



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 188 OF 2018

PATRICK WANYONYI MUNIALO.....CLAIMANT

VERSUS

NZOIA WATER SERVICES COMPANY LIMITED...RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this claim through a Memorandum of Claim filed in court on 10th May, 2018. The Claimant seeks various reliefs including; a declaration that his dismissal was unlawful, reinstatement, salaries in arrears from March, 2018 to April, 2019, 12 months' salary as compensation for unfair dismissal, 3 months' salary in lieu of notice, leave days not taken, exemplary damages, gratuity, a certificate of service and costs of the suit and interest.
2. The Respondent filed a response to the Claimant's claim on 2nd July, 2018, wholly denying the Claimant's claim, save for an admission that the Claimant was their employee as stated in paragraphs 3 and 4 of the statement of claim.
3. Parties filed various applications some of which were heard and determined, while others were withdrawn by the consent of the parties, culminating in the hearing of the main suit.
4. The Claimant testified in support of his case, adopted his witness statement and produced his bundle of documents.
5. The Respondent presented Ms. Patricia Caroline Okello, its Human Resource Manager, to testify on its behalf. She adopted her witness statement dated 10th August, 2020 and produced her bundle of documents of even date as exhibits in the matter.
6. Both parties filed submissions in the matter.

The Claimant's Case

7. The Claimant states that he was employed by the Respondent as Managing Director for close to 10 years. He avers that he had a contract of service with the Respondent that was to run from 9th April, 2014 to 8th April, 2019.
8. The Claimant's further case is that he was terminated from the service of the Respondent vide a letter dated 7th March, 2018, contrary to the terms and conditions of his contract of employment, the Respondent's Human Resources Policies and the law.
9. The Claimant's gross salary at the time of dismissal and as indicated in his January, 2018 pay slip produced before this court, is Kshs. 393,878.00
10. The Claimant avers that his dismissal is unlawful, illegal and unfair. He states that at the time the decision to terminate his services was arrived at, there was a court order barring disciplinary action against him. He further states that he was not given an opportunity to defend himself nor was he given reasons for the dismissal.
11. The Claimant states that he was not paid his terminal dues upon dismissal. He avers that the Respondent demonstrated bias and bad faith in the way in which it terminated his services.

12. It is the Claimant's further case that he suffered prejudice, difficulty, ridicule, shame and unnecessary anxiety on account of the unfair dismissal meted on him by the Respondent.

13. The Claimant asserts that he lost income and professional growth as it took him 10 months to secure alternative employment.

14. The Claimant's prayer is that this court awards him the reliefs listed in his statement of claim.

The Respondent's Case

15. The Respondent's case is that there was no court order(s) barring disciplinary action against the Claimant.

16. The Respondent states that the Claimant was provided with a show cause letter containing grounds for his suspension from duty, and further asked to respond to the show cause letter and that he did respond as requested.

17. It is the Respondent's case that the Claimant was invited for a disciplinary hearing, which invitation he declined to honour.

18. The Respondent avers that the Claimant was terminated for sufficient cause and upon being taken through due process.

19. The Respondent states that the Claimant's performance and management of his duties was found wanting and in breach of the law, Company Regulations and Policies, and which informed the decision to terminate his services.

20. The Respondent further states that the Claimant failed to ensure that the Respondent's operations adhered to statutory requirements and internal operation policies, warranting the disciplinary action to safeguard the Respondent's interest and in the interest of service delivery. The Respondent states that its operations in the areas of procurement, finance, and human resources under the Claimant's management, were found to be inefficient and inappropriate.

21. It is the Respondent's assertion that an employee who is summarily dismissed is not entitled to any benefits and/or gratuity.

22. The Respondent's further case is that the Claimant never subjected himself to evaluation and thus was not eligible for renewal of contract. It states that the Claimant failed to guide the Respondent's Board in carrying out of its duties, as was required under his employment contract.

23. The Respondent states that the Claimant failed to bring to the attention of this court, his response to the charges leading to his suspension contained in his letter dated 19th February, 2018.

24. It is the Respondent's case that the Claimant was invited to a disciplinary hearing that was scheduled for 7th March, 2018, vide a letter dated 27th February, 2018. The Respondent states that the Claimant through his letter of 2nd March, 2018, declined to attend the disciplinary hearing citing court orders barring the hearing.

25. The Respondent states that it proceeded to deliberate the Claimant's case in his absence and that upon considering the allegations levelled against him, and his response to the allegations, the Respondent's Board arrived at the decision to terminate the Claimant.

26. The Respondent states that it did issue the Claimant with a letter of dismissal dated 7th March, 2018.

27. The Respondent states that the Claimant instituted various suits in different courts in relation with the dismissal subject of this matter, and has failed and/or neglected to bring this information to the attention of this court.

28. It is the Respondent's case that the Claimant's dismissal was done procedurally, fairly, within the law and the Respondent's Human Resources Policies.

29. Ms. Patricia Caroline Okello (RW1) told this court on cross-examination, that at the time the Claimant was suspended, the orders barring disciplinary action against him were in force and were only vacated two days after the Claimant had been suspended.

30. It is her further testimony that the decision to suspend the Claimant is power vested in the Board of the Respondent and further confirmed that no Board meeting took place prior to the Claimant's suspension.

31. RW1 further states that the Respondent was a party to the Judicial Review Application that gave rise to the court order referred to herein, and that it was fully aware that the orders were in force at the time of effecting the Claimant's suspension.

32. RW1 states that the Claimant's dismissal was triggered by the Respondent's letter of 1st February, 2018, as the one of 8th January, 2018, was not from a properly constituted Board. It is RW1's opinion that the Claimant had excusable reasons not to attend the disciplinary hearing.

33. RW1's further testimony is that the Respondent does not have documents that speak to the issues subject of the Claimant's suspension as stated in the dismissal letter.

The Claimant's Submissions

34. It is submitted for the Claimant that his dismissal was carried out in contravention of a lawful court order as disciplinary proceedings continued orders of the court notwithstanding. He sought to rely on the holding in the case of *The Republic v Attorney General & Another Exparte Council of Legal Education (2017) eKLR* to support this position.

35. It is submitted that the Respondent did not give any reasons for dismissing the Claimant contrary to Section 43 of the Employment Act, 2007.

36. The Claimant submits that having complaint of unfair and wrongful dismissal, the burden of justifying the grounds of the dismissal rests with the Respondent, which burden, it failed to discharge per Section 47 (5) of the Employment Act.

37. It is further submitted for the Claimant that he is entitled to payment for the unexpired term of his contract as his term was interrupted by the unlawful actions of the Respondent which denied him his 14 months salary.

38. The Claimant further submitted that he is entitled to the remedies sought as listed in his statement of claim.

The Respondent's Submissions

39. It is submitted for the Respondent, that the Claimant frustrated efforts to appraise his performance and refused and/or neglected to obey lawful orders. The Respondent further submitted that the Claimant's actions in this respect amounted to gross misconduct which warranted his summary dismissal.

40. The Respondent submitted that an oral hearing is not always necessary and hence the fact that the Claimant declined to appear for the oral hearing, is not fatal to the disciplinary proceedings, as he did make a written response to the charges against him, which response, the committee took into consideration in arriving at the decision to terminate the Claimant's services. It sought to rely on the holding in the cases of *Jacob Oriando Ochanda v Kenya Hospital Association Ltd (2019) eKLR* and *Kenya Revenue Authority v Menginya Salim Murgani, Civil Appeal No. 108 of 2009* to support this position.

41. It is submitted for the Respondent that the Claimant was taken through a disciplinary process that was fair and within the law. It is submitted that the Claimant does not deserve the reliefs sought, as he was terminated in accordance with the law.

42. The Respondent further submitted that the disciplinary process against the Claimant was not barred by the orders in force at the time, as the orders were against a letter of suspension issued by the Executive Committee members for water, who had no authority to discipline the Claimant. It is submitted that the discipline process that resulted in the dismissal of the Claimant, was initiated by the Respondent's Board vide a letter of 1st February, 2018.

Analysis and Determination

43. The issues for determination in the matter are: -

- i. Whether the Claimant was unlawfully and unfairly dismissed
- ii. Whether the Claimant deserves the reliefs sought

Whether the Claimant was unlawfully and unfairly dismissed

44. The question of whether the Claimant's dismissal was lawful and fair, is dependent on the Respondent's adherence or lack thereof, to the provisions of Sections 41, 43, 45 and 47(5) of the Employment Act, 2007. (See *Walter Ogal Anuro v Teachers Service Commission (2013) eKLR*.)

45. The Respondent issued the Claimant a show cause letter, which letter the Claimant responded to. It then invited him to a disciplinary hearing, which hearing, the Claimant declined to attend on the basis of a court order staying the discipline process.

46. The Respondent's assertion is that no orders existed at the time the hearing took place as the orders issued were against a suspension notice issued by the Chief Executive Officers (CECs) for Water of both Bungoma County and Trans-Zoia County.

47. The orders referred to herein, were issued in Judicial Review Cause No. 1 of 2018 on 25th January, 2018. The Respondent herein was joined in that suit as an interested Party. One of the orders in the Judicial Review application read as follows:

“That the grant of leave do operate as stay of implementation of the impugned decision and all subsequent steps arising therefrom and in particular the Applicant to remain in his position pending the hearing and determination of the substantive motion.”

48. The Respondent being an Interested Party in the JR proceedings, knew that there were orders in place barring disciplinary action against the Claimant, and the least it could have done, was wait for the orders to be lifted or better still, seek the lifting of the orders before issuing the subsequently suspension letter of 1st February, 2018.

49. RW1 told this court that by virtue of the court orders in force at the time, the Claimant had justified reasons not to attend the disciplinary hearing.

50. The Court finds and holds that the disciplinary process that culminated in the dismissal of the Claimant, was unlawful and unfair for reason of there being in force court orders barring the process.

51. On the issue of substantive justification, one of the Respondent's reason for dismissing the Claimant, is failure to be appraised for the job he was employment to do. The Claimant's contract of service at Clause 2.3, provides as follows in regard to performance review: -

“Your performance shall be evaluated on an on-going basis and formal evaluation sessions will be held twice a year. This contract may be terminated with 1 months' notice in writing if your performance is evaluated as not being satisfactory. The terms of the performance review will be jointly decided with you on joining.”

52. An employee in any employment relationship, is not expected to appraise himself. The Respondent's assertion is that the Claimant sabotaged the appraisal process by frustrating efforts to review his performance. No evidence has been adduced to demonstrate to this court, that the Claimant had been invited to appear before an appraisal committee or any other arrangement put in place for this purpose, and that the claimant declined to honour.

53. An employer fails in its oversight role, if it does not appraise employees per their contracts of service. That the Claimant was not appraised, is not a valid and fair reason for his dismissal, as it was not expected that he would appraise himself.

54. The other issues said to have informed the dismissal of the Claimant, is that he failed to ensure that the Respondent's operations adhered to statutory requirements and internal operation policies, warranting the disciplinary action to safeguard the Respondent's interest.

55. The Respondent stated that its operations in the areas of procurement, finance, and human resources under the Claimant's management, were found to be inefficient and inappropriate.

56. The Respondent produced a Board of Directors Adhoc Committee Report as prove that their reasons for dismissing the Claimant are valid and fair. The report is dated 1st February, 2018. This is the same day the Claimant was suspended by the same Board.

57. This report in the opinion of this court is not credible having come on the same day when the Respondent had set disciplinary proceedings in motion against the Claimant. It is in my view, either an attempt at justifying the dismissal or that the Board could have been trying to cover their backs for wrongs committed by officers under their watch.

58. In whole, the reasons for the Claimant's dismissal fall short of the requirements of Sections 43, 45 and 47(2) of the Employment Act, 2007. (*See Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR*).

59. I find and hold that the dismissal of the Claimant is both procedurally and substantively unfair.

Whether the Claimant deserves the reliefs sought

60. The Claimant seeks that this court awards him the following reliefs: a declaration that his dismissal was unlawful, salaries in arrears from March, 2018 to April, 2019, 12 months' salary as compensation for unfair dismissal, 3 months' salary in lieu of notice, leave days not taken, exemplary damages, gratuity, a certificate of service and costs of the suit and interest.

Three Months' Salary in lieu of Notice

61. The Claimant submitted that his contract of service had 14 months to terminate. He further avers that the contract referred to herein provided for a three (3) months' notice period or payment in lieu of the notice.

63. The Claimant submitted that his contract was terminated unlawfully, without reason and without just cause.

63. The Respondent has not proved that it paid the Claimant for the notice period, which he evidently was neither issued nor served. The Claim for three months salary in lieu of notice is merited and is hereby awarded.

12 Months' Salary for unfair Dismissal

64. The reasons upon which the Claimant's dismissal is premised have not been proved to be those the employer believed to have existed at the time of dismissal per Section 43(2) of the Employment Act, 2007. The Claimant's dismissal has been held to be both procedurally and substantively unfair. The holding entitles him to compensation per Section 49 of the Employment Act, 2007.

65. In awarding compensation for unfair and wrongful dismissal, the court is obligated to consider the thirteen grounds provided under Section 49 (4) of the Employment Act. (*See Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR*)

66. The Claimant's evidence is that is he a chemical engineer and has also told this court that he has since secured alternative employment. With these in mind, and guided by the holding in the case of *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR* where the Court cited the case of *D.K. Marete v Teachers Service Commission Cause No. 379 of 2009* and held that remedies are not aimed at facilitating

the unjust enrichment of aggrieved employees, but are meant to redress economic injuries suffered in a proportionate way, I award the Claimant 6 months' salary as compensation for unlawful and unfair dismissal.

Gratuity

67. The Claimant's employment contract provides for payment of a gratuity at the point of separation. The agreement provides that 7.5% of the consolidated salary is payable as gratuity if the employee leaves the service of the employer in the first year, 17.5% if they leave in the second year and 31% if the employee leaves the service of the employer from the third year through to the fifth year.

68. The Claimant's contract began on 9th April, 2014 and was terminated on 7th March, 2018. The Claimant was in the service of the Respondent for close to four (4) years. In accordance with his contract of service, he is entitled to 31% of his consolidated salary for the years served. He is awarded gratuity at 31%.

Annual Leave

69. The Claimant did not indicate how many days of his leave he had not taken as at the time of his dismissal, and which year (s) the days relate to. The claim is not proved and is dismissed.

Exemplary Damages

70. Exemplary damages are awarded for arbitrary and unconstitutional acts of an employer. The purpose for which the damages are awarded, is to punish the party in breach.

71. Lord Devlin in the case of *Rookes V Bernard (1964) AC 1129* summarized the instances where exemplary damages may be awarded as:

- i. Where tortuous intrusions or trespass that are profit motivated such as wrongful Landlord eviction of their tenants;
- ii. Where there is oppressive conduct by government agents; and
- iii. Where the acts of the defendant have caused distress and intolerable anxiety and to be awarded as punishment.

72. The circumstances under which the Claimant herein was dismissed, does not meet the threshold set for award of exemplary damages. The claim fails and is dismissed.

73. In conclusion Judgment is entered for the Claimant against the Respondent as follows: -

- i. Three months salary in lieu of notice at Kshs. 1,181,634.00
- ii. 6 months salary as compensation for unfair dismissal at Kshs. 2,363,268.00
- iii. Gratuity at 31% for the years worked.
- iv. A certificate of service
- v. Costs of the suit and interest

74. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JANUARY, 2022

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Maruti Present for the Claimant

N/A for the Respondent

Christine Omollo- C/A