



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.1660 OF 2017

(Formerly Machakos HCCC No. Case No. 33 of 2000)

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

DANSON MBUBI MUTABI.....CLAIMANT

-VERSUS-

KONZA RANCHING & FARMING

CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant, Danson Mubui Mutabi, filed a Complaint dated 28th February, 2000 seeking payment of his terminal benefits against the Respondent, Konza Ranching and Farming Co-operative Society Limited. The matter was later transferred to Co-operative Tribunal then brought back to the High Court where it was partly heard by Justice Lenaola, and with the creation of the employment court by the new Constitution, the matter was by Consent brought to this Court for further hearing.

2. He avers that he was employed by the Respondent sometimes in 1975 as a Farm Manager and was unfairly terminated from his employment vide a letter dated 20/11/1999. That the Respondent only paid him 3 months' salary in lieu of notice of Kshs. 129,210/= and 174 leave days amounting to Kshs. 249,790/= and that it offered to pay him terminal benefits at a rate of 15 days for each year he had worked. That the said payments were not full and final and that he claims as follows:-

a) 6 month's salary in lieu of notice (6 x 43,070).....Kshs 258,420/=

b) Unpaid retirement benefit under minute 3/75 (b) (6)

equivalent to 2 months' salary for every year worked

(49 ½ months x 43,070).....Kshs. 2,131,965/=

c) Unpaid leave at a rate of 39 days per year for years worked

totalling to 175.5 working days equivalent to 8 months 22

working days (43,070/= x 8).....Kshs. 344,560/=

d) Unpaid offs or rest days (each day payable double) holidays

24x52x43,070.....Kshs 1,791,712/= 30

e) Severance pay for 15 days each worked year for 24 years ¾

months equivalent to 371.25 days coming to

(12.375 months x 43,070).....Kshs 532,991/25/=

f) Unpaid part salary of November 1999 being 19 days worked

43,070/= x 19/30 = (27,277/60 23,0960).....Kshs 4,181/65/=

g) Unrefunded transport costs as per letters of 26/7/1999 Ref

DMM 4/41 and DMM 4/47.....Kshs 30,000/=

TOTAL.....Kshs 7,514,337/90/=

3. The Respondent filed its Defence and Counterclaim on 17/03/2000 and later filed an Amended Defence and Counterclaim on 10/07/2002 dated 09/07/2002 stating that it had no written contract of service with the Claimant and that he was sacked for gross misconduct, negligence of duty and in the public interest. That the payment of Kshs. 129,210/= was not based on any liability as the Claimant was not entitled to anything after being sacked and it denies the whole claim as particularised.

4. In the counterclaim, the Respondent is seeking General Damages for the damage caused by the Claimant's mismanagement and Special Damages of Kshs. 10,172,198.80/= against the Claimant as hereunder read together with the particulars of damages in its counterclaim:-

a) Indemnity in respect of use of personal car amounting to Kshs. 88,000.00/=

b) Indemnity of wrongful payment of dividends to a non-member amounting to Kshs. 15,850.00/=

c) Failing to hand over and/or account for eight lister engines at Konza Ranch amounting to and failing to account for missing items.

5. The Plaintiff further filed an Amended Reply to Defence and Counterclaim on 16/07/2011 dated 15/07/2002 stating that the particulars of gross misconduct by the Respondent are an afterthought as none of them were disclosed to him as a ground of termination of his services. It also denies in entirety the particulars of gross misconduct, special damages, general damages and the allegation that he misused the Respondent's properties as claimed by the Respondent.

6. He further states that he handed over all the properties in his possession and denies the value attached to the said lister engines whose particulars have not been given by the Respondent and that the Respondent's counterclaim is misconceived, bad in law and time-barred and meant to defeat his claim. He avers that all matters related to his claim and that of the Respondent is duly minuted and that the Respondent is in possession of all society minutes which he required it to produce at the hearing.

Evidence

7. CW1, the Claimant, testified in cross-examination that he asked for leave many times but the Society denied him the permission. That he was aware of the allegation that he paid himself Kshs. 88,000/= for car hire, stating that the committee approved the same for him and that he used his car in absence of farm vehicles. That he is aware of the letter dated 06/01/2001 which talks of misappropriation of public funds and that it is not true that he had double membership as his number was 686 while number 1192 belonged to his son who was a member of the Society and who shared a name with him. He stated that he never lost any society documents or kept any title deeds and that the title deeds were kept in the bank by the management company. That he wrote to several advocates of the Society forwarding title deeds but on instructions of the management company and further, that he was not given a Clearance Certificate and was not aware of any clearance certificate.

8. In re-examination, the Claimant stated that he worked for the Respondent for 24 years 9 months and 17 days, that he was not given any hearing before he was terminated and that he was on leave for 6 months when he was terminated. That in the letter of termination signed by the Chairman of the Society, the Respondent admitted to owing him dues he was entitled to and that since 1999, there has been no criminal case reading that he stole any items. Further, that he was not invited to give an inventory of the items in his custody and that he was not given any letter to account for any lost items before he was fired.

