



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 1 OF 2016

(BEFORE D. K. N. MARETE)

CHARLES KIPNG'ENO KETER.....CLAIMANT

VERSUS

KIMBILIO DAIMA SACCO SOCIETY LTD.....RESPONDENT

JUDGEMENT

This matter came to court vide a Statement of Claim dated 5th January, 2016. It does not disclose any issue in dispute on its face.

The respondent in a Reply to Statement of Claim dated 4th February, 2016 denies the claim and prays that it be dismissed with costs.

The claimant's case is that at all material times relevant to this suit she was a permanent employee of the respondent having been employed on 11th November, 1989 at a salary of Kshs.20,038.00. It is his averment that this employment relationship is still subsisting.

It is the claimant's further case that at the behest of respondent criminal charges were preferred against him but this was dismissed on 30th October, 2015 for lack of evidence.

It is her other case that the respondent unlawfully suspended her employment service thus occasioning loss and damages and therefore seeks reinstatement without loss of benefits. He also seeks payment of salary for the month of January, 2002 to the date of filing this cause and also salary arrears calculated at that rate taking into account the government guidelines on the salary payable for such cadre and applicable salary increments for all the years.

The claimant's further case is a denial of breach of obligations of the employment contract or involvement in gross misconduct thereby occasioning dismissal. It is his further averment that the reason for termination was unjustifiable and the entire process tainted with illegality as he had worked diligently and maintained a blemish free service with the respondent. He was also not given a proper opportunity to express himself on his accusations to the respondent.

The claimant in support of his case chose to rely on the claimant's statement dated 19th October, 2017 in which he reiterates his case. He further enlists the following documents as annexures to the claim in such support;

1. Identification Card No.20205446 issued in his favour.
2. Letter of employment by Chepsol Rural Sacco Limited dated 11th February, 1999.
3. Demand Letter dated 28th November, 2015.
4. Copy of judgement in the Principal Magistrates Cr. Cause No.234 of 2005 Gilbert Korir and 6 others. In which the claimant was the 5th accused person.

He prays as follows;

- a. *A declaration that the Respondent's dismissal of the claimant from her employment was unfair and unlawful hence null and void.*
- b. *The Respondent pay the claimant loss of remuneration calculated at the current rate of the claimant's remuneration per month to be paid between April 2011 until the date of reinstatement of employment.*

IN THE ALTERNATIVE

- c. *Outstanding salary from April 2011 to date.*
- d. *3 months salary in lieu of Notice.*
- e. *Maximum compensation of 12 months salary for wrongful/unfair dismissal.*
- f. *Costs of this claim together with interest at court rates of (c), (d) and (e) above.*
- g. *Any further relief that this Honorable Court may deem fit and just to grant.*

The respondent's case is one of denial of the claim. It is her further averment that the suit herein is a vexatious, frivolous and in any case not only an abuse of the process of court but a waste of judicial time since the same is time barred. She would at the first instance of the hearing of the case raise a preliminary objection to this extent.

The respondent further case is a denial that the claimant earned Kshs.12,038.00 and further avers that the claimant was dismissed on reasonable belief and grounds to suspect that he was engaged in fraudulent activities at the work place which suspicions were confirmed by the claimant's admission in a letter dated 7th March, 2002 accepting such engagement in fraud. This was thereafter reported to the relevant authorities who upon investigations charged the claimant in Sotik Cr. Case No.34 of 2002.

The respondent also denies a case of unlawful termination of employment. It is her case that the claimant absconded duty with effect from 14th February, 2002 and has never returned to work to date. He was summoned to return to work on 18th February, 2002 but still ignored, neglected and or willfully refused to turn up.

It is the respondent's penultimate case that the claimant's termination of employment on 6th March, 2002 was lawful in that he was given ample time (more than enough chances) to present his case before the employer but totally ignored. This is presented as follows;

9. The prayer of reinstatement as sought in paragraph 5 is untenable and cannot stand. The Claimant was given more than enough chances to air his grievances but he totally ignored and willfully neglected to present his claim at the Sacco. Due to his willful and reluctant nature, his employment was rightfully and lawfully terminated on 6th March 2002 and a letter to that effect issued to him. Annexed hereto and marked "KDS 4" is a copy of the termination letter.

Equity aids the vigilant and not the indolent; as such the Claimant cannot claim that he was dismissed unheard.

10. ...Further that the Respondent paid all the Claimant's dues when it terminated his services and even went ahead to summon him further after he had been terminated to present himself and claim any monies that he would be claimed. He never presented himself. Annexed hereto and marked "KDS 5" is a copy of the further summon dated 25th March 2002.

11. The respondent denies verbatim the contents of paragraph 7 of the Statement of Claim and avers that its business is delicate and every suspicious activity by any of its employees likely to culminate into a criminal case, as the Claimant's qualifies to be described as gross misconduct. The claimant himself confessed vide his letter to have committed the fraud.

This matter was on 19th July, 2016 consolidated with ELRC Cause Nos. 2/2016, 3/2016, 4/2016 and 6 of 2016.

The matter came to court variously until 11th October, 2017 when the parties agreed on a filing of their witness statements and thereafter a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant 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 was wrongful, unfair and unlawful. The claimant in his written submissions dated 5th December, 2017 reiterates his case and reinforces this by a reliance on section 41 (1) and (2), 43 (1) and 45 (1) and (2) of the Employment Act, 2007 as follows;

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) *Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

Again, section 43 (1) provides as follows;

43.(1) *In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

Lastly, section 45 (1) is as follows;

45.(1) *No employer shall terminate the employment of an employee unfairly.*

(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

The claimant further seeks to buttress his case by relying on the authority of **Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR**, where the court held that;

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

Further, in **Nicholus Muasya Kyula vs FarmChem Limited Industrial cause no. 1992 of 2011; (2012)ELR 235 (ICK)** where the court held that;

“ It is not sufficient for the employer to make allegation of misconduct against the employee. The employer is required to have internal system and process of undertaking administrative investigation and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

The claimant therefore faults his termination of employment for lack of substantive and procedural requirements as provided by sections 41 (1) and (2) and 43 (1) of the Employment Act, 2007 aforesaid. It is his case and submission that no proof of reasons for termination was issued or that the termination was valid, for fair reason and in accordance with fair procedure as provided by section 45 (1) and (2) of the Act. Moreover, the claimant was not afforded a hearing before termination thereby rendering such termination unfair and unlawful.

The respondent submits a case of lawful termination of employment arising out of the claimant's gross misconduct at the work place. She sums her case as follows;

6. *The Respondent on the other hand also states that the genesis of the dispute herein was the implication of the Claimant in fraudulent activities against the Respondent, which allegations he personally admitted in his letter dated 7th March, 2002 (See Annexure Marked, “KDS 1 to the Reply to Memorandum of Claim” leading to his prosecution in Sotik Criminal Case No. 34 of 2002.*

7. *That upon being implicated in the said fraudulent acts the Claimant absconded from work as from 14th February, 2002 as is evident from the annexure marked, “KDS 2” to the Reply to Memorandum of Claim being an extract from the relevant Muster Roll and was called upon to attend a disciplinary hearing on 19th February, 2002 when his representations were heard and a decision taken to terminate his services. See a copy of the summons dated 18th February, 2002 addressed to the Claimant attached to the Respondent's list and bundle of documents filed on 11th February, 2016).*

8. *The decision to terminate his services was subsequently communicated to him vide the letter dated 20th February, 2002 (See a copy of the Dismissal Letter dated 6th March, 2002, addressed to the Claimant; attached to the Respondent's list and bundle of documents filed on 11th February, 2016). The Claimant later surrendered to the police sometime in April, 2002 upon which he was charged and prosecuted, alongside others, in the aforesaid case.*

9. *In the premise, the Respondent avers that the Claimant's allegations that he was wrongfully and/or unlawfully dismissed from employment cannot therefore lie.*

It is the respondent's penultimate submission that the conduct of fraudulent activity by the claimant amounted to gross misconduct and fell within the ambit of section 44 (4) paragraph (g) which provides as follows;

...an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

The respondent elaborately pursues and submits a case of time bar as pleaded in his Notice of Preliminary Objection dated 4th February, 2016. I, however, must add that this is premature, coming at this time of these proceedings. Of necessity, the preliminary objection should have been raised and prosecuted at the onset of this suit. It is not sustainable and cannot be sneaked in at this time and space, it's tenacity notwithstanding.

In all, the claimant falls short of proof of a case of unlawful termination of employment. He begins and ends with a mere expression of a case of unlawful termination but does not move on to adduce evidence in support of her case. The mere acquittal in the criminal prosecution against her and others in Sotik PM Cr. Case No.34 of 2002 is not in itself evidence of his claim. He should have adduced evidence in rebuttal of the issues of fraud submitted by the respondent.

The claimant does not adduce any evidence of lack procedural fairness. He does not rebut the claimant's evidence of lack of pursuit of the various overtures to pursue his case by the respondent. This brings out a weak case on his part. On a preponderance of evidence, the matter tilts in favour of the respondent.

Overall, the claimant in his prosecution and presentation of this case does not discharge his burden of proof as enunciated by section 47 (5) of the Employment Act, 2007 as follows;

47 (5) of the Employment Act which states that;-

“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”

He does not in any way assuage a case of summary dismissal resultant from fraudulent activity which resulted in gross misconduct on her part.

It was always the onus of the claimant to establish and proof unfair termination of employment. This is not in the least done. The prosecution of his matter bears testimony to this. I therefore find a case of lawful termination of employment and hold as such.

On a finding of a lawful termination of the employment of the claimant, he becomes disentitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with orders that each party bears its own cost of the claim. And this clears all the issues for determination.

Delivered, dated and signed this 15th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss. Chelimo instructed by E.M. Orina & Company Advooates for the claimant.

2. Mr.Mwita instructed by Bett & Company Advocates for the respondent.