



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2067 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 25th September, 2018)

SAMUEL LIMISI.....CLAIMANT

VERSUS

MWALIMU NATIONAL SAVINGS & CREDIT

COOPERATIVE SOCIETY.....RESPONDENT

JUDGEMENT

1. The Claimant herein Samuel Limisi filed his claim on 6/10/2016 through the firm of Arwa & Change Advocates. His claim is that he was employed by the Respondent on 24.2.2015 as the Human Resource Manager on merit. He avers that he was a diligent, hard working and dedicated employee. He annexed his employment letter as Appendix SL-2(b).

2. He avers that due to his handwork, he gained recognition, which in turn led to expansion of his duties and was appointed to other committees such as Performance Management (Appendix SL-3), Procurement Tender Committee (Appendix SL-4) and Moderating Committee (Appendix SL-5).

3. He also aver that as a result of his good work, his salary was reviewed raising to 267,670/= from the initial 250,000/= (SL.6 and SL-6(b)).

4. The Claimant avers that on 25.4.2016, he was served with an interdiction letter which read as follows:-

“It has been reported to this office and noted that your general conduct and work performance as Human Resource Manager has been wanting. More lately the following acts of gross misconduct/serious offence has been noted against you: in the month of March/April 2016 improperly soliciting and receiving a reward fee in the course of your duties (section 10.0.7 of management terms and conditions of service”.

5. The above letter, the Claimant avers failed to state the facts of the accusations being leveled against him. He was however required to respond to the said accusations within 5 days from the date of interdiction which he did as per his Appendix SL-8 on 29.4.2016 as follows:-

“...in your letter, I am accused of an act of gross misconduct thus improperly soliciting and receiving a reward/fee in the course of my duties as per Section 10.07of the Management Terms and conditions of service. I wish to state that the above is not true because I have never solicited or received a reward or fee as accused. To the best of my knowledge, I can only remember that at a personal level I had the intent of borrowing Mr. Otinga some money to help me sort out an emergency (funeral at home). He was willing to help me but on realizing that I had gotten some more funds from elsewhere, I declined the help but thanked him for the assistance....”.

6. On 5.5.2016, the Claimant avers that he was served with a termination letter based on the same allegations as those indicated in the interdiction letter (Appendix SL-9).

7. The Claimant contends that his dismissal was unfair and violated his right to fair labour practices under Article 41(1) of the Constitution as he was not given facts of the accusations against him, he was never informed of his accuser (if any). He was also not given a chance to be heard or defend himself or informed of the grounds of his dismissal. He was also not issued with a certificate of service.

8. The Claimant prays for the following reliefs:-

i. Declarative orders declaring that the said termination is unlawful and lacks merit.

ii. Order the Respondent to pay damages to the Claimant for unfair termination of the employment as contemplated in Section 12(3) (VI) of the Industrial Court Act.

iii. Order the Respondent to pay the Claimant 12 month's salary on the monthly salary at the time of the dismissal as required under Section 49 of the Employment Act as compensation for unfair termination thus:

$$12 \times 267,670.00 = \text{Kshs.}3,212,040$$

iv. In the alternative and without prejudice to the foregoing order immediate reinstatement of the Claimant to his position of work.

v. Order that the Respondent issue the claimant with a certificate of service.

vi. Order that the Respondent issues severance pay to the Claimants calculated below pursuant to Section 31.3 of the management staff terms and conditions.

Month's salary x years worked

$$1 \times 267,670.00 = \text{Kshs.}267,670/=$$

vii. Order that the Respondent to pay salary in lieu of notice - $1 \times 267,670.00 = \text{Kshs.}267,670$

viii. Order the Respondent pays the claimant his unpaid leave days untaken leave days x 1 day's salary

$$\text{Untaken leave days} = \text{annual leave days} - \text{taken leaves days} - 36-9 (\text{taken leave days}) = 27$$

$$1 \text{ days salary} = \text{monthly salary} \div \text{number of working days in a month} = 267,670 \div 22 = 12,166.82.$$

$$27 \times 12,166.82 = \text{Kshs.}328,504.14$$

ix. Order any other award or benefit that this Honourable Court may deem fit and just to grant in the circumstances of this case.

x. Orders the Respondent to pay interest at Court's rate on all the above prayers.

xi. Orders that the termination can only take effect once the Respondent confirms to all orders issued by the Court.

9. The Respondent filed a Memorandum of Defence and Counter-claim on 18/11/2016 through Millimo, Muthomi & Company Advocates. They admit employing the Claimant but state that appointments made to various committees were geared towards the assessment of his performance as the Human Resource Management.

10. They also aver that increment of salary was not due to his resilience and industrious work nature but in compliance with the Respondent's increment of salary policy as per the Respondent's Appendix 1.

11. The Respondents also aver that they issued the Claimant a show cause letter requesting him to explain himself over the allegations he had indicated in his Memorandum of Claim. The Respondent aver that this letter was clear on complaints leveled against the Claimant specifically referring to 2 previous warning letters he had received about poor performance in his department buttressed by inept performance by solicitation and receipt of reward in order to perform his duties.

12. The Respondent avers that the Claimant responded to the allegations levelled against him through his letter dated 29th April 2016 and was even afforded an opportunity to provide his version of events at the hearing. The same were not conclusive as he did not respond to the allegations of poor and inept performance in his department as raised in the two warning letters and the interdiction letter.

13. The Respondents therefore aver that the Claimant's dismissal was fair, based on his gross misconduct of non-performance and poor performance and that the Claimant was paid all his terminal dues.

14. The Respondent therefore wants this case dismissed with costs. The Respondent also made a Counterclaim against the Claimant which was Kshs.3,253,491.79 on account of loans advanced to the Claimant by the Respondent.

15. I have examined all evidence and submissions filed by the parties respectively. The issues to determine are as follows:-

1. Whether there were valid reasons to dismiss the Claimant.

2. Whether due process was followed before claimant was dismissed.

3. What remedies to grant in the circumstances.

16. On the first issue, the Respondent terminated the Claimant through a letter dated 5.5.2015 which gave the reasons for termination as follows:-

“In the month of March/April 2016, improperly soliciting and receiving a reward/fee in the course of your duties (Section 10.0.7 of management terms and conditions of service).

17. The Claimant had denied commission of this offence. He indicated he only borrowed 20k from a friend and even returned it. He refuted allegations of soliciting for a reward. The Respondents insisted he had problems of integrity and performance. Whereas issues of integrity and performance are serious issues against an employee, there are matter, which should be proved.

18. Integrity issues of soliciting for a gift are also criminal in nature. There is no indication that the Claimant was arrested and charged over the same issue.

19. There is also no indication that there was a complainant who gave evidence to prove this allegation either at a disciplinary hearing or before this Court. This issue therefore remains a mere allegation.

20. Section 43 of Employment Act states as follows:-

“(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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

21. There is no proof from the Respondent that indeed the reasons for dismissal did occur or existed. It is my finding that the Respondent failed to discharge his burden on this issue and I therefore find that there were no valid reasons to warrant dismissal of the Claimant.

22. On issues of due process, the Respondent wrote to the Claimant and interdicted him and also asked him to show cause in writing why he should not be dismissed. The Claimant wrote back denying commission of the offence. After this, the Respondent dismissed him.

23. Section 41 of Employment Act states as follows:-

“(1) Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

24. In this case, whether the dismissal was envisaged for non-performance or on grounds of misconduct, the Respondents were obliged by law to accord the Claimant an oral hearing to determine the issues alleged against him.

25. The Respondent failed to do so and subjected the Claimant to a dismissal without according him his right to a fair hearing. It is therefore my finding that the Claimant’s dismissal was unfair and unjustified as provided for under Section 45(2) of Employment Act 2007 states as follows:-

2. **“A termination of employment by an employer is unfair if the employer fails to prove:**

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

26. On the issue of Counterclaim, the Respondent counter claimed against the Claimant for Kshs.3,253,491.79 on account of loans advanced to the Claimant by Respondent. RW1 indicated that the loans now owing stood at 2.4 million. The Claimant admitted owing the Respondent

this amount. I therefore find the Counterclaim proved and I allow the same and enter judgement against the Claimant for 2.4 million.

27. On remedies for the Claimant, I find for him as follows:-

1. 1 month salary in lieu of notice = 276,670/=

2. 12 months' salary as damages for unlawful termination = 12 x 276,670 = 3,212,040 /=

TOTAL = 3,488,710/=

Less 2.4 counterclaim

Balance = 1,088,710/=

3. The Respondent shall issue the Claimant with a Certificate of Service.

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of the judgement.

Dated and delivered in open Court this 25th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omondi for Claimant – Present

Respondent – Absent