



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

CAUSE NO 156 OF 2018

CAROLINE JEBIWOT KIPCHOGE.....1ST CLAIMANT

CHARLES ONCHARI OGOTI.....2ND CLAIMANT

VERSUS

THE KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

J U D G E M E N T

1. This cause was consolidated with cause number 157 of 2018 and proceeded under this cause as the lead file.
2. Charles Onchari Ogoti in cause no. 157 of 2018 pleaded among other that he was at all material times employed by the respondent as a technician on permanent terms. His monthly salary was Ksh.88,898 per month and house allowance of Ksh.26,168 per month.
3. On 30th January, 2018 he was summarily dismissed on the allegation that he had direct association or connection with a company called Samcar Ltd which was one of respondent's Labour and Transport contractors.
4. The claimant further alleged that on various dates between November, 2017 and January, 2018 the respondent maliciously and unlawfully obtained his private data including his Mpesa statements which were used to unlawfully dismiss him.
5. Accordingly, the claimant averred that the allegations against him were baseless, unjustified, unsubstantiated and malicious and the summary dismissal was therefore unlawful and unjustified.
6. The claimant therefore sought an order for reinstatement, compensation for unfair termination and damages for breach of contract.
7. Caroline Jebiwot Kipchoge pleaded more or less the same facts as Charles Ogoti save that she was employed by the respondent as a meter reader on three months renewable contract. Her monthly salary was Ksh. 24,914 and house allowance of Ksh,6,460/=.
8. On 31st January, 2018 the respondent summarily dismissed her when it maliciously and without reasonable cause claimed that the claimant knowingly participated as a director of Samcar enterprises which was a Labour and Transport contractor for the respondent and defrauded the respondent of colossal sums of money.
9. The claimant denied she had any direct involvement with Samcar or any other respondent's contractors whilst in respondent's employment.
10. According to Caroline, she stopped being a director of the said Samcar in March, 2016 when she became an employee of the respondent and never dealt with the same which had its own directors.
11. The claimant also averred that sometime between November, 2017 and January, 2018 the respondent maliciously and unlawfully obtained her private data including her Mpesa statements which the respondent used to unlawfully dismiss her from employment.
12. The claimant therefore sought a declaration that her dismissal was unlawful and sought an order for reinstatement.
13. The claimant further sought compensation for unfair termination of service and damages for breach of contract among other remedies.
14. The respondent on its part pleaded among others that both claimants were rightfully dismissed. According to the respondent, an internal audit was carried out by the respondent wherein it was established that the claimants had a direct association with a Labour and Transport Contractors contrary to respondent's code of ethics.

