



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1911 OF 2011

(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 28TH JUNE, 2016)

THOMAS BABU MWANIKI.....CLAIMANT

VERSUS

NASSEFU CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED...RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant filed his Statement of Claim dated 28th October 2011 in Court on the 14th November, 2011 through Kimondo Mubea & Company Advocates. In his claim, the Claimant prayed for, inter alia:

- a. *A declaration that the Claimant’s summary dismissal from the Respondent’s employment was wrongful;*
- b. *A sum of Kshs. 323,092.50 on account of unpaid salaries and allowances net of liabilities due to the Respondent.*

Particularly:

*Unpaid Salary and allowance for the period between July and October 2007:
351,450.00*

Payment in lieu of notice: 87,862.50

Payment of earned leave: 157,855.50

Less liabilities’:

Loan balance 149,067.00

Fosa advance 125,008.00 (274,075.00)

NET CLAIM 323,092.50

- c. **General damages for unlawful termination/dismissal and consequential loss of employment as pleases therein.**
- d. **Costs of the suit.**
- e. **Interest on (b) (c) and (d) above at court rates.**
- f. **Such other and/or further relief as this Honorable Court may deem fit and just to grant.**

Facts of the matter

2. The Claimant was employed by the Respondent as a Manager on the 2nd January 1999 and was later designated to the post of General Manager. On or about the 9th of July 2007, the Claimant was suspended from employment on allegations of fraud and theft. He claims that prior to his suspension, on or about the 15th of November 2006, he had made a report to the Respondent regarding suspected fraud to Respondent's treasurer.

3. The Claimant states that after his suspension, he was issued with a letter dated 12th October 2007, where he was asked to show cause why action should not be taken against him because of the various incidences of fraud found within the organization. He responded to the letter via one dated 20th October 2007, where he asked for a report on the investigation into the fraud so as to note where he had been mentioned and how he would therefore respond.

4. The Claimant stated that he was dismissed via a letter dated 5th November 2007, which backdated the effective letter of dismissal to 1st November 2007, which action he claims was illegal, malicious, and was actuated by other ulterior motives. He further states that the Respondent did not have any evidence against him nor did he adhere to the terms and conditions regulating the Claimant's employment with the Respondent.

5. The Claimant states that pursuant to the wrongful and unlawful suspension and subsequent dismissal of his employment by the Respondent he has been denied his salary and benefits which have remained unpaid, his payment in lieu of notice, payment for earned leave and other compensation or dues that were lawfully due.

6. The Claimant in his submission states that the Respondent did not follow the grounds within which an employee can be summarily dismissed. They state that the Respondent acted contrary to Section 44 (4) of the Employment Act 2007 as well as paragraph 5 (c) of their own terms and conditions of service.

7. The Claimant's terms and conditions of service provide summary dismissal only when:

- i. ***If without permission an employee absents himself/herself from place of work for 4 or more consecutive days.***
- ii. ***If an employee is convicted and given custodial sentence by a court of law due to a criminal offence.***
- iii. ***If any employee willfully neglects to perform any official duty.***
- iv. ***If by becoming or being intoxicated habitually an employee renders him/herself unwilling or incapable of performing his/her duties.***
- v. ***Commits fraud against the property of the society.***

6. ***Serious dereliction of ones duties.***

8. The Claimant states that even the Respondent's own witness failed in cross examination to point out which of the above offences was applicable in the case of the Claimant's summary dismissal, which also

goes against Section 43 (1) of the Employment Act 2007. The witness also failed to give a reason for the dismissal of the Claimant, and produce documentary evidence to show that the Claimant was paid his dues. Moreover, the Claimant submits that he was not given an opportunity to be heard and defend himself.

9. The Claimant further submits that Section 45(1) of the Employment Act prohibits the unfair termination of an employee. The Claimant therefore submits that he is entitled to the reliefs claimed and relied on **Ivetta Mkala vs Nation Media Group, Industrial Cause No 2367 of 2012** where Hon Mbaru J awarded the Claimant compensation equivalent to 12 months gross salary for unlawful termination and **Rift Valley Railways (k) Limited vs Kiya Kalakhe Boru [2015] eKLR** where the Court the Appeal sitting at Mombasa upheld a judgment of High Court of Kenya at Mombasa ICC Claim No 246 of 2013 in which the Court awarded the Claimant compensation equivalent to 12 month's gross salary, being the maximum remedy allowed under Section 49 (1) (c) of the Act for wrongful termination of employment.

10. The Respondents filed a Memorandum of defence dated 21st August 2012 through the Federation of Kenya Employers. They admit that the Claimant was employed by them but deny all allegations stated out in the Claim.

11. The Respondent states that there was an order by the Commissioner for Co-operative Development that an inquiry be made into the by-laws, workings, and financial conditions of the Respondent. This resulted in various discrepancies being unveiled in the Claimant's activities which raised suspicion and suspension from duty of the Claimant pending further investigation.