9. CW2, Rhoda Nduku, who worked for the Respondent from 1974 to 2002 as a Typist and Store Keeper, testified that the Claimant worked for the Respondent as a manager since 1995 and that those days there were no employment letters and they relied on Minutes as proof of employment. That in the course of their work, she never heard of a case alleging the Claimant had stolen anything.

10. In re-examination, she confirmed that the Committee Secretary gave her the minutes to type (produced as *exhibit 2 (a) and 2(b)*) and that *Minute No. 3/75* is the one which shows the Claimant was employed by the Respondent. That the claimant was sacked for missing machines and when he came to explain himself, she was not allowed in the boardroom.

11. RW1, David Muthoka, testified that he became the Chairman of the Society from August 1999 and that when the Claimant was interviewed on 12/11/1974, he was found not suitable of the managerial position and the same was to be re-advertised on 07/12/1974 in the Daily Nation. That he has no record showing how the Claimant came to be manager of the Sacco and that when it was found that most employees had no qualification to the jobs they were holding, including the Claimant and CW2, they decided to recruit qualified people.

12. That the double membership allegation was true as both persons had the same ID number which is the Claimant's ID and that they asked the Claimant to explain all the allegations as listed in *Minute No. 90/99* in the *Management Committee Meeting Minutes dated 19/11/1999*. That the Claimant never cleared with the Society or returned the unaccounted for properties and that they took the issue to the AGM in 2002 which the Claimant attended and was expelled from the Society by the members. That the Claimant was not maliciously terminated as he was given 1 months' notice and also paid 3 months' salary at termination.

13. In cross-examination, RW1 testified that the Claimant was responsible for the Assets Register and that this is how the lister engines got lost but they had no receipts showing that they had lister engines. That after investigations were done, they called the Claimant in 2002 but he did not come to the meeting and that the Ranch was subdivided among the members in 2012 and what remains are public utilities.

14. In re-examination, he stated that the Minutes of 1995 are not signed and there was no proof that they were from their office. Further, that there is no evidence that the Claimant was ever employed by the Respondent and he confirmed that the Claimant attended the Respondent's AGM in 2002. He also confirmed that the Claimant attended a meeting they called him for on 14/09/1999 and it was before he went on leave.

Claimant's Submissions

15. The Claimant submits that the counterclaim by the Respondent has no place in an employment and labor relations court because this is not a criminal court to establish whether he was guilty of having stolen, or aided, abetted in theft or loss of items. That this court therefore lacks jurisdiction to hear and award counterclaim and that the prayers in the counterclaim cannot stand the test of time before this court. He relies on **HCC Kerugoya ELC 287/14 Alice Mweru Ngai vs Kenya Power & Lightening Co. Ltd**, where it was held that:-

"In the case of Owners of Motor Vessel 'Lillians' vs Caltex Oil Kenya Ltd 1989 K.L.R 1, jurisdiction is everything and once a court has no jurisdiction, it has no power to make one more step . That is why issues of jurisdiction are usually raised at the earliest stage of the proceedings because without jurisdiction, the court must down its tools.

...In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act."

16. He submits that the Respondent's minutes dated 25/01/1975 clearly set out his terms of employment as follows:-

i) Danson Mbubi will start working on 3/2/75.

ii) He will start with Kshs. 1,400/= as one month salary.

iii) He will be under probation for 6 months.

iv) After probation termination, Danson Mbubi will become a permanent employee of the society.

v) As a permanent worker he would receive a 6 months notice to termination employment, as well as on his part he would give a notice of 6 months or receive salary equivalent to that duration.

vi) He will also receive retirement benefits due to age or sickness equivalent to salary of two months for every year he has worked for the society (Respondent).

17. That under the Evidence Act, he who alleges must prove and while he has proved his part, the Respondent denied the minutes employing him but was unable to prove when it employed him and under what terms. That in fact RW1 admitted in his testimony that the Claimant was fired from his position as an employee of the Respondent. Further, that the terms upon which he was dismissed are not the terms he was employed under and that consequently, he was not fairly dismissed because the reason of public interest is a wide and unequivocal term and that he was also not given an explanation as to his termination of employment.

18. It is submitted by the Claimant that he was not responsible for the alleged loss of items in the counterclaim and that the Respondent had unit managers responsible for the farm assets on each unit and further, the alleged loss was not brought to members or addressed as liabilities at that time. That the subdivision of the ranch revealed the title deeds the Respondent had alleged were with him were found at lands offices as he had told them after he was fired. That he was not a signatory to the bank to warrant his embezzlement of the Respondent's funds and that the said signatories being the Chairman, Treasurer and Secretary should have been the ones sued for the said theft. He therefore prays for judgment as claimed above together with costs of the suit, dismissal of the counterclaim and costs therefore.

Respondent's Submissions

19. The Respondent submits that the purported minutes the Claimant produced in court cannot be deemed by this Honourable Court as a valid contract of employment and urges this court to find the same. It relies on the case of **Miguna Miguna v Attorney General [2012] eKLR** where Justice Hellen Wasilwa held that:-

"...what was enforceable was the three year contract made in writing between the claimant and the Respondents.....what was agreed orally did not amount to a contract of employment since there was a requirement that the same had to be in writing".

20. Further, that the court in the *Miguna Miguna* case above quoted Gwyneth P.H. in *Employment Law, Sweet and Maxwell 7th Edition at 116* which states as follows:

"A written statement is not the same thing as a written contract of employment. A contract creates the rights and duties of the parties; the written statement merely declares they are what they have been agreed and it follows that it is therefore capable being inaccurate.... It is an important distinction for if a document is held to be a written contract, it will be presumed that it accurately records the terms agreed by the parties and it will be very difficult to persuade a court that the terms are otherwise. If it is a statement then it has no special legal status and could be a mistaken record of what was agreed....."

21. As to whether there was fair termination, the Respondent states that the allegations against the Claimant were grave and irrefutable and it had valid reasons to dismiss him and that it did not manifest any malice or unfairness throughout the hearing or termination process of the Claimant. It cites the case of ***Bamburi Cement Limited V William Kilonzi [2016] eKLR*** where the court stated that:-

"The question that must be answered is whether the appellant's suspicion was based on reasonable and sufficient grounds. According to section 47(5) of the Employment Act, the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer."

22. Further, in the case of ***Thomas Babu Mwaniki v Nassefu Co-operative Savings & Credit Society Limited [2016] eKLR***, the court stated that: "...The Claimant having been Chief Executive Officer of Respondent and so much money having been lost under his watch, he was culpable and therefore Respondent had valid reason to dismiss him." That RW1 confirmed in his testimony in court of the following occurrences that contributed to the Claimant's dismissal:-

1. ***The Claimant was unable to account for title deeds for two farms in the ranch and had no idea where the titles were kept and could not produce them when he was asked to.***
2. ***The Claimant paid himself car allowances for use of his car for a period of 22 days when he was authorized to do the same.***
3. ***The Claimant retained a member No. 419 Michael Mbithi in the society illegally after the member was rejected at an AGM and the said member continued drawing travelling allowances as a bona fide member of the society.***
4. ***In the year 1999 the Claimant paid Kshs 50,000 to stop an annual meeting which was supposed to take place.***
5. ***The Claimant and the former chairman were involved in illegal allocation of plots and he was a beneficiary of an illegal plot worth 10 acres which were later repossessed.***
6. ***The Claimant was keeping animals in the ranch after the same had been bought by third parties. The animals could gain weight and later be sold at the expense of the society which was losing income and spending money on maintaining the cows.***

23. The Respondent submits that payment of terminal benefits cannot precede clearing with the Respondent which is a requirement that all its employees have to meet and that the Claimant has never cleared with it. That the rest of his benefits were to be calculated and if found due, were to be paid to the Claimant once he cleared. Its final upshot is that this is a case whereby one gains employment through the back door, mismanages the employer's property and upon termination, they claim unfair termination and full benefits. That the society has already lost property and incurred liabilities courtesy of the claimant's actions and omissions and to allow this claim is to condemn the society for doing the right thing and saving members from losses.

24. It finally urges this Court to dismiss the claim in its entirety and instead allow the counterclaim as prayed so that the Claimant returns all the society property he has amassed over the years and that it also prays for cost.

25. I have examined all evidence and submissions by both parties. The Respondents contended that the minutes produced in Court by CW2 are not authentic and they do not prove the employment agreement between the Claimant and the Respondent. The Respondent however failed to prove their own version of the contract signed between them and the Claimant while still acknowledging that the Claimant was their employee and was dismissed for some misconduct which they term as being in the public interest.

26. There is no indication that there was any disciplinary hearing which led to the dismissal of the Claimant. The Respondents aver that the Claimant was expelled from the Society by members and they terminated him properly and paid him 1 month's salary in lieu of notice and 3 months' pay.

27. The rules of natural justice demand that a man should not be condemned unheard. The Claimant was definitely condemned unheard and this makes his termination unfair.

28. In terms of remedies, the Claimant sought various prayers as enumerated in his claim. He avers that he was paid only 3 month salary in lieu of notice instead of six and leave and not his retirement benefits.

29. Based on the Minute 3/75 of the Claimant's Exhibit 1 which I have indicated forms the employment contract between the Claimant and the Respondent, I award the Claimant as follows:-

1. ***3 months' salary in lieu of notice = 43,070 x 3 = 129,210/=.***

2. Severance pay for 24 years served calculated at 2 months' salary for each year worked = $2 \times 24 \times 43,070 = 2,067,360/=$.

Total = 2,325,780/=

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

Dated and delivered in open Court this 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Serenjuch holding brief Bundi for Respondent – Present

Mbogo holding brief for Mutua for Claimant- Present