



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 20 'A' OF 2013

(Before Hon. Justice Mathews N. Nduma)

JOHNSON ODUOR ONYANGOCLAIMANT

VERSUS

MASENO WEST SACCO SOCIETYRESPONDENT

J U D G M E N T

1. The advocate for the Claimant filed an application to review the judgment of Maureen Onyango J. dated and delivered on 8th June, 2017.
2. The Application for review is not opposed.
3. The Applicant contends that the trial Judge addressed the issue of suspension of the Claimant instead of dealing with the issue of wrongful dismissal as sought in the Memorandum of Claim. The Claimant did not pray for reinstatement but the court erroneously granted an order for reinstatement.
4. That the court should properly address the following prayers by the Claimant:-
 - (a) Unpaid salaries up to date and Claimant's shares.
 - (b) 3 months salary in lieu of notice.
 - (c) Costs of the suit.

Facts of the Case

5. The Claimant was employed by the Respondent as a Book-keeper on 5th February, 1996. The Claimant worked continuously until when he was summarily dismissed from employment on 7th October, 2008.
6. The Claimant states that the summary dismissal was wrongful and unfair in that he was not given a show cause letter nor a disciplinary hearing to explain himself on the matter.
7. That the dismissal contravened the Employment Act. That the Claimant be awarded as prayed.

Memorandum of Defence

8. The Claim was opposed vide a Memorandum of Defence dated 19th June, 2013 in which the particulars of Employment and date of summary dismissal are admitted.
9. The Respondent states that the dismissal was in terms of section 44(1) of the Employment Act 2007.
10. The Respondent states that it gave the Claimant opportunity to be heard. That the claimant had received numerous warning letters regarding his poor work performance. That his explanation was not satisfactory when invited before the credit and supervisory committee of the Respondent.
11. That the reasons for the dismissal were lawful. That the suit be dismissed with costs.

Burden of Proof

12. Section 43 of the Employment Act, 2007 provides –

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45”

13. Section 44(1) provides –

“(1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”

And

Section 44(3) provides –

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

14. More importantly, section 47(5) provides –

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

15. One needs to rationalize these provisions to accurately apportion the burden and standard of proof in an employment dispute.

16. In this regard, it is clear and consistent with sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya that the overall burden of proving the Claimant's case on a balance of probabilities lies with the Claimant, being the person who asserts and is the one who stands to lose if no evidence is tendered at all.

17. It is therefore crucial that the Claimant presents some evidence in support of the material particulars of the case tending to show firstly, that he was summarily dismissed without a valid reason and secondly, the dismissal did not follow a fair procedure.

18. Once the Claimant presents such satisfactory evidence, the burden shifts to the employer in terms of section 43 as read with section 47(5) that it had good reasons or justification to summarily dismiss the Claimant and in implementing the summary dismissal, a fair procedure as provided under section 41 was followed. The role of the employer is to rebut the evidence tendered by the Claimant.

19. If the Claimant tenders no evidence at all, as in the present case, in which only pleadings with annexures were filed but the same was not formally tendered and adopted before court as the testimony of the Claimant, then the burden of rebuttal does not shift to the Respondent. In such a case, the Claimant's case cannot be said to have been proved on a balance of probabilities and this is the finding of the court in this matter.

20. The only exception to this procedure is where the Respondent has admitted specific claims in the suit. This is not the case in the present suit.

21. Parties ought to note that the provisions of section 20 of the Employment and Labour Relations Court Act, 2011 which exempted the court from observing strictly, the provisions of the Evidence Act, Cap 80 Laws of Kenya was repealed by Act No. 18 of 2014 and therefore the ELRC court is bound by the provisions of the Evidence Act.

22. Accordingly the Claimant accepted not to tender evidence before court at his own peril.

23. The entire suit has not been proved. The initial judgment having been set aside by the court, the entire suit is dismissed. Each party to bear their own costs of the suit.

Judgment Dated, Signed and delivered this 6th day of June, 2018

Mathews N. Nduma

Judge

Appearances

Otieno, Yogo, Ojuro & Co. Advocates for Claimant

Kowinoh & Co. Advocates for Respondent

Chrispo – Court Clerk