



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 38 OF 2014

LUKE WILLIAM MAK'OKOK.....CLAIMANT

VERSUS

KISUMU WATER & SEWERAGE CO LTD.....RESPONDENT

JUDGMENT

1. This Cause was heard on 13 February 2019 when Luke William Mak'Okok (the Claimant) testified and closed his case and 21 January 2021 when Kisumu Water & Sewerage Co Ltd (the Respondent) called 4 witnesses.

2. The Claimant filed his submissions on 27 January 2021, and he identified the Issues for the Court's adjudication as:

(i) Did the Respondent comply with the statutory requirements of sections 41, 42 and 44 of the Employment Act regarding the procedure leading to the dismissal of an employee?

(ii) Was the Claimant accorded a fair hearing in line with Article 41 of the Constitution of Kenya in relation to fair labour practices?

(iii) Has the Claimant established his claim on a balance of probabilities?

(iv) If the answer to 3 above is in the affirmative, is the Claimant entitled to any award and, if so, on what heads and how much per head?

(v) Who bears the costs of this Cause?

3. The Respondent filed its submissions on 25 March 2021 (should have been filed and served by 21 March 2021).

4. The Respondent identified the Issues for adjudication as:

(i) Whether or not the Claimant was unlawfully and/or irregularly dismissed from employment?

(ii) If the answer to (i) above is in the negative, whether the Claimant is entitled to any relief? If so, under what heads and in what quantum?

5. The Court has considered the pleadings, evidence and submissions and will primarily adopt the Issues as set out by the Claimant.

Unfair termination of employment

Procedural fairness

6. The Claimant, a driver, was suspended from duty through a letter dated 6 February 2013 (prior to the suspension, the Claimant had been requested, and he had recorded a statement on 27 January 2013).

7. The ground for the suspension was to enable a disciplinary process to be initiated against the Claimant on allegations of involvement in the theft of a fuel order book.

8. On the same day, the Respondent invited the Claimant in writing to attend a disciplinary hearing scheduled for 8 February 2013. The invitation was copied to the National Union of Water & Sewerage Employees, of which the Claimant was a member.
9. On 8 February 2013, the Claimant appeared before the Disciplinary Committee, and he made representations.
10. The minutes of the hearing indicates that 3 officials from the National Union of Water and Sewerage Employees were in attendance.
11. In challenging the fairness of the process, the Claimant pleaded that the process was a mockery and was meant as a cover-up because he had received 2 invitation letters to attend hearings on 6 February 2013 and 8 Februarys 2013. He further asserted that he was not issued with a copy of the audit report, which led to the disciplinary process.
12. The Court finds the allegation that the 2 invitation letters affected the fairness of the process not proved.
13. The Claimant did also not demonstrate that he was prejudiced because he was not provided with a copy of the audit report before the hearing. The Claimant was aware of the particulars of the charges to confront, and he had met with the auditor on 22 January 2013 and even recorded an investigatory statement on 27 January 2013.
14. In so far as the Claimant was notified of the allegations against him and he was afforded an opportunity to make oral representations accompanied by officials of the trade union of which he was a member, the Court is satisfied that the Respondent was in compliance with the statutory requirements of procedural fairness as contemplated by section 41 of the Employment Act, 2007.

Substantive fairness

15. Pursuant to sections 43 and 45 of the Employment Act, 2007, it was incumbent upon the Respondent to prove that the Claimant had been involved in theft or unauthorised use of fuel orders and, more specifically, fuel order no. 6150 being used to fuel motor vehicle registration KAU 576E on 2 January 2013.
16. To discharge the burden, the Respondent called 4 witnesses.
17. The second witness was a colleague of the Claimant, and he narrated that when he went to fuel his assigned vehicle on 3 January 2013, a named fuel attendant and a supervisor declined to fuel the vehicle and the reason given was that another vehicle with the same registration number had been fuelled the previous day. He stated that upon inquiry, the supervisor gave him the name of the Claimant as the driver who had fuelled the previous day.
18. The witness also testified that the Claimant admitted to him that he had fuelled the previous day. It turned out the Claimant had used the fuel order to fuel a vehicle KBS 531D.
19. The Respondent's third witness was Head of Finance (was serving as Head of Procurement in 2013). He testified that he was alerted by the second witness that the fuel station had declined to fuel his vehicle on the basis that a vehicle with a similar registration number had been fuelled the previous day, and he asked the audit department to conduct investigations.
20. The witness stated that he also visited the fuel station to make inquiries and that he further established that the fuel order used (no 6150) was not in use at the material time.
21. The Respondent's last witness was the Head of Audit. He testified that the audit established that vehicle registration no KBS 531D was in the custody of the second witness and not the Claimant on 2 January 2013 (the Claimant had testified that at the material time, he was using vehicle registration no. KAV 147B).
22. The Respondent produced a copy of fuel order no 6150. It indicates that it was used to fuel vehicle registration no KBS 531D. The Claimant did not have custody of the vehicle on 2 January 2013.
23. In the view of the Court, it cannot be true that the Claimant was not aware of the *discrepancy* in the vehicle registration numbers. The Claimant also did not attempt to explain how he came to have the fuel order at the particular time.
24. The Court is satisfied that the Respondent discharged the burden placed on it. The Claimant was involved in dishonest conduct. The conduct appears to have been going on for some time.
25. The Court finds that the summary dismissal of the Claimant was for valid and fair reasons.
26. Compensation and salary in lieu of notice are thus not available as remedies.

Breach of contract/statute

Overtime

27. The Claimant sought Kshs 581,750/- on account of overtime, and he anchored the head of the claim on clause 8 of the appointment letter, which set out the hours of work.

