



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 69 of 2012

BETWEEN

PETER KIMILU.....

1ST CLAIMANT

KENNEDY OGENDI.....2ND CLAIMANT

VERSUS

KENYA PETROLEUM OIL WORKERS UNION.....

RESPONDENT

Rika J

CC. David Kipsang

Mr. Peter Kimilu the 1st Claimant in Person

Mr. Kennedy Ogendi the 2nd Claimant in Person

Mr. John Obure for the Respondent

ISSUE IN DISPUTE: UNLAWFUL AND UNFAIR TERMINATION

AWARD

1. This Claim is brought by two former officers of the Respondent Trade Union. They seem to have fallen out with the Union’s Leadership, and their contracts of employment terminated in the month of November 2011.

2. They filed a joint Statement of Claim on 24th January 2012. The Respondent filed its Statement of Reply on 19th March 2012. Various other bundles of supplemental pleadings and submissions were filed in the course of the proceedings. The Claimants proceeded by way of submissions made in Court on 29th January 2013. The Respondent did not appear in Court on 4th February 2013, when it was to respond to the Claimants’ submissions.

3. Peter Kimilu states he was employed by the Respondent in 2004 as an Accounts Clerk. The Respondent is a registered Trade Union, representing unionisable employees in the petroleum industry. Kimilu was also appointed as the Bank Agent, carrying out all the bank transactions, on behalf of the

National Treasurer. His last salary was Kshs. 43,400 and airtime allowance of Kshs. 500 per month. He was confirmed to the position on 1st July 2004.

4. He states that he became vocal against misuse of the Trade Union funds by its officers. This put him at odds with the leadership of the Union. He was initially suspended on flimsy grounds on 21st March 2007. He was recalled on 22nd March 2007. He returned but his problems persisted. He was issued with a warning letter on 30th March 2007. Two years later on 18th May 2009, he was called upon to account for Kshs. 162,110. His constant demands for financial probity resulted in a memo issued by the General Secretary, in an attempt to silence Kimilu. On 23rd September 2011, he was again suspended from employment. He was served with a wrongly dated letter inviting him to attend disciplinary hearing, which was to take place on 15th October 2011. He was issued with a letter of termination on 8th November 2011. He states that his contract of employment was terminated by way of a declaration of redundancy. He was offered incorrect terminal benefits. He has approached the Court seeking-

- a) Salary for September to November 2011 at Kshs 130,200;
- b) 1 month salary in lieu of notice at Kshs. 43,400;
- c) 5 days leave balance at Kshs. 25,038;
- d) 3 days worked in December 2011 at Kshs. 21,700;
- e) Pro-rata leave of 19 days at Kshs. 31,715;
- f) Service pay of 7 years at 15 days' salary for every 26 of the years completed in service, at Kshs. 175,269;
- g) Compensation at 12 months' salary for unfair termination at Kshs. 564, 200;
- h) Refund of money wrongly deducted at Kshs. 15,600;

Total: Kshs. 1,526,922

Less Money paid on 13th December 2011: Kshs. 49,306

Less loan amount due : Kshs. 60,000

Less N.S.S.F/ N.H.I.F contributions : Kshs. 3,400

Total Claim :Kshs. 1,414,016; and,

- i) Certificate of service.

5. Kennedy Ogendi was employed by the Respondent as the Nairobi Branch Organizing Secretary, in 1993. He was posted to Mombasa as the Coast Area Representative in 1998. In 2003, he was suspended for throwing his weight behind the winning candidate in the Union election, Mr. Owino Ngige. He was appointed the Director of Organization on 1st August 2005, and received a salary raise. The Union receives an average monthly income of Kshs. 1,784,566.45, employs less than 7 employees and pays them less than Kshs. 27,000 per month. Ogendi takes issue with the Respondent for never having set up in its long history, any welfare or pension scheme; strike fund; or health fund, to assist its employees in times of need.

6. He states that in November 2010, the Union received Kshs. 4,667,047.55. The money was never invested in a way that would benefit members and employees. Ogendi sought to vie for the position of Deputy General Secretary of the Union on 26th February 2011. The date was altered to the following date.

The elections never took place but the Registrar of Trade Unions was given a false report that elections had taken place, which he used to register the current Officers. On 27th February 2011, Ogendi was asked by a brother to General Secretary, to visit the General Secretary who was admitted in a hospital, and ask for forgiveness from the General Secretary, for having expressed interest in the position of Deputy General Secretary. The Deputy's position was held by a relative of the General Secretary. Ogendi refused to visit his General Secretary and was then served with a letter dated 6th June 2011 alleging he had absented himself from work on 2nd and 3rd June 2011, without lawful cause. He was able to show that he had applied for two days of leave.

7. He was issued with two warning letters over the same issue later in June 2011. On 15th September 2011, he was suspended from employment. His contract was terminated on 15th November 2011. He appealed against the decision. His appeal was not considered. He earned Kshs. 41,000 per month as of the date of termination. He too alleges that termination was based on redundancy. He seeks from the Court:-

- a) 1 month salary in lieu of notice at Kshs. 41,000;
- b) Salary for October 2010 at Kshs. 41,000;
- c) Salary for 17 days worked in November at Kshs. 26,807.67;
- d) Leave allowance at Kshs. 3,000;
- e) Annual Leave at Kshs. 41,000;
- f) Pro-rata leave of 8 days at Kshs. 25,230.77;
- g) Severance pay of 19 years completed in employment at 15 days' salary per year, totaling Kshs. 449,423.08;
- h) Compensation of 12 months' salary at Kshs. 492,000;
- i) Gratuity for 10 years as the Respondent did not effect statutory contributions to the N.S.S.F., at Kshs. 236,538 .46;

Total: Kshs. 1,380,000; and,

- j) Certificate of Service.

8. The Claimants filed a document *titled Reply to the Respondent's Additional Supplementary Submission*, on 8th October 2012. The Claim by Kimilu is enhanced to a total of Kshs. 10,202,416. The additional sums are made up of items such as *damages and inconveniences caused to my family of Kshs. 2,000,000; gratuity of Kshs. 2,000,000; and compensation for the foregone years at Kshs. 5,208,000*. Ogendi enhanced his Claim to Kshs. 12,997,962.48 mainly through the inclusion of similar items as those introduced by his Co-Claimant.

9. The Respondent does not see any grounds that would lead the Court to find that the two Claimants left employment through redundancy, or that their contracts were unlawfully and unfairly terminated. Kimilu left through a regular termination of employment, on 9th November 2011. The 1st Claimant was given reasons for termination which included unauthorized payment of money to certain persons from the Union's funds; tampering with payment vouchers; failure to pay power bill; paying himself a non-authorized loan of Kshs. 100,000; and abuse of the Mpesa facility. He violated the Revised Code of Conduct. He was given an opportunity to defend himself. He failed to express remorsefulness, instead putting forward the position that he was victimized. He was guilty of acts of gross misconduct, but the Respondent was magnanimous enough, commuting summary dismissal to a regular termination, where the 1st Claimant was paid terminal benefits. He was paid his dues and acknowledged receipt.

10. Ogendi did not leave through redundancy. He was given a termination letter on 11th November 2011. He received Claimant members' settlement cheques, arising out of a Court Award in Industrial Court Cause Number 90[N] of 2009. The Cheques were received by the 2nd Claimant in his name. He failed to pay the Grievants their dues. He also forged the signature of Mr. Francis Omollo an officer of the Respondent, in a letter of authority, purporting that the 2nd Claimant had been authorized to act as the Legal Officer of the Respondent. Ogendi threatened the Grievants when they reported this fraud to the Respondent. He violated the Respondent's Code of Conduct. His termination was reduced from summary dismissal to a regular termination where benefits were paid. He was subscribed to the N.S.S.F and is not entitled to service pay. The Respondent is ready to release to the Claimants their certificates of service. The Respondent asks the Court to dismiss the Claim with costs met by the two Claimants.

The Court Finds and Awards:-

11. The two Claimants are former long serving employees of the Respondent. Their designations, date and terms and conditions of employment with the Respondent, have not been disputed. They claim to have lost employment through redundancy. The dates of termination are not disputed. The Court does have any material on record that would lead to a finding that indeed there was a redundancy situation at the Respondent, and that the two Claimants were compelled to leave due to such a situation. This was termination that followed complaints by the Respondent, that the Claimants were involved in various acts of gross misconduct. Letters calling on the Claimants issued, and the Claimants attended disciplinary proceedings thereafter. These are not facts that suggest the presence of a redundancy situation.

12. The enhanced claim of Kshs. 10,202, 416 made by Kimilu, and that of Kshs. 12,997,962 made by Ogendi, were made in afterthought and have no legal or factual foundation. The claims have the effect of clouding what good there was in the original claims. There is a tendency for parties coming to the Industrial Court to highly exaggerate monetary claims, encouraged by the absence of prohibitive filing fees. The calculation by such parties is that they have nothing to lose, as the Court may grant some of the exaggerated claims, while declining others. The Court must caution parties that the effect of such claims on the mind of the Court is to raise doubt about the veracity of the entire Claim. It is advisable for parties to stick to what is legally and factually justifiable. When a party approaches the Court with such a claim as "*damages and inconveniences caused to my family of Kshs. 2,000,000*" as made by Kimilu, the result is that the Court begins to doubt other claims that may be genuine. The Court is not persuaded by the claims contained in the Claimants' Supplementary bundle on *damages and inconveniences caused to the Claimants' respective families; compensation for foregone years; gratuity; house rent allowances; and N.S.S.F deductions*. No evidence was led to give substance to these empty claims. No legal provision or contractual clause was given in support of the respective claims. The Claimants have been long in the service of the Respondent, and are familiar with the basic evidentiary standards in establishing employment claims. Mr. Ogendi has been prosecuting matters before this Court on behalf of the Respondent. Parties should always assist the Court by bringing concise and credible claims to Court.

13. The Claimants also appear driven by other motives, other than merely accessing remedies for individual economic injuries suffered by them, upon the termination of employment. They volunteer plenty of information about the Respondent that is irrelevant to the present inquiry. They seem to have axes to grind with the current office holders. Ogendi has participated unsuccessfully in the elections of the Trade Union. He did not like the outcome and reading through his pleadings, one discerns a bitter aftertaste. This attitude again, tends to distract from the pursuit of genuine employment grievances. What does the turnover recorded by the Respondent; the failure by the Respondent to create a Strike Fund; and the fact that the Respondent employs less than 7 employees and pays them less than Kshs. 27,000 per month, have to do with the respective claims for unfair and unlawful termination?

14. The Court has considered the specific Claims for unfair and unlawful termination amidst all the confusion raised by the Claimants' methods of litigation. The 1st Claimant had been warned and suspended severally by the Respondent right from the date he was employed in 2004. He was issued with the final termination letter on 8th November 2011. The Respondent did not satisfy the Court that it had valid reason or reasons for terminating the 1st Claimant's contract of employment. The allegations against

the 1st Claimant were generalized. He does not seem to have been heard in the procedure created under Section 41 of the Employment Act 2007. The 2nd Respondent similarly had a history of warnings, suspension, dismissals and eventual returns, before the final termination on 15th November 2011. The Claimants appear to have had chequered careers with the Respondent. The reasons given to the 2nd Claimant for termination were again generalized accusations. Different reasons were given at various stages. There is no indication that the 2nd Claimant was availed the specific charges and heard on all the allegations, within the procedural guarantees created under Section 41 of the Employment Act 2007. The Respondent did not attend Court when given the opportunity to do so, on 4th February 2013, and failed to justify its reasons for termination. The Court finds termination of the respective contracts of employment to have been unfair both on substantive and procedural grounds. **The Claimants are each granted 6 months' gross monthly salaries in compensation for unfair termination.**

15. The Claimants were paid their arrears of salary up to the last days worked. They were paid outstanding leave days and notice. They received these payments and signed in acknowledgement upon receipt. They were regular contributors to the National Social Security Fund, and are not entitled to service pay. They did not establish any case for refund of money deducted wrongly. In the end **the Court Orders-**:

[a] The termination of the Claimants' contracts of employment was unfair;

[b] The 1st Claimant Peter Kimilu shall be paid 6 months' gross salary at Kshs. 260,400; and the 2nd Claimant Kennedy Ogendi 6 months' gross salary at Kshs. 246,000 in compensation;

[c] The Respondent to pay these respective sums to the Claimants within 30 days of the delivery of this Award;

[d] The Respondent to release the Claimants' certificates of service forthwith; and

[e] No order on the costs.

Dated and delivered at Nairobi this 17th day of May 2013

James Rika

Judge