



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 20 'A' OF 2013

(Before Hon. Lady Justice Maureen Onyango)

JOHNSON ODUOR ONYANGO.....CLAIMANT

-Versus-

MASENO WEST SACCO SOCIETY.....RESPONDENT

JUDGMENT

By Memorandum of Claim dated 12th February 2013 the Claimant avers that he was employed by the Respondent, a registered savings and credit cooperative for workers of the Diocese of Maseno West (ACK). He joined the employment of the Respondent on 5th February 1996 as book-keeper and rose through the ranks to the position of Manager. The claimant's employment was terminated by way of summary dismissal on 7th October 2008. He initially filed a complaint at the Cooperative Tribunal at Kisumu being KISUMU COOPERATIVE TRIBUNAL CASE NO. 16 OF 2009 which was withdrawn before the Claimant filed this suit.

It is the Claimant's contention that the dismissal was in contravention of the provisions of the Employment Act as he was not given an opportunity to respond to the charged levelled against him. He prays for the following remedies-

- (a) Unpaid salary for the month of October 2008
- (b) Severance pay for the years worked
- (c) 3 months' salary in lieu of notice
- (d) Costs of this suit with interest thereon at court rates
- (e) Any other relief the court deems fit to grant

The Respondent filed a Memorandum of Defence dated 19th June 2013 in which it denies the averments in the memorandum of Claim and states that the Claimant was lawfully dismissed from the Respondent's employment in accordance with the Employment Act. The Respondent further denies owing the Claimant the sums claimed and state that the prayers are baseless and without merit.

The case was by consent of parties argued by way of written submissions.

Claimant's Submissions

In the Claimant's submissions he states that the statutory burden of in employment cases is provided for under section 47(5) as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The Claimant submitted the decision to dismiss him was an administrative decision subject to Article 47 of the Constitution. That the decision further constituted unfair labour practice contrary to Article 41 of the Constitution.

The Claimant relied on the decision in **Shankar Saklaniv DHL Global Forwarding(K)** [2012] eKLR where Ongaya J stated that -

The Constitution in Article 10 clearly states that the national values and principles of governance apply to all persons and the principles and values include human rights. Thus, in the instant case, the Respondent was bound to accord the Claimant the right to fair administrative action through observation of the rules of natural justice and as expressly envisaged in section 45(5) of the Act."

The Claimant further relied on the case of **Walter Ogal Anuro v Teachers Service Commission[2013]eKLR** in which the court held that for termination of employment to pass the fairness test there must be both substantive justification and procedural fairness.

It was submitted that in the claimant's case the Respondent did not show a substantive reason for summarily dismissing the Claimant nor accord him justice and equity.

Respondent's Submissions

For the Respondents it was submitted that under section 44 of the Employment Act the respondent has powers to dismiss on grounds set out therein. It was submitted that in the letter of dismissal the Respondent spelt out 7 grounds of dismissal which were failure to guide the society professionally as shown by both the credit committee and supervisory committee reports. It is submitted that the Claimant was heavily reprimanded in the two reports that have been appended to the Respondent's list of documents. It is submitted that the Impromptu Inspection Report observed that the claimant's professionalism was totally wanting and that he did not observe basic book keeping practices.

It is submitted that from the entire assessment of the Claimant's performance, it is clearly shown that he acted in breach of section 44(4) of the Employment Act by wilfully neglecting to perform his duty or he performed his duties carelessly and improperly.

It is submitted that before dismissing the Claimant he was served with various warning letters on 28/7/2005, 24/2/2006 and 19/9/2008 but the Claimant failed to make amends, that besides the warning letters he was given opportunities to correct his negligent and careless handling of his work.

The Respondent submits that the Claimant is not entitled to the reliefs sought, the Respondent having satisfied the conditions precedent to dismissal of an employee.

Determination

I have considered the evidence submitted to court through the pleadings and submissions filed by the parties. The issues for the court to determine are whether the summary dismissal of the claimant's was fair and whether the Claimant is entitled to the remedies sought.

In determining fair dismissal the twin issues to be considered by the Court are whether the Respondent had a valid reason for terminating the Claimant's employment and whether the procedure adopted by the

Respondent to effect the termination was lawful.

Section 43 of the Employment Act, 2007 provides that:

(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.

Section 45 (2) of the Act goes on to provide that:

(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 employees conduct, capacity or compatibility;or

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

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

Conclusion

having found that the suspension was unconstitutional and unlawful and that the circumstances leading to the suspension cannot pass the test of justice and equity, it is my finding that the Claimant has shown that the Respondents were proceeding in a manner that is in contravention of the Constitution and the Employment Act, and further that the manner in which the Respondents have handled the Claimant is manifestly unfair.

For these reasons I declare the suspension unlawful and unconstitutional. I therefore lift the suspension and order the Respondents to immediately reinstate the Claimant back to work as the Chief Executive Officer of Lake Victoria North Water Services Board. The Respondents are further restrained from taking any further disciplinary action against the Claimant on the grounds contained in the Notice to show Cause letter dated 19th August 2016 and the Suspension letter dated 13th January 2017.

In view of the nature of orders made and the relationship between the Claimant and the Respondents, I order that each party shall bear its costs of this suit.

Orders accordingly.

Dated, Signed and Delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE