



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1737 OF 2014

(FORMERLY HCC NO. 1285 OF 2005)

(Before Hon. Justice Mathews N. Nduma)

STEPHEN WACHIRA MURAKARU.....PLAINTIFF

VERSUS

TANA & ATHI RIVER DEVELOPMENT AUTHORITY.....DEFENDANT

J U D G M E N T

1. The Claimant was Acting Chief Accountant at the time he was summarily dismissed from employment on 29th June, 2004 for alleged failure to declare receipt of Kshs.500,000 received in two tranches in respect of a TARDA Project to the Chief Executive Officer. Receipt of the money was acknowledged by the Claimant by a letter dated 5th August, 2002. The Claimant was alleged to have proceeded with the project without due authorization. The Claimant filed the suit at the High Court by a plaint dated 21st October, 2005 on 25th October, 2005.

2. Statement of Defence and Counter Claim dated 8th November, 2005 was filed on 18th November, 2005. Amended Plaint was filed on 9th November, 2007. Amended Defence and Counter Claim was subsequently filed on 30th August, 2009.

Facts of the Claim

3. The Plaintiff was employed by the Defendant on 16th September, 1981 as Agricultural Development Manager. On or about 20th February, 2003 the Managing Director of the defendant interdicted the Plaintiff on grounds that the Plaintiff had received funds on behalf of the Defendant and failed to account for the same.

4. On 29th June, 2004 the Defendant dismissed the Plaintiff from service. At the time the Claimant earned monthly salary of Kshs.69,120.

5. The Claimant avers that the dismissal was unlawful and unprocedural in that, it was not for a justifiable cause, and in breach of the Rules of natural justice.

6. Upon dismissal, the Defendant failed to pay the plaintiff Kshs.2,551,041 made up as follows:-

- | | |
|--|-----------------|
| (i) Half Salary for 8 months | Kshs. 280,000. |
| (ii) Full salary and benefits for 8 months | Kshs. 560,000. |
| (iii) Pension and benefits | Kshs.1,711,041. |

7. The Plaintiff prays, by reason of wrongful dismissal for,

- Loss of salary between February 2003 and June 2004;
- Loss of Pension Contribution, and
- Payment in lieu of three months' notice by dint of clause 2.1.6(c) of the code of TARDA which provided for three months termination notice.

8. In the Response filed by the Respondent, the Respondent states that the dismissal was for a lawful cause in that the Plaintiff misappropriated funds of the Defendant entrusted upon him for the implementation of approved projects.

9. The Respondent counter claims unspecified amount of money which was misappropriated by the Plaintiff between July and October, 2002. Both parties pray for costs and interest of the suit and the counter claim.

10. An amended statement of defence and counter claim was filed on 30th August, 2009 in which the Respondent counter claimed Kshs.413,633 particularly under paragraph 9A of the amended defence and counter claim. Defendant also claimed general damages for the misuse of its funds. The Respondent denied the claim by the Claimant in total.

Determination

11. The issues for determination are:-

(i) Whether the dismissal of the employment of the Plaintiff was for a lawful reason.

(ii) Whether the Plaintiff is entitled to the reliefs sought.

(iii) Whether the counter claim is time barred and if not, whether it has any merit.

Issue 1

12. The court has considered the pleadings, list of documents and the oral testimony by the Plaintiff and the rebuttal by RW 1 Getruda Njambi Ngaruiya Human Resource Officer of the Respondent and has come to the conclusion that Kshs.500,000 was entrusted to the Plaintiff by the community but not by the Respondent. The Plaintiff, utilized the funds to implement the community project which did not belong to the Respondent strictly speaking. That there was no evidence that the Plaintiff misappropriated any of the Kshs.500,000 entrusted to him. The Plaintiff had disclosed receipt and utilization of the project money whilst the works were on going. The summary dismissal of the Plaintiff by the Respondent was wrongful and unfair.

13. This dismissal occurred in the year 2004, before the promulgation of the Employment Act, 2007. The Law applicable to the case is the Employment Act, Cap 226 Laws of Kenya. The Act did not provide for compensation. Common Law principles for award of damages for breach of employment contract, is applicable to this case therefore.

14. The Claimant was paid his own contribution of pension calculated at Kshs.570,347 being 5% contribution but the employer contribution was not paid for the reason that he had been summarily dismissed.

15. Accordingly, the court firstly finds that the Plaintiff is entitled to the employer's contribution of pension in the sum of Kshs.2,133,098 in terms of Rule 29 of the scheme calculated at 18.7% .

16. Secondly, the Plaintiff is entitled to payment of ½ salary withheld during the 8 months he was under suspension in the sum of Kshs.280,000. The Claimant is also entitled to Kshs.552,960 for the further 8 months he was under suspension without any pay at all.

17. The Claimant suffered loss and damage for breach of contract of his employment. The Claimant is therefore entitled to three months salary in lieu of notice in the sum of Kshs.207,360 in terms of clause 2.1.6(c) of the TARDA Code. In terms of the prevailing common Law at the time, the Plaintiff was not entitled to payment of general damages beyond the notice pay at the time the cause of action arose and the suit filed.

Counter Claim

18. The counter claim in the initial statement of defence and counter claim filed on 18th November, 2005 was in respect of alleged misappropriation of funds between July and October 2002. These amounts were unspecified.

19. In the amended statement of defence and counter claim filed on 3rd August 2009, the Respondent counter claimed new items described as Library; TDIP debts; imprest; ID Card and unremitted TDID funds in the sum of Kshs.413,633.

20. These losses are alleged to have resulted from breach of project agreement between July and October, 2002 and were elaborated for the 1st time in the amended statement of Defence and counter claim.

21. The claim for Kshs.413,633 was filed about seven (7) years from the date the cause of action arose. The limitation period for claims based on contract/agreement is six (6) years in terms of section 4 of Limitation of Actions Act Cap 22 Laws of Kenya. The court finds that the counter claim is time barred and the court lacks jurisdiction to entertain the same.

22. In any event, testimony by RW1 did not substantiate the counter claim and same was not adequately proved on a balance of probabilities. The counter claim therefore lacks merit and is dismissed for the above two reasons.

23. In the final analysis, judgment is entered in favour of the Plaintiff as against the Respondent as follows:-

(i) Kshs.829,440 in respect of ½ Salary not paid for 8 months and full salary not paid for the 8 subsequent months of suspension without any pay.

(ii) Kshs.207,360 in lieu of three months' notice.

(iii) Kshs.2,133,098 being the employer contribution of pension.

Total award Kshs.3,169,898

(iv) The award is payable with interest at court rates from date of dismissal till payment in full. This is because the Plaintiff has been denied the benefit, access and use of these funds from 29th June 2004, when the same became due and owing.

(v) The Respondent to pay costs of the suit.

Dated and Signed in Kisumu this 12th day of October, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 26th day of October, 2018

Maureen Onyango

Judge

Appearances

Mr. Njuguna for Claimant

Mr. Waweru Gatonye for Respondent

Daniel Ngumbi – Court Clerk