



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRCC/21/2020

CITATION: ISAAC KIMUTAI CHESIRE

VS

COUNTY GOVERNMENT OF UASIN GISHU

JUDGMENT

The Claimant pleaded that he was on 28th July, 1995 as a watchman by former Municipal Council of Eldoret on 1st September, 1997 he was transferred to Fire Department on the same salary scale. The Claimant underwent training and progressed his skills leading to his appointment as Leading Fireman on salary scale 13.

2. According to him he served the respondent diligently as Fireman 1 at a gross monthly salary of kshs. 65,765/=. On 14th January the Claimant was on duty as usual at Eldoret Fire Station with Crew members which comprised the respondent's ambulance driver.

3. In the course of the night the sole designated respondent's ambulance driver was taken ill and had taken a rest awaiting medical attention. At around 03.22 hours, on 15th January, 2019 the Claimant received a distress call of a patient in need of County ambulance services. The Claimant considering the health condition of the driver proceeded out of necessity to deal with the situation and booked the details in the Occurrence Book Records. The Claimant further pleaded that in the Course of attending to the emergency had an accident with the respondent's ambulance. He reported the accident through the transport officer and was instructed by the said transport officer and County Officer in charge of Roads, Transport and Public Works to have the vehicle towed to Toyota Kenya for repairs at the Claimant's cost which he did.

4. According to the Claimant's the respondent's transport officer verbally undertook not to take any disciplinary action against the Claimant as he had no record of misconduct for the 24 years he had been in service. The Claimant relied on the representation and undertook repairs at his costs to the tune of Kshs. 380,000/= and the same was returned to eh Fire Yard in good mechanical condition.

The Claimant continued to work on full salary in the month of January and February, 2019. On 22nd February, 2019 the Claimant was called by the respondent's Chief Officer. In charge of Roads, Transport and Public Works and served with a backdated letter to show cause and interdiction dated 17th January, 2019. The letter of Show Cause /Interdiction accused him of driving the County Ambulance registration number KCE 011D to Elgeyo Marakwet Boarder without authority. He was required to respond within 21 day which he did and was invited for a disciplinary hearing through a letter dated 15th April, 2019. The hearing was scheduled for 25th April, 2019.

5. The hearing was rescheduled and proceeded on 3rd May, 2019. The Claimant further averred that he never received any communicated on the outcome of the disciplinary hearing. He became concerned and in the month of June, 2019 he learnt that his colleagues who had cases handled at the same time as his had been returned to work with sanctions and warnings noted out. The Claimant therefore appealed against the interdiction on 3rd July, 2019. The respondent summoned to appear before the Public Service Board on 11th July, 2019 when he was informed, he had already been dismissed from service in the month of May, 2019 but communication was not made to him.

6. The Board further informed him that since he repaired the vehicle and he had a limited period to serve before retirement, he could opt for early retirement.

7. The Claimant therefore applied for early retirement on 11th July, 2019 which the respondent acknowledged and no action was taken.

8. On 9th January, 2020 through the Secretary County Public Service Board, the respondent invited the Claimant to appear before the CPSB on 14th with no agenda included in the letter and he was referred to as former driver. The Board made inquiry from the Claimant as to what happened and informed him, they will communicate.

9. Meanwhile the respondent continued to pay the Claimant half monthly salary, provided housing and medical cover for himself and family.

On 19th March, 2020 almost one year and three months since the backdated notice to Show Cause, the respondent informed the Claimant of the decision by the Board CPSB to dismiss him from service on the basis that he was not absolved from the charge of deriving the County Ambulance without authority and causing an accident knowing that he was not the authorized driver.

10. The Claimant therefore averred that his interdiction and subsequent dismissal from service was unfair and unlawful. The Claimant thus sought among others an order of certiorari to quash the decision to dismiss him, reinstatement to his position without loss of benefits or seniority, ½ salary withheld for twelve months, 3 months' pay in lieu of notice and 12 months' salary as compensation for unfair termination of service.

11. The respondent on its part pleaded that on the night of 15th January, 2019 the Claimant without any authority drove the respondent's ambulance registration number KCE 011D from the Fire Station to Elgeyo Marakwet Boarder. The Claimant drove the said ambulance with full knowledge of the fact that he was not the authorized driver.

12. Further the said ambulance was driven negligently as a result it got involved in an accident resulting in extensive damage. The respondent further averred that the Claimant did not report the accident to the police and or the Chief Officer concerned but instead decided to secretly tow the damaged Ambulance to the County Yard and dump it there. The actions of the Claimant amounted to gross misconduct contrary to section 44(4) (g) of the Employment Act and the County Public Service HR Manual which were within the knowledge of the Claimant and were binding on him.

13. According to the respondent the Claimant was issued with a Show Cause letter on 17th January, 2019 inviting him to respond to the allegations within 21 days. The Show Cause letter was not issued on 22nd February, 2019 as alleged.

14. The Claimant responded to the Show Cause letter on 6th March, 2019 through a letter of that date in which he admitted during the subject motor vehicle on the material date without authority and without capacity as the authorized driver.

15. Upon considering the Claimant's response to the Show Cause letter and having found no valid reasons advanced by the Claimant, the respondent by a letter dated 15th April, 2019 invited the Claimant to appear before the disciplinary committee for hearing on 25th April, 2019 which was later rescheduled to 2nd May, 2019. The hearing proceeded at the conclusion of which at the conclusion of which recommendation was made to the CPSB for further deliberations. The CPSB later resolved that the Claimants be dismissed on grounds of driving an official vehicle without authority and without being the respondent's authorized driver.

16. While the respondent was in the process of preparing a communication on the dismissal to the Claimant, he made an appeal against his interdiction on 3rd July, 2019. The appeal was received and Claimant informed that the respondent's public service board had recommended that he be terminated from service. The Claimant subsequently opted to apply for early retirement in view of the fact that he was due for retirement in December, 2021.

17. The respondent's PSB received the request when the term of the serving board was coming to an end hence the application could not be deliberated upon. On 1st October, 2019 the Claimant wrote to the respondent seeking to revoke his application for early retirement and that he be reinstated to employment.

18. On 14th January, 2020 the new CPSB invited the Claimant to appear before it for consideration of his request for reinstatement made on 1st October, 2019. The Claimant appeared before the Board and after being heard a decision was reached that he be terminated and the same was communicated on 19th March, 2020.

19. At the oral hearing the Claimant informed the Court that he was adopting his witness statement recorded on 8th April, 2020 as his evidence in Chief. The Court has reviewed the statement and is a repetition of the averments contained in the statement of claim. The Claimant of particular said on the material date he called by one Catherine who told him her son's wife had prolonged labour and needed an ambulance to assist.

20. It was his evidence that it was their responsibility to respond to distress and that they serve any member of the public. He left with the ambulance on the material date and took the patient to MTRH. On his way back he got an accident.

21. According to him he informed his supervisor who directed him to tow the vehicle to the yard. On 17th January, 2019 he towed the vehicle to Toyota Kenya for repair. He was later told by his supervisor that since he was not the designated driver, he should just repair the vehicle and nothing would be done to him due to his length of service. He further stated that the Disciplinary Committee recommended that he be warned and continue in service. The Board however resolved that he be dismissed.

22. The Claimant conceded that he was not the designated driver but since he worked in emergency section, he felt he had duty to assist a person in distress.

23. In cross-examination he stated that on the material date the designated driver for the ambulance was at work but later left because he complained he was unwell. It was his evidence that he did not call the designated ambulance driver as his witness. He denied any relationship with Catherine. He further stated that he did not report the accident to the police.

24. Concerning the decision to dismiss him he stated that the Board Chairman called him and told him he was dismissed in May but because he repaired the vehicle, he should write asking for early retirement.

25. The respondent's witness Mr. William Koech informed the Court he was the Secretary to the CPSB of the respondent and that he recorded a witness statement on 1st July, 2020 which he sought to adopt as his evidence in chief. He also relied on documents filed in support of the response. Just like the Claimant, Mr. Koech's statement also repeated the factual defenses stated in the memorandum of response.
26. According to him on 15th July, 2019 the Claimant drove an ambulance without authority and in the process got involved in an accident. He never reported the accident to the relevant authorities. The matter was investigated and Claimant issued with a Show Cause letter. The Claimant was later summoned to a disciplinary hearing before a Committee and later dismissed from service.
27. It was his evidence that the delay considering the Claimant's case by the Board was because of the transition from the old to new Board. The new Board called the Claimant and listened to his presentation. Further that the Claimant appealed to PSC over the dismissal and that at the time of the trial, they had not received any outcome of the appeal to PSC. In cross-examination the Mr. Koech stated that the Claimant received the Show Cause letter and interdiction on 17th January, 2019 however there was no evidence that the Claimant received the letter. It was further his evidence that the Claimant was never notified of the delay in deciding his case.
28. He further stated that there was nothing wrong with the Claimant responding to emergency of the correct procedure was followed.
29. In closing submissions, Mr. Mugambi for the Claimant submitted that the Claimant's interdiction and subsequent dismissal from service was unfair and unlawful. The Claimant was not accorded an opportunity to be heard prior to being interdicted in breach of the rules of natural justice.
30. Further a breach of section 76(1) and (2) of the County Government Acts, Counsel submitted that the Claimant was exposed to indefinite interdiction in breach of article 41 of the Constitution and Section 76(1) and (2) of the County Government Act Counsel further submitted that the termination of the Claimant failed to accord with Section 41 of the Employment Act and Section 76(2) of the County Government Act which requires that the employee be heard in presence of a fellow employee of the choice or his union.
31. The Claimant was not informed in advance, supplied with evidence and given an opportunity to examine witnesses which would guarantee a fair hearing as required by Section 41 of the Employment Act and Section 76(2) of the County Government Act.
32. Mr. Mugambi further submitted that the disciplinary proceedings were unfair and unlawful as they breached clause D.32 (7), (8) and (9) of the County Public Service Human Resource Manual since despite the Claimant having followed up on the progress on his disciplinary hearing, no communication was made within 30 days period or termination of the disciplinary hearing undertaken by the respondent and Claimant returned to work.
33. Further, the decision to terminate the Claimant was harsh considering the Claimant's record during the 24 years of service. According to Counsel, the respondent created a legitimate expectation and waived its right to undertake disciplinary proceedings against the Claimant by giving him oral assurance that it would not undertake the same and requiring the Claimant to undertake repairs of the vehicle which he did. The decision to dismiss the Claimant was inconsiderate and disproportionate as the respondent had the first option to impose the sanction of having the officer pay for the repairs of the vehicle as provided under clause D. 30(1) of the County Public Service Human Resource Manual, Counsel submitted that the Claimant was subjected to double punishment over same act of misconduct.
34. Ms. Nasiloli for the respondent on the other hand submitted that the Claimant was engaged as a Fireman and he had a clear job description which laid out what his duties and roles as a fireman. The Claimant opted to act outside his job description on the night of 15th January, 2019 when he drove the respondent's ambulance registration number KCE 011D from the Fire Station to Elgeyo Marakwet Boarder without any authority and with full knowledge that he was not the authorized driver. The vehicle was consequently involved in an accident resulting in extensive damage
35. The actions by he Claimant amounted to gross misconduct which was in contravention of section 44(4) (g) of the Employment Act, County Public Service Human Resource Manual which were all in the knowledge of the Claimant.
36. Ms Nasiloli further submitted that the evidence tendered to the Court by the respondents clearly demonstrated that due procedure was followed and all legal requirements met before the termination of the Claimant.
37. Counsel further submitted that the Claimant responded to the Show Cause / Interdiction letter and expressly admitted having driven the ambulance without any authority. Counsel further submitted that the Claimant's response to the Show cause letter showed his actions on the night of 15th January, 2020 had nothing to do with the allegations of him responding to an emergency but rather to personal engagement involving his neighbours.
38. The reason for which the Claimant was dismissed from employment is not contested. The Claimant contends that he was not taken through due process before dismissal and further that the dismissal was harsh and disproportionate to the offence committed and further considering that he had used his own money to repair the ambulance after being verbally assured by the Chief transport officer that if he repaired the ambulance nothing will be done to him considering his many years of service.
39. The Claimant concedes that he was on 17th January, 2016 issued with an interdiction and Show Cause letter calling upon him to respond to the allegations against him within 21 days. He responded to the same through a letter dated 6th March, 2019. He was subsequently invited for a disciplinary hearing on 15th April, 2019 which was postponed to 2nd May, 2019. When the same proceeded in the presence of the Claimant.
40. By a letter dated 19th March, 2020 the Claimant was informed of the decision to dismiss him from service. The Claimant complained that it took inordinately long to communicate to him the decision to dismiss him. The respondent however ascribed the delay to the transition

from the old to the new Board and further while in the process of preparing the communication to the Claimant, they received a letter appealing against the interdiction and another letter from the Claimant seeking early retirement instead of dismissal.

41. To this point the Court is reasonably persuaded that due process was followed in dismissing the Claimant. Further the delay in communicating the decision to him was reasonably explained.

42. The Claimant complained that the decision to dismiss him was disproportionate to the offence committed. The Court has always held that the decision to dismiss is an objective one. The test is usually that if a reasonable employer placed in the same situation would consider dismissal as the most proportionate disciplinary measure to take, the Court would not interfere. The Claimant does not deny he was not the designated Ambulance driver. He further did not deny that he did not report the occurrence of the accident in question to the police.

43. Any act or omission which occasion an employer loss or damage to property constitutes a reasonable ground for termination of employment. The contention by the Claimant that the respondent assured him that he would not be dismissed if he repaired the vehicle was not backed by any evidence before the Court. To this extent the Court is persuaded that the reasons for which the Claimant was dismissed from employment were valid and justifiable.

44. The Court will therefore uphold the dismissal. The Court however would order that the respondent to refund the Claimant the sum of Kshs. 363,741 which the Claimant spent on repairing the ambulance.

45. To reach the decision to dismiss the Claimant and also retain the money he spent in repairing the vehicle in the hope he would receive reprieve from the respondent would be unjust.

46. In conclusion the Court dismisses the suit with no order as to costs since the Claimant is partially successful each party will therefore bear their own costs.

47. It is so ordered.

DATED AT ELDORET THIS 15TH DAY OF MARCH, 2021

DELIVERED AT ELDORET THIS 15TH DAY OF MARCH, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-03-15 12:03:01+03