



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 373 OF 2015

(Before Hon. Justice Mathews N. Nduma)

EMMANUEL KAYALA MATE.....CLAIMANT

VERSUS

WEVARSITY SACCO SOCIETY LIMITED.....RESPONDENT

J U D G M E N T

1. The suit was filed on 8th October, 2015 by a Memorandum of Claim dated 7th October, 2015. The suit was amended vide an amended statement of claim filed on 8th December, 2016.
2. The Claimant seeks a declaration that the Claimants employment was wrongfully terminated and award general and exemplary damages; payment of arrear salary for July 2014 to January 2015, and full salary from February 2015 to date of filing suit. The Claimant further seeks payment of service pay for years worked; in lieu of leave not taken, overtime and in lieu of notice. The claimant also seeks payment of costs and interest.
3. The Respondent filed an amended statement of response on 8th March, 2017 in which it admitted paragraphs 1, 2, B1 & 3 of the Statement of Claim.
4. The Respondent avers that the Claimant and one M/s Betty of Matianyi, colluded to jointly defraud the Respondent of Kshs.3,149,309 through overdrafts, irregular fictitious deposits, clearance of loans without attaching pay slips, over loaning and misappropriation of funds.
5. The two appeared before the Respondent's board on 1st July, 2014 and admitted in writing to have been involved in fraudulent activities and committed to repay Kshs.3,149,309 by a letter dated 1st July, 2014. In terms thereof the Claimant agreed to repay Kshs.1,307,880.50.
6. The Claimant was invited to appear before a disciplinary hearing before the Board of Directors, but he failed to appear.
7. The matter was reported at Kakamega Police Station upon which the Claimant and his accomplice were arrested and charged at the Resident Magistrate's Court.
8. The Commission for co-operatives also investigated the matter, called the Claimant to appear before it but he did not attend. On 13th July, 2015 the commission submitted a report stating that the Claimant was guilty of misappropriation of Sacco funds. The report is annexed to the defence.
9. That the Claimant submitted a resignation letter on 13th June, 2015 when his new employer demanded for a reference letter by the Respondent. The Claimant backdated the resignation to 2nd January, 2015.
10. On 3rd June, 2015 the Claimant had written to the Respondent demanding to know his employment status and why his salary had been stopped.
11. The Claimant denies all other allegations made in the amended statement of claim and prays the suit be dismissed with costs.
12. The Respondent admits having paid ½ salary to the Claimant during his period of suspension in terms of the Human Resource Manual of the Respondent until when the Claimant resigned from his employment.
13. All the claims by the Claimant are denied in total and the Claimant put to strict proof thereof.

14. On 8th March, 2017 the parties agreed before Maureen Onyango J to proceed by way of written submissions. Direction on filing of submissions were given accordingly. M/s Omar appeared for the Claimant whereas M/s. Omwenga appeared for Respondent.

15. On 6th June, 2018 the Claimant appeared before me in person and M/s Omwenga represented the Respondent.

16. The Claimant restated that he did not wish to testify and solely relied on the pleadings, and written submissions which he had already filed on 14th May, 2018. He then closed his case.

17. M/s Omwenga however brought one witness for the defence. RW1, Victor Kiptanui testified under oath. RW1 testified that he was the Chief Executive Office of the Respondent from May 2014. He had just been employed by the Respondent at the time the Claimant stopped working.

18. The Respondent however relied on the records. RW1 told the court that the Claimant was accused of financial impropriety and when he appeared before a special general meeting by the Executive Committee of the Board to explain he admitted the offence and agreed to repay the money.

19. The Claimant was placed under suspension while further investigations were being carried out. He was placed on half pay during the suspension. The Claimant resigned while under suspension and was employed by Kibabii University from January, 2015.

20. The Respondent wrote to Kibabii University demanding that the Claimant repay the money he had misappropriated and had agreed to repay.

21. RW1 under cross examination by the Claimant insisted that the Claimant had misappropriated funds and had agreed to repay. RW1 denied that the Respondent defamed the Claimant by a letter written to his new employer Kibabii University.

22. RW1 said that since the Claimant had resigned before the matter was concluded, he was not entitled to refund of ½ salary withheld during the period of suspension. RW1 added that the Claimant was given certificate of service and asserted that the claimant resigned of his own will to escape the disciplinary process. The Respondent prays the suit be dismissed with costs.

