



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.127 OF 2015

(Before D. K. N. Marete)

JOASH MONGARE.....CLAIMANT

VERSUS

VERSUS THE NATIONAL OIL CO-OPERATION OF KENYARESPONDENT

JUDGMENT

This matter was originated by way of an Ammended Memorandum of Claim dated 17th April, 2015. It does not disclose the issue in dispute on its face.

The Respondent in a Memorandum of Reply dated 23rd June, 2016 denies the claim and prays that the same be dismissed with costs.

An Ammended Statement of Claim dated 28th July, 2015 is introduced and filed and the respondent also filed an Ammended Memorandum of Reply ammended on 20th August, 2016.

The claimant's case is that on 29th July, 1997 he was employed by the respondent as an Accounts Clerk on probationary terms of service at a salary of Kshs.6,429.00 and Kshs.4300.00 allowances per month.

It is the claimant's further case that on 16th July, 1997, he was confirmed in employment after successfully completing a six (6) months probationary period and earned Kshs.12,480.00 plus allowances of Kshs.14,784.00 to Kshs.27,264.00. He was entitled to a salary increment every year.

The claimant served the respondent for five years from 29th July, 1997 to April, 2001 on a good record but was issued with a suspension letter dated 12th April, 2001 after which he handed over and continued to report forthrightly until this was discontinued. He was charged with the offence of stealing by servant in Eldoret Cr.C. No. 2793 of 2001. He was not paid throughout the trial period and suspension.

The claimant's case is that the trial process was malicious, unfounded and baseless intended to malign his character as follows;

- a) *Causing him to be charged without cause.*
- b) *Failing to tender evidence in court.*
- c) *Failing to pay him while on suspension.*

d) Maligning the name of the applicant.

The claimant avers that the suspension and subsequent arrangement in court deprived him of employment and despite making pleas to the respondent for a resolution of the employment dispute after the determination of the criminal case, this fell on deaf ears.

He prays as follows;

a) That the honourable court finds that the indefinite suspension was dismissal that is as harsh, wrongful and unfair.

b) Gross salary was unlawful termination of employment of Kshs.27,264 per month for 30 years - $27,264 \times 12 \text{ months} \times 20 \text{ years} = 6,543,360/=$ plus salary increment for 20 years.

c) Certificate of service.

d) Leave allowance for 20 years.

e) Costs and interests.

f) Any other relief the court may grant.

The respondent's case is that under the Employment Act, Cap 226 (now repealed) the claimant's case could be terminated without notice if the claimant committed on an unreasonable or sufficient grounds was suspected of having committed a criminal offence against or to the detriment of the respondent. In the instant case, he was reasonably suspected of having stolen Kshs.163,000.00 from the respondent, to her detriment.

The respondent's further case is that the charge in court was as a result of police investigation and not her causation. She avers that the dismissal of the claimant from employment was lawful and that she owes him no duty of compensation. She also brings in a case of limitation of action and prays that the case be struck out *in limine*.

The matter came to court severally until the 30th June, 2016 when the parties agreed on a disposal by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination was the termination of the employment of the claimant wrongful, unfair and unlawful. The claimant in his written submissions reiterates his case and submits that the termination of employment was contrary to the provisions of S. 41 of the Employment Act, 2007 as follows;

41. (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.

It is his further case that this flouted S. 43 (3) and (4) of the Act as follows;

Section 43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

45.(1) No employee shall terminate the employment of an employee unfairly.

(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 employees 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.

The respondent case is one of a constructive termination of employment by the respondent through the conduct of non payment of salaries for thirteen years. He also brings out a case of time bar and limitation of action but this court deems this spent due to an earlier determination.

The respondent further seeks to rely on S 17 (g) of the repealed Employment Act, Cap 226 as follows;

“if 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.”

It is further the respondent's submission that the repealed law did not provide the safeguard of a fair hearing as is in the current law. In the authority of **Pius Ngao Mwenga v Kenya Tourist Development Corporation (2013) eKLR**, the court observed that;

Under the repealed Employment Act, an employer could terminate the employment of an employee by giving the requisite notice and without assigning any reason for the termination. There was no requirement for the right to be heard as is the case in the current law.

A look at the respective cases of the parties brings out a case in favour of the respondent. This is because the termination of employment was in accordance with S. 17 of the Employment Act, Cap 226 Laws of Kenya (now repealed.) This was the law applicable at the time of termination and as above cited provided for termination in the circumstances. The claimant pegs his case on the results of the criminal case at Eldoret but this would not offer much assistance in the circumstances of this case. I therefore find a case of lawful termination of employment and hold as such. And this answers the 1st issue for determination.

On a finding of lawful termination of employment, the claimant is not entitled to the relief sought. The 2nd issue for determination therefore lapses.

I am therefore inclined to dismiss this claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Chepkwony instructed by M/s Chepkwony & Company Advocates for the Claimant.
2. Mr. Masese instructed by Federation of Kenya Employers for the Respondent.