



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 287 OF 2013

(FORMERLY MSA CAUSE NO. 183'N'/09)

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 18TH SEPTEMBER, 2014)

PHILIP N. ONCHWARI CLAIMANT

-VERSUS-

GUSII MWALIMU SACCO LTD RESPONDENTS

JUDGMENT

The claimant Philip N. Onchwari filed his memo of claim on 28.4.2009 through the firm of J. O. Soire and Co. Advocates. His claim is for payment of damages following wrongful termination of employment. The claimant's case is that he was employed by respondents as an accountant in 2004 at a salary of Kshs 6,000/=. In the year 2006, the respondents detected a petty cash difference of Ksh 301,385/85 with the hotel cashier one Pacific Onywoki. The respondents sought an explanation of the same from the hotel cashier as per **App 4**. On 30th March 2007, the claimant proceeded on his annual leave which was to end on or about 15th May 2007 and then proceeded on another normal leave to end on 2nd July 2007.

On 2nd July 2007 the claimant duly reported to resume his duties only to find his office locked and he was verbally prevented and/or not allowed to resume his duties. The claimant even wrote to the board of directors asking about his fate as per **App B** but he received no response. On 7.10.2007, the respondents interdicted him vide **App C** allegedly in line with S. 33.1E of the Terms and Condition of Service (Hotel Section). Vide a letter dated 29.10.2007, marked D the claimant was requested to appear before the executive committee on 23rd October 2007 with a further request that he could also submit any explanation/defence letter which the claimant duly wrote **App E**.

Vide a letter dated 17.7.2008, the respondents wrote a dismissal letter to claimant (**App F**) stating that he had been dismissed from service with effect from 7th October 2007 for failing to account for the whereabouts of Ksh 149,000/= that came into his possession by virtue of his employment with the hotel. The claimant contends that the Ksh 149,000/= cash he was asked to account for was money that had been taken by the cashier and banked as Ksh 150,000/=.

The claimant's claim is for payment of his co-operative shares total Kshs 139,000/=: arrears of salary – salary ½ paid from 7.10.2007 to July 2008 (**App 8**) = 8,000 X 10 = Ksh 80,000/=. He also prays for his certificate of service, service pay for 4 years.

The respondents on the other hand filed their defence on 25.5.2009 through the firm of Osoro Mogikoyo & Co. Advocates. The respondent's case is that the claimant was terminated for failing to

purchase materials as directed after being given Ksh 149,000/= to purchase the same in the year 2005. The claimant was interdicted when the matter was discovered. He was further invited before the respondent's executive committee to show cause why disciplinary action should not be taken against him. The claimant did not appear before the disciplinary committee as expected. Instead he sent written submissions (**App F**). The submissions were found to be unsatisfactory and he was thereafter dismissed.

The respondent contend that they followed due process before terminating the claimant's services. On issue of co-operative shares, the respondents contend that the claimant's shares were used to offset a loan he had and he still owes the respondents Kshs 15,124/= which respondents want claimant to pay.

Upon hearing both parties the issues for determination are as follows:-

1. **Whether the respondents unfairly terminated the claimant's services.**
2. **Whether claimant is entitled to the prayers he has sought.**

On 1st issue, there is evidence that claimant was employed by respondent as an accountant. There arose an audit query which claimant was expected to answer on loss of Ksh 149,000/=. **App C** is the letter that interdicted the claimant. The letter dated 7.10.2007 reads as follows:-

“It has been decided vide Min 664/Exc/2007 to interdict you from performing your duties. This is in line with S. 33.1E of the terms and conditions of service (Hotel Section) that were issued to you on the date of your appointment.

The Society will communicate to you when required to face the board. You will be on half salary during the period of interdiction ---”

The reason/s for the interdiction are however not given. Another letter dated 19.10.2007 was sent to claimant (**App D**) now inviting him to the Executive Committee. It read as follows:-

“You are hereby required to appear before the Executive Committee on the above date (23.10.2007). You can come with explanatory/defence letter if you had not submitted any on your compulsory leave.

You are to meet the directors as you can be directed by the undersigned as from 11 am.”

The claimant replied as per **App E** stating that he had not been on any compulsory leave but had been on normal leave and upon reporting back found his office locked and he was barred from accessing it.

From the 2 letters written to claimant – **App C** and **D**, the reason for the interdiction nor appearance before the board remained vague. One letter talked of compulsory leave which the claimant replied to. Despite the alleged disciplinary process being done, the reason for the process remained unclear.

Section 43 of Employment Act states that:-

“43(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.”

Section 41 of Employment Act states:-

“(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 reasons 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 sub – section (1) make.”

It is therefore imperative from the reading of the law, that the claimant should not only be heard but that the reasons for which termination is contemplated must be explained to him in a language the employee understands.

In the case of the claimant, respondents failed to give the claimant reasons for termination and even as they invited him for a hearing, his position was that he was going to discuss an alleged compulsory leave and he wrote to them and explained that he had never been on compulsory leave.

The action taken by respondent in interdicting and then dismissing claimant without following due process was therefore unlawful and wrongful and therefore null and void.

Is the claimant then entitled to prayers he has sought?

1. **I do find that the claimant is entitled to compensation for wrongful termination amounting to 12 months salary = 12 X 16,000 = Ksh 192,000/=**

I also award claimant as follows:-

2. **Terminal benefits equivalent to 15 days for each year worked = $\frac{1}{2}$ X 16,000 X 4 = Ksh 32,000/=**
3. **Salary arrears for period claimant was not paid his full dues (which is to be computed).**

TOTAL = KSHS 224,000/=

Plus costs and interest.

As for claims from the Co-operative Sacco, the claimant shall deal directly with the Sacco.

HELLEN S. WASILWA

JUDGE

18/9/2014

Appearances:-

Claimant present in person

Ondego h/b Oguttu Mboya for respondent present

CC. Wamache