



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 411 OF 2011

MOSES MURIMI MURAGECLAIMANT

-VERSUS-

KENYATTA NATIONAL HOSPITALRESPONDENT

Mr. Odera for Claimant.

M/s. B.N. Kamau for Respondent.

JUDGMENT

The Claimant seeks payment of terminal dues payable under the Hospital Staff Superannuation Scheme with interest at court rates from the date the same became due and owing.

The claimant also seeks costs of the suit.

The facts on which the case is premised are that the claimant was employed by Kenyatta National Hospital from May 1995 to the 15th of October, 2002 when his contract was terminated.

Upon termination his terminal dues under the Hospital Staff Superannuation Scheme became due.

The Claimant went severally to inquire about payment of the dues from the Respondent, but he was sent away and told that his dues were being processed and would be paid at a later date.

After numerous such attempts to collect the terminal dues he was informed on or about the 9th December, 2003, that the Respondent had already paid him via a cheque given to one **Joseph Kamau Wachira**, a Kenyan national and holder of identity card number 11531509.

The Respondent alleged, which is denied by the Claimant that the Claimant had issued a written authority to the said Joseph Kamau Wachira to collect the cheque on his behalf.

The handwritten letter is attached to the Memorandum of claim and marked (MM1). The Claimant in his sworn testimony denies knowing a person by the name of Joseph Kamau Wachira and or writing the said letter to him.

The Claimant states that at the time he was not married and therefore had no brother-in-law at all, let alone the alleged Joseph Kamau Wachira.

The Claimant denies the signature on the said letter belongs to him and asked the court to compare it with the one in the Verifying Affidavit to see the difference. He says, he saw the letter for the first time when it was sent to his advocate by the Respondent.

Upon receipt of the letter, he reported the matter to Kilimani Police station and recorded a statement stating that his terminal benefits had been fraudulently given by the Respondent to another person he did not know.

He also approached the Kenya Commission for Human Rights to pursue the matter against the Respondent. The Respondent declined to pay him his terminal dues inspite of the demand from his advocate, Kibera Centre for Legal Aid and Human Rights and the Kenya Commission for Human Rights.

The Claimant told the court under cross-examination that upon termination of his employment, he went to his rural home in Kirinyanga as he had no other job in Nairobi. He continued to follow up the payment from time to time from there but was shocked when he was told that he had already been paid.

Though he conceded that he did not know the exact amount due to him, he approximated the same to be Kshs.64,659/75 with interest.

The Respondent however admitted that he was owed Kshs.87,240/= but the unpaid balance which was paid via the cheque in issue was Kshs.64,659/75.

The Claimant told the court that he has an account with Equity Bank and Co-operative Bank presently and has never held an account with National Bank of Kenya. He also told the court that he opened the Co-operative Bank account in the year 2007 but the cheque was allegedly deposited in a Co-operative Bank account in 2003. He denied that, that was his account stating that he never received his terminal benefits at all.

The Claimant blames the Respondent wholly for the fraudulent payment and prays the court to direct the Respondent to pay him as claimed.

The Respondent called one **Ms. Agnes Kavui Ndumbu** who works in the Finance Department of the Respondent. She told the court that she was the Chief Cashier of the Respondent from 1998 to the year 2011 but was presently working in the Revenue Section.

The witness told the court that she was well versed with the payment system of the Respondent and was familiar with this case. She admitted that the Claimant was owed terminal benefits in the sum of Kshs.87,240/= but the net figure payable less various deductions was Kshs.64,659/75.

The witness further narrated that cheque No. 00001768 for a sum of Kshs.64,659/75 was prepared in the name of Moses Murimi Murage, the Claimant and the same was from the records collected by one Joseph Kamau Wachira. She referred to the letter of authority to collect, allegedly written by the claimant and dated 6th December, 2003 which was handwritten.

From the records, the cheque was released to Joseph Kamau Wachira and he signed for it as shown in annexure AKN1 to the Memorandum of response. The cheque was a crossed one and could not be cashed.

The National Bank of Kenya, wrote to the Chief Executive Officer of the Respondent on 6th March, 2013, following an inquiry by the Respondent confirming that the cheque in question in the name of Moses Murimi Murage was cleared through the normal bank process. The cheque was deposited in an accountant held at Co-operative Bank and was forwarded for collection on 15th December, 2003. Respondent's account number 01003-0580051-00 was also deposited with the same amount on the same date. A certified statement was attached to the letter.

According to this witness this was proof that the Claimant received payment of his terminal benefits

and had no further claim against the Respondent.

The witness however under cross-examination by the court admitted that a letter by the Claimant following up the payment and dated 18th August, 2003 was not replied to by the Respondent.

She also agreed that the address given in the purported letter of authority to one Joseph Kamau Wachira was not the address, the Claimant had given the Respondent. She further admitted that the signature in the said letter differs with the signature in the other letter written by the Claimant.

She was unable to answer why the respondent released a cheque to a person on the basis of a handwritten letter without cross-checking.

She also admitted that the Respondent did not write to him to come and collect the cheque yet he had visited them many times following the payment.

She denied that the Respondent was negligent in the manner it released the cheque without first notifying the Claimant that it was ready.

She was hard pressed to answer why the record shows that Mr. Joseph Kamau Wachira collected the cheque on 7th December, 2003 which was a Sunday. She explained that this must be a mistake as the cheque was collected on 9th December, 2003, yet in her supporting affidavit she states that it was collected on 7th December, 2003.

It was put to the witness that on the register there was an alteration changing the date 7th to 9th. That was clear from the register produced that the record was tampered with.

It was put to her that as an accountant, she was very particular on figures and dates and that this was a deliberate alternation from 7th to 9th to suit the false case by the Respondent.

The witness was also shown the record which shows clearly that the cheque was first given to one **Mr. Charles Obungu** of identity card No. 8550405 and he had signed for it. She was at pains to explain under what circumstances this had happened and how the same was then called back and issued to one Joseph Kamau Wachira who did not sign for it.

She admitted that looking at the record, the cheque was signed for by one Charles Obungu and not Joseph Kamau Wachira.

She also admitted that these alterations are not as is customary. She finally conceded that she does not know who took the cheque from the record before court.

Conclusion of facts.

From the admissions by Ms. Agnes Kavui Ndumbu for the Respondent, who was the Chief Cashier at the time the cheque in question was prepared and collected, the Respondent is unable to identify the person who collected it.

It is clear that the cheque register marked "AKN1" produced by the Respondent was tampered with and it does not support the Respondent's case that the cheque was collected by one Joseph Wachira Kamau, allegedly on behalf of the Claimant.

There is no evidence from the Respondent's bank that this cheque was deposited in the Claimant's account at Co-operative Bank or at all.

The Claimant has told the court that as at 2003, he had no account with the Co-operative Bank where the cheque was allegedly paid out.

The court is of the decisive view that personnel of the Respondent in collaboration with other persons, wrongfully, and unlawfully diverted the terminal benefits due and owing to the Claimant to third parties who opened an account and encashed the proceeds.

The Claimant has made out a very clear case on a balance of probabilities that he was deprived of his terminal dues amounting to Kshs.64,659/75 either through gross negligence of the bank and/or deliberate connivance by the personnel of the Respondent.

Whichever is true, the Respondent cannot escape its liability to the Claimant and the court directs the Respondent to pay to the Claimant;

- a. Kshs.64,659/75 being his terminal dues owing from date of termination to-date.
- b. Pay interest at court rates on the amount from 14th October, 2002 to-date.
- c. Pay costs of the suit.

Dated and delivered at Nairobi this 25th day of October, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE