



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 147 OF 2016

CHARLES OCHIENG OPIYO.....CLAIMANT

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITY.....RESPONDENT

JUDGMENT

1. Charles Ochieng Opiyo (the Claimant) was offered employment as an Accounts Clerk in December 1982 by the Lake Basin Development Authority (the Respondent).
2. On or about 7 December 2012, the Respondent confirmed the Claimant to the position of Auditor 1.
3. At some point, the Claimant was elected as a trustee of the Lake Basin Development Authority Staff Provident Fund Scheme.
4. In December 2014, the Respondent caused an audit of the Scheme to be conducted. The audit revealed massive irregularities, and on 20 January 2014, the Respondent issued a show-cause notice to the Claimant. The Claimant responded to the show-cause on 22 January 2014.
5. The trustees also made a joint response to the audit report on 24 January 2014.
6. On 20 February 2014, the Respondent notified the Claimant that the Scheme members had met on 12 February 2014 and resolved that the trustees (including the Claimant) be removed, and fresh elections be held. The letter instructed the Claimant to hand over the office of trustee.
7. The trustees prepared a handover report dated 26 February 2014.
8. On the same day, the Respondent suspended the Claimant from his employment pending further deliberations by the Human Resource Advisory Committee. The suspension letter also requested the Claimant settle in full monies due to the Scheme within 30 days.
9. On 21 October 2014, the Respondent wrote to the Claimant to inform him of dismissal from employment.
10. The Claimant was aggrieved, and on 3 June 2016, he commenced action against the Respondent alleging unfair termination of employment and breach of contract.
11. The Respondent filed a Statement of Defence on 26 October 2016, and the Claimant joined Issue with the Defence on 7 December 2016.
12. The Claimant's evidence was taken on 11 March 2020, while the Respondent's Legal Officer testified on 19 January 2021.
13. Pursuant to Court directions, the Claimant filed his submissions on 21 February 2021, but he did not identify the Issues for determination therein.
14. The Respondent filed its submissions on 19 March 2021, and it identified the Issues for adjudication as:
 - (i) Whether the termination of the Claimant's employment by the Respondent was lawful or done within the ambits of his employment contract and the Employment Act, 2007?
 - (ii) Whether the reasons advanced by the Respondent for termination of the Claimant's employment were valid?

(iii) Whether the Claimant is entitled to the reliefs sought?

15. The Court has considered the pleadings, evidence and submissions and decided to adopt the Issues as identified by the Respondent in its submissions.

16. The Court will also consider whether the Respondent was in breach of contract, as the Issue emerged from the pleadings and evidence.

Unfair termination of employment *Procedural fairness (statutory)*

17. Unless it is a case of summary dismissal, section 35(1)(c) of the Employment Act, 2007 requires an employer to issue a written notice of termination of employment.

18. However, before the termination is effected, section 41 of the Act obligates the employer to afford the employee an opportunity to make representations, preferably accompanied by a colleague.

19. The Claimant was issued with a show-cause letter dated 20 January 2014. The letter set out the allegations against the Claimant and called upon him to make a written response within 48 hours. The Claimant responded on 22 January 2014.

20. The Respondent was therefore in substantial compliance with the statutory requirements of procedural fairness.

Procedural fairness (contractual protections)

21. The Respondent had a *Human Resources Policies and Procedures Manual*, which gave added protection to employees facing disciplinary action.

22. Paragraph 16 of the Manual set out the different phases of the disciplinary process. It also provided for a Human Resource Advisory Committee with a predetermined membership.

23. One of the Committee's functions was to allow the employee(s) to make representations and call witnesses before making its recommendations to Managing Director.

24. The Claimant challenged the fairness of his dismissal on grounds amongst others that he was not allowed to appear before the Disciplinary Committee.

25. The Respondent's witness testified that the Claimant attended a disciplinary hearing but did not appear before the Board because of his grade.

26. Despite asserting that the Claimant appeared before the Human Resource Advisory Committee, the witness did not produce any minutes to support the assertion.

27. The witness did not disclose the date of the hearing or the names and titles of the persons who were present. He also did not reveal where the hearing took place.

28. The Court can, therefore, conclude that the Respondent did not comply with its internal disciplinary procedures.

29. The Court finds that the dismissal of the Claimant was procedurally unfair for failure to comply with internal disciplinary processes.

Substantive fairness

30. By dint of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving the reasons for the Claimant's dismissal.

31. The reasons that led to the Claimant's dismissal were set out in the show-cause dated 20 January 2014.

32. To demonstrate the validity and fairness of the dismissal of the Claimant, a copy of an audit report on the Scheme was produced. The report disclosed irregularities.

33. The Claimant was not only a trustee but also an Internal Auditor. He did not interrogate the Respondent's witness on the veracity of the findings of the audit report during cross-examination.

34. On a preponderance of the evidence, the Court finds that the Respondent had proved valid and fair reasons to dismiss the Claimant.

Breach of contract

Allowances medical during suspension: house allowance, medical allowance and commuter allowance

35. The Respondent contended that the Claimant was not entitled to any of the allowances because he never reported back after a 30-days suspension. It considered him as having absconded duty.

36. The assertion cannot be correct because the suspension letter did not advise the Claimant that the suspension was for 30-days, after which he would report back to work. Instead, the letter had called upon the Claimant to settle the unaccounted for monies within 30-days and wait for further communication.

37. The Claimant sought Kshs 272,000/- being allowances during the period of suspension. He sought a further Kshs 830,000/- as medical allowance.

38. The Claimant anchored these claims on paragraph 16.4.5.1 of the Human Resource Policies and Procedures Manual.

39. The paragraph provides that an employee on suspension shall be entitled to all allowances and medical cover, but not to a salary.

House allowance

40. The Claimant's payslips produced in Court indicate that he was entitled to house allowance of Kshs 15,000/-.

41. A copy of the payslip for March and April 2014 shows the Claimant was paid house allowance for the 2 months. He would thus be entitled to a house allowance from May 2014 to October 2014, amounting to Kshs 90,000/-.

Medical allowance

42. The Claimant was entitled to a monthly medical allowance of Kshs 3,500/-. He was paid the allowance up to March 2014. From April 2014 to October 2014, he was eligible to Kshs 24,500/- and not Kshs 830,000/-.

Commuter allowance

43. The Claimant was earning a commuter allowance of Kshs 2,500/-.

44. The last payment of commuter allowance was made in March 2014. From April 2014 to the date of the dismissal, the Claimant was entitled to Kshs 17,500/-.

Leave balance

45. On account of leave, the Claimant prayed for Kshs 269,197/-, but he did not set an evidential basis for his head of claim, such as disclosing the years he did not go on leave or whether he applied for annual leave but was denied.

46. Section 28(4) of the Employment Act, 2007 circumscribes how much leave can be carried forward.

47. In consideration of the foregoing, the Court declines to allow this head of the claim.

Long service award

48. Paragraph 13.8.1 of the Manual indicated that an employee who had served for more than 30-years would be entitled to an award of Kshs 60,000/-.

49. The Claimant became entitled to the award on the anniversary of his 30th year. The Court will allow the head of the claim.

Underpayments

50. The Claimant asserted that despite being confirmed to the position of Auditor 1 job group E on 1 April 2009, he was not paid the set remuneration for the grade.

51. To prove this head of the claim, the Claimant should have produced a copy of the Scheme of Service or salary grades. He did not, thus not proving the claim to the required standard.

Pension dues

52. The Respondent's Manual provided that an employee under suspension was not entitled to a salary. Pension contributions are ordinarily deducted from the salary.

53. The Respondent could not have been expected to deduct and remit pension contributions when the Claimant was not entitled to a salary.

Reinstatement

54. The Claimant was 47 years in 2009. He must now be approaching retirement. 7-years have also elapsed since separation. Reinstatement would therefore not be practicable.

Compensation

55. The Respondent proved valid and fair reasons to dismiss the Claimant. However, it did not comply with its internal disciplinary procedures. The Claimant served for about 32 years.

56. In light of these factors, the Court is of the view that the equivalent of 6-months gross wages as compensation would be fair (gross salary in February 2014 was Kshs 48,920/-).

Certificate of Service

57. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 21-days.

58. Before concluding, the Court notes that it directed the Respondent to file a schedule of the terminal dues paid to the Claimant, but the order was not complied with.

Conclusion and Orders

59. From the foregoing, the Court finds that though the Respondent proved valid and fair reasons to dismiss the Claimant, the process was unfair.

60. The Respondent is also found in breach of contract.

61. The Claimant is awarded:

(i) Compensation	Kshs 293,520/-
(ii) House allowance	Kshs 90,000/-
(iii) Medical allowance	Kshs 24,500/-
(iv) Commuter allowance	Kshs 17,500/-
(v) Long service award	Kshs 60,000/-
TOTAL	Kshs 485,520/-

62. The decretal sum to attract interest at court rates from the date of judgment.

63. Respondent to issue a certificate of service within 21-days.

64. The Claimant has only partly succeeded. Each party to bear its own costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 14th day of April 2021.

Radido Stephen, MCI Arb

Judge

Appearances

Claimant in person

For Respondent Mr Oloo instructed by Ogejo, Omboto & Kijala Advocate LLP

Court Assistant Chrispo Aura