



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1322 OF 2010

JAMES GITONGA.....CLAIMANT

- VERSUS -

TRUSTEES OF THE AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th June, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 26.10.2010 through Oraro & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Special damages of Kshs. 805,196.00.
- b. Aggravated and exemplary damages.
- c. Compensation for wrongful dismissal.
- d. Costs of the suit.
- e. Interest on (a) and(b) above.

At paragraph 9 of the memorandum of claim the claimant particularised special damages as follows:

- a. Salary (March to October) at Kshs. 65, 268.00 making Kshs.522, 144.00.
- b. 3 months' pay in lieu of notice at Kshs. 65, 268.00 making Kshs.195, 804.00.
- c. Leave days (123) at Kshs.52, 138 x 4 months making Kshs.208, 552.00.
- d. Medical expenses up to October 2007 Kshs.4, 500.00.
- e. Baggage allowance Kshs.70, 000.00.
- f. Total Kshs.1, 001,000.00.

The memorandum of response was filed on 14.06.2011 through Kithi & Company Advocates. The respondent humbly prayed that the claimant's claim as set out in the memorandum of claim be dismissed with costs to the respondent.

It is not in dispute that the claimant was employed by the respondent in the year 1987 as a stores clerk. He was subsequently appointed as a senior accounts clerk, trade officer and later as an accountant, the position he held until his termination. As per the claimant's February 2007 payslip, the claimant's monthly pay was basic pay Kshs.46,552.00 plus house allowance Kshs.11, 815.00 making monthly gross of Kshs.58, 367.00.

The respondent suspended the claimant from service by the letter dated 13.03.2007 and signed by the respondent's chief executive officer one Batram Muthoka. The suspension was on account of an audit report said to have been forwarded to the respondent's chief executive officer and which raised issues of grave concern requiring further investigation. It further stated that the claimant had taken it upon himself

with total disregard of the respondent's rules to report on duty as late as 10.00am for the last couple of days. The claimant was suspended to pave way for further investigations. During suspension, he would not be entitled to any pay from the respondent as provided for in section E of the respondent's Code of Regulations. He was to hand over to his senior and to vacate the respondent's offices as he waited for further communication.

The claimant addressed to the respondent's chief executive officer the letter dated 15.03.2007 requesting to be furnished with the specific nature of the audit report that was in the chief executive's possession that incriminated the claimant of wrong doing as the claimant was lost as to what offence he had committed to warrant his suspension. He further denied that he had been reporting at work as late as 10.00am. Instead, he stated that he had been working late and consolidating accounts for the audit for the last two weeks. Further he stated that he had been working on Saturdays and Sundays on the schedules requested by the external auditor and doing so without compensation. He also stated that he had been working late as other accountants left office at 5.00pm. He appealed that the chief executive officer reconsiders the decision to suspend him.

By the letter dated 25.04.2007 the claimant was invited to the special staff and finance committee scheduled for Monday 30.04.2007 at 11.00am. The material on record does not confirm whether the committee hearing took place or not. By the letter dated 29.10.2007 the claimant was dismissed from respondent's employment. The letter stated as follows:

"RE: TERMINATION

This is to inform you that the society has decided to terminate your services with effect from the date of your suspension in accordance with your employment contract and Society Code of Regulations and Employment Act.

You will be paid the equivalent of three months' salary in lieu of notice. You will also be paid in lieu of any pending leave days.

Meanwhile withdrawal forms have been submitted to the Society Staff Retirement Benefits Scheme to release your benefits.

By copy of the letter the Chief Accountant is asked to compute and pay your final dues less what you owe the Society.

Yours faithfully,

AGRICULTURAL SOCIETY OF KENYA

Signed

Batram M. Muthoka

CHIEF EXECUTIVE OFFICER"

The main issue for determination in this case is whether the claimant is entitled to the remedies as prayed for. The Court has considered the pleadings, the evidence and the submissions on record and makes findings as follows.

