



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 11 OF 2015

[FORMERLY NAIROBI HIGH COURT CIVIL CASE NO 508 OF 2008]

JAPHETH SHEM MUTHIANI WAMBUA.....CLAIMANT

VS

NATIONAL HOSPITAL INSURANCE FUND.....RESPONDENT

JUDGMENT

Introduction

1. This claim was initially filed in the High Court at Nairobi as Civil Case No 508 of 2008. By consent of the parties recorded before **Mbogholi J** on 10th December 2014, the matter was transferred to this Court. The claim is contained in a Plaint dated 31st October 2008.
2. The Respondent filed a Statement of Defence on 12th January 2009 to which the Claimant responded on 26th January 2009. The Respondent subsequently filed an amended Defence on 2nd February 2009.
3. The matter came up for hearing before me on 15th October 2018, during the Nairobi Station Service Week, when the Claimant testified on his own behalf. The Respondent called its Senior Human Resource Officer, Paul Katusya.

The Claimant's Case

4. The Claimant states that he was first employed by the Respondent on vocational basis in November 1996. On 4th April 2000, he was employed in the position of Clerical Officer on temporary terms. On 21st April 2000 he was re-employed on the Respondent's new terms and conditions of employment.
5. In November 2003, the Claimant was arrested, detained and later charged with the offence of theft by servant contrary to Section 281 of the Penal Code in Nairobi Chief Magistrate's Court Criminal Case No 2339 of 2003. After a lengthy trial, the Claimant was acquitted on 9th October 2006.
6. On 7th November 2003, the Claimant was suspended without pay and by letter dated 15th May 2007, his employment was terminated effective 4th November 2003. The Claimant states that the termination of his employment was wrongful and unlawful and contrary to his terms and conditions of service as well as the rules of natural justice.
7. During his employment with the Respondent, the Claimant had taken a mortgage facility of Kshs. 1,980,000 under the Respondent's Staff Mortgage Scheme, by which he had purchased a property known as L.R. No NAIROBI/BLOCK 134/1201 situated at Komarock Estate within the City of Nairobi.
8. Following the termination of the Claimant's employment, the Respondent sold the said property known as L.R. No NAIROBI/BLOCK 134/1201 without notice to the Claimant. The Claimant terms the said sale as unlawful, unjust and un-procedural.
9. The Claimant's claim against the Respondent is for accumulated monthly salaries and salary arrears from the month of November 2003 until his retirement as per the letter of appointment or reinstatement with full salary and benefits.
10. The Claimant further prays for a declaration that the sale of L.R. No NAIROBI/BLOCK 134/1201 was irregular, unjustified, un-procedural and unlawful and that the Respondent is liable to account to him for its full value.

11. The Claimant also claims general damages, costs plus interest.

The Respondent's Case

12. In its Statement of Defence as amended on 30th January 2009, the Respondent denies the Claimant's employment history as pleaded in the Plaintiff.

13. The Respondent states that it is a stranger to the Claimant's averment that he was arrested, charged and later acquitted in Nairobi Chief Magistrate's Criminal Case No 2339 of 2003.

14. The Respondent further states that any suspension of the Claimant was intended to permit the conduct of an internal audit in relation to the Claimant's assigned duties.

15. The Respondent denies that the termination of the Claimant's employment was unlawful or in breach of the obtaining terms and conditions of service or the rules of natural justice. The Respondent states that it was within its statutory duty to summarily dismiss the Claimant as there was sufficient reason to suspect that the Claimant had committed a criminal offence against the Respondent or to the substantial detriment of its property.

16. The Respondent further denies that the Claimant had purchased a property under its Staff Mortgage Scheme and states that any realization of security was undertaken by Savings and Loans Kenya Limited who had made an advance to the Claimant. The Respondent seeks contribution and/or indemnity from Savings and Loans Kenya Limited.

Findings and Determination

17. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

18. On 17th November 2003, the Claimant was issued with the following letter:

"SUBJECT: SUSPENSION

It has come to our attention that on 4th November 2003 while discharging your duties at Kenyatta National Hospital you were arrested by police and charged for allegedly lodging fraudulent hospital claims.

As an officer of the fund, you are well aware that being charged with a criminal offence is a serious breach of discipline, which is punishable as provided under section 14.22.2 (a & b) of the NHIF Staff Terms and Conditions of Service, which states in part that;

(a) Where an employee has been charged with a criminal offence, the Chief Executive Officer shall order his suspension from the exercise of his duties, pending consideration and determination of the case.

(b) While an employee is under suspension he will not be entitled to any salary, but the Chief Executive Officer may, on application, grant an allowance, as he may deem appropriate.

Consequently, you are suspended from exercise of your duties, with effect from the date you were arrested, pending consideration and determination of the case.

In the meantime your salary has also been stopped with effect from 1st November 2003. Kindly supply us with your most reliable postal address where you can easily be reached. Otherwise we shall continue to use the address provided by yourself in the leave application forms which is C/O Box 67 TALA.

Your response if any should be received in this office within fourteen (14) days from the date of this letter.

(Signed)

E.W. KIMANI (MRS)

FOR: CHIEF EXECUTIVE"

19. From the evidence on record, the Claimant stayed on suspension until 15th May 2007 when he was issued with a termination letter stating as follows:

“RE: TERMINATION OF APPOINTMENT

Further to our letter Ref. No. HF/S/0289/44 dated 17th November 2003 and on the advise of the Staff Advisory Committee; we wish to communicate to you Management’s decision that your appointment with the Fund be terminated with effect from 20th March 2007 on account of gross misconduct.

Subsequently, the suspension imposed on you with effect from 4th November 2003 is uplifted. Your benefits, if any, will be determined in accordance with the prevailing Pension Regulations. Please note however that the period not worked will not be paid. You are advised to get clearance from HR Division to facilitate faster processing of the same.

In accordance with the Terms and Conditions of Service, you are advised of your right of appeal against this decision, to the Chairman Board of Directors through the Chief Executive within twenty (28) days from the date of this letter. Failure to exercise this right within the stipulated time will be taken to mean that you have no further defence to offer, and the matter will be considered as concluded.

We wish to thank you for the services you have rendered to the Fund during you tenure of service.

(Signed)

E.W. KIMANI (MRS.)

FOR: CHIEF EXECUTIVE”

20. The cause of action herein arose before enactment of the Employment Act, 2007. In determining this claim therefore, the Court will rely on the Respondent’s Terms and Conditions of Service dated April 2002, which were filed by the Claimant.

21. In issuing the Claimant with a suspension letter on 17th November 2003, the Respondent relied on Clause 14.22.2 of the Terms and Conditions of Service. The Court therefore found no fault in the Respondent’s action in this regard. The Court also found nothing wrong with the procedure leading to the eventual termination of the Claimant’s employment.

22. Moreover, the fact that the Claimant was acquitted of the criminal charges against him did not mean that he was entitled to automatic reinstatement. In its decision in *Clement Karuri v Kenya Ports Authority [2018] eKLR* the Court of Appeal stated thus:

“There is a clear distinction between internal disciplinary proceedings of an employer and criminal proceedings. Internal disciplinary proceedings are anchored on the contract of employment and the burden of proof therein is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.”

23. In the present case, the Claimant went through a criminal trial and was acquitted but he was also subjected to a disciplinary process by his employer at the end of which his employment was terminated. The Court did not find anything to suggest that in handling the Claimant’s case, the Respondent violated either the obtaining employment contract or the applicable Terms and Conditions of Service.

24. Applying the balance of probability standard therefore the Court finds and holds that the Claimant did not prove his claim which is consequently dismissed with no order for costs.

25. Orders accordingly.

DATED AND SIGNED AT MALINDI THIS 6TH DAY OF DECEMBER 2018

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Mocha h/b Mr. Ocharo for the Claimant

Mr. Mbaji h/b Mr. Chege for the Respondent