

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 93 OF 2018

JAMES MUNENE IRERI.....CLAIMANT

VERSUS

NENO SACCO SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent seeking the resolution of a dispute he framed as unfair termination and outstanding dues. He averred that he was employed as an accountant on 2nd January 2003 earning Kshs. 15,000/-. He averred that he worked until 5th March 2009 when he was suspended on allegation of irregularities and lack of transparency in some financial transactions within the books of the Respondent which allegedly involved the Claimant. He averred that the Respondent however deliberately failed to provide sufficient information of the alleged loss of funds to enable the Claimant verify the said information and issue a substantive report by virtue of his being an accountant. The Claimant sued in Embu CMCC No. 78 of 2010 for recovery after refusing to accept the Claimant's resignation. The civil suit was dismissed for lack of merit and the Respondent issued the Claimant with a dismissal letter on 12th February 2010 for the alleged loss of funds by servant. The Claimant sought unpaid salary for the 105 months from his suspension on 5th March 2009, general damages for the unfair termination, the leave dues being annual leave for 6 year and 6 months at the rate of Kshs. 18,178/-, three months salary in lieu of notice and terminal benefits all totaling a sum of Kshs. 2,144,520/-.

2. The Respondent filed a defence in which it averred that the Claimant exhibited traits of dishonesty and irregularities within the books of account and that he defiantly refused to appear before the Respondent's board to explain on several occasions after being summoned. The Respondent averred that at the time the Claimant was suspended the amount withheld in such aforementioned transactions amounted to over Kshs. 600,000/- and that before the investigations could be concluded the Claimant served the Respondent with a resignation letter which was declined before he appeared before the Board and explained the difference of over Kshs. 600,000/- on cheques issued in his name to withdraw on the Respondent's behalf to deposit in another account of the Respondent. The Respondent averred that investigations were commenced with a view to institute criminal proceedings of theft by servant. It admitted that it filed a civil case at Embu Chief Magistrate's Court which unfortunately dragged on for too long and was finally dismissed for want of prosecution which is an issue between the Respondent and its advocates. The Respondent averred that the Claimant wanted to resign from employment in order to avoid the conclusion of the audit investigations. The Respondent denied owing the Claimant the sum of Kshs. 2,144,520/- and urged the Court to dismiss the suit with costs.

3. The Claimant filed a response to the reply to claim in which he averred that there is a huge discrepancy in the sums allegedly withheld by him in the response to claim and the civil case at Embu which was dismissed for lack of merit. The Claimant averred that he attended all meetings he was summoned to, to assist in investigations and cooperated with the Board. The Claimant averred that it has been 8 years since the Respondent purportedly commenced audit investigations against him with the intention of instituting criminal proceedings against him and if indeed such investigations were undertaken no evidence has been adduced by the Respondent. The Claimant averred that given the foregoing it could only be concluded that the Respondent's actions were a ploy aimed at frustrating the Claimant with the main intention being to force him out of employment. The Claimant urged the entry of judgment as prayed in his claim and the dismissal of the response to claim with costs to the Claimant.

4. The parties agreed to have the suit disposed of by way of documents in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Claimant filed submissions in which he submitted that it had not been controverted that at material times to the suit he was an employee of the Respondent and that he was unfairly suspended for alleged irregularities and lack of transparency. He submitted that the mode of termination was unfair and discriminatory as the Respondent failed to provide sufficient information as to the alleged loss. He submitted that the dismissal was malicious and unfair because if there was any basis from the audit report it would have been focal in the case against him. He submitted that the charge sheet produced shows that the stolen money was Kshs. 218,000/- while the Response to Claim speaks of Kshs. 600,000/- lost while the civil suit filed claimed Kshs. 646,000/-. The Claimant submitted that there were 2 audit reports with 2 different amounts and that the Respondent was not certain what is due. The Claimant submitted that there was no reason advanced for his dismissal and that the Respondent had breached Sections 41, 43, 44 and 45 of the Employment Act. He cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**. He urged the grant of the prayers in his claim.

5. The Respondent submitted that the Claimant's case must fail as against the Respondent as the Claimant was dismissed for gross misconduct for stealing the Respondent's money while employed as its servant. The Respondent submitted that he was supposed to cash and deposit funds from one account to another and that the Claimant deposited less than the value of the cheque issued. The Respondent submitted that it was an auditor who unearthed the misconduct and the matter reported to the Police leading to the charge in Embu Criminal Case 655/18 which matter is pending in court. The Respondent submitted that the reported loss was Kshs. 646,000/- and the decision on the charge was by the Police and not the Respondent and that the bottom line was that the Claimant had been charged with theft by servant. The Respondent submitted that irrespective of the amount stolen it was gross misconduct under Section 44(4) of the Employment Act and that the dismissal of the Claimant was therefore justified by way of summary dismissal. The Respondent thus urged the dismissal of the claim with costs.

6. The suit by the Claimant must fail. It was filed on 27th February 2018 while the termination is said to have occurred on 12th February 2010 almost 8 years prior. As the suit offended the mandatory provisions of Section 90 of the Employment Act, there is nothing for the Court to consider in respect of the claim. As each of the parties before court is complicit in one way or another in the delay occasioned by the suit being before court, I will order each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 11th day of November 2019

Nzioki wa Makau

JUDGE