



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT MOMBASA
CAUSE NO. 302 OF 2016

MOSES ECHWA.....CLAIMANT

- VERSUS -

KENYA AIRPORTS AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 21st May, 2021)

JUDGMENT

The claimant filed the statement of claim on 15.04.2016 through Gikandi & Company Advocates. The claimant prayed for judgment against the respondent for:

- i. A declaration that the decision made by the respondent on 09.07.2014 to summarily dismiss the claimant from his employment with the respondent was unfair and amounts to wrongful dismissal since due procedure was not followed by the respondent.
- ii. The respondent to reinstate the claimant to the position of Ground Flight Safety Supervisor in the Department of Ground Flight Safety.
- iii. Damages for unlawful termination of the claimant's employment with the respondent to be calculated at the rate of Kshs.131, 373.10 per month being the amount the claimant was earning at the time when his employment was unlawfully terminated.
- iv. Interest on the total sum of money claimed as compensation at the rate of 12% per annum from the date of filing the suit until payment in full.
- v. General damages as set out in paragraph 12 above. (Being that the claim that the false allegations levelled against the claimant were highly traumatizing and made the claimant to suffer mental stress for which general damages are claimed).
- vi. Costs.

The respondent filed on 18.08.2016 the memorandum of reply through Cootow & Associates Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant testified to support his case. The respondent's witness No. 1 (RW1) was Newton Kithuka, respondent's Security Officer and respondent witness No. 2 (RW2) was Lydia Cheruto Chelimo, the respondent's Staff Welfare Officer. The Court has considered the pleadings, the evidence and the final submissions filed for the parties respectively. The court makes the findings as follows.

To answer the **1st issue** for determination the Court returns that there is no dispute that parties were in a contract of service. The claimant was employed by the respondent by the letter dated 16.10.1996 and confirmed in appointment by the letter dated 06.06.1998 as a Security Warden.

To answer the **2nd issue** for determination the Court returns that the claimant was summarily dismissed from employment per letter dated 09.07.2014 and effective 09.07.2014 on account of gross misconduct. The letter referred to the respondent's letter dated 14.05.2014, the claimant's reply dated 15.05.2014 and the disciplinary committee meeting held on 08.07.2014. The dismissal letter stated that the claimant was entitled to salary and allowances earned until 08.07.2014, leave days earned but not utilised, and pension as provided in the Trust Deed. Payment would be effected after clearance per the prescribed forms.

The **3rd issue** for determination is whether the termination was unfair. The claimant's case is that he was dismissed upon allegations that he irregularly plucked three official documents relating to fuel spillage booklet and thereby he was accused of having conspired to defraud the respondent of some revenue. It is his case that he was not afforded any kind of hearing prior to the dismissal and the disciplinary hearing of 08.07.2014 did not uphold natural justice, the claimant never appeared before the alleged disciplinary committee hearing of 08.07.2014, no charges were served upon the claimant per clause N 9 (i) of the respondent's Human Resource Manual, 2011, he was not given chance to call a witness, the claimant was not allowed to reply through his supervisor per clause N.9 (i) of the manual, and the claimant was not provided a copy of record of disciplinary hearing of 08.07.2014. Thus the termination was unfair because due procedure was not followed.

The respondent's case was that the claimant was accorded a hearing in accordance with section 41 of the Employment Act, 2007. Further he appealed and the respondent declined to allow the appeal.

The Court has considered the evidence. The claimant received the notice to show cause dated 14.05.2014. He was required to reply by 16.05.2014. His response was dated 15.05.2014. He denied the allegation of plucking off FS No. 005, 014, and 016 between 05.03.2014 and 16.03.2014 with respect to fuel spillage booklet and subsequent illegal collection of revenue. He attended the disciplinary hearing. The claimant's case is that the respondent failed to comply with clause N.9 of the respondent's Manual requiring that charges are framed together with a brief statement of the allegations and forwarded to the claimant requiring him to reply through his supervisor within 7 days. RW2 testified that the clause was not complied with to the extent that other than the show cause notice separate charges were not framed with a brief statement of the allegations and further the claimant was not required to reply through his supervisor. In view of that admission, the Court finds that the agreed procedure was not strictly complied with. The Court further finds that despite that procedural lapse, as testified by RW and urged for the respondent, due procedure was substantially complied with because the claimant knew the case that confronted him.

The **4th issue** for determination is whether the claimant is entitled to 12 months' salaries compensation as submitted. The Court has considered the factors in section 49 on award of compensation. The record of disciplinary hearing show that the claimant admitted receiving Kshs.20, 000.00 from his friend at Sax Airline and signed for it on 11.03.2014 and used the money to pay his school fees. While the relevant Voucher from Sax was not exhibited, there is no reason to doubt that the claimant admitted at the disciplinary hearing of receiving and signing for the Kshs.20, 000.00. The Court considers that the respondent had a valid reason to dismiss as at the time of termination. The Court finds that despite the excusable lapse in the procedure as already found, the claimant significantly contributed to his termination when he signed the receipt of the Kshs.20, 000.00. Accordingly, he is undeserving of compensation under section 49 of the Act.

To answer the **5th issue** for determination the Court returns that in this case reinstatement is not available per section 12 (3) (vii) of the Employment Act, 2007 which provides that reinstatement may issue only within 3 years from the date of termination. In the instant case, the three years had already lapsed; dismissal having been on 09.07.2014 and effective 08.07.2014. The Court further finds that no submissions were made for the claimant on the prayer for general damages on account of mental stress and the claim and prayer is deemed abandoned.

The Court has considered the parties' margins of success and each will bear own costs of the suit.

In conclusion, judgment is hereby entered for the parties and the suit determined with orders:

1. The declaration that the respondent's summary dismissal of the claimant's contract of service by the letter dated 09.07.2014 was procedurally unfair for want of strict compliance with clause N.9 (1) of the respondent's Human Resource Manual, 2011.
2. Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 21ST MAY, 2021

BYRAM ONGAYA

JUDGE