



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 726 OF 2019

REUBEN OCHIENG NGESO.....CLAIMANT

VERSUS

NATIONAL TRANSPORT & SAFETY AUTHORITY.....RESPONDENT

JUDGMENT

1. Reuben Ochieng Ngeso instituted this Claim in October 2019 and later filed an Amended Statement of Claim dated 21st July 2020 against the National Transport and Safety Authority (NTSA), for unfair dismissal and termination of employment. He avers that he was an employee of the Ministry of Transport under the Kenya Revenue Authority (KRA) until 2012 when the Respondent organization was established and he was transferred to the NTSA together with other employees. The Claimant averred that he diligently carried out duties assigned to him by his supervisors until July 2018 when the Respondent deployed him to Kisumu while citing “exigencies of service” as the reason for the transfer. The Claimant averred that he nevertheless continued working for the Respondent until 5th December 2018 when he was called to pick a show cause letter at the Respondent’s Nairobi offices, which letter alleged his seeming involvement in fraudulent undertakings in the Respondent’s organization. The Claimant averred that despite responding to the show cause letter, the Respondent called for his disciplinary hearing without following the laid out procedures as outlined in the Respondent’s HR Policy Manual. The Claimant avers that he was given his summary dismissal letter on 2nd September 2019 and was required to immediately hand over his duties and any property of the Respondent authority. He contends that the initial transfers to NTSA happened without any training or inductions being conducted for the employees, despite the new undertakings requiring them to successfully merge the data from the previous regime under the KRA with the systematic update of the NTSA. Further, that his deployment to Kisumu by the Respondent was without any valid reason or explanation. The Claimant further averred that the show cause letter was unprocedurally served upon him by the Director General himself. He prays for Judgment against the Respondent for:

- i. A declaration that the Respondent’s actions against the Claimant amounts to wrongful dismissal of his employment contract and therefore entitle him to his terminal dues.
- ii. General damages for wrongful dismissal of the Claimant’s employment resulting to stress and mental anguish.
- iii. Reinstatement and all the claimant’s terminal dues.
- iv. Punitive damages
- v. Constitutional damages
- vi. Cost of this suit
- vii. Interest on (b), (d), and (e) above at court rate from the date of filing this claim.
- viii. Any other relief this Honourable court may deem fit and just to grant.

2. The Claimant asserts in his witness statement that he was transferred to NTSA in July 2014 and deployed to the Directorate of Registration and Licensing, specifically licensing department, driving license section based in KRA, Times Tower Building. The Claimant stated that within the driving license section, his work was processing and issuing driving licenses using the Driving License Integrated System which belonged to KRA. The Claimant stated that a decision to move driving license operations from the semi-manual KRA system to the government online platform (e-Citizen System) was made in 2015 and he was appointed to be in the Project Team that was to migrate Driving License (DL) data to the e-Citizen system to make all the DL processes electronic. The Claimant stated that he trained all the Driving Schools’ owners, driving test examiners and staff on the new electronic processes and was in charge of password issuance and e-Citizen back

office procedures in the Respondent organisation. He further states that he ceased being in charge of the e-Citizen back office procedures when he was transferred to Kisumu NTSA Office and thus handed over the responsibility. The Claimant stated that the Station Manager at Kisumu directed him to deal with the backlog of customer complains of missing DL records in the e-Citizen system and update the records with genuine documents in the system. The Claimant states that the show cause letter issued to him alleged unprocedural endorsement of Class A, Replacement of identification numbers of genuine drivers with those that could not be ascertained and introduction of fake records in the system by use of pre-determined CoC. The Claimant stated that he denied the said allegations and explained it was due to system errors and the updating was occasioned by customer complaints. He stated that for any data to be amended one had to present evidence through documentations. He asserts that he had authority from the Director Registration and Licensing for Nairobi cases and the Station Manager Kisumu for Kisumu cases. He further states that on 10th May 2019 he was invited for a disciplinary hearing by the Director General which he attended and defended himself accordingly. He stated that however, the committee completely ignored his defence and proceeded to summarily dismiss him without any proof of any specific offense(s) committed that would constitute gross misconduct. The Claimant contended that as a young employee in his first job and working in a highly technologically changing environment, he was treated unfairly by his employer instead of being commended for his work. He prays to get his job back with all the benefits from the day he was dismissed.

3. The Respondent filed a Memorandum of Defence dated 24th February 2019 averring that upon the Claimant voluntarily becoming its employee, he was subject to the terms and conditions of his contract of employment including the Respondent's rules and regulations. It avers that the Claimant's transfer from KRA to the Respondent never conferred upon him any special status/treatment with the Respondent and denies that the Claimant was never trained in his role. The Respondent asserts that it indicted the Claimant in show-cause letter because his involvement in the fraud grossly violated his contract of employment and was contrary to the Respondent's Human Resources Manual and Regulations. The Respondent averred that the show-cause letter clearly spelt out the accusations levelled against the Claimant and the particulars of gross misconduct for him to effectively understand and prepare his defence. The Respondent averred that the Disciplinary Committee conclusively found there was enough evidence to support the charges against the Claimant, which evidence led to the Respondent concluding to terminate the Claimant's employment with reasons as captured in the dismissal letter.

4. The Respondent further avers that the Claimant was paid all his dues in full upon termination and therefore not entitled to the claims as tabulated in his Memorandum of Claim. Further, it averred it was justified to dismiss the Claimant from employment because of his gross misconduct and that the same was in accordance with the rules of natural justice and procedurally fair. The Respondent averred that the dismissal was justified since at the time of terminating the Claimant's employment, it genuinely and reasonably believed he had grossly violated the terms of his contract of employment. The Respondent averred that it had further in a letter previously warned the Claimant of his gross misconduct following ineptitude complaints being brought to the Respondent's attention.

5. The case proceeded to hearing and in evidence, the Claimant testified that he was a Clerical Officer and a Systems administrator. He further stated that no particulars were given for the alleged fraud he was accused of and that he was given the report with the dismissal letter. The Claimant stated that no evidence was given at his disciplinary hearing and that the evidence he brought to the hearing was never looked into as he was told they had no time to look at the said evidence. He testified that he never got any pay and that he prays the Court clears his name and gives him a chance to be reinstated. He also sought payment of damages as he has been struggling financially.

6. The Respondent did not participate at the hearing and the parties were to file submissions. The Claimant in his submissions cites the case of **Postal Corporation of Kenya v Andrew K Tanui [2019] eKLR** where the Court of Appeal was of the view that as the employer had failed to sufficiently discharge the burden of proof placed on it, they had no reason to disturb the findings of the trial court on that aspect of the case. He submits that similar guidelines are to be found in **Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642**, thus:-

“...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.”

7. The Claimant submitted that in proving a case of unlawful termination of employment, the provisions of Section 45(2) (a), (b) and (c) of the Employment Act, 2007 are instructive. The Section provides that: “*A termination of employment by an employer is unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.*”

He submits that the disciplinary hearing panel made a determination on something they had no idea of because they had no clue regarding his work and had to seek guidance from him on how he carried out his roles. The Claimant submitted that he was not accorded a fair hearing in contravention of the provisions of Section 41(1) and (2) of the Employment Act, Article 7 of the ILO Termination of Employment Convention of 1982 and well settled court principles. The Claimant submitted that the principle of fair hearing requires that the employee be given sufficient time to prepare; the right to fully understand the charges; and the right to documentation the employer intends to rely on at the hearing, as well as other documents the employee may request for. It is the Claimant's submission that the Respondent's Human Resources Policy Manual in force at the time of his exit adopted these principles of fairness. He submitted that an employer must adhere to the policy that any procedure involved in ending an individual's employment must be followed to ensure fairness. The Claimant submitted that the HR Manual further unequivocally states that an officer alleged to have committed gross misconduct shall be allowed an opportunity to defend themselves and their witnesses' testimonies considered and adopted. The Claimant further submits that he was treated contrary to the provisions of Section 5 of the Employment Act and the guidelines of disciplinary hearings by the Respondent's HR Policy Manual as the Director General himself served him with the notice to show cause, led the investigation, chaired the disciplinary hearing and passed the verdict to summarily dismiss him. The Claimant submitted that under Section 5 (7) of the Employment Act the employer is vested with the burden of proving discrimination did not take place as alleged.

8. On the reliefs sought in his claim, the Claimant relies on the case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** where the Court held that the dismissal of the Respondent from his employment on grounds of gross misconduct and breach of the Appellant's Code of Conduct was in violation of the Industrial Relations Charter, the provisions of International Labour Organization (ILO) Convention NOs. 98 and 135 as well as principles of natural justice. The Court also held that the Appellant did not observe statutory provisions on summary dismissal as provided for under Section 44 of the Employment Act, 2007 and that the summary dismissal thus amounted to unfair dismissal. The Respondent in the case was subsequently awarded one month's salary in lieu of notice, twelve months' salary, punitive damages, constitutional damages, unpaid leave days and costs of the suit. The Claimant submitted that the prayers in the amended claim should be granted with costs. The Respondent never filed any submissions.

9. The dismissal of the Claimant was said to have been orchestrated by the Director General himself. The Claimant asserts the show cause was personally handed over to him by the Director General contrary to regulations. In his reply to show cause dated 14th December 2018 and received by the Respondent on 18th December 2018, the Claimant states that he received the show-cause letter dated 5th December 2018 through EMS and confirmed receipt of the letter on 11th December 2018. He then goes on to respond to the allegations in the show cause letter by answering each and every allegation sequentially. The show-cause letter was addressed to the Claimant through the Director, Registration and Licensing who duly forwarded the same to the Claimant. His reply was similarly through the Director, Registration and Licensing. It therefore is not true the Claimant received the show-cause letter from the Director General. The Respondent annexed the copy of the disciplinary hearings. At pages 17-21 the proceedings show the Claimant was heard, his explanation considered (including the response he gave in writing) and a determination made. It is clear the Respondent carefully considered the allegations made against the Claimant and his defence and came to the conclusion that he breached his contract of employment and the Public Officer Ethics Act that amounted to gross misconduct. The Disciplinary Committee recommended that the Claimant be summarily dismissed from service of the Respondent. As the Claimant's case was unproved and full of lies it is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE