



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 155 OF 2016

(BEFORE D. K. N. MARETE)

HENRY N. NYABOGA.....CLAIMANT

VERSUS

KENYA FARMERS ASSOCIATION LIMITED....RESPONDENT

JUDGEMENT

This matter was brought to court vide a Memorandum of Claim dated 4th November, 2016. It does not disclose on issue in dispute on its face.

The respondent in a Respondent's statement of Defence dated 28th November, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was employed by the Respondent as a General Clerk II in 1989. He was unfairly terminated on 27th January, 2016 after 27 years stint of service and rising to the position of General Manager. His last gross salary was Kshs.47,890.90.

The claimant's other case is that he was unfairly/prematurely and suddenly suspended/terminated without any valid and fair reason or notice before he attained the retirement age of 60 and has since not obtained any other employment.

The claimant further avers that he was unfairly terminated on 27th January, 2016 without notice, valid reason or pay. He contends that this termination is invalid, unfair, demeaning, illegal, embarrassing and punitive and untenable in a civilized society.

The claimant's other case is that he is aged 53 and is not likely to secure any employment in the absence of a certificate of service. He claims loss of future earnings to the retirement age.

It is his further case that the respondent's action violates the Employment Act, Section 35, 41, 44, 45, 49 and 51. This was unlawful, unwarranted and threatens the employment rights and fundamental freedoms of workers and denies them their right to earn a living. It is also discriminative and violates the rights of the claimant contrary to the constitution of Kenya.

He prays as follows;

a. Compensation under Section 49 (c)

Gross Salary x 12 months – 47,890.90 x 12 =574,690.80=

b. Leave days not taken for 7 years (47,890.90 x 7) =335,236.30=

c. ½ month's salary not paid for the period of suspension

(Kshs.23,945.45 x 12) = 287,345.40=

d. One months Gross Salary in lieu of notice = 47,890.90=

e. Propective/future earnings till retirement

(Kshs.47,890.90 x 12 x 7yrs) =4,022,835.60=

f. Unpaid leave travelling allowance for 12 years

(Kshs. 5,681.90 x 12) = 68,182.80=

g. Unpaid salary while on leave

(January 2014 to January 2016) = 574,690.80=

h. Unpaid ½ salary while on suspension as per the

suspension letter for 9 months = 431, 018.10=

i. Balance K.F.A SACCO) = 36,100.00=

j. Unpaid salary arrears while in Molo Branch = 129,581.00=

(As confirmed by letter from Kisii Branch Manager R. Sirma

to Ag. Chief Accountant – Ref: 4300/AKS/CA/10/06 of 1/7/2006)

TOTAL = 6,507,571.70=

i. Statutory deductions not remitted (N.S.S.F and N.H.I.F)

ii. A Certificate of Service as per Section 51 of the Employment Act.

iii. Costs and interest.

The respondent forments a case of lawful termination of the employment of the claimant and denies liability *in toto*.

It is her further case that on termination the claimant was paid two months salary in lieu of notice and this was utilized in offsetting monies owing to the respondent by the claimant.

In the penultimate the respondent avers that she issued to the claimant a 14 day's notice to explain the shortage and show cause why action should not be taken against him.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?

2. Whether the claimant is entitled to the relief sought?

3. Who bears the costs of this claim.

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in her written submissions reiterates his claim and submits that he was not awarded an opportunity to be heard before termination. There was no procedural or substantive fairness followed in his termination.

6.1 ... *Article 47 (1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedural.*

6.2 *The duty to exercise the power in a fair manner has been recognized to be necessary in the exercise of administrative discretion.*

6.3 ... *we submit that the Employer should not make whimsical, unreasonable, arbitrary decision after an unreasonably long period of time and if he does, the court should step in to remedy the situation.*

6.4 ...*once the Employer fails to follow due process, within a reasonable time, and fails to consider the Employees presentations, the termination becomes substantively and procedurally unfair and the court would not hesitate to declare it unfair and unlawful.*

6.5. ...*the Claimant has demonstrated and proved that there was no procedural and substantive fairness followed before the termination.*

6.6 *The Claimant has demonstrated that during the suspension period, he was never paid his salary nor the 50% salary as per the letter of suspension.*

6.7 *The Claimant has also demonstrated that he was subjected to inhuman conditions for more than Two (2) years without salary and mentally tortured before a decision to terminate his services.*

6.8 *Your Lordship, the Claimant was by law entitled to expeditious, efficient, timely, reasonable, procedural administrative action. We submit that the Respondent miserably failed to discharge its legal duty.*

The respondent in her written submissions filed on 14th March, 2017 reiterates her case and also brings out new issues of dishonesty in the part of the claimant leading to a loss of Kshs.1,829,590.00.

Overall, the claimant's case overwhelms that of the respondent. The claimant ably institutes a case of unlawful termination of employment made worse by the absence of a hearing or disciplinary process leading to the said termination. The respondent fails to rebut this in defence. She does not produce any evidence or minutes of disciplinary proceedings undertaken in the course of termination of the employment of the claimant. The matter tilts in favour of the claimant's case. I therefore find a case of wrongful, unfair and unlawful termination of the employment of the claimant by the respondent and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether claimant is entitled to the relief sought. He is. Having won on the issue of unlawful termination of employment, the claimant is entitled to the relief sought. I am therefore inclined to allow the relief as follows;

i. Eight (8) month's salary for unlawful termination of

employment Kshs.47,890.90 x 8 months =Kshs. 383,127.20

ii. Leave days not taken for 7 years

$$= \text{Kshs.}47,890.90 \times 7 \text{ years} = \text{Kshs.}335,236.30$$

iii. Half salary not paid for the period of suspension

$$= \text{Kshs.}23945.45 \times 12 \text{ months} = \text{Kshs.}287,345.40$$

iv. One month salary in lieu of notice = Kshs.47,890.90

v. Unpaid half salary while on suspension as per the suspension letter for 9 months
=Kshs.431,018.10

TOTAL =Kshs. 1,484,617,90

vi. The respondent be and is hereby ordered to issue a certificate of service to the claimant within 30 days of the judgement of court.

vii. The cost of this claim shall be borne by the respondent.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Oumo Instructed Oumo & Company Advocates for the Claimant.
2. Mr. Obutu Instructed by S.M. Omae & Company Advocates for the Respondent.