



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.E004 OF 2020

(Before D.K.N.Marete)

JAMES MWANGI GICHUHL.....CLAIMANT

VERSUS

UNAITAS SACCO SOCIETY.....RESPONDENT

J U D G M E N T

This matter was brought to court vide a Claimant's Memorandum of Claim dated 28th October, 2020. The issues in dispute are therein cited as;

i) Unlawful dismissal and in breach of contractual terms and without according the Claimant a fair hearing and lacking proper fair administrative procedure with unfair consequently void.

ii) Contravention of Article 28 of the Constitution of Kenya and violation of the right to inherent, human dignity and privacy by the Respondent.

The Respondent did not make or file a response in this cause, or at all. There is none on record.

The Claimant's case is that he was employed by the Respondent as a teller clerk at a standing salary of Kshs.40,300.00 per month. He was later promoted to a member care officer on 18th August, 2017.

The Claimant's further case is that on 5th November, 2017, he was transferred from Kangema to Kahata within Murang'a County and promoted to a Bank office Clerk.

The Claimant's other case is that;

- On 1st October 2019, he was summoned before the disciplinary committee meeting on an allegation of sexual harassment against Sarah Wanja a cleaner and tea girl.
- On 5th November 2019, he was suspended until further notice and in the absence of findings from the alleged complainant, police, security officers or medical report.
- The manager relied on word of mouth from the Director and Branch Manager.

- Summoned to a second disciplinary committee meeting on 23rd January 2020.
- Termination letter issued on 23rd January, 2020 on grounds of office romance (sexual harassments).
- He was and is innocent in law.
- His termination of contract was not in tandem with Section 35, 41, 43 and 45 of the Employment Act, 2007 and also contravened his rights under Article 27 of the Constitution.
- He suffered mental anguish as a consequence of this dismissal.

He prays as follows;

- i) Declaration that the Claimant's termination of the Claimant's services without according him a fair hearing and lacking proper fair administrative procedure was unfair and consequently void.*
- ii) Damages for unfair termination 12 month salary compensation gross pay Kshs. 105,900 x 12 months a total of Kshs.1,270,800.*
- iii) One month salary in lieu of notice Kshs.105,900 and 15 days pending leave for the year 2019, Kshs.52,950.*
- iv) A declaration that the Respondents acted unfairly, reasonably, irrationally, and disregarded the human dignity of the Claimant's by making disclosure relating to allegations of sexual nature without evidence occasioning the Claimant and his family psychological and social torment, trauma and distress contravening Article 28 of the Constitution of Kenya, 2010.*
- v) General damages for violation of the rights to inherent human dignity, privacy and confidentiality when dealing with employee's affairs where allegations of sexual nature have been raised.*
- vi) The Claimant be reinstated to his job group/position with the latest salary.*
- vii) The Respondent meet the costs of the suit.*
- viii) Interest on the award above court rates.*
- ix) Any other relief the court may deem fit to meet the end of justice.*

The Respondent did not put in any response. She however, posted her written submissions dated 26th July, 2021 which suffice as such defence.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful"
2. Is the Claimant entitled to the relief sought"
3. Who bears the costs of the claim"

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The Claimant in her written submissions dated 28th May, 2021 choose to analyse his case of sexual harassment in support of his innocence. He goes out to establish that the allegations of sexual harassment were not substantiated or backed by any evidence and therefore are not adequate as a support for his termination of employment.

The Respondent in her written submissions dated 26th July 2021, submits a case of sexual harassment of one, Sarah, by the claimant which claim the claimant admitted at a disciplinary meeting.

The Respondent therefore submits a case of fair termination of employment and seeks to rely on Sections 43 and 6 of the Employment Act, 2007 as follows;

Section 43 of the Employment Act provides that;

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Further,

Section 6 of the Employment Act provides that;

“(1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker

(a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express-

(i) promise of preferential treatment in employment; (ii) threat of detrimental treatment in employment; or

(ii) threat about the present or future employment status of the employee;

(b) uses language whether written or spoken or a sexual nature;

(c) uses visual material of a sexual nature; or

She relies on the authority of **Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR** to further buttress her case. This essentially provides that for a termination to pass the fairness test it must be established that there was not only substantive justification for termination but also procedural fairness.

The Respondent in her witness statement of Peter Ken dated 12th May, 2021 narrates the sequence of events leading to the termination of the employment of the claimant. This was as follows;

- A report of sexual harassment is made to the respondent and investigations ensue.
- The Claimant voluntarily admitted to the branch manager and board member, one, Frashiah Kamore that he had committed the issue complained of, sexual harassment.
- The admission was with view to resolving the matter locally.
- The claimant is suspended and investigations ensue.
- That after admission by the claimant the respondent held several meeting to the management staff as this misconduct seemed unfounded and was doubtful.
- That this misconduct was in contravention of the Respondent’s HR police and code of conduct.

- A termination of the employment of the claimant is made in utmost good faith.
- That the claim is intended to hoodwink and mislead the court in finding a solution to this cause.

The Claimant was informed of the reasons for termination of his employment. He admitted culpability. Due process was had and the claimant found culpable of the allegations of sexual harassment made against him. This therefore justifies the Respondent action in terminating his employment. A case of fair and lawful termination of employment therefore ensues and I find as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost a case of unlawful termination of employment she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the claim.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.

D.K.NJAGI MARETE

JUDGE

APPEARANCES

1. MR.KAMAU INSTRUCTED BY KABUTHIA KAMAU & ADVOCATES FOR THE CLAIMANT.

2. MR.MWANGI HOLDING BRIEF FOR MR.NGUGI INSTRUCTED BY NGUGI & COMPANY ADVOCATES FOR THE RESPONDENT.



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