Determination

23. The issues for determination in this matter are –

(i) Whether the Claimant's employment was terminated or he voluntarily resigned from employment?

(ii) Whether the Claimant is entitled to the reliefs sought?

Issue 1

24. Having analysed the pleadings filed by the parties, including the list of documents, and having considered the vivavoce evidence by RW1 for the Respondent and the submissions filed by the parties, the court has arrived at the following conclusions of fact:-

(i) The Claimant wrote a letter of resignation to the Chairman of the Respondent dated 2nd January, 2015. In the said letter the Claimant thanked the Respondent for having worked for it from 11th November, 2010 till date of resignation.

25. The Claimant was employed by Kibabii University college while he was under suspension from the Respondent's employment pending conclusion of disciplinary proceedings. The Claimant was called to a disciplinary hearing by a committee of the Board but did not attend.

26. Prior to his suspension on 7th July, 2014 the Claimant had written a letter dated 1st July, 2014 to the Chairman of the Respondent in which he stated –

“I commit myself to pay the sum of shillings 1,307,880.50 which appears as cash shortage on the system. Thanks in advance for your consideration.”

27. This letter was written following a Board Meeting held on 20th June 2014, in which the Claimant and another person working in the SACCO admitted having been involved in misappropriation of funds. Minutes of the meeting of the Board were produced before court.

28. The Claimant has the onus of proving all aspects of his case on a balance of probabilities in terms of section 107 and 108 of the evidence Act, Cap 80 Laws of Kenya.

29. The Claimant made bare allegations of constructive dismissals by the Respondent. The Respondent has tendered tangible and credible evidence to the effect that the Claimant had voluntarily resigned from his employment and got a new employer, Kibabii University College whilst he was under suspension.

30. The Claimant has not adduced any evidence to show that his employment was unlawfully or unfairly terminated by the Respondent. To the contrary, the Claimant did not attend a duly constituted disciplinary hearing to defend himself against charges of misappropriation of

finances.

31. The documentary evidence before court clearly supports the version put before court by the Respondent.

32. Accordingly, the Claimant has failed to discharge the burden of proof placed upon him by Law to prove his case on a balance of probabilities.

33. The Court of Appeal in **Moses Kiplagat Changwony v Tana River Development Authority [2017]eKLR** upheld the decision of Nderi Nduma J. in cause No.785 of 2010 in which the court rejected a claim for constructive dismissal in circumstances similar to those set out in the present case. This court follows the reasoning in that case.

34. Accordingly, the court finds that the claimant voluntarily resigned from his employment with the Respondent and the Claim for unfair and unlawful termination of employment is not merited and is dismissed.

Issue ii

35. The second issue is whether the Claimant is entitled to the reliefs sought.

36. The Claimant did not adduce any evidence to prove that he was owed arrear salary by the Respondent by the date he was suspended. The Respondent was justified to pay the Claimant half salary during the period of suspension. The Claimant would have been entitled to a refund of the half salary withheld if he had been cleared of the charges made against him. The Claimant resigned before the process was concluded and is not entitled to the refund of the ½ salary withheld during the period of suspension. Equally, the Claimant has failed to prove that he was owed in respect of leave days not taken, service gratuity or overtime. These claims are dismissed for want of proof.

37. The entire suit is therefore dismissed. However the Respondent is directed to provide the Claimant with a Certificate of Service to allow him to obtain employment elsewhere.

Counter Claim

38. The Respondent claims payment of Kshs.1,307,880.50, which the claimant stated appeared to be cash shortage on the system.

39. This letter qualifies at best to be an admission of poor work performance by the Claimant and cannot be construed to provide proof that the Claimant had obtained this money for his own benefit and therefore should refund the same to the Respondent.

40. The testimony by RW1 did not provide any further assistance in this regard. What is clear is that the Respondent lost funds due to the negligent conduct by the Claimant and other staff. However the Claimant has not proved on a balance of probabilities that the said loss was solely attributable to the Claimant and that the Claimant personally benefited from the said money.

41. The counter claim has not been proved as against the Claimant and is dismissed.

42. In the final analysis the claim and the counter claim are both dismissed. Each party to bear their own costs of the suit. The Respondent to provide the Claimant with a certificate of service within 30 days of this judgment.

Dated and Signed in Kisumu this 4th day of October, 2018

Mathews N. Nduma

Judge

Appearances

Claimant in person

Munyao, Muthama & Kashindi Advocates for the Respondent

Chrispo – Court Clerk