



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 611 OF 2012
MULEKA LUKE KIZITO OJIAMBO.....CLAIMANT

Versus

THE MUSIC COPY RIGHT SOCIETY OF KENYA.....RESPONDENT

Mr. Asiyo for Claimant

JUDGMENT

1. The suit was commenced by way of Statement of Claim filed on 13th April, 2012. The Claimant seeks compensation for unlawful and unfair termination of employment on 27th January, 2010.
2. The Claimant further seeks payment of terminal benefits set out in the Statement of Claim as follows:
 - a. one month salary in lieu of notice in the sum of Kshs.72,000.00,
 - b. unpaid salary in the months of November and December, 2009 and January, 2010 in the sum of Ksh.216,000.00
 - c. unpaid leave for one month in the sum of Kshs.72,000.00

Facts of the Claim

3. The Claimant was employed by the Respondent as an Assistant Accountant on or about the month of October, 2001. The Claimant worked continuously and diligently and was on 12th February, 2008 promoted to an Accountant earning a salary of Kshs.48,000.00 per month.
4. The terms and conditions of service were set out in a document signed by the Claimant on 18th March, 2008 and produced as evidence before court.
5. The Claimant's salary was reviewed by a letter dated 11th August, 2009 to Ksh.72,000.00 per month. The letter is marked annex 'M6' to the Statement of Claim.
6. The Claimant's employment was terminated by the Respondent vide a letter of termination dated 27th January, 2010 marked annex 'M5' to the Statement of Claim. The termination letter was with

effect from 231st January, 2010.

7. The reason for the termination as contained in the letter of termination was that the Claimant was arrested for a cognizable offence punishable by imprisonment and was not released on bail or bond or otherwise lawfully set free within fourteen days.
8. That the Claimant was suspected on reasonable and sufficient grounds of having committed a criminal offence against or to the substantial detriment of the employer, the Respondent herein.
9. That the Claimant failed to sufficiently defend himself before the Management Disciplinary Committee sitting on 25th and 27th January, 2010.
10. In his testimony before court the Claimant denies having committed any offence. The Claimant produced a Judgment of the Chief Magistrate, Mr. P.N. Ndunga delivered on 6th April, 2011 in which the Learned Magistrate found,

“After evaluating all the evidence and submissions on record, I find that the evidence on record is not in support of the offence of stealing by servant as charged I accordingly find the accused not guilty of the offence as charged and I hereby acquit him under Section 215 of the Criminal Procedure Code.”

11. The court is aware that the burden of proof in a criminal trial is beyond reasonable doubt whereas the burden of proof in a disciplinary hearing and in a civil suit like the one before this court is on a balance of probability.
12. The Claimant has adduced evidence tending to show that he was not guilty of the offence of stealing by servant as against the employer, the Respondent herein.
13. The Respondent was served with the Statement of Claim accompanied by summons to enter appearance and file a Statement of Response to the Claim. The said documents are part of the record and an affidavit of service sworn by the Process Server Mr. Kenneth O. Oduor on 4th May, 2012 and filed on 5th June, 2012 was produced before court.
14. The court is satisfied that the Respondent was properly served on 20th April, 2012, with notice of summons on the General Manager of the Respondent, Mr. Maurice Okoth who was known to the Process Server at the time of service.
15. That the Respondent failed to enter appearance nor file any statement of response to the claim.
16. The matter proceeded to formal proof on 11th May, 2015.
17. The court is satisfied that the Claimant has proved on a balance of probabilities that he did not commit the alleged offence of theft by servant as alleged or at all.
18. The court is further satisfied that the Respondent had no justifiable reason to terminate the employment of the Claimant. The termination of employment of the claimant by the Respondent was therefore unlawful and unfair and therefore in violation of Section 45(1) as read with 45(2) (a) and (c) of the Employment Act, 2007.
19. The Claimant is therefore entitled to compensation in terms of Section 49(1)(c) as read with Section 49(4) of the Act.
20. The Claimant has also proved that he was entitled and the court was not paid the terminal benefits set out in the Statement of Claim and the court awards the Claimant accordingly.
21. With respect to the claim for compensation, the court considers that the Claimant had served the

Respondent diligently for a period of about 9 years. The Claimant had received promotion and salary increment regularly and his career growth was curtailed unlawfully and unfairly. The Claimant lost means of earning a livelihood and suffered loss and damage.

22.The Claimant suffered diminished reputation by fact of wrongful charges before the Chief Magistrate's Court at the behest of the Respondent for alleged theft by servant. The Claimant was found not guilty for the alleged offence. The Claimant suffered further loss and pain in this respect.

23.The court awards the Claimant the equivalent of nine (9) months' salary as compensation for the unlawful and unfair termination of employment in the sum of Ksh.638,000.00 (72,000 x 9).

24.In the final analysis, the final award to the Claimant as against the Respondent is as follows;

- i. Kshs.638,000.00 Compensation
- ii. Kshs.72,000.00 Notice pay
- iii. Kshs.216,000.00 Unpaid salary for November and December 2009 and January, 2010; and
- iv. Kshs.72,000.00 in lieu of one month unpaid leave.

Total Award is Kshs.998,000.00

25.The award is payable with interest at court rates from the date of filing this suit till payment in full.

26.The Respondent is to pay the costs of the suit.

Dated and delivered in Nairobi this 15th day of January 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE