



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1865 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 14<sup>th</sup> June, 2016)**

**JUMMY KINANJA WASIKE..... CLAIMANT**

**VERSUS**

**OXFORD UNIVERSITY PRESS E.A LIMITED .....RESPONDENT**

**JUDGMENT OF THE COURT**

1. This Claim was instituted via Memorandum of Claim dated 17<sup>th</sup> October 2014 and filed on 22<sup>nd</sup> October 2014, through the firm of Rakoro & Company Advocates where the Claimant claims for damages for unlawful and unfair termination. He states that he was employed by the Respondent as an Accounts Clerk on the 2<sup>nd</sup> of January 2001 earning a salary of Kshs. 16,000.00 a month with 21 days leave per year.
2. He states that he carried out his duties diligently and honestly for 8 years where he received several annual increments and in 2014 at the year of his dismissal his salary had risen to Kshs. 62,000.00. Further, the Claimant had earned bonuses of Kshs 39,112.00 in 2008/2009; Kshs 48,454.00 in 2009/2010; Kshs. 90,791.00 in 2011 /2012 and Kshs. 126,490.20 in 2012/2013.
3. The Claimant further states that he was appraised every quarter and in each appraisal his performance was determined to be good. The Claimant applied for leave on the 21<sup>st</sup> of March 2014 which application was approved and he was to be paid half his of salary as leave allowance but that did not happen. He was yet to receive his salary as at the 23<sup>rd</sup> of May 2014 and on enquiry he was told the payroll had been closed and that he was to wait. Calls to the Human Resource Manager and the Head of Finance & Operational Director went answered and upon reporting back from leave, attempts to meet the said parties bore no fruit.
4. The Claimant states that he sought the help of labour officers who advised him to seek Legal Counsel as he had not received any dismissal or termination letter. His Counsel wrote a demand letter to the Respondents. He avers that he was terminated unfairly and as a result of the aforesaid reasons he lost substantial amount of salary, allowances and other benefits she would have otherwise earned. He seeks for the claim to be allowed in the following terms:
  - a. **Salary from May – August 2014 – (Kshs. 62,005 x 4) = Kshs .248,000.00**
  - b. **1 months' notice pay = Kshs . 62,006.00**
  - c. **Leave Allowance = Kshs. 31,003.00**

- d. ***Performance Bonus for 2013/2014 period = Kshs. 126,490.20***
- e. ***6 days annual leave balance 2014/2015 = Kshs. 8,858.00***
- f. ***½ month salary of the 8 years worked = Kshs.268,693.00***
- g. ***Compensation – 12 months salary = Kshs 744,060.00***

***TOTAL Kshs 1,489,352.20***

- 5. The Respondent filed a Response to the Claim and Counter Claim dated 19<sup>th</sup> January 2015 through the firm of Michuki & Michuki Advocates where they admit that the Claimant was in their employment for the stated period but deny the allegations set out in the Memorandum and puts the Claimant to strict proof thereof.
- 6. The Respondent states that after an internal audit, the Claimant was found to have misappropriated the Respondents money equivalent of Kshs.78,419.50 and USD 4559 and could not account for the deficit.
- 7. The Respondent held a meeting on the 19<sup>th</sup> May 2014 attended by the Claimant, the Financial Accountant, Finance and Operation Director and Human Resource Manager, where the Claimant was given an opportunity to be heard and the Claimant admitted in writing that he had misappropriated the Respondents money and made an undertaking in writing to repay the money.
- 8. The Respondent states that the Claimant deposited cash Kshs 80,000 and USD 600 in to the Respondents account leaving a balance of Kshs 401,176.24 and the Respondent asked him to proceed on leave for 14 days from 21<sup>st</sup> May 2014 within which period he was to make arrangements to repay the misappropriated amount. The Respondents states that the Claimant failed to report back as agreed and attempts to contact him proved futile.
- 9. The Respondents states that failure by the Claimant to report back to work as expected amount to absconding of duty and that they are still owed the outstanding sum of Kshs. 401,176.24.
- 10. The Respondent avers that under the Claimant's contract of employment and the Employment Act, the Claimant is not entitled to service pay in the circumstances and the case should be dismissed. He further avers the termination was neither unlawful nor unfair and therefore damages are not payable to the Claimant. Further, the Respondent avers that the Claimant's acts and omission fall under the actions prescribed by Section 44 (3), 4(c) and 4(g) of the Employment Act 2007 amounting to Summary Dismissal.
- 11. The Respondent claim that for these reasons the termination was justified as it was orchestrated by his own conduct, he absconded from duty, switched off his phone making it impossible to contact him and since he had not provided a forwarding address, the Respondent was unable to serve him with a termination letter.
- 12. They state that the prayers sought are untenable and counter claim for misappropriated funds in the following amount:
  - i. ***Balance of Kshs 401,176.24 being balance of the misappropriated amount of Kshs.78,419.50 and USD 45599 being deficit in petty cash reconciliation and GBP 408.60 (or Kshs. 58,282.96) being travel cash refund received by the Claimant from the Respondent's members of staff but which the claimant failed to bank and which the Claimant had undertaken to pay.***
- 13. The Respondent prays that the Claimant's claim be dismissed with costs and judgment be entered in favour of the Respondent against the Claimant for the aforesaid amount.
- 14. Having considered the submissions of both parties, the issues for determination are as follows:
  - 1. ***Whether the Claimant was terminated or he absconded duty.***

2. ***If he was terminated/dismissed whether there were valid reasons for the dismissal/termination.***
3. ***Whether due process was followed.***
4. ***Whether the counter claim of the Respondents has merit.***
5. ***What remedies if any this Court can grant.***

15. On 1<sup>st</sup> issue, the Claimant has averred that he was terminated. This is because he states that he was locked out of the Respondents premises when he reported back from leave.

16. The Respondents on their part indicate that he absconded from duty. It is not in dispute that the Claimant had served the Respondents for some time and had been promoted and even given bonus for a good job done including for the year 2013/2014. This means that he did his work well up to that period of September 2013 (Appendix 20). In March 2014 his job was even graded at level B4 which was even an uplifting the previous scale. In May 2014, a month after the upgrade, the Respondents aver that the Claimant went on leave and never reported back.

17. It is however clear that if indeed he went for leave and never came back, the Respondents never wrote to him to explain why he had not reported to work. This was necessary because apparently the Claimant had been a “good employee”.

18. On 18.8.2014, the Claimant’s Counsel wrote to the Respondent a demand notice alleging that his client had not been allowed to resume duty from leave. The Respondents never replied to this letter. I believe it would have been at this point that they should have replied indicating that the Claimant had absconded duty. This never did and so their assertion in the pleadings in January 2015 – some five months late that the Claimant had absconded duty is an afterthought. I therefore find that the Claimant was dismissed as opposed to absconding duty.

19. On the 2<sup>nd</sup> issue, the reasons the Respondent gave for dismissing the Claimant are that the Claimant misappropriated money equivalent to Kshs.78,415.50 and USD 4559. The Claimant was asked to pay these amounts and on 21.5.2014 deposited 80,000/= and USD 600 in Respondents account leaving a balance of 401,176.24/= (after conversion in Kshs) which the Respondents have Counter-claimed.

20. The Respondents aver that the Claimant was not diligent or faithful in the discharge of his duties. Under Section 43(1) of Employment Act:

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

21. The onus of proving reasons for termination/dismissal lies on the employer and the way of proving these reasons is by taking the Claimant through a disciplinary hearing process.

22. In case of the Claimant, the Respondent failed to take him through an internal disciplinary process and therefore prove these reasons. There is no evidence that the Claimant was taken through a disciplinary process as envisaged under Section 41 of Employment Act which states as follows:

**“(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”.**

23. The Claimant has denied ever misappropriating the Respondents cash and the Respondents witness has admitted that the procedure adopted in a meeting of 19.5.2014 with Claimant did not follow procedure. The witness also stated that this was Claimant's 1<sup>st</sup> misconduct. For other moneys said to have been misappropriated, the witness indicated that only one Enock could confirm it.

24. What this means is that the reasons for the dismissal were not proved as envisaged and therefore the Respondents did not have valid reasons to dismiss the Claimant and neither did they follow due process. They never even issued the Claimant with a letter of dismissal or termination. This answers issue No. 2 and 3 above.

25. Having found as above the Respondents are also expected to prove their counter-claim. The Respondent's witness on her part when asked on some of her allegations on theft or money not accounted for by the Claimant stated that “only Enock could explain”.

26. It is therefore this Court's finding that the counter-claim is not proved and it is dismissed accordingly with costs to the Claimant.

27. I find that the Claimant's dismissal was unfair and unjustified in terms of Section 45(2) of Employment Act 2007 which states 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**
- c. **that the employment was terminated in accordance with fair procedure**

28. I therefore find for the Claimant and award him as follows:

- 1. **1 months salary in lieu of notice = 62,006.00**
- 2. **Salary for May to August 2014 = 62,006.60 x 4 = 248,000/=**
- 3. **Leave allowance for May – June 2014 = 31,004.00**
- 4. **6 days annual leave balance 2014/15 = 8,858/=**
- 5. **Service pay for 8 years worked = 62,006 x 1/2 x 8 = 248,024/=**
- 6. **12 months salary as compensation for unlawful termination = 12 x 62,006.60 = 744,012/=**  
**TOTAL = 1,341,946/=**
- 7. **Respondents to pay costs of this suit.**

Read in open Court this 14<sup>th</sup> day of June, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimant in person – Present

Isindu holding brief for Michuki for Respondent – Present