First, the claimant has prayed for salary that was withheld during suspension being from 15.03.2007 to 29.10.2007 when his contract of employment was terminated. The respondent's witness (RW) admitted that the disciplinary procedure in the respondent's Code of Regulations had been breached in handling the disciplinary case that was levelled against the claimant. In particular RW testified that the claimant had not been informed the specific charges that were levelled against him and as provided in clause 4.1 (b) which states, "**4.1 (b) Where the irregularity is of a more serious nature, he shall be informed of the specific charges against him and be asked by the Head of Department/ Branch Manager to explain why disciplinary action should not be taken against him.**". Despite the claimant's letter dated 15.03.2007 requesting to be furnished with the specific nature of the audit report that was in the chief executive's possession that incriminated the claimant of wrong doing, the claimant was not provided with the particulars or specific details of the allegations. Further, the claimant was never asked to explain why disciplinary action should not be taken against him. In such circumstances, the Court finds that the respondent breached its own disciplinary procedure and which applied to the disciplinary case that was purportedly initiated against the claimant.

Further, the claimant's evidence was that under clause 6.1 (b) (ii) of the Code an employee may be suspended in the event of being convicted of a criminal offence for which punishment by way of imprisonment may be imposed. The clause provides as follows, "**6.1 (b) (ii) Suspension: In the event of the employee being convicted of a criminal offence, for which punishment by way of imprisonment (other than in default or payment of a fine) may be imposed, the Society may suspend the employee from duty while it makes such enquiries it thinks fit into the circumstance. During the period of suspension and until the decision of the Society is communicated to the employee, he shall not be entitled to receive any salary PROVIDED that the Society may if it deems fit, pay the employee an alimentary allowance for such period in such amount and such terms as it may determine. If the employee is reinstated, he shall receive the balance of the salary to which he would otherwise have been entitled to receive in excess of the said alimentary allowance.**"

The Court finds that as submitted for the claimant, the respondent breached clause 6.1 (b) (ii) of the Code because the claimant was never charged with a criminal offence and therefore could not have been convicted as envisaged in the clause. Thus, the Court returns that the circumstances that would justify a suspension under the clause were not satisfied and the suspension was in clear breach of the clause and was therefore unfair or unjustified.

The Court has considered that the audit report referred to in the suspension letter was not filed or produced at the hearing. The Court has also

considered that lateness as was alleged against the claimant would not have constituted a serious offence or a gross misconduct under the Code of Regulations and as per RW's evidence. Thus, the Court returns that the claimant has established that the respondent lacked a reasonable justification for the suspension and then the termination of the contract.

As submitted for the claimant, the Court follows the holding in Imenje –Vesus- Kenya National Co. Ltd (1986) KLR 350 (Apaloo J) that for the period he was suspended without pay, the plaintiff was technically in employment of the company until either party brought the contract of employment to an end. The court also follows Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, in which the court stated thus, “**The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.**”

The court reckons that the present cause of action was prior to the Constitution of Kenya, 2010 and the Employment Act, 2007. However, as a matter of justice and fairness, in this case where the respondent clearly breached its regulations and therefore the contractual terms on suspension and disciplinary process, the Court returns that the cited opinion in Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR applies. Further, as the respondent breached the cited provisions of the Code of Regulations, the Court considers that the claimant would have been entitled to administrative reinstatement in the circumstances of the case so that, under regulation 6.1 (b) (ii) of the Code, he would receive the balance of the salary to which he would otherwise have been entitled to receive in excess of the said alimentary allowance. There was no evidence that the alimentary allowance was paid and the Court returns that the claimant be paid the full withheld salary and house allowances that was withheld.

Accordingly, the Court returns that the claimant is entitled to monthly pay withheld during the suspension and as prayed for. He earned Kshs.58, 367.00 gross per month and for 8 months being March to end October he is awarded **Kshs. 466, 936.00**.

Second, it has been found that the termination was in breach of the prescribed procedure on a notice with specifics of the charges, an opportunity to the claimant to explain his case towards exculpation, and on suspension. The Court has also found that the alleged reasons for termination were not justifiable. The Court returns that the termination was wrongful and the claimant is awarded three months pay in lieu of the contractual three months termination notice at Kshs.46, 552.00 monthly basic pay making **Kshs.139,656.00**. In any event, the Court observes that the pay was offered in the termination letter and is justified as per the contractual provision especially that the claimant was dismissed by the letter of 29.10.2007 but retrospectively with effect from the date of suspension on 15.03.2007 – so that the dismissal was clearly without notice as was agreed. The Court follows the opinion in Imenje –Vesus- Kenya National Co. Ltd (1986) KLR 350 at 353 - 17 thus, “**It seems to me the Company would find difficulty in justifying its position that it could validly give notice in February 1984 and claim that it determined the contract of employment fifteen months earlier.**”

Third, the claimant has prayed for pay of outstanding leave days as at time of termination. The claimant testified that he knew the maximum days that he would have carried forward to the next financial or service year were 60 days only. He claimed 123 leave days. The respondent provided no evidence to rebut the claimed leave days in view of the claimant's evidence. The Court returns that on a balance of probability the claimant has established that he had the outstanding leave days as claimed but in view of the policy on leave days that he could carry forward, he is awarded 60 leave day making $60/30 \times \text{Kshs.46, 552.00}$ making **Kshs.93,104.00**.

Fourth, the claimant prayed for baggage allowance Kshs.70, 000.00. The claimant testified that he transported his belongings from Nairobi to Kitale, a distance of over 400 Km. He provided no evidence of the receipts showing that expense as was said to have been incurred. The prayer will fail as it was not proved.

Fifth, the claimant prayed for medical expenses up to October 2007 Kshs.4, 500.00. It is submitted for the claimant that no receipts were filed to establish the claim and the same will fail for want of relevant evidence.

Sixth, the claimant prayed for aggravated and exemplary damages as well as compensation for unfair termination. It was submitted for the claimant that the same be awarded. The submissions offered no guidance on the quantum or the justification. The respondent submitted that in Halsbury's Laws of England 4th Edition Volume 12 Para.1190 at page 474 exemplary damages is defined thus, “**Exemplary damages are damages which are awarded to punish the defendant and vindicated the position of the law. They may be awarded in the actions in tort and only in three categories of cases: The first category is oppressive, arbitrary or unconstitutional actions by servants of the government. The second category is cases in which the defendant's conduct has been calculated to make him profit and third category is where exemplary damages are expressly authorised by statutes.**” It was further submitted for the respondent that in Kenya Revenue Authority –Versus- Menginya Salim Murgani [2010]eKLR it was held that the principles as held in Rookes –Versus- Bernard [1964] 1 ALL ER 367, applied, thus, there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in cases of oppressive, arbitrary or unconstitutional action by the servants of the government and in cases where the defendant's conduct had been calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff.

As submitted for the respondent, the claimant has failed to show that the parameters as set out in the cited authorities existed in the present case. Accordingly the prayer will fail. Further, parties were in agreement that the Employment Act, 2007 did not apply to the present case because the cause of action accrued long before the coming into operation of the Act. The Court returns that the submissions and prayer for 12 months' pay in compensation for unfair termination as founded upon section 49 of the Act was misconceived and will fail.

Finally, the respondent referred to previous warnings imposed against the claimant by the respondent but the Court returns that the same had no proximate causation or relation to the matters in dispute and the remedies the Court has finally awarded.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a. The respondent to pay the claimant a sum of **Kshs.699, 696.00** (less tax) by 01.08.2018 failing interest to be payable thereon at Court rates from the date of the termination letter 29.10.2007.
- b. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 8th June, 2018**.

BYRAM ONGAYA

JUDGE