15. In the case of Carolyne, the respondent averred that she was listed as one of the signatories to Samcar's bank accounts and was responsible for paying some of the employees' salaries via Mpesa. Further she withdrew large sums of money from Samcar's Bank account at KCB Bank.
16. In the case of Charles Ogoti, he was accused of fact that during his employment with the respondent he directly associated with one Patricia Kipsoi, a director of Samcar who was a mother to his child.
17. Further that the claimant being technician in charge of O&M within Baringo County was directly involved in allocation of jobs to Samcar as well as approval of documents for processing and payment. This according to the respondent amounted to conflict of interest and was in contravention of part 2 of the respondents code of conduct and ethics.
18. The respondent further alleged with respect to Charles that he inspected and approved schemes worth Ksh.8.9 million invoiced by Samcar Enterprises Ltd for payment which schemes were during investigation found to have not been done despite payment.
19. At the hearing Mr. Charles Onchari Ogoti (1st Claimant) stated that he recorded a statement on 3rd April 2018 which he adopted as his evidence in chief. He further adopted documents filed with the claim.
20. According to the first claimant, he considered his termination unfair because he was not issued with a copy of the audit report to enable him adequately prepare his defence.
21. In cross-examination he stated that he was employed in 2011 as a technician cum project supervisor based at Baringo. It was further his evidence that he signed the respondents code of ethics which barred employees from acting in a manner not in the interest of the respondent.
22. Mr. Ogoti further stated that he knew Patricia Jemutai and that they were involved in an intimate relationship and further that they had a child together. He however denied they were married to each other. In submitting his biodata form he did not name her as his spouse but filed the form when he was taking a medical cover for their common child.
23. It was his evidence that he was not aware that Patricia was a director in Samcar Enterprises. He further stated that he deposited money to Samcar Enterprises account around 2016 and that an employee of Samcar asked him to deposit money in the account.
24. Concerning payment to contractors he stated that it was part of his work but he was not alone. Payment involved four people and he was one of them.
25. With regard to Mpesa he denied sending Mpesa to Alfred Kipkoech. He further stated that there was a time he was lending money to contractors and would be paid back with 14% interest and later changed that the money he sent to Kipkoech was a personal dealing.
26. Regarding Samcar, he admitted that he was aware that the company was one of the respondent's contractors.
27. Concerning procedure for termination he stated that he was issued with a notice to show cause and he responded to the same. He was thereafter called for a disciplinary hearing which he attended and defended herself. Thereafter he was issued with a termination letter giving reasons for the termination. He never appealed the termination. It was his evidence that he was never heard to his satisfaction and that he requested for the audit report but was not issued with one at the hearing. He was given a copy after the hearing.
28. In re-examination he stated that CR-12 did not indicate that Patricia was a director of Samcar and that at the time of his relationship with her, she had nothing to do with Samcar.
29. The second claimant Ms. Caroline Jebiwot informed the court that she wrote her statement on 3rd April, 2018 which she sought to adopt as her evidence in chief. She also relied on the documents filed over this claim.
30. According to her she was not given the audit report and when the investigators came to her office, they were too fast for her.
31. It was her evidence that she knew Samcar Enterprises and that she used to work for the company before joining the respondent. She was one of the directors but sold her shares in 2016 and resigned from the company. In October, 2016 she was still a signatory to Samcar's Bank account. She further admitted that she was aware of the respondent's code of regulations and that she never got time to handover her issues at Samcar service she was required to report to the respondent immediately.
32. The claimant further admitted that she knew Alfred of Samcar and that he used to send him money on instruction from Samcar directors since she was still a signatory to their Bank account.
33. Concerning the disciplinary process, she stated that she was issued with a show cause letter to which she responded and later attended a disciplinary hearing and presented her defence. She was terminated thereafter. Further, she denied withdrawing Ksh.1.8 million from Samcar Account.
34. The respondent's witness Mr. Argwings Kodhek stated that he worked for the respondent as a senior officer in charge of investigations. His work entailed systems review and investigations.
35. He stated that he recorded a statement on 4th July, 2019 which she sought to adopt as his evidence in chief. He also relied on his list of

documents filed on 18th June, 2019 and a further list filed on 8th July, 2019.

36. Mr. Kodhek stated that he prepared an investigation report concerning Samcar enterprises and the report was dated 5th December, 2017. According to him, he established that the claimant violated the respondents code of ethics by getting involved in the conduct and affairs of a contractor contracted to perform work for the respondent. Carolyne was a signatory to Samcar Bank account. The documents also indicated she was director of Samcar. He further stated whenever the respondent paid Samcar, Carolyne would withdraw nearly all the money and send some to Charles Ogoti.

37. It was further stated by Mr. Kodhek that the companies form CR 12 indicated Patricia Kipsoi as one of the directors and the same Patricia was declared by Charles as his wife in his biodata with the respondent.

38. In cross examination he stated that he was the one who prepared the report and that Samcar was contracted to work for the respondent from 2014 to 2016. The report was for the financial year 2017/2018. Every contractor was required to avail form CR 12 before they were hired and that he received CR 12 in respect of Samcar in 2017. He did not confirm who the directors of Samcar were prior to 2017.

39. Concerning jobs allocated to contractors, he stated that every job had a refence number and payment would be to a reference number and a specific location.

40. The respondent's 2nd witness Mr. Rason Oloiptip stated that he was the Principal Human Resource Officer for the respondent based in Nairobi. He recorded a statement on 5th July, 2019 which he sought to rely on as his evidence in chief. He further relied on documents filed with the response.

41. Mr. Oloiptip stated that he was aware of the investigation reports and that it recommended disciplinary action against the claimants for breach of the respondent's code of ethics. Charles was issued with Notice to show cause on 13th December, 2017 and he responded on 19th December, 2017 and was subsequently invited for a disciplinary hearing on 16th January, 2018 and recommendation made to the management thereafter. A dismissal was issued on 30th January, 2018.

42. In cross examination he stated that the audit report was the basis of the termination. He further stated that reports were provided upon request and that the claimants never requested to be supplied with the audit report before responding to the show cause letter.

43. Carolyne requested for the report at the disciplinary hearing and the chairman of the panel directed that she be supplied with a copy.

44. The court having carefully and elaborately considered and summarized pleadings and evidence as above. The court also having perused submission by counsel, takes the view that there are only two issues which require to be decided in this matter. First, whether there existed valid and or justifiable reasons for terminating the claimants service and second, whether in the process of termination the respondent followed the procedural fairness as contemplated under section 41 of the Employment Act.

45. For termination of employment to be upheld the employer ought to demonstrate that any reasonable employer in their place would consider termination as the most proportional measure to take in the circumstances of the case. Section 43(2) of the employment Act succinctly puts it that the reason or reasons for termination of contract are matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the service of the employee.

46. The 1st claimant herein, Caroline J. Kipchoge was accused of being directly involved in a company known as Samcar Ltd which was a firm contracted by the respondent to carry out line construction, emergency jobs, change of rotten poles and underground cabling reinforcement schemes. Further that the said company received monies on various occasions for work that was never physically executed.

47. The 2nd claimant, Mr. Charles Ogoti was similarly accused of direct involvement with Samcar Ltd and awarded, inspected and authorized bill of quantities contrary to the company's code of conduct and ethics. He was further accused of submitting documents for payment for schemes which he knew were never implemented by the Labour and Transport contractor. Both claimants were given 72 hours to respond to the allegations against them.

48. Caroline in her response stated among others that the allegation was not right since in 2015 she had not joined the respondent and was still working with contractors. She further stated that when the auditors went to her and asked about Samcar and her link with them, she gave the name of the directors and the supervisors in charge. According to her she resigned from Samcar to join KPLC on 8th March, 2016. She refused to produce her Mpesa statements saying they were personal and that she did some small work and business on weekends to sustain her family and parents.

49. Charles in his response stated in material part that he had no direct association with Samcar and demanded to be shown how the auditors arrived at associating him with Samcar.

50. He further stated that while on leave the auditors called him and asked him to write down a brief history on how long he had been with the respondent. Further the auditors came with the contractor's invoices from finance and asked to be taken to site but he told them he had signed so many documents and therefore wanted copies to enable him prepare but the auditors refused.

51. During his testimony, Charles denied Patricia Jemutai, who was one of the directors of Samcar was his wife but that they had an intimate relationship and a child. According to him he did not include Patricia in his biodata as his spouse but for purposes of medical cover for their common child. He denied that he was aware Patricia was a director of Samcar.

52. Charles further stated in his evidence that there was a time he was lending money to contractors and he would be paid back with 14% interest.

53. Caroline on her part testified that she used to work for Samcar before joining the respondent. She was a shareholder and director but sold her shares in August, 2016 and resigned from the company however by October, 2016 she was still a signatory to Samcar Banks Accounts.

54. According to her she never got time to hand over her issues when she joined the respondent.

55. Caroline was employed on 2nd March, 2016 on a three-month renewable contract and by October, 2016 she still remained a signatory to Samcar Bank accounts at the same time continued to work for the respondent. She further admitted sending out money through her Mpesa account on instructions of Samcar directors since she was still a signatory to Samcar's Bank Accounts.

56. Charles although denied he was married to Patricia Jemutai, said he filed her details as his spouse in his biodata with the respondent. According to him, he did so to get medical cover for their common child. Charles further stated that he used to lend money to contractors, Samcar included and he would be paid back at 14% interest.

57. The respondent's code of ethics which both claimants admitted knowledge of, states that conflict of interest occurs when an officer's personal interest conflicts or appear to conflict with his/her duties. All employees were expected to perform their duties honestly, fairly, transparently and to act in the best interest of the company in all situations avoiding interests, activities investments, relationships and influences that might compromise their objectivity, effectiveness and faithful performance of their duties.

58. The code further stated that conflict of interest has personal implication for the employee which include disciplinary action and loss of credibility.

59. Caroline conceded that she remained a signatory to Samcar's Bank Accounts and would withdraw money allegedly on instructions from Samcar's directors and pay out. The respondent produced evidence to support the withdrawals and payments.

60. Charles on the other hand conceded that although not his spouse he registered Patricia Jemutai as one for purposes of obtaining medical cover for the child. Patricia is stated as one of directors of Samcar. Further he stated that he used to lend money to respondent's contractors including Samcar and they would pay him back at 14% interest.

61. The foregoing scenario does not require any additional evidence or input to be seen as a clear conflict of interest. In the circumstances, the court is persuaded that there existed sufficient evidence to summarily dismiss the claimants for gross misconduct.

62. Regarding procedural fairness, the court has noted that the claimants were issued with show cause letters to which they responded, they were subsequently invited for disciplinary hearing at the conclusion of which they were issued with summary dismissal letters. This far the court is satisfied that the claimants were accorded procedural fairness. The claim is therefore found without merit and is hereby dismissed with costs.

63. It is so ordered.

DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2022

Abuodha Nelson Jorum

Judge