



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1933 OF 2012

ENOCK ANYANGO ANYANGA.....1ST CLAIMANT

CHARLES OCHOGO ODONGO.....2ND CLAIMANT

VERSUS

KENYA UNION OF SAVING AND CREDIT

CO-OPERATIVE LIMITEDRESPONDENT

JUDGMENT

1. The claimants in this suit were respondent's employees serving as Operations Manager and Accountant respectively.
2. They averred that they served the respondent diligently until March, 2000 when undue pressure was put upon them by the then Managing Director to resign following their alleged involvement in irregular financial practices.
3. In responding to their resignation, the defendant by a letter dated 30th May, 2000 reduced or converted the claimant's resignations to suspension pending the determination of their alleged involvement in the irregular practices at the Central Finance Department of the defendant. The suspension was stated to be without salary or benefits and for unspecified period. They complained that since suspension they had been kept out of employment indefinitely and no findings of the alleged investigations had been made known to them exposing them to loss of income and future earnings.
4. According to the claimants, the actions by the respondent were ultra vires, a nullity and specifically calculated towards frustrating them and denying them the fruits of their labour. The claimants therefore claimed against the defendant payment of all the accrued salary and benefits for the period they had been unlawfully out of employment or a declaration that they were still in the employment of the defendant herein hence entitled to all accrued earnings or terminal benefits.
5. The respondent in its defence stated that the claimants by letters dated 30th March, 2000 and 4th November, 1999 respectively, resigned from employment effective 30th March, 2000 and 5th November, 1999 respectively. The respondent further averred that the claimants were not entitled to any benefits for contravening the express provisions of section 44(h) of the Unions Terms and Conditions of Service resulting in loss of enormous Union funds.

6. In their testimony in Court the 1st claimant stated that he was employed by the respondent on 1st December, 1994 and issued with a letter of appointment. In April 1999 he was appointed as Operations Manager in Central Finance Department. His duties generally included overseeing operations department. It was his evidence that in 1999 September, the Respondent's Managing Director then, Mr. Bango asked him to go to his office with a file for Mucomewo Sacco Society. The Managing Director told him there was a scandal involving the Society. The Managing Director showed him a copy of a cheque for Kshs.200,000/= which was issued in favour of a Mr. Owiyo and asked why the Sacco was paying Mr. Owiyo. The Managing Director told him that he was in charge and must know about it and if he did not, he must have been negligent in his duties. Investigations were conducted after which the accountant and the Computer Manager were asked to resign. He continued to work and the Mucomewo issue kept coming up. He stated that the Managing Director told him that it was still in his view and that of the Board that he failed to prevent the scandal and hence the claimant should resign. It was his evidence that he resigned on 4th April, 2000 because he was told to either do so and get his terminal dues or be dismissed without them. Around September, 2000 he received a letter informing him that his resignation had been reduced to suspension since some more irregularities had been discovered and until they were resolved he would remain an employee of the respondent.

7. In the same month, on 7th September 2000 he received a letter asking him to appear before the Board to clarify the allegations in an anonymous letter which had been received. He stated that he attended the meeting as requested and discussed the letter. It was his evidence that he told the Board that he agreed with the contents of the anonymous letter but did not participate in its writing. He was subsequently asked to meet with Deloitte and Touche to discuss the anonymous letter as they had been appointed to investigate the allegations. He met Deloitte and was questioned on the Mucomewo issue. Around January, 2001 he attempted to meet the Managing Director but was refused audience. He then wrote a letter on 15th February, 2001 seeking to know for how long his suspension would be. The letter was never responded to.

8. Concerning the loan form by Mucomewo, it was his evidence that the form was regular. The loan was approved by the respondent's branch manager and forwarded to provincial Co-operative Officer who approved it. It was then brought to his office and upon studying the same he found it regular and recorded it in the loans register. He denied breaching section 44(h) of the respondent's terms and conditions of service. He therefore sought from the Court the lifting of his suspension and reinstatement to employment as he still regarded himself as the respondent's employee.

9. In cross-examination he stated that Mucomewo's savings as per documents that were presented by the computer department was over 2 million. He further stated that the issue before the Managing Director was, how come an employee of the respondent was benefitting from a loan disbursed by the respondent to a member Sacco.

10. Regarding records, he stated that it was the branches who handled primary records and not Head Office and that Head Office relied heavily on the branches. It was his evidence that this loan application was approved by signing on the form. There were no comments on the loan application form except the signatures. He admitted that he was the one who received the forms. As a manager he never commented on the loan application nor did the Central Finance Committee. The Managing Director had to go through the documentation independently. He could not sign before he does. He further stated that he was the one who signed the payment voucher.

11. The second claimant in his testimony stated that he was employed by the respondent in June, 1988 as an accounts supervisor and left while he was holding the position of an accountant. It was his evidence that he was prevailed upon to resign by the Managing Director. The Managing Director felt he was involved in the irregularities in some of the respondent's transactions. He was never issued with a show cause letter. He denied violating section 44(h) of the terms and conditions of service. According to him he still regarded himself as the respondent's employee but under suspension.

12. In cross-examination he denied any participation in the disbursement of the loan to Mucomewo because at that time he was on leave.

13. He admitted knowledge of Yoken and stated that he must have dealt with it. He denied authorizing any payment to Yoken.
14. The respondent on his part called three witnesses. The first witness Mr. Peter Omolo testified that he was the Finance Manager of the respondent. He stated that the 1st claimant resigned citing unavoidable circumstances. Later some fraudulent transactions were unearthed. The fraud involved a Sacco called Mucomewo.
15. They were advanced loans they never qualified for because their savings were below the minimum to enable them qualify for a loan. They were advanced 3 million yet their savings were only Kshs.700,000/=. According to him, the processing of the loan was under Central Finance Operations Manager which was the 1st claimant. The 1st claimant was the one who received the loan application form. The loan to Mucomewo was paid on the advice of the certifying officers one of whom was the 1st claimant.
16. He further stated that there was a refund of Kshs.1.8 million to Mucomewo which was also fraudulent. The payment was cross-checked by the 1st claimant and recommended by him. According to him the accounts were manipulated to effect these payments. The transfer of Kshs.1.8 million should have come from special deposits account which Mucomewo never had. The movements of the Savings account were inflated by approximately Kshs.1.8 million and the statement generated by 2nd claimant and a Mr. Owiyo.
17. With regard to the 2nd claimant he stated that he signed the payment voucher for the payment of Kshs.1.8 million to Mucomewo. According to the witness the claimant resigned because he knew it would catch up with him.
18. The witness also stated that there was another Sacco called Yoken based in Embu from whom a letter dated January 1998 purportedly came from. The letter was acted on by urging Yoken not to withdraw from the respondent. In July, 1990, the 1st claimant remarked the file for action stating that the Sacco was still demanding their money back. They were therefore paid Kshs.3.7 million. The voucher was signed by the 1st claimant. Yoken returned the payment as they did not know what it was for.
19. It was his evidence that the claimants were never coerced to resign. They did so voluntarily.
20. In cross-examination he stated that the claimant's suspension was not specific on the period it would take. He further stated that he was not aware of any communication to the claimants to answer charges against them and further, whether they were furnished with a copy of the report on the investigations on the alleged fraud. He further admitted that the Deloitte report never adversely mentioned the claimants. The report recommended further investigations to establish who the real culprits were.
21. The respondent's second witness was a Mr. Peter Nderitu. He stated that he was a member of Yoken Sacco and was the chair from 1998-2009. It was his evidence that Yoken was a member of the respondent.
22. It was his testimony that there was a cheque for Kshs.3.7 million that came from the respondent to Yoken whose purpose they never understood. He called the respondent's Managing Director to find out and was advised to refund the money to the respondent which he did less bank charges.
23. The respondent's third witness Mr. Benson Bati informed the Court that he was a member of Mucomewo Sacco. He was then an ordinary member but currently he was the chair. He stated that Mucomewo never had any money in the account with the respondent and that from its contributions, Mucomewo did not qualify for a loan of 3 million.
24. Mr. Rakoro in his closing submissions stated that the evidence before the Court showed that the claimant was forced to resign. The claimants wrote to the respondent on the issue of suspension on 15th

February 2001, 27th February 2001, 3rd April 2001, 6th January 2004 and 2nd September, 2004 and further a demand letter by counsel on 7th December 2004. He submitted that the contents of the demand letter was clear on the issue of forced resignation but the respondent never responded to the same. According to counsel the respondents failed to prove in Court that the resignations were voluntary.

25. Regarding suspension, counsel submitted that when the respondent's Managing Director Mr. Bango informed the claimants that their suspension was being treated as suspension, the claimants understood that to men their resignations had not been accepted but instead had been suspended indefinitely. According to counsel it was not possible that the claimants would be under suspension and at the same time have resigned.

26. Mr. Rakoro therefore submitted that the claimant's employment was not determined by their resignations on 30th March 2000 and 5th November 1999. He argued that they were still respondent's employees but under administrative suspension which was meted on 30th May, 2000. To support this contention Counsel relied on the case of **Elly Ouma Hongo v. Kenya National Union of Teachers Kisumu East Branch IC NO. 791(N) of 2009.**

27. Regarding the reasons for "forced" resignation or suspension, counsel submitted that the claimants were not involved in the investigations against them. They were only asked to give their story on the unsigned letter. There was no finding that the claimants were involved or benefited from the alleged fraudulent activities involving Mucomewo and Yoken Saccos.

28. According to Counsel, Deloitte and Touche recommended in their reports that the irregularities be pursued further with a view to establishing the real culprits and beneficiaries of the transactions. Counsel further submitted that the respondent's witness conceded that the claimants have never been sued in civil Court nor prosecuted for the offence of fraud or any other offence involving the alleged irregular practices.

29. Concerning payment during suspension, Counsel invited the Court to rely on the observations in the case of **Grace Gacheru Muriithi V. KLB (2012) eKLR** where the Court said:

"...The Court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all dues if the employee is exculpated..."

30. Mr. Modi for the respondent on the other hand submitted that the investigations done by both the respondent's internal committee and Deloitte & Touche revealed fraud and/or financial scandal and that the reports of the Board recommended recovery of part of the financial fraud or loss from the claimants and a Mr. Owiyo.

31. According to Counsel, the 1st claimant admitted to having dealt with the Mucomewo loan application and that his duties included ensuring that the applications for loan documents were complete in every way and satisfied the requirements laid down for applications and assisting the accountant in ensuring that record keeping was up to date. The loan application by Mucomewo was not complete as required. The record keeping by Mucomewo was not correct since it did not qualify for the loan granted yet the 1st claimant approved the loan. The 1st claimant further processed payment of Kshs.3,713,240/75 to Yoken Sacco which sum was found not to be payable to the said Sacco and was refunded by them.

32. Counsel further submitted that the 2nd claimant admitted to paying, certifying and or recommending payment of Kshs.1,875,452/= to Mucomewo which sum was purported to be a refund of special deposit which did not exist. According to Counsel therefore the upshot of the summary of evidence adduced in this case by both parties and witnesses was that there was a financial scandal and or fraud committed against the respondent in which the claimants were involved and the respondent suffered serious financial loss.

33. Concerning whether the claimants could be suspended after resignation, counsel submitted that in law this was not possible. Regarding claim for Provident Fund Contributions, Mr. Modi submitted that the involvement of the claimants in the Mucomewo and Yoken sacco fraudulent transactions which were criminal in nature, disqualified them from receiving the respondent's contribution to the fund as at March, 2000. According to Counsel therefore the claimants were only entitled to their personal contributions as at March, 2000 which stood at Kshs.78,090 and Kshs.67,290 respectively.

34. In conclusion counsel submitted that the upshot of all these was that the claimants failed to prove their case on a balance of probability as requested and the same ought to be dismissed with costs.

35. From the review of pleadings, documents, evidence by witnesses and submissions by Counsel, the questions to be decided in this matter are first; did the claimants resign or were they suspended? If the latter be the case could they continue to deem themselves as employees of the respondent and for how long?

36. Thirdly, if the Court were to take the view that the claimant's services were deemed to be terminated once they were found to be implicated in the alleged financial scandal, was such termination in accordance with clause 44(h) of the respondent's Terms and Conditions of Service and the applicable Employment Act i.e Cap 226?

37. Fourthly, should the Court find the Respondent to have wrongfully terminated the claimant's services what is the scope and quantum of terminal dues and compensation payable?

(a) Did the claimants resign or were they suspended?

38. By letters dated 4th November, 2009 and 30th March, 2000 the 2nd and 1st claimants resigned from their employment without disclosing the reasons for such resignation. Whereas in ordinary circumstances, an employee resigning from employment is not obliged to disclose reasons for such resignation, the practice and under normal circumstances, is that an employee would indicate reasons for such an action.

39. Further whereas the respondent's terms and conditions of service does not provide for resignation, its consequence is termination of the contractual arrangement between the employer and employee and where it does not take the pattern of the exit clause contained in the contract, an employer is well within its right to deem it as termination of contract without or less notice and demand payment in lieu of notice as per the contract of service or deeming provisions of the Employment Act.

40. The claimants resigned from employment with immediate effect with the 2nd claimant offering to forgo his 80 days of leave while the 1st claimant cited unavoidable circumstances. Whereas it is usual in appropriate cases for an employee resigning to trade-off his leave days with the requisite termination notice, the 2nd claimant made no mention of this. The resignations of the claimants therefore display some underlying urgency which could only be understood in the context of the letters from the respondent's Managing Director dated 30th May, 2000 informing them that further investigations revealed that there were irregular practices carried out in the Central Finance Department where their responsibilities were considerable and that the Board of Directors had decided that until the exact loss to the respondent and their involvement is established, their resignation would be treated as suspension from duty without salary and benefits.

41. From the foregoing it cannot be a matter of argument on whether the claimants resigned or were suspended. The respondent's letter is quite clear that the Board of Directors decided to treat the claimant's resignation as suspension pending the outcome of investigations into the alleged financial scandal. This answers the first question framed.

(b) How long should the claimants remain suspended?

42. The Claimants were suspended on 30th May, 2000. The main reason for their suspension was to allow investigations to be carried out on the alleged financial scandal in which they were suspected to be involved. The claimants in their letters dated 15th February 2001, 27th February 2001, 3rd April, 2001, 6th January 2004 and 2nd September 2004 coupled with the Counsel's demand letter dated 7th December, 2004 sought to know the fate of their suspension. These letters were apparently not responded to by the respondent. The respondent on the other hand exhibited two documents before the Court which though shed some light on the outcome of the investigations, were undated hence could not be of useful assistance to the Court in deciding when the claimants ought to have considered themselves dismissed from respondent's services.

43. These are the reports of investigation by Deloitte and Touche and the Final Report to the Board of Directors on the investigations into alleged fraud between KUSCCO Staff and Mucomewo Sacco. This therefore leaves the Court with no option but to evaluate the circumstances of the parties as well as comparable situations to enable the Court decide at what point the claimants ought to have concluded that the respondent no longer needed their services and considered their contracts terminated.

44. General contractual principles are applicable to employment contracts. They are binding on the parties thereto and parties must fulfil their commitments. In this particular case the letters of appointment issued to the claimants by the respondent constituted binding contracts between the respondent and the claimants. There is no provision for resignation or suspension however it is a normal human resource practice for an employee to be placed on an administrative suspension pending the outcome of investigations into a matter such employee is implicated in. Administrative suspension is neither punitive nor amounts to termination of employment. An employee is still considered to be on his or her contract of employment with pay even if half of it.

45. The claimants herein were suspended without pay or benefits. One of the essential obligations of an employer in an employment contract is payment of remuneration. There is generally no obligation on the employer to provide work unless the employment is such that the work, and attendant publicity are as important to the employee as the remuneration, as in the case of an actor or a singer; or it is necessary for the employee to be provided with work in order to earn remuneration, as in the case of an employee remunerated by Commission, or the employee is engaged to fill a particular office, notably of a profession nature.

46. Suspension without pay therefore constitutes a fundamental breach of contract and amounts to constructive dismissal.

47. The Supreme Court of Canada in the case of David Potter v. New Brunswick Legal Aid Commission (2015) SCC 10 has stated as follows concerning constructive dismissal:-

“ Constructive dismissal consists of conduct that, when viewed in the light of all the circumstances, would lead to a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract...”

48. The claimants herein were suspended indefinitely pending the outcome of investigations into their alleged involvement into financial malpractice at the respondent. They were concerned about the indefinite nature of their suspension and kept correspondence with the Respondent over the issue but their correspondence solicited no response from the respondent.

49. It could therefore be reasonably construed that the respondent no longer considered itself bound by the terms of the contracts of employment between itself and the claimants. The question then would be: at what point should the claimants have considered themselves constructively dismissed? That is to say when could it be said that the cause of action accrued? Lord Donaldson of Lynton MR in the case of Halford v. Brookes (1991) observed that:

“...Knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on

preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence ... in other words, the claimant must know enough for it to be reasonable to begin to investigate further...”

50. The claimants herein by their several correspondences referred to earlier in this judgment sought to know the fate of the investigations for which they were administratively suspended but got no response. They consequently on 2nd June, 2005 commenced the suit herein against the respondent seeking among others a declaration that they were still employees of the respondent or in the alternative that the directive suspending them from duty indefinitely was unlawful null and void to the extent that it terminated their employment.

51. The filing of the suit was done almost 5 years after suspension. This can reasonably be reckoned as the time the claimants considered their suspension to amount to termination of contract. This resolves the second question framed by the Court.

(c) Was the claimants' termination in accordance with clause 44(h) of the respondent's terms and conditions of service and the applicable Employment Act – Cap 226?

52. Clause 44(h) of the respondent's terms and conditions of service provides as follows:-

44. The Union reserves the right to summarily dismiss at any time and without previous notice, any employee found guilty of any of the following:-

(h) If an employee involves himself/herself in personal financial dealings with affiliated societies or converts Union money to personal use without authority.

53. The respondent in this matter sought the services of what the Court may call a reputable audit firm in the name of Deloitte Touche whom they asked the claimants to appear before for questioning over the alleged financial scandal. In their undated report produced by the respondent, Deloitte and Touche stated that the irregularities should be pursued further with a view to establishing the real culprits and beneficiaries of the transactions. What this implied was that the findings of the forensic auditors were inconclusive.

54. The respondent's witness stated that the matter was referred to Anti-Fraud Banking Unit of the Police and as far as he was aware, neither of the claimants had been prosecuted in connection with the alleged fraud.

55. Clause 44(h) talks of one being found guilty. The term guilt in this sense need not be in the sense of being found guilty after a criminal trial, but a finding of blameworthiness or responsibility after internal investigations. None of the claimants were found blameworthy leading to the inevitable conclusion that their termination was contrary to clause 44(h) of the respondent's Terms and Conditions of Service. Further section 17(g) of the former Employment Act (Cap 226) provided that an employee could be summarily dismissed:

(g) 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.

56. None of these happened in the case of the claimants. This resolves the 3rd question formed by the Court.

(d) Quantum of Compensation

The Court therefore awards the claimants as follows:-

(A) **1st Claimant Mr. Enock Onyango Anyanga**

Kshs.

- (i) Salary from 1st April, 2000 to
May, 2005 @ 48,000 p.m.....2,976,000.00
 - (ii) Three months' salary in lieu of notice
of termination.....144,000.00
- 3,120,000.00

2nd Claimant Mr. Charles Ochoo Odongo

- (i) Salary from 1st April, 2000 to
May 2005 @ Kshs.29,500.....1,829,000.00
 - (ii) One month's salary in lieu of notice.....29,500.00
- 1,858,500.00

57. In total the respondent shall pay the claimants Kshs.4,978,500 as compensation for wrongful termination of services.

(B) The claimants shall be at liberty to withdraw their Provident Fund Contributions in accordance with the Fund's rules and regulations.

(C) This award shall be subject to taxes and statutory deductions.

(D) The claimants shall have costs of the suit and interest thereon.

58. It is so ordered.

Dated at Nairobi this 17th day of July 2015

Abuodha J. N.

Judge

Delivered this 17th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge