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| Advocates: | - |
| Case Summary: | - |
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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 64 OF 2015

MICHAEL GITAU NJOROGE.....
.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT AFYA YETU
INITIATIVE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th December, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 17.04.2015 through Gori, Ombongi & Company Advocates. The amended claim was filed on 07.07.2015. The claimant prayed for:

- a. Compensation for wrongful dismissal to a maximum of 12 month wages and general damages emoluments or contingencies at a rate of 15% of the total amounting to Kshs.1,420,068.00.
- b. Damages for lost earning from 10.05.2012 up to today being monthly earnings at a rate of 91,030.00 and annual increment of 5% of the salary per month.
- c. The claimant to be reinstated to his job as the General Secretary of the respondent and Programme Coordinator of CBHIS.
- d. Costs of the suit.
- e. Interest on (a) (b) and (d) above till payment in full.

The response to the claim and counterclaim was filed on 07.05.2015 through Waweru Macharia & Company Advocates. The respondent prayed for:

- a. The claimant's claim to be dismissed or struck out with costs.
- b. Judgment to be entered for the respondent for Kshs.541,824.00 plus costs and interest.
- c. Any other relief the court may deem fit to grant.

The claimant filed the reply to the claim and the response to the counterclaim on 27.05.2015.

The claimant was employed by the International Centre for Development Research (CIDR) for 5 years from February 2003 to December 2008 as a programme co-ordinator. In December 2008 CIDR wound up and it was desired that its assets and activities are transferred to and taken up by a local organization. The claimant together with other employees for CIDR registered the respondent as a local Non- Governmental Organization which took up the CIDR assets, liabilities, staff and projects in Kenya. The claimant then became the respondent's employee designated as the chief executive officer, programme coordinator and the secretary general. His employment with the respondent was effective 1.01.2009 as an employee and respondent's founder. The respondent ran a project known as Community Based Health Insurance Scheme (CBHIS) for which the claimant was the Programme Coordinator.

On 2.12.2010 the claimant invited 4 persons to serve on the respondent's board and a further person on 9.09.2011 with a view of enhanced leadership and guidance for the growth of the respondent.

It was the claimant's case that between December, 2011 and February, 2012 four of his juniors and one of the board members, the board chairman, designed to remove the claimant from the positions he held on alleged grounds that the claimant mismanaged the project's funds. In that design, the evidence as given was that the claimant's email had been hacked by the claimant's colleague and malicious emails circulated to respondent's board members.

On 13.02.2012 while on duty the claimant received a letter from the chairman of the respondent's board, one Dr. George Gicheru Ngatiri also the respondent's witness (RW) in the case. That day all staff became uncooperative, the claimant was denied access of his office and the car keys for the official car were forcefully withdrawn from the claimant by his junior colleagues. The claimant testified that he walked from the respondent's premises to attend lectures at Kenyatta University, Nyeri Campus, where he was a student in the master's class. He felt humiliated.

On 14.02.2012 he reported at the office at 8.00am but he could not access the office compound and his colleague one Wilson Wang'ombe stood at the gate armed with a wooded weapon to obstruct the claimant from entering the premises. He pleaded and then he was allowed in to pick his private belongings. It was the claimant's testimony that another colleague one Charles Maina confronted him as he arranged his belonging at the office and ordered the claimant to leave and an argument ensued and in that process his other colleagues drove to Nyeri police station. The other two members of staff who were signatories to the respondent's accounts went to the bank and advised the bank not to honour any transaction carried out by the claimant. The police arrived at 11.00am and then Dr. Ngatiri, as the claimant testified, ordered him to leave the office for 3 months. After the claimant left office, RW never called him again. On 10.05.2012, the claimant received a letter from RW dismissing him with immediate effect following the outcome of an investigative audit on allegations made against the claimant by the management team.

It was the claimant's case that he was seriously aggrieved by the forceful termination that was without a notice and a hearing in self exculpation. Further the agreed applicable disciplinary procedures in the respondent's manuals were never followed and the dismissal was, in the claimant's case, unfair. Thus, the claimant prayed as per the amended memorandum of claim. At dismissal the claimant earned Kshs.91,030.00 as net pay and Kshs.101,230.00 as gross pay per month. It was the claimant's case that the chairman and the staff schemed to fire him so they take up the organization.

Later in May 2012 the claimant was arrested for alleged theft of Kshs. 865,331.00, the respondent's money as per the charge sheet at the magistrate's court at Nyeri. It was the claimant's evidence that he received the written allegations and he responded to all of them.

The **1st issue** for determination is whether the claimant's termination was unfair. The claimant confirmed that he received the letter of suspension setting out all the allegations and he responded to all the allegations. He was then called to a hearing after he received the termination letter. The court finds that whereas the respondent complied with the need for the notice, the prescribed hearing did not take place before the termination as envisaged in section 41 of the Employment Act, 2007. On that account, the court finds that the termination did not afford the claimant due process and it was unfair. As the reasons for the termination are subject to the inquiry by the trial court in the criminal case as instituted against the claimant, the court will not delve to make an inquiry in that respect. As there was no hearing on appeal and as was agreed to in the respondent's submissions, the failure to be heard was never cured and the termination was unfair.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

a. The claimant has prayed for compensation for wrongful dismissal to a maximum of 12 months' wages and general damages emoluments or contingencies at a rate of 15% of the total amounting to Kshs.1,420,068.00. Under section 49 (1) (c) of the Employment Act the maximum compensation for unfair termination is 12 months' gross salaries at the rate of the monthly pay at termination. The court has considered the claimant's long service. His account of the humiliation by his juniors, that is not rebutted, in the designs of his forceful ejection from the office, in the opinion of the court, aggravated the claimant's injury. Further the claimant has shown the undisputed role the claimant played in establishing the respondent. The claimant was willing to continue in employment but for the unfair termination. Taking all these circumstances into account, the court finds that the claimant is entitled to the maximum compensation being Kshs. 101, 230.00 times 12 making **Kshs.1,214,760.00**. He is further awarded one month salary in lieu of the termination notice under section 35(1) of the Employment Act making **Kshs. 91,030.00**.

b. The claimant prayed for damages for lost earning from 10.05.2012 up to today being monthly earnings at a rate of 91, 030.00 and annual increment of 5% of the salary per month. The pertinent issue is whether the claimant is entitled to the pay as prayed. The court uphold its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’**. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds

that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.” The evidence is clear. The claimant testified that he was a student in the master’s class at Kenyatta University, he was engaged in agribusiness and he was also a football coach. The court finds that the claimant was engaged in gainful engagements that invariably earned him alternative income pending the hearing and determination of the suit. Thus the court finds that the exception to the doctrine of partial reinstatement applies and the claimant is not entitled as prayed for. The court further considers that in view of the pending criminal case, the status of the claimant’s exculpation remains unknown and in terms of the exception as set out in the cited opinion, the prayer will fail.

c. The claimant prayed that he be reinstated to his job as the General Secretary of the respondent and Programme Coordinator of CBHIS. The court has considered the pending criminal case which constitutes an element of strained relationship between the parties and return that reinstatement would not be convenient in the circumstances of the case.

The 4th issue for determination is whether the respondent is entitled as prayed for in the counter claim. The court makes findings as follows:

a. The respondent prayed that claimant’s claim to be dismissed or struck out with costs. The claimant’s claim has succeeded substantially and the prayer will therefore fail.

b. The respondent prayed for judgment to be entered for the respondent for Kshs.541,824.00 plus costs and interest. It was pleaded at paragraph 10 of the response and counterclaim that the claimant had stolen 541,824.00 from the respondent in the course of his employment. First, the court finds that that claim is at variance to the Kshs.865,331.00 that was allegedly stolen by the claimant from the respondent as per the charge in the criminal case. Secondly, the court finds that theft was a criminal offence and the respondent did not establish that a trial court with competent jurisdiction had found the claimant liable as alleged. The prayer will therefore fail. While making that finding the court upholds its holding in the ruling of 4.12.2015 in **David Nyamai and 7 Others-Versus-Del Monte Kenya Limited [2015]eKLR** that an employer lacks authority or jurisdiction to make a finding of criminal liability against the employee as that jurisdiction is the exclusive preserve of the trial court with competent jurisdiction to try the offence in issue; thus, **“The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under sections 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a**

prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the Employment Act, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee. Firstly, and on that ground alone, the court finds that the claimants' cause of action was not time barred."

c. As the counterclaim has failed, the respondent will pay the claimant's costs in that regard.

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

- a. The respondent to pay the claimant **Kshs.1,305,790.00** by 01.02.2016 failing interest at court rates to be payable thereon from the date of the judgment till full payment.
- b. The dismissal of the respondent's counterclaim with costs.
- c. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 11th December, 2015.

BYRAM ONGAYA

JUDGE



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