



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 237 OF 2013

MUSA OGARO OSORO.....CLAIMANT

-VERSUS -

WAKENYA PAMOJA SACCO SOCIETY LTD RESPONDENT

JUDGMENT

Introduction

1. The claimant's suit is contained in the amended memorandum of claim filed on 13.7.2017 and it seeks the following reliefs:-

- a. General damages for breach of contract
- b. Damages for loss of income amounting to Kshs.14,073,072
- c. General damages for unfair termination
- d. General damages for mental anguish and psychological torture
- e. Payment of all emoluments, arrears, pending salary and allowances
- f. Exemplary damages for false imprisonment and malicious prosecution.

2. The respondent has admitted that she terminated the claimant's services but denied that the termination was unfair. She avers that the claimant was terminated for dishonest, inefficiency and unprofessionalism. She therefore prayed for the suit to be dismissed with costs and instead her counter claim for outstanding loans of Kshs. 990,620.88 be allowed.

3. The suit was heard on 12.2.2018, 13.3.2018 and 19.3.2018 when the claimant testified alone and the respondent called 2 witnesses. Thereafter, both parties filed written submissions which have carefully considered alongside the pleadings and evidence.

Claimants case

4. The claimants testified as CW1. He told the court that he was employed by respondent as a Saving cCerk on 1.9.2003 and rose to become Internal Auditor at the respondent's Head Office. On 5.2.2013, he was transferred to Ikonge Branch as the incharge but after working there for only 6 days he was dismissed by the Deputy CEO on 12.2.2013 through a phone call. On 13.2.2013, the respondent published a notice in the Standard and Daily Nation newspapers alerting the public that he had ceased to be an employee of the respondent. He was then locked out of office by the Assistant IT Manager.

5. CW1 further testified that he was arrested 2 weeks after the dismissal and charged with the offence of stealing respondent's money but after the trial he was acquitted. He contended that his dismissal was unfair because the alleged theft was false and he was not accorded any prior hearing. He therefore prayed for the reliefs sought including compensation for unfair termination.

6. He denied the counter claimed debt of Kshs.990,662.88. He however admitted that he had a loan which he was servicing but he was not issued with the latest loan statement. He prayed for the counterclaim to be dismissed.

7. On cross examination CW1 admitted that he was served with show cause letter on 11.7.2011 accusing him of late reporting and taking money from the employer without authority followed by a warning letter dated 20.7.2011 for late reporting. He further admitted that on 7.8.2012 he received another warning letter accusing him of taking sickness and lying that he was admitted in Kisii Hospital. He however denied all the accusations contained in the said letters and accused the employer of witch-hunting for alleging that he went to the hospital.

8. CW1 further denied that he authorized payment of Kshs.300,000 to himself. He disowned the signature in the concerned withdrawal voucher No. 214415, dated 7.2.2013 and contended that he was acquitted of the charges related to the said voucher after Document Examiner said that the Handwriting was not his. He further denied that he disappeared from office on 7.2.2013 and maintained that he remained in the office until 12.2.2013 when he was dismissed. He relied on copy of Attendance Register and Duty Allocation Records to prove that he was in the office when the DCIO Nyamira wrote the letter dated 8.2.2013 seeking for information to assist in his arrest.

Defence case

9. Mr. Fred Miruka, respondent's HR Manager testified as DW1. He told the court that the claimant was in charge of the respondent's Ikonge Branch after his transfer to that branch was endorsed by the Board on 23.1.2013. He further stated that the respondent's supervisory committee visited Ikonge Branch on 7.2.2013 for an impromptu inspection and discovered a voucher for Kshs.300,000 by which the claimant had been paid without authorization by the relevant officer and the claimant was missing leading a report being made to Nyamira Police Station.

10. DW1 further testified that on 8.2.2013, the respondent's Senior Management Team comprising the CEO, Operations Manager among others visited Ikonge Branch and found the claimant but he used abusive words against them and left. As a result of the said absence from work and misconduct, the claimant was dismissed by the letter dated 11.2.2013. That the letter was served by hand delivery through his last known residence address because he was not present at work. Thereafter the management published a notice to the general public through two newspapers to the effect that the claimant was no longer employed by the respondent. That the notice was meant to protect the public from any fraud owing to his conduct. He further contended that claimant had been served with warning letters on 20.7.2011 and 17.7.2012.

11. On cross examination, DW1 admitted that claimant was not served with any show cause letter or accorded any hearing before the dismissal. He further admitted that the claimant was never served with termination letter but his dismissal was communicated vide public notice through newspapers. He admitted that the claimant had signed Attendance Register and Duty Allocation Register for the days he was alleged to have been absent. He further admitted that the claimant was charged with stealing respondent's money but he was acquitted. He admitted that he wrote a letter to the claimant's current employer warning her that the claimant had stolen money from the respondent.

12. RW1 further admitted that the claimant was not paid his terminal dues contending that he had not cleared with the respondent. He contended that the claimant's loans were not secured and he was no longer servicing them. He however admitted that the loans had guarantors but they disappeared and he reported the claimant to the Credit Bureau. He however did not have the claimant's current loan account statement.

13. Yobes Onchoka Moegi, the respondent's Credit Manager testified as RW2. He told the court that on 7.2.2013 he visited Ikonge Branch with the respondent's Supervisory Committee and found the claimant absent from work. Upon enquiry, they were told by Albert Mokuia that the claimant had gone to Kisii University. Mr Mokuia also showed them a voucher used to pay claimant Kshs.300,000, which he said to be instructed by the claimant to write.

14. RW2 further testified that they tried to reach the claimant by phone but all was in vain. As a result they reported the matter to the police and he was arrested and charged but after trial he was acquitted. Thereafter the claimant was dismissed by the CEO through newspapers. RW2 contended that the claimant had been served with warning letters before the dismissal for being habitual late comer. He concluded that the claimant owes the respondent a loan which is still outstanding. He however admitted that after being served with the said warning letters he was promoted to be the Internal Auditor at the Head Office.

Analysis and Determination

15. There is no dispute that the claimant was employed by respondent until 12.2.2013

- a. Whether the termination was unfair;
- b. Whether the reliefs sought should be granted;
- c. Whether the counter claim should be allowed.

Unfair termination

16. Under Section 45(2) of the Employment Act, termination of employees employment contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid and fair reasons is one that relates to the employees conduct, capacity and compatibility or the employer's operational requirements. Fair procedure on the other hand refers to the process of according the employee a hearing before termination of his contract of service and post termination process including right to appeal, payment of terminal dues and issuance of certificate of service.

Reasons for termination

17. The respondent averred that the claimant was dismissed by the letter dated 11.2.2013 which was produced herein as an exhibit. The letter listed 8 offences which can be summarized as negligent performance of duty, stealing, fraud, dishonest, and late reporting and early leaving without permission. The claimant denied the said offences and contended that he was tried and acquitted of the alleged theft of money in the criminal charges that were preferred against him.

RW1 contended that the claimant was dismissed for stealing Kshs.300,000 while RW2 contended that the claimant was dismissed for stealing Kshs.300,000 and using abusive words against the Senior Management team on 8.2.2013.

18. After careful consideration of the evidence tendered, I have noted that the allegation of theft of the Kshs.300,000 has not been proved by the respondent. Indeed it has been admitted by the defences witnesses that the claimant was exonerated by a Document Examiner in the Criminal Case. In addition, the offence of absenteeism and late reporting was disapproved by the copies of Attendance Register and Duty Allocation Register produced by the claimant. Consequently I returned that the respondent has not proved the alleged misconduct against the claimant.

Procedure followed

19. The claimant testified that he was never served with show cause letter or accorded any hearing prior to his dismissal. That position was confirmed by the two defence witnesses. The said witnesses confirmed that the claimant was informed about his dismissal through newspaper notification to the public. That procedure was not only unfair but also contrary to the mandatory procedure provided by Section 41 of the Employment Act. The said provision requires that before terminating an employee on ground of misconduct, poor performance or physical incapacity, the employer must explain to the employee in a language he understands and in the presence of another employee of his choice or shop floor union official, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

20. In view of the said failure by the respondent to prove a valid and fair reason and the admission that the claimant was not accorded any hearing before the dismissal I return that the dismissal of the claimant was unfair within the meaning of Section 45 of the Act.

Reliefs

21. Under Section 49 read with section 50 of the Employment Act, I award him 3 months salary in lieu of notice as per the termination Clause of the respondent's management staff terms of service 4th Edition published on 1.1.2004. I also award him 12 months salary being compensation for unfair termination. In awarding the maximum compensation, I have considered his long service of 10 years and the fact that he did not contribute to his dismissal through proven misconduct.

22. The award is based on the gross pay of Kshs.40,509 as per the claimant's payslip for January 2013. Hence the notice plus the compensation works to Kshs.607,635.

23. The claim for Kshs.14,073,072 for loss of income before retirement at 60 years is dismissed for lack of any contractual or legal basis. In any event, it is common knowledge that the claimant is now in a gainful employment within the Kisii County Government.

24. The claim for General Damages for mental anguish and psychological torture is also dismissed for lack of particulars and evidence. Likewise the claim for Exemplary damages for false imprisonment and malicious prosecution is dismissed for lack of evidence to prove that the torture, the imprisonment and the prosecution was committed by the respondent.

25. Finally, the claim for all emoluments, arrears, pending salary and allowances is dismissed for lack of particulars and evidence. Such claims in my view are in the species of reliefs called special damages which must be specifically pleaded and proved.

Counter claim

26. The claimant admitted that he still has outstanding loans with the respondent but after servicing through check off system for a while he could tell the actual balance. The RW2 also admitted that the outstanding balance was unknown to him. It was also admitted by the defence that the loans were guaranteed by guarantors but as evidence was adduced to prove that the guarantors paid. In view of the uncertainty of the outstanding balance, I will only allow the counter claim based on payslip for January 2013 which showed:

- a. Staff development loanKshs.464,010.06
- b. Salary advance.....Kshs.250,000.00
- c. Car LoanKshs.276,610.83

TotalKshs.990,620.89

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Conclusion and disposition

27. I have found that the dismissal of the claimant was unfair within the meaning of Section 45 of the Employment Act. I have further found

that the respondent's counter claim of Kshs.990,620.89 is still outstanding which means that after factoring the award made to the claimant above, there is still a loan balance of Kshs.382,985.89.

Consequently I enter Judgment for the respondent in the sum of Kshs.382,985.89 plus costs and interest from the date hereof. Each party shall bear his or her own costs.

Signed, dated and delivered at Nairobi this 23rd day of November, 2018.

ONESMUS N. MAKAU

JUDGE