



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

ELR NO 20 OF 2017

(Formerly NKR ELRC 172/14)

PATRICK HANDA.....CLAIMANT

VERSUS

RAI PLYWOODS (K) LIMITED.....RESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was employed in March,2002 as an electrician. During his employment he was elected as the chairperson of PLY SACCO in 2004 and later as Secretary in 2005. He served the respondent for 9 years. On 14th February, 2011 he was summoned to the director’s office where he met two CID Officers over allegations that he and others had conspired to defraud Raiply Company of 66 million shillings.

2. The Claimant was consequently suspended to pave way for investigations. He was later on arrested and charged before Eldoret Magistrates Court with the offence of conspiracy to commit felony. The Claimant was however acquitted of the charges. The Claimant and his colleagues subsequently wrote to the respondent on 26th March, 2012 demanding the revocation of their interdiction and for payment of their full salaries and allowances from the date of interdiction. They did not receive any response to their demand.

3. The respondent on its part pleaded among others that the Claimant’s suspension and indictment were procedural and founded on reasonable cause and investigation by the relevant authorities. The decision to indict the Claimant was based on his tenure as Treasurer of Ply woods SCCO when the respondent lost Kshs. 79 million through fictitious deductions.

4. The respondent further pleaded that the ruling in the criminal proceedings established that there was indeed theft of funds through the SACCO but the proceedings collapsed when the prosecutor failed to tender all the evidence which pointed to the Claimant and his associates. The Claimant on being charged was summarily dismissed as per section 44(4) (a) of the Employment Act, 2007.

5. During the oral hearing the Claimant further stated that he was employed in 2002 as an electrician. On 15th February, 2011 he was suspended over allegations of being involved in loss of Plywood SACCO funds. After suspension, the respondent never called him for any disciplinary hearing. He further stated that he has never been issued with any termination letter. According to the Claimant he was never shown any document showing money was lost. He however, recorded a statement over the loss with the police and was later on arrested and charged over the issue.

6. On 3rd February, 2012 they were acquitted of the charges and upon acquittal they asked through their lawyer if they could resume work but the respondent never replied to the letter.

7. In cross-examination he stated that in 2004 he was elected as the Supervising Committee chairman of the SACCO and later on secretary General. The SACCO was a different entity from the respondent. He further stated that upon employment he gave all his contact information. He denied knowledge of any disciplinary hearing. The Claimant however stated that Box 161-60100 was for a primary school in his village and that the school closed some years back. He was however the one who provided the address.

8. The respondent's witness Mr. Joachim Muli Kimoja informed the Court that he worked for the respondent as HR Manager. According to him, the Claimant was first employed in March, 2002 as an electrician. It was further his evidence that Rai Ply SACCO was a different organization from the respondent. It was a SACCO for Rai Ply workers. According to Mr. Kimoja the SACCO and the respondent lost around 79 million. The Claimant and others were accused of embezzling the funds. Independent investigations by the police led to Claimant's suspension. The Claimant was suspended on 15th February, 2011 and issued with a show cause letter. The respondent sent about five notices to the Claimant through the address 161 Kakamega. This was the address in the Claimant's personal file. The Claimant never honoured any of the notices. He never came back to work after the suspension.

9. In cross-examination he stated that he joined the respondent after the Claimant had left and that he learnt of the case through Claimant's personal records., The Claimant had no previous disciplinary cases. There was a notice to surcharge the Claimant before his prosecution.

10. It was further his evidence that the letters to the Claimant were sent by registered post but returned unclaimed.

11. On 26th March, 2012 the Claimant wrote to the respondent through his lawyer informing the respondent of the Claimant's acquittal. He further stated that no disciplinary hearing took place because the Claimant never showed up. No dismissal letter was issued. The Claimant since suspension never came back to the respondent's premises.

12. The Claimant herein was suspended indefinitely to allow investigations into embezzlement of funds belonging to Rai Ply SACCO. He was subsequently charged with offence of conspiracy to defraud but was acquitted for lack of evidence. The Claimant upon acquittal through his lawyer, wrote a letter dated 26th march, 2012 demanding among others reinstatement and payment of all his dues.

13. The respondent admitted receiving this letter and referring the same to their advocate for action.

14. According to the respondent it summoned the Claimant about five times to show cause and attend disciplinary hearing but the Claimant never showed up. According to the respondent, the letters were posted to Claimant's home address provided by him in his personal records with the respondents. The letters were sent by registered mail but never returned unclaimed. The respondent attached copies of the alleged letters however the returned unclaimed mail was never exhibited.

15. The Claimant did not deny that the postal address used was provided by him for his records with the respondent. He however stated the address belonged to a primary school which had since closed down.

16. The allegations against the Claimant may not have been sufficiently proved to the standards required in a criminal trial, however, nothing prevented the respondent from using similar evidence to take the Claimant through a disciplinary hearing whose standard of proof is not as high as in a criminal prosecution.

17. The disciplinary hearing never took place due to what the Court surmises to be breakdown of communication between the

parties.

18. The Claimant's suspension was indefinite and pending investigations of the allegations against him. He was subsequently arrested and charged; The Court would not be wrong to assume that the Claimant stayed away from his place of work pending the outcome of his prosecution. It is indeed upon the conclusion of the criminal trial where he contacted his employer seeking among others reinstatement to employment. Whereas the respondent admits receiving the said demand letter, they did not respond to the same. If the respondent was truthful that it tried to contact the Claimant to show cause and attend disciplinary hearing in vain, the natural reaction would have been to respond to the demand letter from the Claimant's advocate stating among others the failed attempt to reach the Claimant for purposes of disciplinary hearing.

19. To this extent the Court finds and holds that as much as there may have been valid reasons for terminating the Claimant's service, the termination was done contrary to procedure set out in the Employment Act, that is to say the Claimant was not given a chance to be heard before his services were terminated.

20. On the issue of termination, the Claimant was never issued with a termination letter. He was only issued with a letter of suspension. A suspended employee still remains an employee until his or her services are terminated. Since there was no termination letter, the Court will reckon the date of termination to be around 26th March, 2012 when the Claimant's counsel issued a letter of demand to which the respondent never replied. The Court will therefore award the Claimant's as followed: -

Kshs.

(i) Salary for the period of suspension

(15/2/2011 to 26/3/2012)	248,079
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(ii) One month's salary in lieu of notices	19,083
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(iii) Eight months' salary as compensation

For unfair termination	<u>152,664</u>
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419,826

(iv) Costs

(v) Items (i) (ii) and (iii) are subject to taxes

And statutory deductions.

It is so ordered.

Dated at Nairobi this 30th day of October 2020

Abuodha Jorum Nelson

Judge

Delivered this 30th day of October 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judg



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