



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC 1120 OF 2015

DAVID OBARE.....CLAIMANT

VERSUS

KENYATTA UNIVERSITYRESPONDENT

JUDGEMENT

1. The Claimant was employed by the respondent from 28.1.1992 until 28.1.2015 when he was summarily dismissed for alleged misconduct. He brought this suit on 30.6.2015 seeking the following reliefs:

- a. *A declaration that the Claimant's dismissal from employment was unlawful and unfair.*
- b. *A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded in claim.*
- c. *An order for Respondent to pay the Claimant his dues, terminal benefits and compensatory.*
- d. *An order for the Respondent to give the Claimant a Certificate of Service for the 23 years of service.*
- e. *Costs of the suit plus interest thereon.*

2. The Respondent filed defence on 7.3.2016 denying that the summary dismissal of claimant was unfair and averred that the reason for the dismissal was valid and claimant was accorded a hearing before the dismissal. It further averred that the suit is prematurely before the court because the claimant did not exhaust the internal dispute resolution mechanism by appealing against the dismissal under section 6.3 of the terms of service. Therefore it prayed for the suit to be dismissed with costs.

3. The suit was heard on 29.1.2020 and 23.11.2020 when both parties gave evidence and thereafter filed written submissions.

Evidence

4. The claimant testified as Cw1 and narrated how he joined the respondent on 28.1.1992 as a clerk Grade I and made through the ranks to the position of Clerk Grade A/B in the DVC (Administration) Division effective 1.9.2004. His salary was also increased from the starting Kshs 1410 to Kshs 40,057 per month in January 2015.

5. He stated that on 24.1.2014 he was suspended on false allegation that he had unprocedurally allocated University Servant Quarter known as Liberia 6 to another employee called Martin Wafula and received a monthly rent of Kshs 3000 for three years. He contended that the allocation of houses in the University is an elaborate activity which involves the Deputy Vice Chancellor (DVC) and the Allocation Committee which culminates with an allocation letter signed by the DVC (Administration) and dispatched by the Assistant Registrar (Housing).

6. He further stated that the Estate Department is the one which undertake the day to day inspection and maintenance of the Houses. He explained that Mr Martin Wafula was found in Liberia 8 servant quarters previously occupied by Dr Tom Kimani and not Liberia 6 which was occupied by Dr Nasibi Were.

7. He testified that on 28.5.2014, he attended a disciplinary hearing and no evidence was presented and the committee recommended for further investigation on the matter and a further hearing to follow. However, he was never called for any further hearing as promised and instead he was served with a summary dismissal in January 2015. He contended that the dismissal was unfairly done because he was dismissed without being accorded a fair hearing within which to defend himself, and also because he was subjected to 8 months before the dismissal. He therefore prayed for the reliefs set in the claim.

8. On cross-examination, he stated that he joined the respondent from 6.2.1989 and worked till 28.1.2015 totaling to about 26 years. He admitted that he held supervisory and inspector role in the Housing of staff at the Staff Quarters. He explained that Liberia 8 was previously occupied by Dr Kimani until the main House was razed down by fire but the Servant Quarter remained. He contended that the Servant Quarter was never allocated to any one after Dr Kimani left and it remained locked always for 2 years and the Housing Department did not have the keys to the Servant Quarter.
9. He admitted that Mr Martin Wafula, a casual employee, was found staying in the Liberia 8 servant quarter but, he denied that he is the one who unprocedurally allocated the servant quarter to Mr Martin Wafula. He further denied that he received from Mr Wafula a rent of Kshs 3000 as alleged and explained that the only Kshs 3000 he received from Mr Wafula was a loan for his daughter's medical expenses which loan he repaid to him
10. He contended that he reported the unoccupied servant quarter to the security in order for them to offer protection but he admitted that he did not produce the letter by which he made the report to the security during the disciplinary hearing. He admitted that he attended the disciplinary hearing accompanied by Assistant Director of Housing Department Mr Oyier and the charges were read to him relating to Liberia 6. He further admitted that he was given opportunity to explain his case and thereafter he was told that he would be called for further hearing after further investigations were done.
11. However, he was never called for any further hearing until 28.1.2015 when he received a dismissal letter giving him 14 days to appeal. He admitted that he did not appeal and instead he opted to sue for remedy under the Employment Act.
12. On re-examination he reiterated that the dismissal letter stated that he had allocated Liberia 6. He further contended that the decision of the disciplinary committee on 28.5.2014 was that there was need to gather more evidence and proof that he had received money from Mr Martin Wafula. The committee also stated that he was to appear for final decision.
13. He maintained that the Committee never finalized hearing his case on 28.5.2014 and that he was never called for any further hearing nor was he shown the investigation report before the disciplinary. He contended that the decision to dismiss him was made in a meeting held on 21.2.2015 to which he was not invited.
14. Finally he contended that the letter he used to report the unoccupied house, Liberia 8 was retained by the security office. He further contended that he opted not to appeal to the employer against the dismissal because the dismissal was abrupt and not in accordance with a fair procedure.
15. The respondent's HR Manager, Mr Nderitu testified as Rw1. He stated that the House in issue herein and which led to the dismissal of the claimant was Liberia 8 and not 6. He clarified that the reference of Liberia 6 was a typing error on the part of the investigator. He urged the court to rectify the said error contending that the only house that was burnt down was Liberia 8 formerly occupied by Dr Kimani.
16. He testified that the claimant was the clerk in charge of keeping records for all houses and he was reporting all repair issues and vacant houses for reallocation to the Housing Committee.
17. Rw1 further stated that sometimes in January 2014 a report was made to the Security Officer of the respondent that an illegal allocation of a servant quarter unit in Liberia 8 to Mr Martin Wafula of the respondent's Games and Sports Department for a monthly rent of Kshs 3000. He contended that an investigation done revealed that the said arrangement had been going on for three years and the rent was paid to the claimant.
18. Rw1 further stated that owing to the said report the claimant was suspended by the letter dated 24.1.2014 and on 28.5.2014 he was invited to a disciplinary hearing before the Senior Board of discipline to answer the said charges of illegal allocation of the said servant quarter to Mr Martin Wafula Muindy. He contended that the claimant gave his defence and also Mr Martin Wafula Muindy gave his testimony that he paid Kshs 3000 to the claimant for 3 years. Thereafter the Board decided that the claimant would continue in his suspension pending further investigations.
19. Rw1 also stated that on 21.1.2015, the Board met again and decided to summarily dismiss the claimant. The decision was communicated via the letter dated 28.1.2015 which also notified him of his right of appeal within 14 days of the said letter. He believed that the summary dismissal was fair because it was done in accordance with the law and respondent's terms and conditions of service for Senior Clerical, Catering and Administrative and Technical Staff (Grade A-F). He further believes that the suit is premature because the claimant did not exhaust the internal appeal mechanism. He also believes that the suit lacks merits and should be dismissed with costs.
20. On Cross-Examination, Rw1 admitted that decision of the Disciplinary Board on 28.5.2014 was that the hearing was postponed to a future date pending further investigation to gather evidence and proof that the claimant received money from Mr Martin Wafula.
21. Rw1 further contended that the claimant, at the hearing, admitted to receiving Kshs 3000 via mpesa from Mr Martin Wafula. He stated that there were Mpesa statements showing that the claimant received money but the statements were not in court. He advised that the decision to dismiss the claimant was reached during a meeting held on 21.1.2015 where at the claimant was not present nor was his representative present.
22. On re-examination Rw1 admitted that the claimant stated that the money he received from Mr Martin Wafula was to take his child to hospital. He further stated that during the meeting held on 21.1.2015, the claimant was represented by the Chairman of his trade union (KUSU) Mr Davit Maina, and Mr Oyier from Claimant's department.

Submissions

23. The Claimant submitted that his dismissal was procedurally unfair and unlawful since he was never invited to any other disciplinary hearing after the same was adjourned on 28.5.2014 to pave the way for further investigations. In his view the failure to give him a fair hearing before the dismissal contravened his right under Article 47(1) of the Constitution which demands that before making any adverse decision a person must be given an opportunity to be heard.

24. To justify the foregoing point, reliance was placed on Kenya **Human Right Commission & Another Vs Non- Governmental Co-ordination Board & Another [2018] eKLR** where Mwita J held that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

25. The Claimant further relied on **Daniel Kiplangat Kikebut Vs SMEP Deposit Taking Micro Finance Ltd** where Marete J held that employer is obliged to accord a hearing to his employee in the presence of another employee, before dismissal on ground of misconduct, poor performance or physical incapacity. He maintained that the procedure laid down in the Employment Act was not followed and as such his dismissal was unfair under section 45(2) of the Employment Act.

26. He further submitted that the reason for dismissal was not valid because the truth of the allegations levelled against him was not established. In his view after the hearing was adjourned on 28.5.2014, no proper investigations were done and no further hearing was done as promised. He further contended that even in this suit no evidence was tendered to prove that indeed the alleged tenant was paying him a monthly rent for the said premises. Therefore he maintained that his dismissal lacked substantive justification and was procedurally unfair.

27. In the end he contended that due to the matters above, he is entitled to the reliefs sought by the suit.

28. On the other hand, the respondent submitted that the claimant's dismissal was procedurally fair and the reason for the dismissal was valid. It contended that the Claimant grossly misconducted himself by dealing with its property in an unauthorized manner by legally allocating a house to Mr Martin Wafula and receiving rent from the illegal occupant for years.

29. As regards the procedure followed, the respondent contended that it granted the claimant a proper and fair hearing before the dismissal. It contended that it informed the claimant, the charges against him vide the letter dated 24.1.2014 and invited him to a disciplinary hearing on 28.5.2014 where he attended with a representative and gave his defence. It further contended that the claimant's defence was unsatisfactory and after the dismissal he did not appeal.

30. The respondent relied on **CMC Aviation Ltd Vs Mohammed Noor [2015] eKLR**, **David Gichagua Omuya Vs Mombasa Maize Millers Ltd [2014] eKLR** and **Anthony Mkala Chitavi Vs Malindi Water & Sewerage Co. Ltd [2013] eKLR** where the courts were unanimous that for the termination of an employees contract of service to pass the test of fairness, the employer must demonstrate that it was founded on a valid reason and that a fair procedure was followed. In its view, it has discharged the foregoing burden of proof and the suit should be dismissed with costs since the claimant is not entitled to the reliefs sought.

Issues for determination.

31. Having considered the pleadings, evidence and submissions there is no dispute that the claimants was employed by the respondent until 28.1.2015 when he was summarily dismissed for gross misconduct. The issues for determination are:

- a. *Whether the dismissal was grounded on a valid reason.*
- b. *Whether the procedure followed was fair.*
- c. *Whether the claimant is entitled to the reliefs sought.*

Valid Reason

32. Under section 43(1) and 45(2) of the Employment Act, the burden of proving a valid reason for dismissing an employee rests with the employer. In this case Rw1 stated that the illegal tenant Mr Martin Wafula told the Board during the disciplinary hearing that he was allocated the material servant quarter by the claimant for a monthly rent of Kshs 3000 and he paid him in cash and Mpesa for 3 years. He further stated that the claimant admitted that he received Kshs 3000 via mpesa which he claimed to be a loan for medication of his child which he refunded to Mr martin Wafula.

33. On the other hand, the claimant maintained that the said Kshs 3000 was a as loan to cater for medical expensed for his child and he repaid to Mr Maritn Wafula. Rw1 did not produce any written evidence including mpesa statements indicting that the claimant received rent of kshs 3000 from Mr Wafula for the alleged 3 years or in other way to rebut the claimant's loan allegation. In fact Rw1 admitted that on 28.5.2014 the disciplinary hearing was adjourned to pave the way for further investigations with a view to get evidence or proof that money was paid to the claimant by Mr Martin Wafula for 3 years as rent.

