



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 8 OF 2014

(Formerly Cause No.1439 of 2011 at Nairobi)

JAMES KARIUKI WANYAMBA.....CLAIMANT

VERSUS

KAGUMO TEACHERS COLLEGE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th September, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 25.08.2011 through J.W.Wanjohi & Company Advocates. The claimant prayed for judgment against the respondent for orders as follows:

- a. That the respondent be compelled to pay the claimant his monthly salary of Kshs.54, 377.00 from May 2011 to date.
- b. That the respondents do pay the claimant his entire salary at the completion of this case.
- c. That this honourable court declares that the claimant is still an employee of the respondent and further that the respondent's intention to summarily dismiss the claimant be rendered illegal.
- d. Any other order the court might deem fit and just to grant the claimant.

The respondent filed the statement of defence on 08.09.2011 through C.O. Wairoma, Litigation Counsel, for Attorney General. The respondent pleaded that the suit is misconceived and a gross abuse of court process and must be dismissed with costs as the claimant is not entitled to any of the orders sought.

The claimant filed a notice of change of advocates on 07.02.2014 appointing H.K. Ndirangu to act in place of his earlier advocates. The claimant further filed a notice of change of advocates on 25.06.2014 appointing C.Kimathi & Company Advocates to act for him in place of H.K.Ndirangu & Company Advocates.

The respondent is a public teachers' training college whose management is vested in the board of management. The claimant was at all material time a public officer holding the office of Finance Officer in the service of the college.

The respondent employed the claimant to the position of finance officer sometimes in April, 1987. The claimant testified that in June 2009 during preparation of the respondent's payroll, the claimant discovered discrepancies between the payroll and the amount that had been posted at the bank account. The claimant testified that he summoned the two clerks involved in preparation of the payroll and he informed the two clerks that the amount stated in the payroll was different from that paid out to the staff at the bank. The two clerks informed the claimant that there was no purpose for the claimant to check

with the bank because they knew the source of the discrepancy. It was the claimant's testimony that the clerks told him that the payroll that the claimant signed was not the one they used to take to the bank but that they would take to the bank a different list of staff members for payments and through which the fraud would be effected. The claimant testified that the two clerks pleaded for his forgiveness by not reporting the case to the respondent's principal. However, the claimant testified that he immediately reported the case to the principal.

It was the claimant's testimony that the principal summoned the two clerks (Charles Njoroge and Stanley Muthike) and the two told the principal that they had committed the fraud in conspiracy with 5 other staff members whose names were disclosed to the principal. The two clerks wrote statements admitting their gross misconduct and requested to be allowed to pay the amount misappropriated, to be forgiven and mercy to prevail in view of their misconduct. The principal suspended the two clerks and the case was reported to the police, auditors, and the board. The police, according to the claimant's testimony, said they would take action after they received the audit report.

The claimant testified that his subsequent analysis and investigation revealed that the fraud occasioned the loss of Kshs. 3,289,157.50. The claimant testified that the 2 clerks had overpaid themselves together with the 5 conspirators. The respondent's board invited the two clerks to appear before it in self defence but they failed to do so. The board's term lapsed in December 2009 and the new board again invited the 2 clerks to appear for a hearing. Instead of appearing for the hearing, they chose to write substantially similar letters implicating the claimant in the fraud by stating that they were stealing on behalf of the claimant. They wrote after lapsing of a year since they had written admitting their wrongdoing.

On the basis of the 2 letters by the clerks implicating the claimant in the fraud, the respondent, by the letter dated 16.07.2010, asked the claimant to step aside to pave way for investigations. The claimant remained out of his place of work until the invitation of 25.10. 2010 requiring him to appear before the board on 1.11.2010. The claimant attended as scheduled but when given a detailed questionnaire to complete before the hearing, he requested for more time so as to refer to relevant documents for effective and completeness of the answering. Nevertheless the hearing later proceeded and the claimant testified that he orally answered all the questions. Later after about a week the claimant received the letter dated 15.11.2010 alleging misconduct against the claimant that the claimant had failed to answer in writing the questions that had been put to him in the questionnaire. The claimant replied by his letter dated 19.11.2010 that he had fully participated at the hearing of 1.11.2010.

The claimant instructed his advocates to write the demand letter dated 11.02.2011 and the respondent lifted the claimant's suspension as per the respondent's letter dated 25.02.2011. The letter of 15.11.2010 was withdrawn unconditionally and without prejudice to any other or further steps the respondent's board may decide to take in relation to the respondent's loss of money during the claimant's employment as a finance officer. The entire claimant's withheld pay of Kshs.174, 688.00 was released to him and he asked to resume duty but the principal advised him to wait. The claimant then received the letter dated 4.04.2011 proposing summary dismissal on the ground that the claimant was involved in the fraud. The letter stated that the fraud in question could not have been perpetrated without either the claimant's awareness and participation or without gross negligence on the claimant's part such that the claimant failed in due diligence to notice and or to prevent the fraudulent scheme. The letter stated that in the respondent's view:

- a. The claimant had by his conduct fundamentally breached the obligations arising under his contract of service in the manner contemplated in section 44 (3) of the Employment Act.
- b. In the manner contemplated in section 44(4) (c) the claimant had carelessly and improperly performed work which from its nature it was his duty to perform carefully and properly.

Accordingly, the letter stated that the respondent intended to terminate the claimant's employment summarily for gross misconduct. The letter invited the claimant to attend the hearing before the board on 21.04.2011 accompanied with an employee of his choice.

The claimant replied by his advocates' letter dated 18.04.2011 stating that the claimant would attend the

scheduled hearing and requested the board to summon some witnesses including the board members between January 2007 and December 2009 and, the 2 clerks and the 5 conspirators. The letter also stated that the board avails specific documents related to the case as set out in the letter to assist the claimant to defend himself at the hearing. The claimant attended the hearing as scheduled accompanied by his advocate but the board asked the advocate to vacate from the hearing. The advocate complied and the hearing proceeded without the claimant's access to the witnesses and the documents as requested for in his advocates' letter of 18.04.2011.

The claimant was subsequently summarily dismissed with immediate effect as stated in the letter dated 9.05.2011. The claimant was to be paid his salary and any other money due and payable up to 9.05.2011 but subject to claimant's clearance with the respondent. The claimant denied receipt of that termination letter by his advocates' letter dated 22.06.2011 and the respondent forwarded the copy of the letter and the certificate of service by the letter of 29.06.2011. It was the claimant's case that the dismissal was unfair and unlawful and the court should order payment of his salary from 30.04.2011 to the date of the judgment at Kshs. 54,377.00 per month. The claimant testified that his last paid salary and allowances were for April 2011.

The 1st issue for determination is whether the claimant's dismissal was unfair. First, the court has considered the cumulative steps and processes leading to the claimant's dismissal. When taken together, the steps and processes show that the claimant was notified the details and nature of the allegations that were leveled against him. The court finds that the respondent complied with the need for a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Second, the court has considered the reason for termination. The claimant's case is clear that the 2 clerks committed the fraud and they admitted that misconduct but after a year wrote to unfairly and dishonestly implicate the claimant. The respondent's case was stated by the respondent's witness (RW) as follows:

“We felt that although the claimant was adversely mentioned by other 2 employees, we had no grounds to say the claimant directly benefited from funds collected. He slept on the job in the 3 years and failed on his duties. He admitted that there was a loss and assisted in gathering the documents from the bank. He agreed that the college lost the money. He admitted liability and pleaded for leniency as that was a professional hazard.”

Upon cross examination RW testified and confirmed as follows:

- a. It was the claimant who while performing his duties, being to supervise the two clerks, the claimant asked about the discrepancies and the two clerks admitted committing the fraud which the claimant promptly reported to the respondent's principal.
- b. The two clerks as implicated wrote to admit that they had committed the fraud.
- c. The evidence in court showed that the claimant had kept proper books of accounts for the period in issue including undertaking bank reconciliation and the respondent's board had discussed the financial records at its meetings.
- d. The respondent intended to take out criminal proceedings against the two clerks but that had not been done at time of hearing of the suit.
- e. No sufficient grounds existed to show that the claimant benefited from the theft or fraud.
- f. The respondent's board considered the 2nd set of letters written by the two clerks seeking to adversely implicate the claimant and the board found that the 2nd set of letters were baseless because the claimant had not received extra pay.

The court has revisited the evidence as set out above together with the reasons for the termination thus: **“(a) The claimant had by his conduct fundamentally breached the obligations arising under his contract of service in the manner contemplated in section 44 (3) of the Employment Act, and, (b) In the manner contemplated in section 44(4) (c) the claimant had carelessly and improperly performed work which from its nature it was his duty to perform carefully and properly.”**

The court finds that as at the time of the termination, the respondent had no reason to believe that the claimant had breached the obligations under his contract of employment. In particular, the claimant's

unearthing of the fraud shows that the claimant discharged his duty to supervise the staff working under him and further discharged the bank reconciliation function. For the period under review, the evidence showed that the claimant performed his duties to prepare proper books of accounts and the audit reports had not disclosed the fraud; as the claimant urged, the fraud was a professional hazard and which in the circumstances of this case, the claimant had not participated but had worked to unearth. The court finds that it was natural that the fraud could only be detected, as it happened, after it had taken place and there was no reason to doubt the claimant's account of the events. In the court's further opinion, it was for the respondent to act upon the claimant's discovery by taking appropriate action to punish the two clerks and to recover the money in issue from the clerks and the 5 co-conspirators. For unexplained reasons, that was not done and in this court's opinion, it was unfair for the respondent to punish the claimant after the claimant had performed his duties professionally. The court finds that the dismissal was against the protection the claimant enjoyed as a public officer, under Article 236 of the Constitution, from victimization for performing the functions of the office the claimant held.

The court further finds that the only reason why the claimant was subjected to disciplinary process was due to the dishonest and misleading 2nd set of letters the 2 clerks who were the owners of the fraud had written and which the respondent's board found to be baseless. That the misleading and dishonest 2nd set of the letters constituted reason for initiating the disciplinary process against the claimant shows that at the time of the dismissal, the respondent had no valid reason to terminate the claimant's employment. The court finds that the dismissal was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007.

While making that finding, the court upholds its opinion in **Edward Juma Masakha –Versus- National Environment Management Authority [2014]eKLR** thus, **“While making the finding, the court further holds that it would be unfair labour practice for an employer to terminate a manager or other senior officer on account of obvious breach of trust by an officer working under the manager because managers are entitled to trust those who work under them and an employer's service delivery would be impossible if such trust relationship is not protected and respected.”**

In the present case, the court finds that the two clerks breached the trust vested in them by their employer, the respondent, and their supervisor, the claimant. The court further finds that the two clerks deliberately and without involvement of the claimant engaged in the fraud which was discovered by the claimant. Accordingly the court finds that it was unfair labour practice for the respondent to dismiss the claimant in a clear case where the two clerks had breached the trust as vested and the claimant had performed the functions of the office he held. The termination was unfair for want of a valid reason for the dismissal and for violating the claimant's protection under Article 236 of the Constitution.

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 for an order that the respondent be compelled to pay the claimant his monthly salary of Kshs.54, 377.00 from May 2011 to date. The court has found that the termination was unfair as it offended Article 236 of the Constitution and there was no valid reason leading to the claimant's dismissal. The court finds that in furtherance of the purposes of Article 236 of the Constitution, the claimant is entitled to the prayer as made and is entitled to **Kshs.2, 881,981.00** being pay for 53 months from May 2011 to September 2015 at Kshs. 54, 377.00 per month as prayed for and under the doctrine of partial reinstatement. While making that finding the court uphold 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.” Further, while making this award, the court has considered the manner in which the board handled the disciplinary case setting the claimant forth and back despite the clear material that the board held about the case; the long service the claimant put in with the respondent beginning April 1987 when the claimant had freshly graduated from the university; and the devastating consequences the disciplinary case occasioned the claimant obviously making it impossible for the claimant to secure alternative job thereafter and in his professional field he had made great investment and time to assemble.

- b. The court has found the termination was unfair and the claimant is entitled to a declaration accordingly.
- c. The court has found that the claimant performed his duty and he did not contribute to his termination in any manner. The court has considered the long service and the adverse consequences of the dismissal to the claimant’s otherwise good professional standing and performance. The court finds that 12 months’ salaries in compensation for unfair termination will meet ends of justice at Kshs. 54, 377.00 making **Kshs.652, 524.00**.
- d. As the termination was unfair, the claimant is also entitled to one month pay in lieu of the termination notice making **Kshs. 54, 377.00** as prayed for.
- e. The claimant is entitled to the certificate of service as a statutory right.
- f. The respondent will pay the claimant’s costs of the suit.

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

1. The declaration that the claimant’s summary dismissal from the respondent’s service as a finance officer was unfair for want of a genuine reason as envisaged in section 43 of the Employment Act, 2007 and for violation of Article 236 of the Constitution.
2. The respondent to pay the claimant **Kshs.3, 588,882.00** by 1.12.2015 failing interest to be payable thereon from the date of this judgment till full payment.
3. The respondent to deliver to the claimant the certificate of service by 1.12.2015.
4. The respondent to pay the claimant’s costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 25th September, 2015**.

BYRAM ONGAYA

JUDGE