



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 5 OF 2016

(Before D. K. N. Marete)

WINNY CHEMUTAI BII.....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 does not file any defence or at all. None is available on record.

The claimant's case is that at all material times relevant to this suit she was an employee of the respondent having been employed on 8th February, 2001. As at 20th April, 2011 she earned a salary of Kshs.14,405.00.

It is the claimant's further case that at the behest of respondent criminal charges were preferred against her 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. She also seeks payment of salary for the month of April, 2011 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 her further averment that the reason for termination was unjustifiable and the entire process tainted with illegality as she had worked diligently and maintained a blemish free service with the respondent. She was also not given a proper opportunity to express herself on her accusations to the respondent.

She 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.

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 1st December, 2017 when the parties agreed on 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 the circumstances did not file any written submissions. This is despite an open opportunity and space so to do. She chose to rely on the claimant's statement dated 19th October, 2017 in which she reiterates her case. She further enlists the following documents as annextures to the claim in such support;

1. Identification Card No.200363997 issued in her favour.
2. Letter of appointment by Chepsol Rural Sacco Limited dated 8th February, 2001.
3. Letter of salary adjustments dated 22nd December, 2008.
4. A letter of suspension from duty dated 20th April, 2011.
5. Demand Letter dated 20th November, 2015.
6. Copy of judgement in the Principal Magistrates Cr. Cause No.234 of 2005 Gilbert Korir and 6 others. In which the claimant was the 7th accused person.

The respondent in their written submissions dated 4th December, 2017 brings out a case of lawful termination of employment. She opens 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 over which she was prosecuted in Sotik Criminal Case No. 32 of 2002. Incidentally the Claimant was suspended without pay pending the hearing and determination of the said case a decision that was

communicated to her well in advance.

It is the respondent's further submission that as a consequence of fraudulent activity leading to the claimant's prosecution in Sotik Criminal Case No. 34 of 2002, the respondent, being a financial institution was obligated to take reasonable steps to avert loss of depositors/shareholders funds. She further puts it as follows;

9. Offences such as the one the Claimant was implicated in herein are clearly anticipated by the provisions of section 44(4) of the Employment Act which terms them as acts of gross misconduct warranting summary dismissal. Section 44(4) paragraph (9) provides:

...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.

10. In view of the reasonable suspicion that the Claimant had committed an act of gross misconduct, a decision was taken to suspend the Claimant without pay pending the hearing and determination of the said case which was communicated to her well in advance. In the premise her allegations of wrongful termination are clearly unfounded.

The respondent elaborately pursues and submits a case of time bar as pleaded in her 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. She 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 her claim. She 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. She does not rebut the claimant's evidence of lack of pursuit of the various invitations to pursue her case by the respondent. This brings out a weak case on her part. On a preponderance of evidence, the matter tilts in favour of the respondent.

Further, the claimant in her prosecution and presentation of this case does not discharge her 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"

She 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 duty of the claimant to establish and proof unfair termination of employment. This is not in the least done. The prosecution of her 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 11th 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.