



**Sikuku v Kapenguria Teachers Sacco Society Limited (Cause 1601 of 2010)  
[2018] KEELRC 268 (KLR) (20 December 2018) (Judgment)**

*Pius Sikuku v Kapenguria Teachers Sacco Society Limited*[2018] eKLR

Neutral citation: [2018] KEELRC 268 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1601 OF 2010  
HS WASILWA, J  
DECEMBER 20, 2018**

**BETWEEN**

**PIUS SIKUKU ..... CLAIMANT**

**AND**

**KAPENGURIA TEACHERS SACCO SOCIETY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant, Pius Sikuku, instituted this suit vide a Memorandum of Claim dated 20<sup>th</sup> December, 2010 filed on 21/12/2010 seeking payment of his terminal dues together with damages for unfair termination against the Respondent, Kapenguria Teachers Sacco Society Limited.
2. He avers that he was first employed by the Respondent on 20/09/2006 as an Accountant, then as a Manager in 2007 and was then deployed to work as an Accountant again from May 2009 on a permanent basis. That he was registered in the pay roll as employee number 003896 earning a gross salary of Kshs. 35,850/= and was enjoying house, medical and responsibility allowance at the time his contract was terminated. That he was an efficient employee highly recommended in the manner he worked and that he never received any form of warning whether orally or in writing.
3. That on 10/10/2009, the Respondent purported to deploy him to its Lodwar branch to work as an Accountant and as Manager in charge for a period of one (1) month as the Respondent looked to get a Manager for the said branch. That he wrote to the Respondent on 11/10/2009 citing good and relevant reasons which included his medical status that could not allow him to be deployed to the Lodwar branch and that the Respondent wrote back to him on 12/10/2009 suggesting that on humanitarian grounds, he should report to the aforesaid branch for two weeks and not the one month contemplated earlier.



4. That he then wrote to the Respondent on 13/10/2009 and 14/10/2009 inquiring whether it was still necessary for him to go to Lodwar as another staff had already been posted to the said branch and he supplied evidence of his medical condition. That he was called from his home on Sunday 6<sup>th</sup> December 2009 and was kept waiting at the Respondent's office until midnight when he was given a dismissal letter without explanation or a chance to defend himself before a panel and that he was humiliated by being ordered to leave immediately and to surrender all office equipment as he was pushed out of the office. Further, that he has not taken his belongings nor handed over to date.
5. He avers that the said termination did not apply the principles of good industrial relations practice guidelines nor statutory laws and that the reasons disclosed in the dismissal letter were not adequate. That he subsequently visited the Ministry of Labour and reported the matter upon which the Ministry wrote to the Respondent on 09/12/2009 proposing certain recommendations but the Respondent has not responded to date. That he issued a demand letter to the Respondent but it has neglected and/or the Respondent refused to pay his Claim and that he prays this Honourable Court do award and order for his terminal dues which are made as follows:-
  1. Amount the Claimant could have earned were he not terminated unfairly of Kshs. 9,894,600/= (35,850 x 12 months x 23 years pending retirement).
  2. Severance Pay at the rate of 15 days for every year worked of Kshs. 71,700/= (35,850 x 4/2).
  3. General damages for injured feelings considering the Claimant was at senior management position and in light of the wrongful dismissal coupled with malice.
  4. Punitive damages to act as punitive measures to curb employers from unilaterally and unfairly terminating employees without due regard of the Labour laws.
  5. Certificate of Service.
  6. 12 months' pay for unfair dismissal amounting to Kshs. 430,200/=.
  7. Notice Pay of 3 months amounting to Kshs. 107,550/= (35,850 x 3).

### **Respondent's Case**

6. The Respondent filed a Reply to Memorandum of Claim dated 22/02/2011 on 01/03/2011 stating that the Claimant was summarily dismissed because of his gross misconduct and indiscipline leaving it with no choice but to take action as per its Terms and Conditions of service and staff policy. That the Claimant was contractually obligated under Clause 15.6 of its Staff Policy Document and legally obligated under the *Employment Act* which he did not adhere to as he absconded from duty, wilfully neglected to perform his duty, behaved in a manner insulting to the Society, knowingly failed and/or refused to obey a proper command issued to him and was guilty of insubordination.
7. That it warned the Claimant and further explained the consequences in case he did not change but he never responded to the warning letters either orally or verbally and neither did he attend any of the meetings convened by the Respondent. That it then summarily dismissed him through a decision reached in its Joint Management Meeting held on 04/12/2009 at its Boardroom with minutes of the said meeting attached as proof and that it notified the Claimant of the dismissal vide a letter dated 04/12/2009.
8. It contends that it acted within the law and followed due process and that the reasons for the Claimant's summary dismissal were justified in law. That the Claimant grossly contravened its policy by paying himself gratuity for 3 years without the management's authority and when it demanded the same from



him, he did not respond. That it did not refuse to pay him his gratuity but was of the view that the same would be paid upon calculating his gratuity and shares which were to be adjusted on his liabilities. That after calculating the same, it found that the Claimant's liabilities far outweighed his dues as reflected in the demand letter it issued to him as aforesaid. The Respondent prays that:-

- i) This Honourable Court do find that the Claimant engaged in acts that amounted to gross misconduct under the Employment Act.
- ii) Having found as (i) above, the Industrial Court do declare that the Respondent acted within the law by summarily dismissing the Claimant.
- iii) The summary dismissal was legal.
- iv) The Respondent was willing to pay all dues accruing to the Claimant but upon finding that he had over paid himself, no amount was payable to him by the Respondent.

### **Evidence**

9. The Claimant testified that when the Respondent opened a branch in Lodwar, the Board of Directors asked him to do an investigation and he found there was a problem in Lodwar. That he served the Respondent his medical report from Kitale District Hospital which suggested that his deployment to Lodwar be postponed until he had stabilised. In cross-examination, he testified that his salary remained the same in all the capacities he held with the Respondent over his period of employment and that when he was deployed to Lodwar, he had been given 2 weeks leave and that he then went for his annual leave in August 2009 after the two weeks and he confirmed that he never reported to Lodwar.
10. That he is currently still unwell since 2002 and that he has never seen the letter at Appendix D1 of the Respondent's documents and neither the one at page 32. That he had taken a loan of Kshs. 50,000/= in 2008 but could not remember how much he had paid and that he never received any letter on his Loan Account Statement. He stated that he was 33 years when he was terminated and that the Respondent putting his termination in the newspaper has made it hard for him to get employment.
11. RW1 the Chairman of the Respondent testified that the Lodwar branch has been operational from 2007 with 4 employees and that they had never had security issues. He stated that when the Claimant refused to go, they sent a loan officer to go and act and that the letters written by the Claimant were written while he had already absconded duty.
12. That the Claimant took various loans amounting to Kshs. 510,250/= as at November 2009 as evidenced in page 10 of the Respondent's documents and that they are claiming the same from him. In cross-examination, he confirmed that he did not have the audit report and that the Claimant was not called into the meeting as he had absconded but he did not bring anything to court to prove that the Claimant had absconded.

### **Claimant's Submissions**

13. The Claimant submits that the Respondent did not conduct any investigations because it has been demonstrated in Appendix E of the Respondent's documents that his employment was terminated on the same day the Respondent held the meeting to purportedly consider the allegations against him and further, that no report was produced in court by RW1 into the said allegations.
14. That his dismissal was unfair because due procedure was disregarded and there was no valid reason for termination as per Section 45 (2) (a), (b) and (c) of the Employment Act stating that the concept of fair



hearing in matters pertaining internal disciplinary hearing is both a constitutional right and fair labour practice but there was no fair hearing in this case and he was greatly disadvantaged.

15. That the alleged warning letters from the Respondent dated 27/11/2009 and 28/11/2009 did not contain his signature of receipt like all letters served to him usually had and that these two letters are a product of fraud by the Respondent in a bid to cover up its actions. Further, that the Respondent alleged insubordination by him yet he had given valid reasons as to why he would not transfer as evidenced in Appendix 7, 8, 9, 10 and 11 in his list of documents. That the court should consider the following issues which prove that the Respondent has been unfair to him:-

- i) The letter alleging insubordination of the Respondent by the Claimant was written on the 27<sup>th</sup> November, 2009 BUT stamped on the 8<sup>th</sup> December, 2009 when the Claimant had already been dismissed vide a letter of 4<sup>th</sup> December, 2009; this fact evidences fraud on the part of the Respondent;
- ii) The letter of summary dismissal was written on the 4<sup>th</sup> December, 2009 BUT formalised in a meeting of 6<sup>th</sup> December, 2009 clearly evidencing that the dismissal was effected before the discussion in the meeting; and
- iii) The recommendation letter by the Respondent clearly exonerated the Claimant from any blame.

16. He further urges the Court to consider Section 41 of the Employment Act which provides that, 'Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.' He also relies in the case of *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR where Justice Stephen Radido observed that:-

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

17. That Justice Nduma Nderi held as follows in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR:-

“I agree with Counsel for the Respondent that internal disciplinary proceedings are non-judicial in nature. However, in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer



which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

18. The Claimant also submits that the Respondent’s claim for unpaid loan that he took was brought up at the hearing in court as an afterthought and that the Respondent did not raise the same in its Memorandum of Reply. That the Respondent has been silent about the stated liabilities for 10 years from 2009 to 2018 and has only raised it as a flimsy and weak excuse of a defence when in fact the stated loan was paid off.
19. That the Respondent has never demanded for payment of the same and that the only letter issued to claim for payment of liabilities dated 30/04/2010 was never received by him as there was no signature of receipt on it. That the Respondent has been statute barred by Section 4 of the Limitation of Actions Act and cannot claim the same and that in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR, the court made the following observations:-

“It is common ground that the cause of action in this matter was based on contract and that section 4 of the Limitation of Actions Act prohibits suits filed after the end of six years from the date on which the cause of action accrued. As Potter, JA observed in the case of *Gathoni vs Kenya Cooperative Creameries Limited* (Civil Application No. 122 of 1981):-

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

It is also trite law that the period of limitation cannot be extended...”

20. It is submitted by the Claimant that he prays for maximum compensation of 23 years’ salary he would have earned had he retired in accordance with the law at 60 years as per Section 49 of the Employment Act. That he worked for the Respondent for 4 and a half years and is therefore entitled to 15 days’ pay for every year worked as provided in Section 35(5) of the Employment Act which states that, ‘an employee whose contract has been terminated under subsection 1(c) on notice period shall be entitled to service pay for every year worked, the terms of which shall be fixed.’ That given he was on a permanent and pensionable employment, he is entitled to 3 months’ notice pay since the Respondent dismissed him without issuing notice to him and that he is also entitled to general and punitive damages as averred in his claim. That this Court should condemn the Respondent to bear the costs of this suit, interest thereof and any other costs this Court deems proper.

### **Respondent’s Submissions**

21. The Respondent submits that the reasons for dismissing the Claimant were valid and included him refusing to be deployed to Lodwar, refusing to sign the reporting and departure book as required and absconding management meetings without justification. That he effectively locked himself out of the internal grievance handling process of the Respondent and is estopped from claiming he was not given an opportunity to be heard.
22. Further, that his claim for payment of salary for the unexpired period of contract is misconceived because the law does not provide for anticipatory income and that payment of the same would unjustly enrich him and offend the principle of fair go all round as he would not be contributing labour to the



Respondent during the unexpired period. That it relies on the case of Robert Kennedy Moi v Attorney General & another [2014] eKLR where Court held as follows:-

“The Claimant prayed for payment of salary for the unexpired period of contract. Payment for salaries for the unexpired period of contract are not due as the law does not provide for anticipatory income. Section 49 (4) (e) requires that employees mitigate their losses. Being able bodied, the Claimant was expected to move on with his life after the termination of his employment.”

23. It submits that the claim for 3 months’ notice pay is misconceived as the dismissal was not unfair and that even if the court were to find that the dismissal was unfair, the court can only award the Claimant one month notice pay provided for in the law as the 3 months’ pay in lieu of notice was not agreed upon by the parties. That the claims for general damages and punitive damages must fail as they are unknown to employment law and that the Court should dismiss the memorandum of claim with costs.
24. I have examined all the evidence and submissions of both parties. The Claimant was ostensibly dismissed vide a letter dated 4<sup>th</sup> December 2009 but which does not give reasons for dismissal. The letter only indicates that the dismissal is in accordance with staff policy clause 15.6 (a) (c) (d) (e) and (1).
25. Section 43 of *Employment Act* states as follows:-
  - “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
  - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
26. It is imperative that before an employee is dismissed, there must be valid reasons assigned to the dismissal. In the case of the Claimant, there is no indication as to what the reasons for dismissal were and this offends the provision of Section 43 of *Employment Act* 2007.
27. Other than valid reasons, the Respondent admitted that the Claimant was not given an opportunity to be heard as he had absconded duty. This reason cannot be true because the Respondents summoned the Claimant and served him with a dismissal letter. Their position that he had absconded duty is therefore not true.
28. Section 41 of *Employment Act* states as follows:-
  - “(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations



which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

29. Thus the law is clear that a man should not be condemned unheard. In the case of the Claimant, he was never given any opportunity to be heard.

30. Section 45 of *Employment Act* states as follows:-

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure..”.

31. It is therefore my finding that the Claimant’s dismissal was unfair and unjustified.

32. The Respondents have tried to introduce a Counter Claim in their case alleging that the Claimant owes them 510,250/= in loans. This was never pleaded as a Counter Claim in the Response to the Claim and so it cannot be claimed through evidence.

33. It is my finding that the Claimant was unlawfully and unfairly dismissed. I find for him and award him as follows:-

1. 1 months’ salary in lieu of notice = 35,850/=.

2. 12 months’ salary as compensation for unlawful dismissal = 12 x 35,850 = 430,200/=.

Total = 466,050/=

3. Payment of his gratuity as indicated in his dismissal letter.

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

**DATED AND DELIVERED IN OPEN COURT THIS 20<sup>TH</sup> DAY OF DECEMBER, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of

Khasiani holding brief Kidiavai for Respondents

Claimant – Absent