12. The Respondent states that it was after the receipt of an inquiry report on the 18th of August 2007 that it was noted that the Claimant authorized the payment of full salary to an employee who was suspended for being an impediment to investigation.

13. The report also stated that the Claimant had been involved in fraudulent activities, more particularly keeping an account open that the owner had requested closed so as assign to it fictitious deposits and withdrawals. The Claimant himself deposited a Kshs. 50,000.00 quick loan on 27th July 2006.

14. The Respondent also states that the organization had lost Kshs. 19,987,915.48 through fraudulent activities and it was recommended that the Claimant together with 9 former board members each be surcharged the total amount of Kshs. 17,656.95 which was negligently paid to the employee who was suspended as salary.

15. The Respondent further states that the Claimant was not in full control of his work as manager, and when he was informed of the missing money he failed to explain or show why action should not be taken against him.

16. The Respondent claims that the Claimant still owed them KShs 476,632 and that on or about April 2012, the Respondent herein sued the Claimant in the Co-operative tribunal after he failed to repay an amount of Kshs. 152,406.95 which the Commissioner for Cooperative Development and Marketing had surcharged him for mismanagement of the Respondent Society.

17. The Respondent also pointed out various disciplinary action taken against the Claimant one where in November 2000, the Claimant was cautioned for failing to adhere to the laid down procedure while communicating with the Central Management Committee.

18. Moreover, it was noted with concern that the Respondent had lost many members due to the poor manner in which the Claimant treated them. The other noted incident was in January of 2005 where the Claimant was cautioned for being rude and for personalizing an issue which was being queried by the treasurer.

19. In their submissions, the Respondent starts by stating that the Court herein does not have jurisdiction to hear this matter as it is time barred within the limitations set out by the Act. They rely on Section 90 of

the Employment act, which sets the time limit at 3 years and bars claims filed after that period.

20. The Respondent further submits that the Claimant came to court 4 years after the cause of action arose and did not show the court if other mechanisms which he was exploring that compelled him not to come to court before the exhaustion of time.

21. The Respondent submits that they did have grounds to summarily dismiss the Claimant as his tenure as manager led to loss of money through theft and fraud. When the inquiry document was released, it was a public document and implicated the Claimant in the fraud and loss of colossal sums of money.

22. The Respondent submits that it was the duty of the Claimant to know the level of accountability expected of him in his position as the General Manager of the institution, moreover, the Claimant ought to have known the provisions of Section 28 (6) of the Cooperative Societies Act which provides that:

“in the conduct of affairs of a cooperative society, the committee shall exercise the prudence and diligence of ordinary men of business and the members shall be held, jointly and severally liable for any losses sustained through any of their acts which are contrary to the act, rules, by laws or the directions of any general meeting of the co-operative society.”

23. The Respondent therefore submits that the Claimant was dismissed from employment due to his failure to carry out his duty, that is taking care of peoples savings and investments and it was his sole duty not to allow the rampant fraudulent activity, additionally his averments that he was a whistle blower can hold no water as he too was implicated in directly dealing with a fraudulent account.

24. The Respondent submits that the Claimant failed to properly address the issue of notice being premature as he was awaiting the inquiry report when he was issued with the notice to show cause, and as an officer of the bank, he ought to have known that it was a public document that would be available to whoever sought it.

25. It is the Respondents submission that the above stated reasons were therefore enough reasons for summary dismissal.

26. The Respondent also submits that they gave the Claimant an opportunity to make his representation in responding to the issues raised in the Notice to show Cause but the Claimant failed to address them, so the Respondent on his part fully complied with the provisions of the law. He relies on the case of **Reginald Njagi Nyaga vs French Embassy Nairobi.**

27. The Respondent submits that the Claimant was paid his terminal dues less his deductions on the amounts he owed the Respondent and that he is not entitled to one months salary in lieu of notice as he was summarily dismissed in accordance with the law.

28. The Respondent submits that the Claimant took two amounts Kshs. 125,008.00 taken as FOSA advance and a normal loan amount of Kshs 1,124,861.20 which after setting off with the amount of his terminal benefits of Kshs 648,228.95 the amount of Kshs 476,632.25 remains unpaid.

29. Therefore, the Respondents pray that the suit be dismissed on the grounds set out above and that judgment be entered in favour of the Respondent for the Counter Claim of kshs 476,632.25.

30. In their response to the Respondents submission, the Claimant state that a party is bound by their pleadings and cannot raise issues that was not contained in their pleadings.

31. They state that the Respondents Memorandum of defense dated 21st August 2012 did not raised the issue of time limitation and the court should not entertain the same at this stage.

32. They rely on the case of **Nairobi City Council vs. Thabiti Enterprises Ltd [1995 – 98] 2 EA** where a passage in Bullen and Leake (12ed) at 3 under the Rubric nature of pleadings was stated as:

“the system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus served the two fold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the Court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the Court will have to determine at the trial.”

33. Similarly on page 238 thereof, the Court of Appeal restated the holding in the case of **Sande vs. Kenya Co-operative Creameries Ltd [1992] LLR 314 CAK** where the Court expressed itself thus: That a Judge had no power or jurisdiction to decide an issue not raised before him and went on to emphasize that:

“in our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position.”

34. The Claimant further states that his cause of action arose in November of 2007 and that law that was applicable at that point was the prevailing Act before the present Act came into effect on 2nd June 2008. The previous Act had put limitation in respect of a contract at six years and the Respondents submissions that the claim was time barred should not hold as the Act cannot apply retrospectively.

35. They refer to the case **Gerald Muli Kiilu vs. Barclays Bank of Kenya Ltd [2016] eKLR** where the Court stated that:

“The Employment Act, 2007, came into effect on 2nd June 2008 and through Section 90 a 3 year limitation period is created for filing claims related to employment that arose from the said date of commencement. In the case before the learned judge of the Industrial Court, the cause of action had accrued pre - 2007 Act and the appellant’s remedy lay under the repealed Employment Act, Cap 226 Laws of Kenya. That Act did not have a time limitation for lodging claims and the issue of limitation was therefore covered by the Limitation Act Cap 22 Laws of Kenya. Section 4(1) thereof provides that a cause of action founded on contract had to be filed within 6 years.”

36. They submit that this Court has jurisdiction to hear and determine the claim.

37. The Claimant further submit that the Claimant’s claim arose when the Trade Disputes Act was not in force and that this does not bar the Court from awarding the maximum compensation equivalent to 12 months gross pay provided under the Employment Act. They refer to the case of **Major Wilfred Kyallo Kangullyu v Tetra Pak Limited, Industrial Cause No 715 of 2011 [2014] eKLR** where it was held that:

“an employee whose contracts of employment were terminated before the year 2007 when the new employment law came into force, and who filed their claims in Civil Court, should not be treated differently from employees who at the time filed their claims at the Industrial Court under the repealed Trade Disputes Act, and who could award compensation or reinstatement for unfair and unlawful dismissal.”

38. They humbly submit that the Claimant be awarded as claimed.

39. Having considered the submissions and evidence of both parties, issues for determination are as follows:

1. ***Whether the claim before Court is time barred.***
2. ***Whether there were valid reasons to terminate the services of the Claimant.***
3. ***Whether due process was followed before Claimant was dismissed.***
4. ***What order if any this Court grants in the circumstances.***

40. On 1st issue, the Claimant in his pleadings told Court that he was dismissed on 5th November 2007. During that period, the Employment Act (now Repealed) subsisting as the current Employment Act 2007 came into force vide a gazette notice dated 2.6.2008. It therefore follows that the applicable law thus was Employment Act (Now Repealed) which had no limitation period but was guided by Cap 22 which put limitation period at 6 years for matter of contract. This claim having been filed in 2011 is not time barred.

41. On 2nd issue, the reasons given for Claimant's termination are that he was involved in fraudulent activities. The Claimant as Chief Executive Officer of Respondent was expected to guide the Respondents resources but the Respondent aver that during his tenure the Respondent lost 19,987,915.48 of shillings. This aspect was only brought to his attention in a suspension letter dated 9.7.2007.

42. After this he was dismissed on 5/11/2007 after his representation had been considered in writing. He avers that the reasons advanced were not true and that he was but a whistle blower.

43. Section 45(2) of Employment Act provides as follows:

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 employee's conduct, capacity or compatibility; or**

ii. **based on the operational requirements of the employer; and**

3. that the employment was terminated in accordance with fair procedure

44. Reasons must be proved. The Claimant having been Chief Executive Officer of Respondent and so much money having been lost under his watch, he was culpable and therefore Respondent had valid reason to dismiss him.

45. On the 3rd issue, due process was not followed. It is unfortunate that under the then Employment Act, it was not mandatory for one to be subjected to a hearing before termination but general rules of Natural Justice still subsisted. It was therefore important that Claimant be heard before dismissal but this was ignored.

46. I therefore find the dismissal of Claimant unfair and unjust and I award him as follows:

a. **1 months salary in lieu of notice =87,862.50/=.**

b. **Unpaid salary for July to October 2007 = 351,450/=.**

c. **Leave for 2007 = 52,618.50/=.**

TOTAL = 491,930/=

Less loan of 274,075/=

Balance = 217,853/=

Plus costs.

47. The Counter Claim though pleaded is not proved and is therefore dismissed.

Read in open Court this 28th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimondo for Claimant

Kanyiri for Respondent