



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 1836 OF 2013

PETER SASAKA.....CLAIMANT

VERSUS

THE TRUSTEES OF AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

JUDGEMENT

1. The claimant averred that he joined the respondent as an accountant at its head office in April 1992. He served in designated capacities with diligence and dedication from April, 1992 until he was summarily dismissed through a letter dated 23rd May 2013.

2. According to the claimant, the termination of the claimant's employment breached the Employment Act, the principles of fairness, lawfulness and natural justice as well as the respondent's employment code. The claimant therefore sought from the court, compensation for unfair termination of services, three months' salary in lieu of notice, leave pay, travelling allowance and medical costs.

3. The respondent on its part denied that the claimant was dismissed without any reason, maliciously and unfairly. According to the respondent, several opportunities were availed to the claimant to explain, clarify and correct questions and assumptions which had been raised but the claimant chose not to respond to the same and failed to participate in any of the proceedings thereof.

4. The respondent further averred that the claimant purported to resign and tendered his resignation on 1st May 2013 in a bid to defeat the notice to showcause letter dated 25th April, 2013 calling upon him to attend disciplinary hearing on 10th May, 2013. The respondent further contended that the claimant's purported resignation was fundamentally flawed as no notice was given as required by law.

6. The respondent further pleaded that they were ready, willing and able to pay the claimants' dues subject to the same being calculated and tabulated in adherence to relevant laws, procedures and statutory deductions. Counsel in this matter both felt the documents as filed in support of their respective positions were sufficient hence they consented to the dispense with oral evidence and proceeded to file submissions.

6. Mr Nyaencha for the claimant submitted that while the claimant was a branch manager Mombasa, the CEO without cause forced his client to proceed on leave on 15th April, 2013 and while on leave, the claimant's signature was removed from those designated signatures. This according to counsel was unprocedural and a clear indication that the CEO wanted him dismissed.

7. Counsel further submitted that on 6th May, 2016 the respondent's CEO wrote to his client a letter requiring him to attend a disciplinary hearing on 10th May, 2013. The said letter accused the claimant of several offences. According to counsel after receipt of the letter, the claimant on 1st May, 2013 wrote an email communicating his resignation. The respondent however rejected the resignation hence the position as at 6th May, 2013, the claimant was still the respondent's employee.

8. Counsel further submitted that at the disciplinary hearing the respondent added additional charges which were not sent to the claimant to enable him prepare. According to Mr Nyaecha, the respondent found the claimant guilty of the new charges and proceeded to dismiss him summarily.

9. Counsel contended that there was no evidence adduced against the claimant in support of the accusations. For instance, there was no evidence of illegal connection of water to Laxmanbhai Construction Ltd. Counsel further submitted that no evidence was adduced to show the claimant was unable to perform his duties and that his client's effort to attend evening classes and better his education was not a sign of abandoning him station.

10. The respondent on his part submitted that it complied with the requirements set out in section 41 of the Employment Act. According to Mr Terer the respondent issued a proper notice vide its letter dated 25th April, 2013 leveling accusations against the claimant. The accusations were that the claimant engaged in gainful employment other than that of the respondent and misappropriation of resources.

11. The notice clearly required the claimant to showcause why disciplinary action should not be taken against him. The claimant received the notice and instead of responding he immediately chose to resign. The respondent declined to acknowledge his resignation and instead invited the claimant to appear before its disciplinary committee to hear the accusations levelled against him in the show cause letter. The claimant immediately wrote another letter confirming he was not going to appear before the disciplinary committee.

12. The foregoing, counsel submitted was evident that the claimant knew of the accusations and he also had the opportunity to respond to the allegations within the time set by the notice. The charges levelled against the claimant were proved during the disciplinary committee and had been confirmed by witness statements from the claimant's former secretary and his former driver.

13. Based on the foregoing, counsel submitted that the court ought to find that the termination of claimant's services was fair and that he was not entitled to damages. It is common ground that the claimant herein was issued with a show cause letter dated 25th April, 2013 which set out the accusations against him. He was required to show cause within 48 hours why appropriate disciplinary action should not be taken against him for gross misconduct.

14. The claimant instead of showing cause tendered his resignation via email dated 1st May, 2013. The email made no reference whatsoever to the show cause letter of 25th April, 2013. By a letter dated 6th May, 2013 the respondent wrote back to the claimant informing him that his resignation had been declined and that the disciplinary hearing would proceed as per the show cause letter of 26th April, 2013 and that his attendance was required.

15. The claimant through his letter dated 8th May, 2013 responded to the above letter reiterating that he had resigned from the respondent as an employer and requested that his terminal benefits be worked out and paid to him. He therefore stated the disciplinary hearing was not applicable to him and he would not attend. The respondent nonetheless continued with the disciplinary hearing as scheduled and at the conclusion thereof resolved to dismiss the claimant.

16. A party to a contract of employment may terminate the same in accordance with the contract itself or in breach thereof. In the event of a termination in breach of the contract and or employment legislation the party aggrieved can sue for remedies provided under the contract itself and legislation. The

claimant's contract of employment dated 23rd March, 1992 provided that after successful completion of probationary period and in absence of breach either party shall give the other 3 months' notice or three month's salary in lieu.

17. The Claimant herein tendered his resignation by a letter dated 1st May, 2013 to take effect the next day. This was obviously shorter than the period stipulated in his employment contract. The claimant however in subsequent correspondence with the respondent made it clear that he had resigned and was no longer bound to attend the scheduled disciplinary meeting.

18. Where an employee commits a repudiatory breach of contract, the contract is terminated once an employer as the innocent party, has accepted the breach. But the employment contract being a contract for personal services on the part of the employee, an employer cannot decline a decision by an employee to separate from his contract of employment. The employer has the right to accept the repudiation and sue for damages under the contract and employment legislation.

19. In this particular case, when the claimant decided to resign instead of appearing before the disciplinary committee and left no doubt that he was no longer bound by the employment contract, the respondent did not have to proceed with the disciplinary hearing. The respondent could have accepted the repudiation of the contract and pursued the claimant for damages and any other obligations under the contract or loss occasioned by the claimant during the existence of the contract.

20. In the circumstances the court finds that the claimant having terminated his contract of employment contrary to the stipulated provisions, cannot be heard to claim any compensation for unfair termination of his services. The respondent having settled his dues upon termination, the claim is therefore found without merit and is hereby dismissed with costs.

21. It is so ordered.

Dated at Nairobi this 3rd day of February 2017

Abuodha Jorum Nelson

Judge

Delivered this 3rd day of February 2017

Abuodha Jorum Nelson

Judge

In the presence of:-

.....**for Claimant**

.....**for Respondent**

Abuodha Jorum Nelson

Judge