility was ever granted, the same was repaid in full and in good time.
6. Further that if any loan facility was extended to him, the same was to be repaid from his dues owed by the plaintiff. The defendant denied his terminal benefits were a meagre Kshs. 577,401/10. Further that if the plaintiff has deducted any of his dues then the same had been done arbitrary and unlawfully.
7. The defendant further counter claimed by averring that on or about February, 2004 the plaintiff maliciously, unlawfully, and without any reason and or notice, terminated his employment. The actions by the plaintiff caused him loss and damage. The defendant therefore claimed general damages against the plaintiff.
8. The plaintiff /claimant's first witness Mr. Patrick Thuo stated that he worked for the respondent as Finance director and that he recorded a witness statement on 27th April, 2018 which he sought to adopt as his evidence in chief. According to Mr. Thuo, the Claimant's case was about money advanced to the respondent as an employee. He further stated that he would not be producing original documents because they were consumed in a fire incident.
9. According to him the amount outstanding from the respondent was Kshs. 2,000,039,782/05. It was his evidence that the respondent ceased to work for the Claimant in 2004 and when he left, the amount outstanding was a higher figure but his terminal dues were used to reduce the outstanding debt.
10. According to him the respondent had two debts, one was car loan and another company loan which had a monthly recovery of Kshs. 35,000/= . The Claimant tried to recover the money from the respondent after he left employment without success.
11. In cross -examination he stated that the respondent worked for the respondent as a company secretary by the time he left. According to

him, the respondent's contract was terminated he however could not answer if the respondent had done any wrong. It was his evidence that the respondent was paid his terminal dues and was informed of his debts at the time of termination.

12. He further stated that the loan to the respondent was covered in the pay slip and that some documents got burnt in a fire incident at the respondent's premises however the fire incident was not pleaded and that there was a police abstract report on the fire incident.

13. The fire affected the administration block where the documents were contained. In re-examination he stated that the respondent did not leave the Claimant in a normal way. He further stated that he was aware the respondent was charged with a criminal offence however he did not follow the outcome of the charges. He also stated that the respondent was released with a "nil" pay slip.

14. The Claimant's second witness Mr. Stephen Kibet Malakwen stated that he worked for the Claimant as the Head of HR and Administration and that he filed a witness statement on 11th March, 2019 which he sought to adopt as his evidence in Chief.

15. According to him, the respondent's services were terminated by the Board. There was a newly constituted Board in 2003 which terminated the respondent's service. The new Board came in as a result of floatation by the previous Board of the shares of the Company making it a private company.

16. The respondent was asked to handover the office of the Claimant's company Secretary but he said he had no authority to hand over unless authorization by the Board. It was his evidence that the appointment of the new Board was challenged in Court by the previous Board but the suit was dismissed. It was his evidence that the termination of the respondent was fair and that the respondent was paid salary and allowances up to the time of termination. He was also paid in lieu of notice.

17. In cross-examination he stated that he could not tell the Court any wrongdoing by the respondent. The respondent's termination letter talked of loss of confidence in the respondent. On the issue of loan, he stated that there were policies that governed finances in a Company. He further stated that the respondent took loans which were recovered from his pay slips and that the respondent never complained about the deductions.

18. It was his evidence that loan records were kept by the HR Department which postings were done by finance. He further stated that most of the documents were destroyed by the fire attack however the police abstract did not say when the fire was. The abstract did not state of any document was burnt.

19. The respondent on his part stated that he worked for the respondent for nineteen years. From 1995 to 2004. He was initially appointed as management accountant and later became Chief Accountant. In 1991 he became the Company Secretary and worked until December, 2003 when the Government took over the Claimant.

20. The takeover was done through a gazette notice. A new Board was appointed and the new MD wrote to him to hand over the office of the Company Secretary. No reason was given. He handed over as requested. It was his evidence that the Old Board and himself were charged in Court in December, 2003 with abuse of office they were however acquitted of the charges.

21. On 20.2.2004 the respondent received a letter from the Claimant terminating his service. No reason was given for his termination. The letter said the termination was on account of loss of confidence.

22. The Claimant /Plaintiff in this case is the respondent's former employer. It claims that the respondent owed it some Kshs. 2,039,782/02 which was the balance after deduction of some Kshs. 577,401/10 which were due to the respondent as his terminal dues upon termination.

23. The Claimant stated through its witness that it was not possible to produce documents to support the amount claimed because the Claimant's premises where his documents were kept got burnt down in a fire incident. The fire incident was however never pleaded nor was the police abstract produced in support of the fire incident report show when the incident occurred. It is a rule of civil claims that whoever alleges must prove to the required evidentiary standard, the allegation, if the Court was to believe it.

24. It may well be true that there was a fire incident but why was it not pleaded? Why would the police abstract on the incident not state when it took place? Further, the Claimant was a public and a corporate body. It must have had external auditors and bankers. Could not these bodies not be referred to at least to get some records over the Claimant's accounts as relates the allegations against the respondent?

25. In absence of primary or secondary evidence, it becomes quite to difficult for the Court to have any basis for making a finding in favour of the Claimant. Besides the respondent stated that he was paid some **kshs. 3,609,050** as his terminal dues on **15th April, 2005** after the termination of his service in February, 2004 (more than a year later). The current suit was filed the same month and year when the Claimant was paid the respondent **Kshs 3,609,050/=** it became difficult to understand why the Claimant should pay the respondent an amount over and above the sums claimed in the plaint only to file a claim against the respondent and almost contemporaneous with the time the respondent was paid.

26. To this extent the court finds the claim without merit and the same is hereby dismissed with no order as to costs.

27. On the counter claim by the respondent, the termination took place in February, 2004 before the enactment of the present Employment Act. Under the previous Act (Cap 226 now repealed) there was no provision for compensation for unfair termination. The Common Law position which prevailed then was that there was no obligation to hear and assign a reason for termination of employment unless specifically provided for in the contract. In any event if there was unfair termination or wrongful dismissal of an employee was only entitled as compensation pay in lieu of notice.

28. The respondent has conceded he received some money from the Claimant as terminal benefits. He did not give a breakdown on what the payment consisted of. The Court is therefore reluctant to make any additional payment. The counterclaim is therefore disallowed as well.

29. In conclusion the claim and the counter claim have for reasons given above not proved hence will be dismissed with costs to each party. That is to say each party to bear their own costs.

30. It is so ordered.

Dated at Eldoret this day of 2019

Abuodha Jorum Nelson

Judge

Delivered this 28th day of November, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge