



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1070 OF 2012

RAPHAEL JUMA JUMA.....CLAIMANT

VS

ARMED FORCES CANTEEN ORGANIZATION.....RESPONDENT

AWARD

Introduction

1. Raphael Juma Juma, the Claimant herein was an employee of the Respondent, the Armed Forces Canteen Organization (AFCO). He brought this claim by way of Memorandum of Claim dated 12th June and filed in Court on 22nd June 2012 seeking damages for unfair termination of employment as well as payment of terminal benefits.
2. The Respondent filed a Reply and Counterclaim on 17th September 2012 and the matter was heard on 11th June and 28th November 2013. The Claimant testified on his own behalf and the Respondent's Chief Personnel and Administration Officer, Cletus Hedson Lyambila testified for the Respondent. Only the Respondent filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent as an audit clerk effective 5th July 2000. On 28th May 2001, he was suspended without pay on allegations of fraud. The allegations giving rise to the Claimant's dismissal were the subject of criminal proceedings in which the Claimant was charged with stealing and making a document without authority contrary to Sections 275 and 357(a) of the Penal Code.
4. The Claimant was acquitted of the criminal charges on 3rd October 2006 and on 31st October 2006, he wrote to the Respondent's Managing Director expressing his wish to resign. The Claimant did not receive a response to his letter. Sometimes in June 2009, the Claimant received a letter from the Respondent asking him to appear before the Disciplinary Board on 17th June 2009, which he duly attended. On 29th July 2009 the Claimant's employment was terminated. The termination was to take effect from 28th May 2001.

5. It is the Claimant's case that his dismissal was wrongful. He claims the following:
- a. A declaration that his dismissal was unlawful and wrongful
 - b. Special damages amounting to Kshs. 4,123,350
 - c. General damages for wrongful dismissal
 - d. Terminal benefits
 - e. Costs and interest
 - f. Any other relief the Court may deem just to grant

The Respondent's Case

6. In its Reply and Counterclaim, the Respondent admitted having employed the Claimant as an accounts clerk in the Audit Department with effect from 5th July 2000. Following loss of goods worth Kshs. 471, 870 the Claimant was suspended on 28th May 2001. It was Respondent's case that the Claimant deliberately neglected his duties leading to the loss and the Respondent therefore claims the sum of Kshs. 471,870 by way of counterclaim.

7. Although the Claimant was acquitted of the criminal charges facing him, the Respondent held him responsible for negligence of duty. The Respondent declined to accept the Claimant's resignation dated 31st October 2006 and instead subjected the Claimant to a disciplinary hearing before the Respondent's Disciplinary Board which recommended that the Claimant be summarily dismissed. The Respondent maintains that the Claimant was properly suspended and subsequently dismissed in accordance with the terms and conditions of his employment.

Findings and Determination

8. The Claimant's claim is based on his assertion that the termination of his employment by way of summary dismissal was unjustifiable and unfair. Section 43 of the Employment Act, 2007 provides 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.

9. Section 45 (2) of the Act goes on to provide that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer

and that;

(c) that the employment was terminated in accordance with fair procedure.

10. On 30th May 2001, the Claimant was issued with a suspension letter in the following terms:

“This is to inform you that you have been suspended from duty without pay with effect from 28th May 2001 until further notice pending investigations on the loss of AFCO goods.

CEW LYAMBILA

Chief Personnel/Admin Officer

For: Managing Director”

11. The Claimant remained on suspension up to conclusion of the criminal case facing him and on 31st October 2006, he wrote to the Respondent as follows:

“I refer to your suspension letter issued to undersigned dated May 30th 2001 which suspended me from duty with effect from May 28th 2001.(sic)

On that regard I wish to inform you that the matter that was taken to court by yourselves has been determined and I was acquitted from all the charges under Section 215 of the Criminal Procedure Act Laws of Kenya.(sic)

Based on the circumstances therefore, I wish to tender my resignation effective from December 1st 2006. Meanwhile I request you to organise for my total dues.

Yours faithfully,

Raphael Juma Juma”

12. From this letter, it would appear that the Claimant believed that his vindication from the criminal charges facing him automatically rendered him blameless before his employer. In the case of ***David O. Owino Vs Kenya Institute of Special Education (Industrial Court Cause No 453 of 2012)*** this Court took a different view as follows:

“Acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not render the employee's decision wrongful or unfair.”

13. I will therefore proceed to examine the charge facing the Claimant before the Disciplinary Board in that light. At the internal disciplinary stage, the Claimant faced the charge of negligence of duty between 11th and 14th May 2001 leading to the loss of Kshs. 471,870. He appeared before the Disciplinary Board on 17th July 2009 and did not question the record of the disciplinary proceedings as presented before the Court by the Respondent.

14. In establishing the reasons for termination of employment, the employer is not required to provide proof beyond reasonable doubt as required in criminal matters. Additionally, as stated in the ***Halsbury's Laws of England (4th Edition Vol 16) at page 482*** in determining whether a disciplinary action taken against an employee by an employer is lawful and fair, the Court is not called upon to substitute the employer's decision with its own decision nor to re-enact the internal disciplinary process. The duty of the Court is to check whether in the particular circumstances of the case, the employer acted in a reasonably fair manner.

15. I have considered the circumstances surrounding the Claimant's suspension and eventual dismissal and have arrived at the conclusion that the Respondent had a valid reason to terminate the Claimant's employment. I further find that in effecting the termination, the Respondent adopted fair procedure as set out in the law. The Claimant's claim for unfair termination therefore fails and is dismissed. The Claimant is however entitled to his benefits under the Staff Pension Scheme and the Respondent is directed to facilitate release of the said benefits to the Claimant within the next 30 days from the date of this award.

16. Apart from the charge of negligence of duty made against the Claimant, no specific evidence was led in support of the Respondent's counterclaim against the Claimant. The counterclaim therefore fails and is dismissed.

Each party will bear their own costs.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF APRIL 2014

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*