



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 36 OF 2015

NAHASON NJOGU NJOROGE..... CLAIMANT

VERSUS

MURATA CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd July, 2015)

JUDGMENT

The claimant filed the statement of claim on 04.03.2015 through Mwaniki Warima & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's termination was unlawful in that it was done without following the laid down legal procedure.
- b. Damages.
- c. Kshs.3, 191, 900.34 benefits being service gratuity Kshs. 1, 112, 041.34; underpayment Kshs.1, 465, 675.00; withheld pay Kshs. 184, 184.00; and school refund of Kshs. 430, 000.00.

An amended statement of claim with the same prayers was filed on 20.03.2015. The respondent's response was filed on 13.03.2015 through J.Ngumo Mbogo & Company Advocates. The amended statement of response was filed on 02.04.2015. The respondent prayed that the claimant's claim is dismissed with costs. The respondent also filed a counterclaim on 02.04.2015. The respondent counter-claimed that the respondent granted the claimant a staff scholar loan of Kshs. 600, 000.00 and a staff loan of Kshs. 490,000 and as at termination the claimant had not repaid a sum of **Kshs. 772, 773.00** which the respondent prayed for. The claimant filed a reply to the response and defence to counterclaim on 15.04.2015. The claimant stated that any amount owed to the respondent be set off against the amount found due to the claimant from the respondent.

The claimant was employed as an internal auditor by the respondent as per the letter of appointment dated 21.02.2007. The claimant was based at the respondent's head office in Murang'a. By the letter dated 8.11.2013 the claimant was transferred from the head office to Thika branch with immediate effect to continue with reconciliation of Thika and Kirwara branch. By the letter dated 5.02.2014 the claimant was notified to appear before the respondent's board of directors meeting scheduled for Friday 7.02.2014 at the respondent's boardroom in relation to inter-branch reconciliations. The court has considered that invitation and found that it was an invitation to discuss performance generally and not an invitation to a disciplinary hearing as envisaged in section 41 of the Employment Act, 2007. The court considers that the invitation was not a notice to the claimant that it was desired to terminate his employment on account of misconduct or poor performance and that he was to attend a hearing in that regard.

The claimant attended the meeting as scheduled and was subsequently given the letter of suspension dated 8.02.2014. The letter stated that the claimant had failed to advise the board appropriately in relation to reconciliation at Kirwara or Thika branch and matters related to safety of respondent's member's funds; a fact the letter stated had been admitted by the claimant. The suspension letter further stated that the claimant admitted before the board that the outstanding reconciling items had not been posted to their rightful accounts from January 2011 to 8.02.2014, the date of the letter. Further, the claimant had failed to give an explanation for that position thereby raising doubt about the accuracy and integrity of the affected accounts' balances and overall Sacco balances for the affected period. The letter stated that the same amounted to a serious offence and incompetence on the part of the claimant. The letter concluded by stating that the claimant was therefore suspended from duty on half pay effective 8.02.2014 pending the full deliberation, investigation and decision.

In view of the suspension the claimant addressed to the respondent the letter dated 12.02.2014. In that letter the claimant stated as follows:

- a. That he was a holder of B. Com Finance, CPA (K), CPS Part 2, a member of the Institute of Certified Public Accountants of Kenya, and Institute of Internal Auditors of Kenya with 13 years experience in auditing and accounting having been employed by the respondent in 2007.
- b. That he had not admitted to any of the allegations as made against him and at the meeting he had presented a report on reconciliation at Kirwara and Thika branches. He had reported severally in his reports that the two branches had failed to undertake branch reconciliations since January 2011 which led to deployment of two accounts to the branches sometimes in May 2012 and subsequently in October 2013 he was assigned to conduct special reconciliation for the two branches. That he had prepared the relevant report for January 2011 to 31.12.2013 but could not table it before the board for want of the authority by the Chief Executive Officer and Board of Directors.
- c. That he had therefore performed his duties as required as he had performed his duties competently.

By the letter dated 24.05.2014 the respondent terminated the claimant's employment. The claimant's case was that he was not given a hearing before the termination and he demanded his terminal dues and he got no response.

The **1st issue** for determination is whether the claimant's termination was unfair. First, the respondent's witness James Kamau Gachau(RW) admitted that under clause 8 of the collective agreement that was binding upon the parties, the claimant was entitled to a warning prior to the suspension but which was not complied with in the instant case. Second, there was no evidence that the claimant was given a hearing after the suspension and before the termination. The court finds that the termination was such that the claimant was not afforded due process because the provisions of the collective agreement about the suspension proceedings requiring a warning prior to the suspension was breached and the claimant was not given a hearing as envisaged in section 41 of the Employment Act, 2007. The court finds that the termination was unfair.

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 court has found that the termination was unfair and the claimant is entitled to the declaration accordingly and as prayed for.
- b. The claimant had served the respondent since 2007. The court has considered the high professional qualifications the claimant possessed and the dedicated service he rendered. The evidence does not disclose that the claimant contributed to his termination in any manner. Accordingly, the court finds 12 months' gross salaries under section 49 (1) (c) of the Act will meet the ends of justice in this case. The claimant is awarded Kshs.92, 092.00 by 12 months making **Kshs. 1,105, 104.00**.
- d. The claimant prayed for Kshs. 184, 184.00 withheld during the period of suspension. The claimant

- did not provide evidence to support this prayer and to offer the relevant justification. The claimant's submissions did not provide the justification for the prayer. In the circumstances, the court finds that the prayer will fail as its basis and justification was not established.
- e. The claimant prayed for Kshs. 1,465, 675.00 for underpayment. The claim was based on the submission that upon passing of requisite examination, the claimant was not accorded the relevant salary increment or promotion. RW testified that promotion was subject to vacancy and the claimant being head of the Internal Audit, there was no such vacancy that the claimant could have been promoted to as urged for the claimant. Clause 30 (ii) of the collective agreement provided that the respondent shall award one year increment to any employee who had successfully passed a recognised examination held on completion of the course for which the employee was sponsored. Clause 30(iii) provided that the employee who privately sponsored his studies and passed relevant examinations would be entitled to one year salary increment. The claimant submitted that on 2.02.2011 he passed CPA Part III section 5 and 6 and his salary ought to have increased from Kshs. 54, 472.00 to Kshs. 62, 642.00; on 3.08.2011 he passed CPS Part I section 1 and his salary should have increased to Kshs.82, 328.00; on 1.02.2012 he passed CPS Part II Section 3 and 4 and his salary should have increased to Kshs. 94, 678.00; and on 22.11.2013 he was awarded a decree by the KCA University so that his salary should have increased to 122, 999.00. The respondent did not dispute the claims save by submitting that the respondent had the power to promote the employees. The court finds that the claimant has established that he privately sponsored his studies, the studies might have been relevant to his work, he passed the examinations and the parties were bound by the agreement as per clause 30 of the collective agreement. However, the claimant failed to establish the basis of the incremental rates of 15%, he failed to show that the examinations that were passed were recognised as set out in the collective agreement and the court finds that in the circumstances the amount as claimed is not justified.
 - f. The claimant abandoned the claim for gratuity as baseless and in view of the contributory pension that the claimant was entitled to. The claim will therefore fail.
 - g. The claimant prayed for school fees refund of Kshs. 430, 000.00. Under clause 30 the refund was available only where the employee was sponsored for studies by the respondent. The evidence was that the claimant was not sponsored but he was given a staff interest free scholar loan to privately finance his studies. The court finds that the claimant was a privately sponsored staff on staff interest free scholar loan and the claim for refund will therefore fail.
 - h. Thus the court finds that the claimant is entitled to a sum of **Kshs. 1,105, 104.00**.

The **4th issue** for determination is whether the respondent is entitled to **Kshs. 790, 080.00** being unpaid loan advanced by the respondent to the claimant. The claimant admitted that he owed the respondent the money as claimed and the court finds that the respondent is entitled as counterclaimed. That amount is set off from the amount found due to the claimant so that the respondent will pay the claimant **Kshs.315, 024.00**. In view of that outcome of the parties' respective claims, the court finds that each party will bear own costs of the suit.

In conclusion judgment is entered for the parties with orders as follows:

1. The respondent's counterclaim is granted with orders that the amount as found due to the respondent is set off against the amount found due to the claimant as set out in this judgment.
2. The respondent to pay the claimant **Kshs. 315, 024.00** by 1.09.2015 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
3. Each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 3rd July, 2015.

BYRAM ONGAYA

JUDGE