



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 26 OF 2012

(Formerly Cause No. 504 of 2012 at Nairobi)

PAUL NGENO.....CLAIMANT

-VERSUS-

PYRETHRUM BOARD OF KENYA LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 1st November, 2013)

JUDGMENT

The claimant **Paul Ngeno** filed the memorandum of claim on 27.03.2012 through Mboga G.G. & Company Advocate. The claimant filed an amended memorandum of claim on 01.03.2013 and he prayed for judgment against the respondent for:

- a. **A declaration that the purported laying of the claimant redundant amount to unfair termination.**
- b. **The claimant be reinstated and paid his full salary to date.**
- c. **An order that the respondent must pay the claimant his dues as follows:**
 - i. **Salary arrears Kshs.936,752.00**
 - ii. **Unpaid leave for 3 years Kshs.100,200.00**
 - iii. **3 months pay in lieu of notice Kshs.100,200.00**
 - iv. **Pareto Sacco deductions not remitted to the society Kshs.166,440.00**
 - v. **Redundancy pay Kshs.386,420.00**
 - vi. **Total Kshs.1,446,812.00**
 - vii. **Costs and interest**
 - viii. **Any other relief that the honourable court may deem fit to grant.**

The respondent **Pyrethrum Board of Kenya** filed the memorandum of defence on 20.02.2013 through the Federation of Kenya Employers. The respondent pleaded that the claimant was entitled to:

- a. **Half salary from 2.04.2009 to 7.08.2009 Kshs.145,752.00.**
- b. **Salary from 1.04.2009 to 7.08.2009 Kshs.105, 126.00.**
- c. **5 days accrued leave Kshs.4,139.00.**
- d. **Retrenchment package Kshs.386,420.00.**
- e. **Less rent arrears of the period claimant occupied respondent's residential house from 2009 up to September 2012 and less any liabilities due to the respondent from the claimant.**

- f. **The court to find that the demand for pay in lieu of notice is included in the retrenchment package.**
- g. **The respondent to claim the Pareto Sacco money from the co-operative.**
- h. **Costs of the suit.**

The case was heard on 19.09.2013. The claimant gave evidence to support his case. The respondent's witness was its human resource manager since 1998, one Roselyne Chepgeno.

The claimant was employed by the respondent as an accounts clerk with effect from 1.05.1997. He was interdicted on 21.04.2008 and following the interdiction, he was put on half basic monthly salary. His basic monthly salary was Kshs.24,833.00 and the half paid while on interdiction was Kshs.12,416.50. While on interdiction, he was paid the full remunerative allowances. The interdiction letter dated 21.04.2008 and addressed to the claimant stated as follows:

“INTERDICTION

We are in receipt of information to the effect that you reversed cheque number 095275 from the cash book which had been cancelled leading to the cheque being cashed in June 2007.

You also never noted the anomaly in your reconciliation report which is a serious neglect of your duties which can lead to your services being terminated.

In order to allow management to carry out investigations in this matter, it has been decided that you be interdicted on half pay with effect from 2nd April, 2008 for a period of three months.

Meanwhile, you will be expected to be reporting to Finance Manager and sign a register twice a week on Monday and Fridays for the period.

Yours Sincerely,

Signed

DONALD O. OKOYO

PERSONNEL SERVICES MANAGER”

The interdiction lasted up to 1.04.2009 when the claimant was suspended from duty. Effective the date of the suspension, all his monthly pay was withheld. The suspension letter addressed to the claimant was dated 1.04.2009 and it stated as follows:

“SUSPENSION FROM DUTY

Please refer to our letter ref. PF/08-8162/DOO/jwg dated 21st April, 2008.

A report from the Divisional C.I.D Headquarters ref. no. CI/SEC/4/4/A/VOL.1/ dated 5th March, 2009 indicates that you were charged in court together with others not yet arrested with the offence of stealing by servant.

This is, therefore, to inform you that the management has decided to suspend you without pay with effect from 1st April, 2009 until the case is heard and determined by the court.

By copy of this letter, the Finance Manager is requested to effect the above changes.

Yours Sincerely,

Signed

ROBERT R. NYARANGI

HUMAN RESOURCE MANAGER”

The claimant was charged on 27.02.2009 with the offence of stealing by servant contrary to section 281 of the Penal Code in Criminal Case No.1154 of 2009 in the Chief Magistrate’s Court at Nakuru. The claimant was acquitted on 12.11.2010 under section 215 of the Criminal Procedure Code for lack of evidence to sustain the offence as charged. The claimant informed the respondent about the acquittal by his advocates’ letter dated 22.11.2010. The letter addressed to the respondent’s managing stated as follows:

“RE: PAUL NGENO

We act for the above named person on whose instructions we address you as follows:

That on 21st April 2008 you interdicted our client with half pay up to 31st March 2009 to allow your management to carry out investigations. Later, on 1st April 2009 you suspended our client from duty without pay pending hearing and determination of a criminal case that he was charged with. He remained on suspension until 12.11.2010 when he was acquitted of any wrong doing.

In the meantime, on 7th August 2009, you purported to unlawfully lay our client redundant. You never paid him his salary arrears or damages for unlawful termination. Our mandatory instructions are to demand from you which we hereby do, admission of liability and there after the sum payable to our client shall be calculated.

Take notice that if we do not receive your admission of liability within the next 14 days we have firm instructions to institute appropriate legal proceedings against you at your peril as to costs.

We enclose here the copy of the hand written judgment for your record.

Yours faithfully,

Signed

MBOGA G.G. & CO.

ADVOCATES”

The respondent’s managing director wrote the letter dated 16.12.210 in reply to the advocates’ demand letter. The respondent took the view that the criminal process had been an initiative by the Criminal Investigation Department (CID) who prosecuted the case. Further, while on suspension, the claimant had been legally laid off through a legal notice as a result of the staff rationalization process affecting the respondent. The respondent further stated that the acquittal had paved way for the claimant to be cleared of any liabilities with the respondent before payment of his terminal dues. The clearance, the respondent stated, would include recovery of the lost money from the claimant and two others through the respondent’s administrative and disciplinary machinery. In that process, the respondent stated in the letter that it would not be influenced by the court judgment in acquitting the claimant.

The claimant was not reinstated following the acquittal. He had, prior to the acquittal, received the redundancy letter dated 7.08.2009 slipped under the door at his residential house. The letter conveyed to the claimant that he had been identified for redundancy and the redundancy package included:

- a. Notice or pay in lieu of notice.

- b. Severance pay.
- c. Lump-sum Golden Handshake.
- d. Transport expenses.

The package was to be paid less any indebtedness to the respondent. The letter informed the claimant that he would be paid Kshs.386,420.00 over the next 2 months subject to usual clearance formalities.

The claimant testified that before suspension there were no investigations by the respondent and the investigative procedure set out in the letter by the Public Service Commission of Kenya dated 27.2.2008 was not followed. The claimant was not at work during the evaluation for redundancy and the criteria used to identify him for redundancy was not communicated to him. At the time of the criminal case, the claimant testified that his salary was Kshs.43,433.00. That was to be the rate of the three months pay in lieu of notice in view of the redundancy. The claimant further testified that his pay less statutory deductions would have been Kshs.33,400.00 and the net for three months would have been Kshs.100,200.00. The claimant admitted to owe the respondent rent at about Kshs.3,450.00 per month effective the date of the suspension when all his salary was withheld and the rent not deducted as was the arrangement.

The claimant's case was that the suspension was to subsist until the determination of the criminal case and before the case was determined, he was purportedly terminated from employment through redundancy. The claimant claimed 97 leave days being 30 days for 2008, 2009 and 2010 and 7 days for 2007. He claimed salary up to 12.11.2010 when he was acquitted of any wrong doing. He testified that he ought not to have been declared redundant. He further testified that Pareto Sacco dues were deducted from his monthly salary and not remitted, hence the prayer as made in the memorandum of claim.

The respondent's witness testified that the redundancy was a process independent of the suspension and disciplinary process. She testified that the respondent was willing to pay the claimant the salaries withheld during the interdiction and suspension. The witness set out the claimant's entitlements to include:

- a. Half basic salary withheld from 2.4.2008 to 30.3.2009, the date of the suspension.
- b. Salary withheld during suspension period from 1.4.2009 to 7.8.2009, the date of the redundancy.
- c. About 6 days leave due and not taken in 2007. Leave for 2008, 2009, and 2010 will not be paid because leave is earned and because the claimant did not work during the three years, he did not earn the leave.
- d. Since 7.08.2009, the claimant left employment on account of redundancy and therefore the claim for salary up to 12.11.2010, the date of the acquittal, was unjustified.
- e. The Pareto Sacco deductions of Kshs.166,440.00 had been made but not remitted due to the respondent's financial difficulties.
- f. The claimant's office had been merged with another office currently held by one officer and it was therefore difficult to reinstate the claimant as there was no vacancy.
- g. The rent per month was Kshs.3,200.00 and the claimant had not paid effective the date of the suspension.

The respondent's witness stated that the purpose of the redundancy was to reduce the wage bill. While on suspension, she admitted that the claimant was not earning the salary and consequently his termination did not lead to immediate decline in the wage bill. The witness confirmed that other than the rent owed, she was not aware of any other liability due to the respondent from the claimant.

The witness further testified that the suspension was overtaken by the termination on account of redundancy.

The issues for determination as set out by the court include:

1. **Whether the claimant is entitled to the withheld salaries during interdiction and suspension.**
2. **Whether the claimant's termination by way of redundancy was unfair.**

3. **Whether the claimant was entitled to and remained in employment between the date of redundancy and the date criminal case was determined.**
4. **Whether the respondent was entitled to invoke the disciplinary case and therefore the pending criminal case as valid selection criteria to target the claimant for redundancy.**
5. **Whether the parties are entitled to the remedies as prayed for.**

The court has considered the pleadings, the evidence and the submissions. The following findings are made by the court on the issues under determination:

Issue No. 1: Whether the claimant is entitled to the withheld salaries during interdiction and suspension

The respondent has admitted that the claimant is entitled to half basic salary withheld from 2.4.2008 to 30.3.2009, the date of the suspension; and salary withheld during suspension period from 1.4.2009 to 7.8.2009, the date of the redundancy. The court finds that the claimant is entitled to salary withheld during the interdiction as admitted by the respondent.

As for salary withheld during the suspension, the claimant has claimed the same up to 12.11.2010, the date of the acquittal and not up to 7.8.2009, the date of the redundancy.

The court has considered the respective positions taken by the parties. The suspension letter was clear thus, **“This is, therefore, to inform you that the management has decided to suspend you without pay with effect from 1st April, 2009 until the case is heard and determined by the court.”** The respondent conveyed to the claimant that he was to remain on suspension until the criminal case had been determined by the court. The case was not determined until 12.11.2010. The respondent never lifted the suspension at any point prior to the redundancy. In the opinion of the court, the claimant remained on suspension until 12.11.2010 because the suspension was never lifted to pave way for the redundancy. The suspension was a disciplinary process initiated by the respondent and as long as the process had not been concluded, it was not open for the respondent to purport to initiate another termination process, namely, redundancy procedure.

As to whether the claimant is entitled to be paid up to the date of acquittal, the court upholds its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **“The respondent terminated the claimant’s service by the letter dated 20th December 2010 received on 30th December 2010 and with effect from 18th May 2010, the effective date of the suspension. The issue before the court is whether the claimant is entitled to be paid for the period between the date of suspension and the date of conclusion of the disciplinary case being the date the letter of termination was delivered, that is, 30th December 2010. In opposing this claim, counsel for the respondent has cited paragraph 6.2.4 of the respondent’s terms and conditions of service, 1999 which provides, thus, ‘An employee under suspension will not be entitled to any salary, but may, in case of hardship, and on request be granted an alimentary allowance in such amount and such terms as may be determined by the Managing Director.’**

The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice

to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”

In the present case, the disciplinary procedure ended when the claimant was acquitted by the criminal court on 12.11.2010. The claimant was entitled to pay until that date because at the end of the disciplinary process the employee was found innocent.

As to whether the outcome in the criminal case was binding upon the respondent, the court holds that the acquittal in the criminal case was binding upon the respondent as the conclusive finding on the allegations leveled against the claimant. The court further holds that after the acquittal, the respondent was thereby precluded from commencing or continuing administrative disciplinary action against the claimant on grounds substantially similar to the matters in the criminal case and for which the claimant was acquitted. The court upholds its opinion that in employment disciplinary cases where the criminal element exists in the opinion of the employer, the employer has an election to conduct the investigations using the internal administrative systems or to report to the relevant criminal justice agency and in which event the agency's findings would be binding upon the employer in that matter as was held to be the position in the case of **Patrick Njuguna Kariuki –Versus- Del Monte (K) Limited, Cause No. 9523 of 2011.**

Accordingly, to answer the first issue for determination, the court finds that the claimant is entitled to the withheld half pay during the interdiction and full pay during the suspension up to the date of the acquittal. The court finds that the claimant is entitled to **Kshs.936,752.00** as prayed for.

Issue No. 2: Whether the claimant's termination by way of redundancy was unfair

The court has already found that the disciplinary procedure was never concluded and it was not available for the respondent to purport to initiate termination by way of redundancy in light of the pending disciplinary process. The court holds that it is unfair labour practice for the employer to terminate the contract of employment on grounds other than the grounds of a pending termination process already underway as was the case in the present case. In such cases of parallel termination processes, the court holds that the employer's grounds or reasons for termination are blurred and with the consequence that the employee is not accorded due process because he or she is torn between the ensuing termination processes and procedures.

In any event, the claimant was not accorded the redundancy procedure as provided for in section 40 of the Employment Act, 2007. He was not given any notice or prepared for the redundancy and the selection criteria was not disclosed to the claimant. In view of the unfair termination, the court awards the claimant **Kshs.521,196.00** for unfair termination being twelve months pay at the rate of the last gross monthly pay of Kshs.43,433.00.

Issue No. 3: Whether the claimant was entitled to and remained in employment between the date of redundancy and the date criminal case was determined

The court has already answered the third issue for determination and has found that between the date of the unfair termination by redundancy and the date of acquittal in the criminal case, the claimant was entitled to and remained in the respondent's employment. The suspension was not lifted and the disciplinary process could end and came to a conclusion only after determination of the criminal case. Throughout the time the criminal case had not been determined and the suspension was subsisting, the claimant was validly in the respondent's employment.

Issue No. 4: Whether the respondent was entitled to invoke the disciplinary case and therefore the pending criminal case as valid selection criteria to target the claimant for redundancy

Appendix 3(b) on the memorandum of defence is the tabulation of the names of the employees and the criteria used to justify their respective identification for redundancy. The claimant is serial No. 93 under the finance department. Among the criteria and reasons for his purported identification for redundancy

was, “**Recent disciplinary case.**”

Under section 40 (1) (c) of the Employment Act, in selecting employees for redundancy, the employer shall have due regard to seniority in time and to skill, ability and reliability of each employee of a particular class of employees affected by redundancy. In the opinion of the court, where an employee has been subjected to disciplinary procedure and found culpable, such finding can indicate the reliability, ability and skills of the employee especially where the poor performance or misconduct leading to the imposition of the punishment is taken into account. In such circumstance, the adverse disciplinary findings would constitute a valid consideration in the redundancy identification criteria.

However, where there is pending administrative disciplinary case, the employee in such situation has not yet been found culpable and in the opinion of the court, it would be unfair to identify an employee for redundancy on account of such pending disciplinary case. The court holds that a pending disciplinary case is not an indicator of an employee’s skills, reliability or ability and until the employee is found culpable on such account, the pending disciplinary case is not a valid consideration to target the employee for redundancy. Where there exists a pending disciplinary case and redundancy is underway, the fair action is for the employer to conclude the disciplinary case against the affected employee rather than invoking the pending case as a reason for identifying the employee for redundancy. In the opinion of the court, the only exception would be where all employees in the employer’s establishment or employees in the affected employee’s category are to be terminated on account of redundancy and in which event the employer may opt to determine the disciplinary case by way of stated deliberate summary abortion of the disciplinary case and proceed to terminate the affected employee under the redundancy process.

In the instant case, the claimant was subject to a pending disciplinary case which was not determined prior to the purported redundancy and the case had not concluded or been determined. The court therefore finds that it was misleading and irregular to identify the claimant for redundancy on account of recent disciplinary case and the pending disciplinary case was not available to aid the identification criteria for the claimant to proceed on redundancy.

Issue No. 5: Whether the parties are entitled to the remedies as prayed for

The court has already found that the claimant is entitled to **Kshs.521,196.00** for unfair termination being twelve months pay at the rate of the last gross monthly pay of Kshs.43,433.00; and to the withheld half pay during the interdiction and full pay during the suspension up to the date of the acquittal being **Kshs.936,752.00** as prayed for.

The court makes the following findings on the other prayers made by the parties:

- a. The claimant has prayed for payment of leave days for 2007 being 7 days, and 90 days for 2008, 2009 and 2010. The respondent has objected to the pay for the 90 days because the claimant did not actually work and therefore did not earn the leave days. The court has considered the provisions of section 28 of the Employment Act, 2007. Under the section, an employee is entitled to annual leave with respect to consecutive months of service. Accordingly, the court finds that an employee earns annual leave for every period of unbroken service and since the claimant did not actually serve during the interdiction and the suspension, he is not entitled for annual leave pay as prayed for. In any event, the court has ordered for the claimant’s full pay throughout the interdiction and suspension period and ends of justice have already been met. However, the claimant is entitled to **Kshs.6,680.00** for due leave days in 2007.
- b. The court finds that the claimant is not entitled to the redundancy package because his termination has been found to have been unfair, the claimant found entitled to an award for unfair termination and the claim for redundancy package is therefore found unjustified.
- c. The claim for Pareto Sacco for **Kshs.166,400.00** is found justified because the deductions were made and not remitted. The submission by the respondent on need to facilitate the Sacco to recover loans was not urged at the hearing with supporting evidence and is found to be a void

submission.

- d. The respondent is entitled to Kshs.3200.00 per month for rent from October, 2010 to November, 2013 making 38 months thus, **Kshs.121,600.00** which the court has deducted from the claimant's entitlement found payable by the respondent as conclusively ordered in this judgment.
- e. In absence of any more favourable agreement, the court finds that the claimant is entitled to only one month pay in lieu of the termination notice being **Kshs.43,433.00**.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the respondent's termination of the claimant's employment by way of redundancy was unfair.
2. The respondent to pay the claimant **Kshs.1,552,861.00** by 1.12.2013, failing interest thereon to be payable at court rates from the date of the judgment till full payment.
3. The respondent to pay costs of the case.

Signed, dated and delivered in court at Nakuru this Friday, 1st November, 2013.

BYRAM ONGAYA

JUDGE