



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 66 OF 2014

STEPHEN KAMAU NJOROGE..... CLAIMANT

VERSUS

MURANG'A FARMERS CO-OPERATIVE UNION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 13th May, 2016)

JUDGMENT

The claimant filed the statement of claim on 4.06.2014 through J.N. Mbuthia & Company Advocate. The claimant prayed for judgment against the respondent for:

- a. Kshs. 661, 809.21 being salary arrears Kshs. 454, 449.21, half salary for April 2013 Kshs. 5,600.00, 12 months' salaries for compensation for unfair termination Kshs. 134, 400.00, unremitted NSSF Kshs. 44, 960.00, and one month salary in lieu of notice Kshs. 11, 200.00.
- b. The costs of the claim.
- c. Any further or better relief the court may find just.

The respondent filed the statement of defence and counterclaim on 03.07.2014 through Kirubi, Mwangi Ben & Company Advocates. The respondent prayed for:

- a. Refund of Kshs. 184, 347.50 by way of shortage.
- b. Costs of the counterclaim.
- c. Any other or better relief the honourable court may deem fit to grant.

The reply to defence and defence to counterclaim was filed on 11.07.2014. The claimant prayed that the counterclaim be dismissed with costs.

On 31.03.2016 the respondent filed a notice of change of advocates to Macharia Gakaria & Associates Advocates but there is no evidence that that notice was served. The respondent's earlier Advocates had ceased to act by the notice of withdrawal from acting filed on 28.10.2015. Thus, the respondent was served in person for the hearing of 17.03.2016 and the hearing proceeded ex-parte.

The claimant was employed by the respondent on 01.10.1994 and at the material time he was deployed at one of the respondent's agro-vet stores and front office services at Kahuro, as a general clerk. The claimant received on 28.05.2013 a notice of termination of his employment dated the same date and alleging that the claimant had been found in serious breach of discipline including theft by servant and falsification of respondent's documents. Thus it was resolved that the claimant be dismissed for gross misconduct and he be surcharged Kshs.184, 347.50 which the claimant had failed to account for as per the audit report of 18.05.2013. The claimant admitted that the internal audit report implicated him but he

denied liability as implicated. It was his testimony that there were two other persons deployed to work with him at the store and when he was away the other two clerks took charge. He saw the audit report for the first time in court and therefore, he had no opportunity to be heard about that report and to defend himself accordingly. He testified that he had not taken the money as alleged and as claimed for in the counterclaim. The salary arrears were as per further list of documents where he was no. 33 on the list and the arrears were as per the list issued by the respondent. He claimed Kshs. 454, 449.00. Further, in April 2013 while on suspension he was paid half salary and he claimed the outstanding pay of Kshs.5, 600.00. He filed his NSSF statement showing there had been no remissions yet he had been deducted the relevant deductions for 88 months making Kshs. 44, 960.00 as claimed. He claimed one month pay of Kshs. 11, 200.00 in lieu of the termination notice.

The court has considered the evidence, the pleadings and the submissions on record. In absence of any other material, the court finds that the claimant has established his case as claimed and as prayed for. The evidence is that the claimant was not given a notice and a hearing before termination as envisaged under section 41 of the Employment Act, 2007 and the court finds that the termination was unfair. The claimant did not contribute to his termination and even in view of the (but not established) surcharge the court considers that if that liability had been established then a surcharge for the shortages would have been sufficient punishment. The claimant had also served the respondent for a long time and in view of the arrears, the court finds the 12 months' salaries for compensation for unfair termination will meet ends of justice. There was no hearing to establish the claimant's liability as claimed in the counterclaim and the court returns that the counterclaim will fail.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a. The respondent to pay the claimant Kshs. 661, 809.21 by 01.08.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- b. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 13th May, 2016.

BYRAM ONGAYA

JUDGE