



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1830 of 2011

JAMES MUGO WARUO.....CLAIMANTS

VERSUS

KENYA UTALII COLLEGE..... RESPONDENT

JUDGEMENT

By a Memorandum of Claim dated 27th October 2011 the Claimant **JAMES MUGO WARUO** filed suit against the Respondent **KENYA UTALII COLLEGE** alleging unfair dismissal. He prays for the following orders:-

- (i) The termination of the Grievant/Claimant be declared unlawful and hence null and void.
- (ii) The Respondent do re-engage the Grievant/Claimant in work comparable to that in which the Grievant/Claimant was employed prior to the dismissal or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period the Grievant has been working and out of office/work.
- (iii) Reinstate the Grievant and treat him in all aspects as if the Grievant employment had not been termination.

In the alternative to the demand for reinstatement of the Grievant/Claimant demand for payment as under:-

- (1) Terminal dues as enumerated under Clause No.2(0) above thus sum of Kshs.643,735.98.
- (2) Interest on Clause 2(i),(iii),(iv) & (v), from the dates owed until payment in full at Court rates.
- (3) Any other statutory entitlements.
- (4) The Respondent does issue the Grievant with Certificates of Service.
- (5) The Respondent to pay legal costs in this suit.

The Respondent has denied the allegations of unfair dismissal and contends that that the Claimant's employment was terminated on account of fraud and that the termination was justified, lawful and in accordance with the rules of natural justice. The Respondent prays that the claim be dismissed with costs. The Parties were heard on 22nd October and 14th November 2012. The Claimant testified on his own behalf while the Respondent called 6 witnesses.

The relevant facts are not in dispute. The Claimant was employed in the position of Technical Assistant Electrician on 13th November 2000. His starting salary was K£.3,162 per annum. He was terminated from employment on 28th April 2011 after initially being suspended from employment from 17th February 2011. On 29th January 2011 the Claimant was given Shs.3,000 to purchase spares for repair of rooms 72 and 79 at KCB Leadership Centre Karen which was being managed by the Respondent on behalf of KCB. The Claimant purchased used parts from Nyayo Open Air Market and fitted them without handing them over to stores for issuance as was the procedure. He then submitted a cash sale receipt for Shs.3,000 from **RAJIM HARDWARE STORES** to account for the money given. The parts failed to function and were removed by the contractor at the centre. That is when it was discovered that the parts fitted by the Claimant were not new.

The issues for determination as framed by the Claimant and adopted by the Respondent are as follows:-

1. Whether the Claimant was at fault.
2. Whether the Claimant was accorded, an opportunity to defend himself.
3. Whether the termination of the Claimant's employment was unlawful.
4. Whether the Claimant is entitled to the remedies sought.

I now look at the issues:-

Issue No.1- Whether the Claimant was at fault

The evidence on record from the Claimant and the Respondent confirmed that the Claimant was issued Shs.3,000/= to buy spares for repair of leaking taps. He purchased second hand materials from Nyayo Market where he was not issued a receipt but on return to the College presented a receipt for Shs.3,000/= from Rajim Hardware Stores. He also fitted the items purchased without having them received in the stores before being issued to him as was the normal procedure. From the foregoing, I find that the Claimant was at fault and the Respondent had valid reason to take disciplinary action against him.

Issue No.2 – Whether the Claimant was accorded an opportunity to defend himself.

The evidence on record is that the Claimant was issued a suspension letter on 17th February 2011. He was required by the same letter to show cause why he should not be terminated. He replied to the letter on 21st February 2011. In the reply he stated that he would be able to verbally clarify any unclear issues and answer any queries raised if given an opportunity. Such opportunity was never given. The next correspondence he got from the Respondent was the letter of termination dated 28th April 2011 which referred to investigations carried out in which the Claimant was not involved.

The Claimant was never called for purposes of explaining to him the reasons why the Respondent intended to terminate his employment nor was he given an opportunity to defend himself as provided in Section 41 of the Employment Act. I therefore find that the Claimant was never given an opportunity to defend himself.

Issue No.3 – Whether the termination of the Claimants employment was unlawful.

For termination of an employee to be valid, the employer must show that there was valid reason for termination and that fair procedure was used. In the present case, there was valid reason but the procedure used was not fair as the Claimant was never accorded a hearing in terms of Section 41 of the Employment Act.

I therefore find that the termination was unfair.

Issue No.4 – Whether the Claimant is entitled to the remedies sought

I will consider each remedy sought by the Claimant:-

(a) Re-instatement/Re-engagement

Having found that there was valid reason for termination of employment, and since the reason is one questioning the Claimant's integrity, this is not a case that would merit re-instatement or re-engagement. The prayer for re-instatement or re-engagement is therefore dismissed.

(b) Salary for April 2011

The Claimant's employment was terminated by letter dated 28th April 2011. He stated in his testimony that he was called to collect the letter on 6th May 2011. The letter is signed on the same date. This fact is not contested by the Respondent.

I therefore find that the Claimant is entitled to the full salary for April 2011 and from 1st to 6th May 2011 when he was issued the letter of termination. I award him the same at Kshs.28,824.00/=.

(c) Reasonable Notice of 12 months

The Claimant has prayed for notice of 12 months. The Respondent in the termination letter offered to pay 1 month's salary in lieu of notice. Section 35 of the Employment Act provides for payment of 1 month's notice being the interval at which the Claimant was paid salary. Section 49 also provides for payment of 1 month's salary in lieu of notice.

I therefore award the Claimant Shs.24,020/= being 1 month's salary in lieu of notice as provided in Section 35 and 49 of the Employment Act.

(d) Pro rata leave 6 months

The Claimant seeks Shs.8,407 being 6 months leave. The Respondent did not submit any leave records to confirm that the Claimant had taken leave during the last 6 months of his employment. Although the Claimant did not specifically mention this in his testimony, the same is pleaded in his claim which he stated during his testimony that he is relying on in entirety. The Respondent did not specifically deny this. Section 10(7) of the Employment Act provides that if an employer fails to produce records of prescribed employment particulars he takes the burden of proving or disproving the alleged term of employment.

I find that the Claimant is entitled to 6 months leave as prayed and award him Kshs.8,407.00/=.

(e) Service pay

The claimant is not entitled to service pay as he was in pensionable service and was also a member of NSSF as evident from deductions made in his payslip attached to the Memorandum of Claim. The prayer for service pay is therefore dismissed.

(f) Maximum compensation

As I have found above, the respondent had valid reason to terminate the Claimant's employment. However the Claimant was not given a hearing as prescribed by law or at all. For this reason the Claimant is entitled to compensation. However due to the fact that he was responsible for what

befell him, he cannot be entitled to full compensation. Taking into account his length of service of just

over 10 years, his culpability and the failure of the employer to use fair procedure, I find that 5 months' salary as compensation is reasonable.

I therefore award the Claimant Shs.120,100/= being five months salary as compensation.

The Respondent raised an issue with the use of gross salary in calculation of the terminal benefits for the Claimant. The Respondent argued that the proper figure for use is the basic salary. I do not agree with that argument. The Employment Act at Section 36 provides for payment of notice based on remuneration which would have been earned during the notice period while Section 49(1) also provides for payment of the gross monthly wage. The Claimant was therefore right in using monthly gross salary as the basis for calculation of terminal benefits.

In conclusion, Judgement is entered in favour of the Claimant against the respondent in the total sum of Kshs.181,351.00/=. The Respondent shall also issue a Certificate of Service to the Claimant and pay the Claimants costs of the case.

Orders accordingly.

Read in open Court and signed on this 20th day of February 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of: _____ Claimant

_____ Respondent