



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1904 OF 2011

MATHEW MUNGA MUNGAL.....CLAIMANT

VERSUS

HOME GROWN COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent on 31.1.2003 as an Accounts Clerk and on 5.5.2003 he was confirmed. He worked diligently until 12.5.2006 when he was accused of stealing Kshs.787,000 from the respondent on 11.5.2006. He was arrested and on 13.5.2006 he was charged in court with said offence. While the charges were pending, he was dismissed summarily for the same offence on 30.5.2006. At the time of the termination his salary was Kshs.37,154 per month.

2. He was however acquitted on 19.3.2010 and on 11.11.2011 he brought this suit contending that his contract of service was wrongfully and unlawfully terminated. He therefore prayed for the following reliefs:

- (a) Declaration that the summary dismissal of the claimant by the respondent was unlawful, un-procedural and unfair.
- (b) Declaration that the action of the respondent has defamed the claimant causing him irreparable character, personality and professional damage.
- (c) Declaration that the failure to pay the claimant commuter allowance was unlawful
- (d) Declaration that the failure to pay duly earned salary for 17 days was unlawful and commit the respondent to Kshs.100,000/= and commit the respondent to two(2) years in civil jail pursuant to Employment Act No. 11 Section 25, Laws of Kenya.
- (e) Declaration that the refusal to issue the claimants with certificates of service pursuant to Employment Act No. 11 of 2007 section 51(1-2) was unlawful and commit the respondent to pay affine of Kshs.100,000 and be committed to civil jail for 6 months, pursuant to Employment Act No. 11 of 2007 Section 51(3).
- (f) An order compelling the respondent to pay the claimant due commuter allowance/salary withheld, maximum compensation and damages for unfair, unlawful dismissal and defamation totaling to **Kshs.33,060,977.15** as calculated in paragraph 41 in the submission herein above
- (g) Declaration that the costs of this suit be to the respondent.
- (h) Any further and better relief that this court may deem fit.

3. The respondent filed her defence on 19.3.2012 admitting the employment relationship between her and the claimant. She however denied that the contract was wrongfully terminated by herself and averred that the procedure provided by the Employment Act was followed. She further averred that the claimant was found with Kshs.787,000 which was missing from the safe of the cashier, one Geoffrey Wafula. She also averred that it was not the first time the claimant was on the wrong and contended that in 2005 he had misappropriated Kshs.236,000. Finally she averred that the claimant is not entitled to any dues because he had misappropriated company funds and had outstanding loan which after the set off remained Kshs.389,313.

4. On 16.4.2018, counsel for the two parties agreed to dispense with calling of oral testimonies and agreed to dispose of the suit by way of

written submissions on the strength of the record. The claimant filed on 9.5.2018 but the respondent never filed hers.

Claimant's Submissions

5. Save for the summary of facts and evidence, the submissions by the claimant were based on the wrong Employment Act. The submissions were done on the basis of section 35, 41, 44, 45, 47 and 49 of the Employment Act 2007 which came into force in 2008. The cause of action, however, arose on 30.5.2006 when the claimant was dismissed and as such, the law applicable to this suit is the Employment Act, then in force which was repealed by the 2007 Act. On that basis, I return that the submissions by the claimant were not well founded and are irrelevant to the dispute herein. I will therefore proceed to determine the suit on the basis of the pleadings and the documentary evidence filed.

Analysis and Determination

6. After careful consideration of the pleading and evidence, the following issues arose for determination.

(a) Whether the termination of the claimant's contract of service was wrongfully and unlawfully terminated by the respondent on 30.5.2006.

(b) Whether the reliefs sought by the claimant should be granted.

Wrongful and unlawful termination

7. The reasons cited for terminating the service of the claimant were that he grossly misconducted himself by stealing Kshs.787,000 from his employer cash office. The basis upon which he was suspected of the said offence is that he was caught by CCTV camera going to the cash office at 6 p.m. after all the other employees had left for the day. Another reason for such suspicion is that, when asked to explain his movement, he contradicted the CCTV camera footages by stating that he left the office at 5 p.m. and never returned there until the following day when he was arrested.

8. The said CCTV camera footages were not produced as evidence and the Security Guardette who is alleged to meet the claimant on 11.5.2006 at 6 p.m. while going back to the cash office was not called to testify in this case. There is further no other form of evidence that was produced to connect the claimant to the alleged theft of money.

9. Even if the claimant was seen at the cash office on 11.5.2006 at 6 p.m., it is common knowledge from the pleadings that the Kshs.787,000 was allegedly kept in the cashiers safe and no evidence has shown that the claimant knew the secret code (combination) and used it to open the safe before stealing the money. That burden of proving all the foregoing was on the respondent but in my considered view, the same has not been discharged on a balance of probability.

10. The defence has failed to prove that the claimant returned to the cash office on 11.5.2006 at 6 p.m., that there was Kshs.787,000 in the cashier safe at the time, that he knew the safe combination, that he used it to open the safe, stole the money and thereafter securely locked the safe. Without such evidence, and considering that the claimant was also acquitted on the related criminal case due to the same reason that crucial evidence was not presented, I return that the alleged misconduct against the claimant was not valid and proceed to find that he has proved on a balance of probability that he was wrongfully and unlawfully dismissed without prior notice as required by the repealed Employment Act.

Reliefs

11. In view of the foregoing find, I make declaration that the summary dismissal of the claimant was unlawful, unprocedural and unfair. However, decline to make the other declaration sought because they are not founded on the law in force at the time when the cause action arose. Likewise the claim for Kshs.33,060,977.15 for commuter allowance, withheld salary, compensation for unfair dismissal and defamation is dismissed for want of particulars and evidence or legal basis for the relief. It is trite law that special damages must not only be specifically pleaded, but they should also be specifically proved. Consequently, I award no pecuniary relief to the claimant save for costs and interest thereon at court rates.

Dated, Signed and Delivered in Open Court at Nairobi this 30th day of November, 2018

ONESMUS N. MAKAU

JUDGE