



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 51 OF 2016

NAFTALY KIOGORA.....CLAIMANT

VERSUS

MERU CENTRAL DAIRY CO-OPERATIVE UNION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd December, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 15.03.2015 in person. The claimant prayed for judgment against the respondent for:

- s. The suspension to be declared null.
- b. To be paid full salary for the time the claimant has been on suspension.
- c. To be reinstated unconditionally.
- d. To be paid costs of the suit.

The respondent filed the defence on 08.05.2016. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant was employed by the respondent on 20.12.2010 in the packing department. In June 2013 he was confirmed as a production supervisor. The claimant worked until 29.12.2014 when he was suspended from duty effective 29.12.2014 and on the ground of gross insubordination, particulars of which were set out in the letter of suspension. The suspension letter informed the claimant that he would be invited for a hearing to defend himself as would be communicated to him and that during the suspension he would receive half pay.

By the letter dated 31.10.2015 by the respondent's advocates, it was conveyed to the claimant that the claimant had terminated his employment with the respondent on 19.01.2015 and that the claimant had failed to clear with the respondent. The letter informed the claimant that if he did not take steps to clear in 14 days from the date of the letter (31.10.2015) then requisite remedial action against the claimant would be taken. The claimant replied by his letter dated 06.01.2016 and stating that he did not terminate his services as stated in the advocates' letter of 06.01.2016; that he was suspended on 29.12.2014 and was informed in writing that the date will be fixed whereby the claimant would be required to attend the hearing; and that the claimant was informed in the said suspension letter that he would be receiving half

salary while on suspension which up to 06.01.2015 the respondent had failed to pay. The claimant demanded the payment of his half salaries and further stated that he was not aware of the alleged termination of his employment. Subsequently the claimant filed the present suit.

The respondent's case is that after the letter of suspension, by the letter dated 06.01.2015 the claimant was invited for a management board meeting on 08.01.2015 so as to defend himself and after attending the meeting, the claimant was not successful in his defence. The said board recommended the claimant's termination from employment and the claimant was issued with a termination letter on 19.01.2015 copied to the county labour officer and received by the labour officer on 21.01.2015. A copy of the termination letter was forwarded to the claimant by the letter dated 04.02.2016 issued by the respondent's advocates.

The **1st issue** for determination is whether the claimant's contract of service was terminated effective 19.01.2015 and as conveyed in the letter of 19.01.2015. First there is no evidence that the claimant received the letter dated 06.01.2015 inviting him to attend a disciplinary hearing on 08.01.2015. Second there was no evidence that the respondent's management board met on 08.01.2015 as was alleged for the respondent especially that the relevant minutes or record of the alleged meeting were not filed in court. Third, there was no evidence that the claimant received the purported letter of termination dated 19.01.2015. Fourth, it was submitted that the respondent's advocates' letter dated 31.10.2015 was in an excusable error to have stated thus, **"That you terminated on 19.01.2015 from our client's service and to date you have not cleared with them."**

The court has considered the high standard of precision and accuracy in legal communication and more so in legal writing – where counsel would have chance to check and cross check the facts of the communication and read and proof-read the communication. It is implausible that counsel for the respondent would write in such error of substance that first, the claimant terminated his employment, say as of his own motion; and then second, that the claimant did so on 19.01.2015 – whereas it was alleged that the claimant had been terminated at the meeting of 08.01.2015 and effective 19.01.2015. It is true that in the precise and accurate legal communication including written communication it is open for counsel to make mistake but it is the court's view that in such eventuality (and in this case in view of the looming litigation) amendment must have been made by counsel promptly – but which was not done in this case as it ought to have been addressed to the claimant by letter and long before the hearing or further steps in the suit. For avoidance of doubt, the court holds that a piece of evidence in the proceedings such as the respondent's letter of 31.10.2015 is not a pleading which would be amenable to amendment with the leave of the court or the court's own motion under the slip rule meant for correction of clerical mistakes in civil proceedings (and as was purportedly advanced for the respondent). The purported correction by counsel and at the hearing stage, in the opinion of the court, served little purpose to change the otherwise inconsistent and incredible respondent's case.

The alleged letters inviting the claimant to a hearing and the subsequent purported termination letter were signed by the respondent's human resource manager who for unexplained reasons was not called to testify and the letters were unreasonably addressed to the claimant at the respondent's postal address whereas the claimant was already out on suspension. If the alleged termination on 08.01.2015 took place and a termination letter delivered as alleged and as testified for the respondent, it was not clear why time ran until 31.10.2015 when the respondent's advocates wrote asking the claimant to clear. The alleged delivery of the termination letter was not documented at all. Further, if the termination was effective 19.01.2015 and the suspension was effective 29.12.2014, there was no evidence that the claimant had been paid for the period 29.12.2014 to 19.01.2015 and as per the terms of the suspension letter. While making these considerations the court has considered that it was the evidential burden of the respondent to establish the genuine reasons for the alleged termination as envisaged in section 43 of the Employment Act, 2007 and also to establish its averments as per the defence but which obligations the respondent has failed to discharge.

All such highlighted inconsistencies made the respondent's account unbelievable. Taking into account all the stated factors, the court returns that the claimant was not terminated from employment as was urged for the respondent but he was emplaced on a long suspension during which time the respondent failed to honour and to implement the terms of the suspension.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

a. The claimant prayed that the suspension to be declared null. There is no doubt that the claimant was placed on a suspension. The court has found that the steps subsequent to the suspension about the promised half pay and a disciplinary hearing were not carried out on the part of the respondent. The court finds that the suspension decision was unreasonable as it was founded upon bad faith as demonstrated by the respondent's conduct subsequent to the suspension. The suspension as was blended with bad faith and subsisting for a long time and whose promises were never upheld, in the opinion of the court, amounted to unfair labour practice in contravention of the claimant's right to fair labour practices as conferred under Article 41(1) of the Constitution. The claimant is entitled to the declaration as prayed for.

b. The claimant prayed to be paid full salary for the time the claimant has been on suspension. The suspension has been found null and accordingly, there is no bar to the claimant's prayer. While making that finding, the court further considers and upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11,** where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’.** The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.” In the present case the evidence was that the claimant survived upon farming which he had been involved in throughout including the time he was in the respondent's employment so that, as the claimant testified, during the unfair suspension he lost income and did not get an opportunity to mitigate that loss.

c. The claimant prayed to be reinstated unconditionally. The material on record does not disclose any bar to the remedy of reinstatement. The claimant is willing to return to work and his position is still available. As the suspension has been found to have been unreasonable, the court finds that the claimant is entitled to reinstatement effective 29.12.2014, the effective date of the offensive suspension.

d. As the claimant has substantially succeeded in his claims, the court finds that he is entitled to be paid costs of the suit.

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

1. The declaration that the claimant's suspension from employment by the respondent's letter dated 29.12.2014 is null.
2. The declaration that the respondent to pay the claimant full salary for the time the claimant has been on suspension being 24 months times the last basic pay of Kshs. 25, 950.00 making **Kshs.622,800.00** payable by 15.01.2017 failing interest to be payable at court rates till full payment.
3. The claimant is hereby reinstated in the respondent's employment without a break in service with effect from 29.12.2014 and to report to the respondent's human resource manager to resume duty and for appropriate deployment not later than 03.01.2017 at 8.00 o'clock in the forenoon.
4. The respondent to pay the claimant's costs of the suit fixed at **Kshs.35, 000.00** payable by 15.01.2017 failing interest to be payable at court rates till full payment.

Signed, dated and delivered in court at **Nyeri** this **Friday, 2nd December, 2016.**

BYRAM ONGAYA

JUDGE