



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 82 OF 2016**

**KENYA UNION OF COMMERCIAL, FOOD &**

**ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**SIBO WATER & SANITATION CO LTD.....RESPONDENT**

**JUDGMENT**

1. The Kenya Union of Commercial, Food & Allied Workers (the Union) sued Sibbo Water & Sanitation Co Ltd (the Respondent) in 2016, and the Issue in Dispute was stated as:

Unprocedural and unlawful dismissal of Mr Gilbert Ochieng (the Grievant).

2. The Respondent filed a Response on 10 June 2016, and the Cause was heard on 18 February 2020, when the Grievant testified, and on 16 December 2020 when the Respondent's Human Resources Manager testified.

3. The Union filed its submissions on 5 February 2021 (should have been filed and served before 30 January 2021), while the Respondent filed its submissions on 18 February 2021.

4. The Court has considered the pleadings, evidence and submissions and will adopt the Issues as identified by the Union in its submissions.

**Whether the disciplinary process was procedurally fair?**

5. On 28 October 2013, the Respondent suspended the Grievant from work pending further investigations on alleged fraud within the revenue function.

6. The suspension was followed by a disciplinary hearing on 1 November 2013. The Grievant attended the hearing and made representations.

7. On 30 December 2013, the Grievant appealed against the dismissal. The Respondent did not respond to the appeal.

8. The Union challenged the fairness of the process on the ground that the Grievant was not represented by a colleague or trade union official during the disciplinary hearing.

9. Section 41 of the Employment Act, 2007 envisages an employee facing a disciplinary hearing being afforded an opportunity to be accompanied during the hearing process.

10. The Respondent did not inform the Grievant of the right to be accompanied during the hearing. It also did not inform the Grievant's trade union. The minutes of the disciplinary hearing produced in Court by the Respondent do not record the Grievant as accompanied by a colleague.

11. The Court finds that the Respondent fell short of the dictates of procedural fairness.

**Valid and fair reasons for dismissal**

12. Under sections 43 and 45 of the Employment Act, it was incumbent upon the Respondent to not only prove but prove as valid and fair the reasons for the dismissal of the Grievant.

13. The Respondent called its Human Resources Manager to discharge the burden.

14. The witness produced an audit report. The Report shows that the Grievant could not account for Kshs 7,020/- which he had collected from customers. The names of the customers as well as receipt numbers were indicated.

15. The dismissal letter shows that the Respondent recovered the amount from the Grievant's terminal dues.

16. The Court is satisfied that the Respondent had, and proved that it had valid and fair reasons to dismiss the Grievant.

### **Compensation**

17. Although the Respondent proved that there were valid and fair reasons to dismiss the Grievant, the Court has concluded that the process was unfair.

18. The Grievant served the Respondent for about 7 years.

19. In consideration of the length of service, the Court is of the view that the equivalent of 5-months gross pay as compensation (Kshs 10,900/-).

### **Breach of contract/statute**

#### **Leave**

20. The Grievant did not lay an evidential foundation on this head of the claim either in the witness statement, which was adopted as part of the evidence or during oral testimony. Relief is declined.

### **Refund of unremitted Sacco contributions**

21. In the Memorandum of Claim, the Union pleaded that the Respondent deducted Kshs 60,000/- from the Grievant but did not remit the same to his Sacco.

22. The Union did not place any records/evidence such as copies of payslips or account statements from the Sacco to prove that the deductions were made or were not remitted. Relief is declined.

### **Underpayments**

23. The Union anchored the head of the claim on underpayments on two documents.

24. The first was referenced *Salary and Allowances for employees of the Water Board, Ministry of Water and Irrigation, January 2007*.

25. The Grievant was not an employee of a Water Board, and in the view of the Court, the Circular does not apply in his case.

26. Secondly, the Union relied on a *Working Taskforce Report on Human Resource Management Issues raised by Staff within the Water Sector* issued on 27 June 2007.

27. The extract of the Report filed in Court did not have any solid recommendations on salary rates or grades and is therefore of little assistance to the Union's case.

### **Conclusion and Orders**

28. The Court finds and declares that the termination of the Grievant's employment was procedurally unfair.

29. The Grievant is awarded:

(i) Compensation                      Kshs 54,500/-.

30. Due to the ongoing social partnership between the Union and Respondent, no order on costs.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 7<sup>th</sup> day of April 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For the Union

Mr Atela, Assistant Secretary-General

For Respondent

Ms Achieng instructed by Oundo, Muriuki & Co. Advocates

Court Assistant

Chrispo Aura