



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**APPEAL NO. 7 OF 2018**

**(FORMERLY KISII CIVIL APPEAL CASE NO. 93 OF 2015)**

*(Before Hon. Justice Mathews N. Nduma)*

**BOOM A. BOSIRE.....APPELLANT**

**VERSUS**

**GUSII MWALIMU CO-OPERATIVE SAVINGS**

**AND CREDIT SOCIETY LIMITED.....RESPONDENT**

**J U D G M E N T**

1. This is an appeal from a Judgment and Decree of Hon. A. C. A Onginjo – Chief Magistrate Kisii delivered on 11<sup>th</sup> June, 2015. The Appellant who was the Plaintiff in the lower court states that –

(a) The Learned Magistrate erred in law and fact is not awarding him damages based on a derived salary of Kshs.49,930 per month from January, 2005 to date of Judgment.

(b) The Magistrate erred in not declaring letter of termination dated 20<sup>th</sup> September, 2004 null and void and holding that the Appellant's employment had been terminated; and

(c) The Learned Magistrate erred in not awarding interest on the Principal sum adjudged from the date of the suit.

2. The facts which are discernible from the Record of Appeal show that the Plaintiff was employed by the Respondent by a letter dated 24<sup>th</sup> June, 1996 as a Book Keeper with effect from 1<sup>st</sup> July, 1996. The employment was guided by the terms and conditions of service of the society produced as Exhibit P 1. By a letter dated 23<sup>rd</sup> December 1997, the Plaintiff was confirmed to the position of Assistant Senior Book Keeper.

3. The Plaintiff's salary according to the payslip produced for 2004 was as follows:-

Basic Salary Kshs.22,043

Responsibility Allowance Kshs. 1,204

House Allowance Kshs. 6,800

Medical Allowance Kshs. 4,000

Making a gross salary of Kshs.34,047

4. The Appellant contends that the court aquo erred is not finding that he was entitled and was denied a salary raise to a monthly gross salary of Kshs.49,930 from the date of confirmation to Assistant Senior Book Keeper. The Appellant prays that he be awarded the underpayments set out in his plaint and testimony before court which the learned Magistrate erroneously did not award.

5. The evidence before the lower court indicates that the Appellant was suspended from duty for working when he was supposed to be on leave on 5<sup>th</sup> April, 2004 and he remained in suspension until 4<sup>th</sup> June, 2004 when the suspension was lifted. The Letter of Suspension did

not indicate whether the Appellant was to be paid during the period of suspension or not. It was the Appellant's contention that suspension from duty was guided by clause 32.0 (F) of the terms and conditions of service of Respondent and that one could only be suspended without pay if charged with a crime, which was not the case with him. He contended that the suspension was malicious as he had been requested to sit in for an employee who was indisposed notwithstanding that he ought to have gone on leave. He had apologized to management but was reinstated and was not paid salary for the months he was in suspension which he claimed in the suit,

6. The Appellant was declared redundant and was retrenched on 20<sup>th</sup> September, 2004. The retrenchment was however to take effect three months later in December, 2004 during which period the Appellant was to remain on leave. The Appellant was paid other benefits including severance pay at the rate of one month's salary for each completed year of service. It was the Appellant's case that the retrenchment was not merited. It was actuated by malice, and was therefore unlawful, null and void.

7. The Respondent on the other hand contested all the claims and allegations by the Appellant stating that the Appellant was not entitled to any arrear payments with respect to under payments; arrear salary during the period of suspension and to a declaration that the Letter of retrenchment was null and void with the result that the Appellant be paid general damages for breach of contract of employment. The retrenchment took place two days upon reinstatement from suspension.

8. The Appellant testified that the Principle of first in last out was not followed in terms of clause 38 of the terms and conditions of service of the Respondent.

9. It was not in dispute that the terms of service applicable to the Appellant were that contained in Exhibit '4' determined by the Board on 13<sup>th</sup> December, 2002. It was also not in dispute that the Appellant who had been appointed as Book keeper in grade 6 was confirmed on a higher status of Assistant Senior Book Keeper but was not accorded a higher grade adjustment nor a higher salary from date of confirmation.

10. The Learned Magistrate correctly found that the suspension of the Appellant was wrongful and that he was entitled to unpaid salary during the period of suspension. The Learned Magistrate further correctly found that the suspension and retrenchment was clouded in bad faith and DW 1 confirmed in court that his daughter was employed to replace the Appellant subsequently. The learned Magistrate further correctly found that the management practiced nepotism and discrimination against the Appellant contrary to the provisions of the terms and conditions of service in Exhibit 4.

11. The Learned Magistrate awarded the appellant salary for the months he was on suspension; under payments from December 2002 to September 2004 and awarded the Appellant one month salary in lieu of notice.

12. The Appellant who was largely successful in his case faults not the finding of the court aquo on the merits but the remedies, the lower court granted the Appellant.

13. This court agrees with the Appellant as follows:-

14. The Learned Magistrate had no basis to award the Appellant one month salary in lieu of notice since the Respondent had placed the Appellant on three (3) months paid leave to December 2004. It is not clear whether the Appellant received salary up to December 2004. The Respondent was bound and is directed to pay to the Appellant, if it did not pay three months' salary in lieu of notice computed at the appropriate salary on the grade of Assistant Senior Book Keeper being the proper position held by the Appellant and on the basis of which he ought to have been graded and paid from date of confirmation.

15. Furthermore, and with respect to the claim for general damages, retrenchment was guided by section 40 A of the erstwhile Employment Act, which appertained at the time. The statute obliged an employer to notify the labour office of any impending retrenchment and the targeted employee at least one month prior to the date of intended retrenchment. Furthermore, the employee is enjoined by the provision to discuss the retrenchment with the employee targeted and provide the justification to the employee for the intended exercise. The letter of retrenchment simply stated that the Appellant was not qualified despite lack of evidence of any appraisal conducted; any record for prior work performance; any warning given during his tenure of employment to justify such a drastic step taken immediately after an unjustified suspension and replacement by a daughter of DW 1, management staff.

16. However, prior to promulgation of Employment Act, 2007 and going by the Decision of the Court of Appeal in **Githinji vs Mumias Sugar Co. Limited Court of Appeal, at Nairobi, civil Appeal No.194/91 EAL (1995 – 1998) IEA 68**, which is binding on this court with respect to the pre- 2007 legislation, the law did not provide for an award of General Damages with respect to a breach of contract of employment. The remedy was restricted then, to that which was provided in the contract itself and the Employment Act, that existed then.

17. In this respect, the Learned Magistrate was correct in not awarding General Damages to the Appellant.

18. Accordingly, the Appeal succeeds to the following extent and the final orders of the court are as follows:-

- a. The Appellant is to be paid by the Respondent three months salary calculated at the appropriate scale of Assistant Senior Book Keeper in lieu of notice.
- b. The Respondent to pay salary at the scale of Assistant Senior Book Keeper for the period the Appellant was under suspension.
- c. The Respondent to pay under payments set out and proved by the Appellant from the date of confirmation to the position of Assistant Senior Book Keeper to December 2004, the date the retrenchment took effect.

d. The Respondent to confirm payment of all the terminal benefits set out in the letter of retrenchment including salary to December 2004; Payment in lieu of leave for the year 2004 and severance pay calculated at one month's salary for each completed year of service. For the avoidance of doubt, the salary applicable in the computation of these terminal benefits is that applicable to the position of Assistant Senior Book Keeper to be confirmed by the Respondent within 14 days of this Judgment failing which the monthly payment of Kshs.49,930 provided by the Appellant to apply in computation of the items (a) to (d) above.

e. Respondent to pay costs of the Appeal and the trial in court below.

**Dated and Signed in Kisumu this 6th day of December, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

Bosire Gichana & Co. for Appellant

Mose Mose & Milimo Advocates for Respondent

Chrispo – Court Clerk