



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO.1034 OF 2017**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**FELIX O. SIATA.....CLAIMANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. The Claimant has filed the Memorandum of Claim dated 2<sup>nd</sup> June 2017 suing the Respondent for unlawful termination of employment. He avers that he worked in the Respondent's Customs Department and when he was transferred to the Border Control Office as Supervisor on 10/08/2009, the functions of gate operations were removed from the Enforcement docket and given to a new office. It is the Claimant's averment that he worked until 30/06/2014 when he was retired by the Respondent. The respondent filed its response dated 17<sup>th</sup> August 2017.

**CLAIMANT'S CASE**

2. The Claimant further avers that on 14/12/2012 he was invited to appear before the disciplinary committee after earlier invitations had been cancelled twice and that the Head of Customs never offered him technical advice regarding his appearance before the said committee. That the disciplinary procedure was flawed and discriminatory since there was selective charging of the officers, consideration of appeal and reinstatement of some and that the disciplinary committee never considered the evidence on record.

3. That one suspect was allowed to sit in the deliberations of the special disciplinary committee meetings of 20<sup>th</sup> and 21<sup>st</sup> March 2013, which came up with the final report. That the person he is alleged to have concealed his employment as per the charges, was employed by the station manager and worked in full public view. He avers that he later received a letter of retirement 'in the authority's interest' in July 2014 and when he requested for documents on 24/07/2014, he was given a report excluding minutes of the deliberations of 14/12/2012.

4. The claimant says he was never given the statements of the drivers and other essential documents were concealed from him but nevertheless filed his appeal of 21/08/2014 which he is yet to get feedback on.

5. The Claimant prays for judgment against the Respondent for: a declaration that his retirement and attendant delay in taking administrative action is illegal, null and void and that an order that he be adequately compensated for time lost out of employment; general damages; damages for unlawful termination of employment; and costs and interests be given.

6. In his Statement, the Claimant asserts that despite being away from the station at the time and gate operations not being under his name, he was charged with fraudulent exportation of Supermatch Cigarettes from Uganda. That ideally all officers in the Enforcement Section should have been charged.

7. The Respondent filed a Statement of Response dated 11<sup>th</sup> August 2017 averring that the Claimant's retirement emanated from information received by its Investigations and Enforcement Commissioner that Supermatch Cigarettes from Kampala Uganda's Ms. Leaf Tobacco and Commodities (U) Limited were being dumped into the Kenyan market through the Malaba border station.

8. That being the officer in charge of department at the Malaba station, the Claimant was thus accused of abetting tax evasion and loss of revenue amounting to Kshs.762 Million due from Supermatch Cigarettes destined for Ethiopian and South Sudan markets. It is the Respondent's averment that the Claimant was asked to show cause why disciplinary action should not be taken against him and given the opportunity to defend himself before the disciplinary committee on 19/12/2012.

9. That the disciplinary committee then recommended for the Claimant's retirement on the ground that the Respondent had lost confidence in

him, due to negligence in performance of duty. It denies the allegation of bias and discrimination in the disciplinary process which it avers is unsupported by any evidence and admits receiving the Claimant's appeal.

10. The Respondent also filed two witness statements made in November 2021 by Peter Mugo Ndune who produced the investigation Report as an exhibit; and Grace Mwangi who asserts that the Respondent acted within the confines of its Code of Conduct in retiring the Claimant in the interest of the Respondent.

### **CLAIMANT'S SUBMISSIONS**

11. The Claimant submits that the flawed disciplinary process and dragged appeal contravenes his constitutional rights under Article 47 of the Constitution of Kenya, the provisions of the Employment Act 2007, KRA's Employee Code of Conduct and Amb. Francis Muthaura's Circular Guidelines on handling corruption cases of public officers.

12. He further submits that termination of employment must be fair both in substance and procedure as affirmed in the case of **Catherine Muthoni Wairimu v Walter Reif [National Chairman of the Pubs, Entertainment and Restaurants Association of Kenya] & 2 others [2015] eKLR** wherein the court granted the claimant 12 months' salary for unfair termination.

### **RESPONDENT'S SUBMISSIONS**

13. The Respondent submits that the law on fair termination of employment is provided under **Sections 43 and 45 of the Employment Act** and that an employer is required to prove the reasons for termination as being valid and fair. That this position was also espoused in **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] eKLR** that the employer must satisfy the elements of fair procedure and valid reason. That **Section 41 of the Act** further provides the procedure for terminating an employment whose compliance it has demonstrated in its pleadings by considering all the Claimant's oral and written representations before deciding to terminate his services.

14. It further submits that the Claimant's conduct violated **Section 44(4) (g) of the Employment Act** on gross misconduct and **Clauses 3.17, 4.1.1, 4.1.4 of the Respondent's Staff Code of Conduct**. He says that the Claimant on his part did not adduce evidence in support of his allegations that the Respondent's actions violated the law and was unprocedural. It further refers the Court to the Claimant's appeal exhibited as **FOS-11** wherein he does not deny having been in charge of the exit gate to the yard.

15. The Respondent also submits that the Claimant's contract of employment provided a termination clause that either party may terminate the contract upon giving three months' notice or payment in lieu of notice. That having duly notified the Claimant in the letter of retirement that he would be paid in lieu of notice upon clearance, it aligned with the provisions of **Section 36 of the Employment Act** on termination notice.

16. It is submitted by the Respondent that it then follows that the remedies sought by the Claimant are not tenable. That the sole reason for the Claimant's termination was his own conduct as explained under **Section 49(4) (b) (c) and (k)** and cannot thus be granted compensation. It submits that it undertook to pay the Claimant all his dues upon clearance.

17. The changes against the claimant inter alia are abetting tax evasion amounting to KShs.762 million due to super match cigarettes heeded to Ethiopia and South Sudan from Uganda. He was accused of failure to keep records and maintenance as the maintenance person in charge of enforcement at Malaba border.

18. He was also accused of failing to take action when he learnt of consignment of cigarettes ferried by truck No.UAE 244N.

19. He was accused of failure to man the lower gate and also concealed illegal employment of a member of public who manned the upper gate.

20. He was asked to explain the following changes failure of which disciplinary action would be taken against him. This was a letter dated 27<sup>th</sup> June, 2011.

21. The Claimant responded on 9<sup>th</sup> July, 2011 and he said the trucks in question passed the border before he was deployed in the enforcement section.

22. He also says URA officials failed to follow the procedure laid down in releasing the trucks between URA and KRA.

23. He says proper records were maintained at the upper gate i.e. inward bound goods register, toll free register and motor vehicle units register.

24. As for the release of truck UAE 244N he says he reported on duty on 30<sup>th</sup> May, 2011 and not on 29<sup>th</sup> May, 2011 and so he was not in charge of that gate on that date. He says Mr. Khalwale reported the matter to the station manager and not officer in-charge of enforcement.

25. He says Malaba border had shortage of staff and worked with available staff.

26. He says he was not an impres holder nor station manager to employ people at the station.

27. He says the gate was manned with the permission of the station manager.

28. After he wrote the explanation he was invited for disciplinary meeting scheduled for 24<sup>th</sup> October, 2012 and he was not informed to bring a witness from his employment or from the union as per Section 41 of the Employment Act. The meeting did not proceed on that date.

29. On 14<sup>th</sup> November, 2012 he was again invited to appear on 21<sup>st</sup> November, 2012.

30. Finally the meeting took place of 20<sup>th</sup> March to 21<sup>st</sup> March 2013 and after the meeting he was informed that the authority had lost confidence in him and was retired in authority's interest.

31. He was awarded three months' notice and was told he had a right to appeal.

32. The case before me is a very serious case where the Respondent allege the Respondent lost 762 million Kenya Shillings due to tax evasion. The evidence adduced by the Respondent needed to be watertight by the investigating officers. It was also a case that should have been investigated by the Anti-corruption officers.

33. The Claimant is accused of allowing trucks which are suspected to have dumped cigarettes from Uganda to South Sudan and Ethiopia in Kenya. There is no documents to show the exports and how they were released. The Claimant is only referred to as the enforcement officer.

34. There were no statements from customers clearing agents who dealt with these consignments.

The statements of the involved drivers were not produced in court.

35. The Respondent witness No.2 Grace Mwangi said custom officers kept changing and she could not recall procedure adhered at the time.

36. The Respondent also accused Claimant of employing a person at the gate but there was no evidence to prove that he was the one who had employed him.

37. The evidence adduced by the Respondent is not water tight to connect the Claimant with these very serious allegations levelled against him.

38. Section 45 of the Employment Act provide that the employer shall not terminate the employment of an employee unfairly.

39. In the case of **CATHERINE MUTHONI WAIRIMU VS WALTER REIF (NATIONAL CHAIRMAN OF THE PUBS, ENTERTAINMENT AND RESTAURANTS ASSOCIATION OF KENYA & 2 OTHERS** "the court held there was no hearing granted to the Claimant in the form contemplated by Section 41 and 45 of the Employment Act. The Respondents allege that they issued the Claimant with warning letter and notice to show cause. That was in order. It did however not amount to hearing under Section 41 and 45 of the Act."

40. In summary the Claimant should be invited to a duly constituted panel and given a chance to defend himself in the presence of his witness. He should be supplied with the documents that are used against him and concrete reasons given as to what they clamant is accused of.

41. The Claimant after the hearing requested for the documents to use in his appeal and no indication he was availed the same (his letter at 7/8/2014). He finally got a response to his appeal in 2018 according to the Respondent witness No.2.

42. The Claimant in his letters inviting him to attend disciplinary meeting was not informed the specific charges brought against him and no documents were availed to him.

43. He was not informed to invite a fellow employee or a shop union representative to be present during his explanation.

44. The court finds the reasons given by the Respondent for terminating the Claimant's employment are at the most shallow and unsubstantiated and the process followed was flawed and did not follow the fairness test.

45. In the case of **KENFREIGHT E.A. LIMITED VS BENSON K. NGUTI (2016) EKLR CIVIL APPEAL NO. 31 OF 2015** the court held that it is not enough to terminate the employment by notice or payment in lieu thereof but termination should be based on valid reasons and fair procedure should be followed.

46. In the case of **LOICE OTIENO VS KENYA COMMERCIAL BANK LIMITED** the court held that it is a mandatory requirement to comply with the principles of natural justice in summary dismissal.

47. It was held that even in the face of fundamental breach of employment contract/obligations or gross misconduct must not be resorted to without complying with the procedural fairness and natural justice. An employer who summarily dismisses an employee without a hearing will be failing a foul of Section 41 (2) of the Employment Act.

48. The court finds the Respondent did not give sound and clear reasons and did not accord a fair hearing to the Claimant in the presence of a witness of his choice as required by the law.

49. The Claimant's termination of employment was therefore found to be unfair and wrongful and judgement is entered in his favour.

50. **REMEDIES**

(i) The Claimant's prayer for reinstatement is declined

as his termination is over 3 years ago from June, 2014.

(ii) He is awarded damages for wrongful and unlawful termination at an equivalent of 5 months.

The Claimant to produce a copy of payslip

of the last salary in order to work out the requisite figures for the award as the same is not in the court file.

(iii) The above amply compensates for time lost out of employment and other general damages.

(iv) Costs of the suit are awarded to the Claimant.

(v) Interest is provided at court's rates from date of award till full payment.

(vi) Mention on 3<sup>rd</sup> May, 2022 to confirm the award.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 31<sup>ST</sup> DAY OF MARCH, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**