34. The Board's decision on page 11 of the Disciplinary proceedings states as follows:

“Boards Decision

- (i) *That there is need to gather evidence and proof that Mr Obure received money from Mr Martin Wafula. Mr Obare to appear for final decision.*

(ii) That Mr David N. Obare to be on suspension pending more investigations on his case.

(iii)

35. In my view the foregoing decision indicates that the Board had not been shown any evidence to prove that the claimant had received rent from Mr Wafula for 3 years and recommended for further investigations to gather proof of such payment.

36. The minutes of the next Board meeting held on 21.2.2015 do not show that any new evidence was tendered to prove that the claimant did indeed receive rent for 3 years from Mr Wafula. The witness who tendered evidence if any obtained from recommended further investigation is not named.

37. Rw1 contended that mpesa evidence was obtained but he did not have the same in court. It follows that the respondent has failed to adduce evidence to prove that the claimant allocated the Liberia 8 servant quarter to Mr Martin Wafula for a rent of Kshs 3000 per month and that he indeed received the said rent illegally for 3 years.

38. In addition to the foregoing observation, I have carefully considered the statement made by Mr Martin Wafula dated 18.1.2014 and his testimony during the disciplinary hearing on 28.5.2014 and noted that he admitted that he occupied the servant quarter for Liberia 8 on invitation of the son to Dr Kimani before the main house was destroyed by fire. He was therefore not brought there by the claimant. There is also no documentary evidence to prove that he was occupying the premises through an agreement with the claimant.

Procedure followed

39. Section 41 of the Employment Act requires that before dismissing an employee for gross misconduct an employer must first explain the reason to the employee in a language he understands and in the presence of another employee of his choice, and thereafter invite the two to air their representations which must be considered before the dismissal is decided.

40. In this case there is no dispute that the claimant was informed of the charges by the letter dated 24.1.2014 and thereafter attended disciplinary hearing before the Senior Board of Discipline and gave his defence. It is also not in dispute that the Board decided to adjourn the case to allow more investigations to gather evidence and proof that the claimant received money from Mr Martin Wafula, but he was never called back to attend further hearing until 28.1.2015 when he received a letter dismissing him summarily.

41. The claimant was also not called to defend himself from any further incriminating evidence, if any. It follows that the decision to dismiss him was not reached in accordance with a fair procedure because he was not heard on the proceedings held on 21.1.2015 where it was alleged by Rw1 that further evidence was adduced against the claimant.

Reliefs Sought

42. Having found that the respondent has failed to prove that the dismissal of the claimant was grounded on valid reason and that a fair procedure was not followed, I make declaration that the dismissal was unfair and unlawful within the meaning of section 45 of the Employment Act.

43. Flowing from the foregoing the claimant is entitled to one month salary in lieu of notice plus 12 months' salary as compensation for unfair dismissal by dint of section 49 of the Act. In awarding the 12 months, I have considered that the claimant served the respondent for over 20 years during which period he earned steady promotions due to his diligent service.

44. I further award him leave for 2014 as prayed because it was not rebutted by leave records. However the claim for salary for 8 years lost due to premature termination is declined for lack of any legal or contractual basis.

45. The claim for damages for defamation is also dismissed for not being substantiated.

46. Finally the claim for certificate of service is granted as prayed because it is a right under section 51 of the Employment Act.

Conclusion

47. In view of the observations and findings above, I enter judgement for the claimant as follows:

a. Notice 50,219

b. Compensation 602,628

c. Leave 50,219

703,066

The above award is subject to statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated and delivered at Nairobi this 8th day of April, 2021

ONESUS MAKAU

Judge

In the presence of:-

Wagira Advocate for the Claimant, and

Agwenyi Advocate for the Respondent.

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE