



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 11 of 2012

JAMES M. KIBUNJA CLAIMANT

VERSUS

MATHIRA FARMERS SACCO SOCIETY LTD. RESPONDENT

J U D G M E N T

The claimant in this suit was employed by the respondent as a manager on a 3 year contract with effect from 1st June, 2008 to 31st May, 2011.

He however claims that the respondent unlawfully terminated his services 23rd July, 2010.

According to his memorandum of claim filed in court on 28th April, 2011 prior to his termination he was asked to go on compulsory leave to pave way for investigations details of which he claims were not availed to him.

On 18th July, 2010 he was suspended to facilitate investigations regarding his conduct for the past 46 months and his salary withheld from June, 2010.

On 23rd July, 2010 the claimant was summoned to appear before the respondent's board members and supervisory committee wherein allegations regarding his conduct were made and according to him he was neither given an opportunity to respond nor was availed any copy of the alleged investigations despite several requests.

According to the claimant an arbitration meeting was held by the Provincial Cooperative Officer at which it was resolved that the claimant be paid all his dues as per contract with the society for the remaining period.

He avers that his total dues as per the agreement was Kshs.651,232 out of which the respondent has only paid Kshs.124,830.60. The claimant therefore desires that the court orders the respondent to pay the remainder of the benefits as agreed among other remedies.

The respondent for its part avers that the claimant was summarily dismissed after it was found that he failed to obey instructions in disbursement of a loan for Gakuyu Farmers Cooperative Society and fraudulently overstating his gratuity and receiving the same.

It is the respondent's position that according to contract the claimant was not entitled to any benefits on termination of his services and that the sum of Kshs.124,830.60 was paid to him gratuitously.

The respondent avers that the purported agreement to pay the claimant the sums claimed is disputed since

that was not the resolution reached at the meeting with the Provincial Cooperative Officer.

At the trial, the claimant reiterated that he was sent on compulsory leave and that on 16th July, 2010 he received a letter summoning him to appear before the Board to answer charges but the charges were neither disclosed in the letter nor attached to it. He stated that he subsequently wrote to the respondent on 22nd July, 2010 asking for the report to enable him respond to the accusations but the report was not availed to him.

At the meeting of 23rd July, 2010 when he appeared before the Board the allegations were dictated to him and he said he was not able to respond immediately.

He denied disbursing funds against recommended priority schedules. He however admitted in cross-examination that disbursement without approval would be breach of article 59.

Regarding loan to Mr. Wamae an employee of the society, he denied irregularly disbursing the money to him. According to him the loan was applied for and appraised before being disbursed.

Regarding allegations of overpayment of honorarium, to himself he denied doing so and stated there was an anomaly which was reversed after a recalculation.

The respondent called one witness a Mr. David Thengereri Kirungu who stated he was a Board member and treasurer of the Sacco. He stated that he was familiar with the issue.

It was his evidence that when the claimant was on leave certain anomalies were detected and the claimant was asked to respond to them after which the Board reached the decision to suspend him. He denied the claim by the claimant that he did not participate. According to him the claimant appeared before the Board from 10.00 a.m. to 2.00 p.m. On the material date and was taken through the accusations one by one and the findings finally notified to the claimant.

Regarding the meeting with the Provincial Cooperative Officer, it was his testimony that whatever transpired was not accurately captured.

It was his evidence that the claimant's gratuity was wrongly calculated and he made a refund.

Concerning Gakuyu farmers, the witness stated the payment was to be made to farmers directly. It was meant for farmers not suppliers for farm inputs.

Regarding loan for Kshs. 100,000 to Rutuma, it was his testimony that the same was irregularly approved since only the manager signed the loan application but was never approved by the Board.

Concerning honorarium, he testified that the claimant as manager was only entitled to bonus like any other staff.

He concluded his evidence by saying that there was no agreement to pay the claimant the sums he was asking for since he was in breach of article 59 of the staff manual. The payment of Kshs.124,830.60 that was made to the claimant was gratuitous and not because he was owed anything.

In cross-examination he stated that the executive committee used to sign blank cheques leaving the claimant who was the manager then, to fill in the details of payment. It is these cheques that the claimant used to pay himself.

Counsel for the claimant Mr. Omenta submitted that the respondent's action in terminating the claimant's employment was wanting in good faith in that in suspending and eventually terminating the claimant's contract without according him an opportunity to be heard the respondents had already made up their mind to terminate his employment while hoodwinking him that he was under investigation.

Under section 45(5) the court is required in deciding whether it was just and equitable for an employer to terminate the employment of an employee to consider among others the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision.

The claimant has complained that upon returning from sick leave he was sent immediately on another compulsory leave to facilitate investigation over the 46 months he has been working for the respondent. During this period he was called for a meeting by the Board and allegations against him together with evidence read and or showed to him. No notice or communication was sent to him prior to the meeting. The respondent's witness Mr. Thengereri confirmed that the report on the allegations against the claimant was not availed to him since there was only one copy. It is a cardinal rule of natural justice that a person facing any accusation of any nature ought be given a reasonable opportunity to know the nature of such accusation and be accorded a reasonable opportunity to respond to the accusation.

The allegations against the claimant were numerous and some may have required examining documents and making reference elsewhere. Credible and grave they may have been but to dictate them to the claimant expecting him to respond there and then was not only unreasonable but unjust and inequitable hence fell short of the standard contemplated by section 45(5) of the employment Act. Besides section 41(1) requires an employer before terminating the employment of an employee on grounds of **misconduct**, poor performance or physical incapacity to explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

Further before termination, the employer shall consider any representations which the employee may make.

Nothing in the pleadings nor in the evidence adduced during the trial or oral testimony in court showed or demonstrated that the respondent complied with these clear provisions of the law. To this extent the court makes a finding that the termination of the claimants employment fell short of standards set by the statute and is hereby declared unfair and unlawful.

According to the claimant's contract of employment, if termination were to be done normally he would be entitled to three months notice. Although the contract does not provide for payment in lieu of notice, the Employment Act in Section 36 provides for such payment. To this extent the Court reduces the claimants dismissal to normal termination and orders that he be paid 3 months salary in lieu of notice. The court further orders that the claimant be paid all his benefits less any monies he may be owing the respondent on account of his employment contract. The quantum of these benefits shall be computed by the parties with the assistance of the Registrar of the Court.

Regarding unfair termination of employment, section 49(1)(c) empowers the court to award up to a maximum of 12 months salary or wages where it is of the conclusion that a claimant has been unfairly terminated. This court is of a similar view and hereby awards the claimant four months salary as reasonable compensation for unfair termination.

In conclusion this court awards the claimant compensation as follows.

1. Three months salary in lieu of notice $(25,858 \times 3) = 77,574.00$
2. Terminal benefits as per contract – to be computed by the Registrar of the court with the assistance of the parties.
3. Four months salary as compensation for unfair termination.

The award shall be subject to any payments already made to the claimant, liabilities owed to the

respondent and statutory deductions. It is so ordered.

Dated at Nyeri this 10th day of May 2013.

Abuodha J. N.

Judge

Delivered at Nyeri this 10th day of May 2013.

**Delivered in open Court in the presence of Maina Mbuthia h/b
for Lucy Mwai for the Respondent and the Claimant in person.**

Abuodha J. N.

Judge