



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 184 OF 2016

JOSHUA OMENDA ODENY.....CLAIMANT

V

LAKE VICTORIA SOUTH WATER SERVICE BOARD.....RESPONDENT

JUDGMENT

1. Joshua Omenda Odeny (the Claimant) sued the Lake Victoria South Water Service Board (the Respondent), alleging breach of contract.
2. The Respondent filed a Defence on 24 August 2016, which prompted the Claimant to file a Reply to Defence on 13 September 2016.
3. On 13 June 2017, the Claimant amended the Memorandum of Claim to add a cause of action for unfair termination of employment.
4. The Claimant's evidence was taken on 20 December 2018 in the Respondent's absence, but the parties consented to the re-opening of the hearing.
5. The Claimant thus testified again on 24 November 2020, while the Respondent's case was taken on 20 January 2021.
6. The Claimant did not file his submissions (should have been filed/served by 20 February 2021) while the Respondent filed its submissions on 8 April 2021 (should have been filed/served by 20 March 2021).
7. The Court has considered the record.

Unlawful suspension

8. The Claimant was suspended through a letter dated 4 June 2015, and two main reasons were given, to wit, failure to accompany a Board team to a project site to hand over the Uyoma Community Water Supply project and failure to submit a handing over report on Uyoma Community Water Supply project. The letter indicated that the suspension was based on section 6.16(v) of the Terms and Conditions of Service.
9. According to the Respondent, the Claimant's conduct constituted wilful neglect to perform official duty and violated section 6.5.1(iii) of the Terms and Conditions of Service and constituted insubordination as per section 6.5(iv) of the Terms and Conditions of Service.
10. The parties did not file a copy of the Terms and Conditions of Service, and the Court will therefore assume that the suspension of the Claimant, being based on a contractual provision, was lawful.

Unfair termination of employment

Procedural fairness

11. Section 35(1)(c) of the Employment Act, 2007 contemplates written notice of termination of employment, while section 41 of the Act requires the employer to inform the employee of the reasons for the contemplated dismissal and afford the employee an opportunity to make representations.
12. The suspension letter outlined the allegations against the Claimant. It also called upon him to show-cause before 12 June 2015.

13. The Claimant responded on 5 June 2015, and on 11 June 2015 and on 2 July 2015, the Respondent informed him that the response was unsatisfactory. He was requested to give a detailed explanation before 20 July 2015.

14. The Claimant wrote to the Respondent on 29 October 2015 seeking to know the status of the suspension, and on 23 November 2015, the Respondent notified him that the Staff Disciplinary Committee would sit to hear his case on 24 November 2015.

15. The Claimant appeared before the Committee and made oral representations, and on the same day, the Respondent instructed him to prepare and submit a comprehensive technical and financial report on the Uyoma Community Water Supply project before 3 December 2015, before his case could be concluded.

16. The Claimant presented a report on 1 December 2015, and the Staff Disciplinary Committee met and discussed the report on 11 January 2016.

17. In the meantime, the Respondent had caused an audit to be conducted, and this led to another show-cause letter dated 18 January 2016 asking the Claimant to respond on or before 27 January 2016. The Claimant did not respond.

18. The Disciplinary Committee met on 31 March 2016, and this led to the Claimant being dismissed through a letter dated 19 April 2016. The dismissal letter gave 2 more reasons for the dismissal of the Claimant.

19. The Court is satisfied that the Respondent accorded the Claimant sufficient opportunity to respond and make representations on the allegations against him in the two instances, and therefore it was in substantial compliance with the requirements of procedural fairness.

Substantive fairness

20. In terms of sections 43, 45 and 47(5) of the Employment Act, 2007, the Respondent had the onerous burden of not only proving but proving as valid and fair the reasons for the dismissal of the Claimant.

21. During cross-examination, the Claimant had impugned the validity and fairness of the reasons for his dismissal on the ground that he had not been appointed as Scheme Manager or to oversee the Uyoma Community Water Supply Project, and therefore he could not hand it over.

22. The Claimant also contended that he was sick on the day scheduled for handover and could not travel to Uyoma.

23. The Court finds the testimony on appointment as Project Manager as lacking in candour for the Respondent produced a letter dated 18 June 2013 informing the Chairman of the Uyoma Water project of the Claimant's appointment as overall Scheme Manager.

24. Despite the Claimant testifying that he was sick at the time of handover, he admitted that he did not provide any records to the Respondent to back up the illness claims. If indeed the Claimant was ill, he did not demonstrate that he informed any of his bosses of the illness at the first instance.

25. Having disposed of the Claimant's defences on why the reasons were not valid or fair, the Court will now examine whether the Respondent discharged the burden placed on it.

26. On 14 May 2015, the Chief Officer, Environment, Water and Natural Resources, County Government of Siaya, addressed a letter to the Claimant raising concerns about his failure to hand over the Uyoma Community Water project to the Interim Committee members. He was asked to urgently prepare a handover report.

27. On 28 May 2015, the Respondent directed the Claimant to prepare an exhaustive hand over a report on the Uyoma Water and Sanitation project before 2 June 2015. The letter made reference to previous instructions asking the Claimant to prepare the handing-over report.

28. The letter also instructed the Claimant that a team would accompany him to the project on 3 June 2015 for a physical hand over of the project.

29. The Claimant did not prepare the handover report nor attend the physical handover on 3 June 2015. In his very first explanation letter dated 5 June 2015, he did not give any plausible reason why he had not prepared the report or attending the handing over ceremony.

30. The Claimant was under a contractual obligation to follow lawful instructions issued by the employer. He did not promptly inform the employer why he could not comply with the instructions. His attempts at explanation only came after disciplinary action had been commenced.

31. The Court is satisfied and finds that the Respondent not only proved but proved that it had valid and fair reasons to dismiss the Claimant.

Breach of contract

Salary during suspension

32. The Claimant did not produce a copy of the Terms and Conditions of Service to enable the Court to determine whether the Respondent was in breach of contract by failing to pay him during the suspension period or to show whether he was entitled to any withheld salaries

during suspension upon dismissal. Relief is declined.

House allowance/medical allowance

33. Just like in the head of the claim for salary during the suspension, the Claimant did not prove any breach of contract in respect to house allowance and medical allowance.

34. Further, although the letter of appointment referred to medical benefits scheme, a copy of the same scheme rules was not produced to assist the Court to determine this particular entitlement.

Conclusion and Orders

35. From the foregoing, the Court finds no merit in the Cause, and it is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 14TH DAY OF APRIL 2021

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mr Wasuna instructed by Wasuna & Co. Advocates

For Respondent Ms Asunah instructed by Staussi, Asunah & Oluoch Advocates

Court Assistant Chrispo Aura