



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 878 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2015)

PETER OTIENO OMBUDE.....CLAIMANT

VERSUS

KENYA PLANTATION & AGRICULTURAL WORKERS.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Peter Otiemo Ombude filed their Memorandum of Claim on 21/5/2014 through the firm of Betty Rashid & Company Advocates. The Respondent is a trade union duly registered as such under the Trade Unions Act Cap 233 Laws of Kenya (repealed).
2. The issue in dispute in this matter is the unlawful and wrongful suspension/constructive unlawful and wrongful dismissal from employment of the Claimant and alleged political discrimination and victimization of the Claimant as an employee.

Claimant's case

3. The Claimant's case is that he was 1st elected in 2006 and later re-elected on 8/1/2011 as the Respondents' Sulmac/Oserian Branch Secretary. As at October 2011, he was earning a salary of Kshs.19,500/= and an allowance of upto Kshs.10,000/= a month from the Respondent. He annexed **Appendix C 3 (a)** and **C 3 (b)** as copies of his pay slip and a letter signed by the Respondents Secretary communicating the Respondents 30% salary increase respectively.
4. It is also the Claimants case that in September 2011, he was contracted by the Support Team of the International Criminal Court (ICC) in the Hague to avail himself to give evidence on the Kenyan cases at the court which cases are matters of judicial notice.
5. That following this invitation by the International Criminal Court, he dutifully sought leave permission in a letter dated 27th September 2011 sent to the Respondents office in Nakuru (**Appendix C 4**).
6. The Claimant then testified at the Hague on 3rd October 2011 and returned to the country on 5th October 2011 and reported back to work on 7th October 2011 and worked through to 11th October 2011.

He avers that on 10/10/2011, there was a strike at Shalimar Flower and the Claimant in his official capacity participated in helping broker a return to work formula at the firm. The Claimant annexed

excerpts from his passport and return to work formula as **Appendix C5.**

7. On the 7th October 2011, the claimant avers that it was reported in the Star Newspaper and on 8th October 2011 in the Standard Newspaper that two national officials of the Respondent had held a press conference on 6th October 2011 at Respondents head office whereat they purportedly disowned the Claimant over his testimony at the Hague. The Claimant annexed **Appendix C 6** copies of newspaper cuttings as evidence.
8. It is further the Claimant's evidence that he gave his testimony at the ICC in his personal capacity at invitation of International Criminal Court (ICC) and was not representing the union.
9. He further avers that on 11/10/2011 at 6 pm, he received a letter dated the same day purportedly signed by 9 of the Respondents Branch Committee Members purportedly suspending him from his office duties indefinitely (**Appendix C 7.**)
10. On 12th October 2011, the Claimant wrote a letter addressed to the General Secretary of the Respondent appealing against the suspension. The appeal was never addressed and he wrote a reminder on 1st November 2011 which too was not responded to (Appendix C 8).

By that day the claimant avers that his office had been locked and the lock changed thereby locking him out of the office indefinitely.

11. It is the Claimant's case that since the purported suspension, the Respondent has not paid the Claimant his salary and the same remains due and unpaid for the month of October 2011 to date.
12. It is the Claimant's case that he served Respondents diligently and it was during the time he served that the branch reported having 2nd majority membership out of the Respondents 19 branches countrywide.

He avers that due to his good work, he earned a salary raise and even brokered a successful return to work formula on behalf of members of the Respondent.

He also avers that before the suspension, on 11/10/2011, he had never had any complaints whatsoever against him from members or officials of the Respondent. He avers that his suspension from office amounts to constructive dismissal and is unlawful, wrongful, malicious, politically discriminatory and calculated to victimize him.

13. The Claimant avers that the purported suspension contravenes the Respondents own constitution. It is his position that he was never given an opportunity to answer to allegations of unavailability, inability or failure to serve the interests of the members. He contends that the purported grounds of the suspension are otherwise false, flimsy and purely made up as an excuse for the unlawful suspension/constructive dismissal.

14. The Claimant further avers that the alleged committee meeting of 8th October 2011 is fictitious as the committee meeting was never held as alluded to in the letter, besides persons said to have attended the meeting and signed the suspension letter have confirmed to him that they never attended the meeting as alluded. He avers that the purported meeting if any was in any event illegal and in total violation of the Respondents Constitution and Rules.

15. It is the Claimant's position that the purported press conference by some officials of the Respondents purporting to disown his testimony at the Hague shows malice in the subsequent suspension.

He avers that the Respondents branch committee has no power to terminate his employment or otherwise suspend him from his duties.

16. The Claimant has submitted that the purported suspension is a manifestation of political discrimination and victimization, the Claimant being victimized for perceived wrong doing in giving his testimony at the International Criminal Court (ICC) as he did. He also submitted that the termination was contrary to the Employment Act 2007 in that the reasons for termination do not constitute grounds of summary dismissal as envisaged under the Act.

He also avers that he was never given notice nor salary in lieu thereof nor given an opportunity to respond to the accusations leveled against him.

17. The Claimant seeks judgment against the Respondent as follows:

- a. ***Salary for October 2011 to the end of his constitutional term i.e. January 2006 – 1,504,500/=;***
- b. ***Expected allowance for the period – 510,000/=;***
- c. ***Outstanding leave days – Kshs.19,500/=;***
- d. ***Exemplary damages on account of political victimization;***
- e. ***Interest at court rates.***

Respondent's case

18. The Respondents filed their response to Memorandum of Claim on 11/6/2012 through the firm of J.A Guserwa & Company Advocates. It is their averment that the Claimant was elected as the Sulman/Oserian branch secretary in Naivasha on the 8th of January 2011 as per the said branch's mandate without any influence from the Respondents head office.

The Respondent further avers that the Claimant continued to stay in office as a branch secretary and was and still is at the sole discretion of the branch electorate who voted him into the said office and the Respondents head office has no veto power given the branch matters touching on the disciplinary measures it may take over its officers or employees.

19. The Respondent therefore avers that he is a stranger to the averments of the Claimants claim, the Respondent deny the alleged unlawful, unfair and discriminative treatment by the Respondent together with all the particulars set out thereunder to which they want the Claimant to prove thereof.

20. The Respondent deny that the resulting termination was actuated by malice and a manifestation of political discrimination and victimization which the Claimant is challenged to prove thereof.

21. It is the Respondents position that on 21/10/2011, the claimant was directed to go to the Respondents head office which he failed to do and on 6/12/2011, he was also directed to lodge his

appeal to the Respondents national Secretary General which he totally failed to do (**Appendix KPAWU 1 AND 2**).

The Respondents aver that the action taken by Sulmac/Oserian Branch to suspend the Claimant was lawful and justified as the reason for the said action are as set out in the minutes of the meeting held on 8/10/2011.

22.The Respondents have submitted that under Rule 15 of its constitution the Sulmac/Oserian branch like its other branches had and still have the mandate to convene meetings of the nature that took place on the 8th October 2011 and to take disciplinary action against its office bearers or members as was the case with the claimant.

23.The Respondent denies that the committee falsified signatures and attendance list of the purported meeting of 8th October 2011 by the persons who signed the same. They also deny that the Claimant's suspension and/or termination has any political undertones which they challenge claimant to prove. The Respondent therefore urges this court to find the claim misconceived, frivolous and lacking in merit, and to be dismissed with costs to the Respondents.

24.The Respondents RW1 gave evidence in this matter and in cross examination stated that there is no evidence of branch officials being called for a meeting. He also stated that a full time employee of union works and is paid by the head office. He also stated that branch decisions are ratified by head office and that the suspension decision has not been ratified by the head office.

Issues for determination

25.I have considered evidence and submissions of both parties and issues for determination are as follows:

1. ***Were there valid reasons to suspend the Claimant from employment?***
2. ***Whether due process was followed before Claimant's suspension.***
3. ***What is the Claimant's current position with respect to the Respondent?***
4. ***What remedies if any the Claimant is entitled to.***

26.On the 1st issue, the letter of suspension addressed to the Claimant states that he was suspended for reasons that:

- ***he was unavailable in the office to serve the union members,***
- ***his inability to deliver services and***
- ***not serving the interest of members and the union promptly.***

Of course, the reasons given must be reasons which must be proved. Section 43 of Employment Act 2007 states that:

“(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.

(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.”

27.The Claimant has stated that he had never received any warnings with regard to his work or been through any disciplinary processes in the 5 years he was in Respondents employment. He further stated that he had performed his duties well and even brokered a successful return to work formula for workers who were on strike on 10/10/2011. All these point towards good performance at work.

28. The only issue that remains is unavailability in office which the Claimant has explained was because he was out at the International Criminal Court (ICC) giving evidence for 3 days. He stated that he applied for leave of absence in this case.

29. There is no indication that leave was granted but nonetheless the reason for the absence was well known.

30. Whereas the reasons advanced remain so, the conduct of the Respondents Oserian/Sulmac branch officials point otherwise. The averment by the Claimant that the branch had disowned him as he went to give evidence at the International Criminal Court (ICC) is clear from the newspaper captions which the Respondents have not denied.

This shows that the Respondents branch was unhappy with the Claimants' decision to be a witness at the International Criminal Court (ICC) cases.

31. It is also imperative to seek to answer whether the reason is one of the reasons that could warrant a suspension.

Under Rule 15 (c) of the Respondents Union's Constitution:-

“The Executive Committee may suspend or disband or transfer members of any branch which fails to comply with the Constitution and Rules of the Union or decision of the Quinquennial Conference, Special Conference or Executive Committee and may transfer the members of any branch so suspended or disbanded to another branch”.

There is no other provisions in the Constitution as to “what Rules of the Union” that are breachable are. The procedure to be followed in event of any intention to suspend an official is also not expressly provided.

32. Given that the reasons advanced for the suspension are not valid in that the Claimant has given evidence to counter them by showing that his work was above board and he served members well and raised the standard of the branch to Number 2, then there was no valid reason to suspend the Claimant from work.

33. On the second issue, the question is on due process. Under Rule 19 (a) & (b) of the Respondents Constitution:

- a. ***“A member may be suspended or expelled from the Union as may be determined by the Executive committee if:***
 - i. ***he fails within 14 days of demand in writing by the General Secretary to pay subscriptions which are more than three months in arrears or***
 - ii. ***He infringes any of the terms of this Constitution or acts in a manner which is detrimental to the interests of the union.***

Provided that any member suspended or expelled shall have the right to appeal against such suspension or expulsion to the first quinquennial conference following such action by the Executive Committee.

- b. ***No member shall be suspended or expelled unless he has been given an opportunity to state his case personally or in writing at a meeting of the Executive Committee or which he has received not less than 7 days notice in writing. Such notice shall include details of the allegation with which the member is charged.*** (emphasis is mine).
- c. ***A member who has appeared before the Executive Committee in accordance with sub-section (b) of the Rule, shall if he is dissatisfied with the decision of the Executive Committee, and has***

lodged an appeal in the manner provided, have the right to restate his case before the Quinquennial Conference when the matter shall be considered.

d. *A member attending a meeting of the Executive Committee or Quinquennial Conference in the terms of sub-section (a) and (b) of this Rule shall be entitled to call witnesses in support of his case.*

e. *Any decision taken by the Executive Committee to suspend or expel a member shall, when an appeal has been lodged in the manner provided, be subject to ratification or otherwise of the Quinquennial Conference.* “ (emphasis is mine)

34.The reading of the above provisions show that only the Executive Committee of the Respondent can suspend a member and only after a proper hearing and upon the member being given prior notice of the intended hearing with all allegations against him stated.

35.This provision is similar to Section 41 of Employment Act 2007 which states that:

“(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.”

36.In the case of the Claimant, he was suspended from office by a branch office which was against Respondents own Constitution. No opportunity was given to him to explain in writing or personally the accusations against him. The notice required was 7 days and none was given to him.

The Claimant’s rights under Article 50(1) of the Constitution of Kenya 2010 were flouted. No fair administrative action was also availed to him.

37.It is therefore the finding of this court that the Claimant’s suspension was unfair and unlawful. Since his suspension on 12/10/2011, he has not received any communication from the Respondents and neither has he been paid any of his dues. I will consider this suspension to be an unlawful termination in the circumstances.

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

1. **1 month salary in lieu of notice = 19,500/=**
2. **Salary for October 2011 for 12 days = $12/30 \times 19,500 = 7,800/=$**
3. **Outstanding leave days for 2011 = 19,500/=**
4. **12 months salary as damages for unlawful termination = $19,500 \times 12 = 234,000/=$**

TOTAL DUE = 280,800/=

The Respondents will also pay costs of this case plus interest at court rates from the day of this judgment until the amount is paid in full.

Read in open Court this 9th day of July, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Omesa holding brief for Nyambati for Claimant – Present

No appearance for Respondent