



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRC.C/32/2019

CITATION: JULIUS KIPCHIRCHIR ROTICH VS COUNTY GOVERNMENT OF UASIN GISHU

JUDGMENT

ON 2021-07-09 BEFORE HON. JUSTICE J. N. ABUODHA

1. The Claimant pleaded that he was employed by the respondent on 20th November, 1998 as a Building Inspector scale 12. He rose through the ranks to Building Inspector II in November, 2009.
2. The Claimant further alleged that pursuant to the transition of Local Government to County Government he continued and on 29th September, 2017 he was promoted to Building Inspector I in Job Group J. His gross monthly pay became Kshs. 77,700/=.
3. On 21st December, 2018 at about 1.50 p.m the Claimant was directed by his superior the Acting Chief Officer Physical Planning and Urban Development to halt the construction of an alleged illegal structure on the land parcel ELDORET MUNICIPALITY /BLOCK 83 AND 84 which order the Claimant obeyed.
4. The Claimant was however later issued with a notice to show cause dated 21st December, 2018 alleging gross misconduct in his work performance. He was accused of failure to stop an illegal construction in the parcel of land herein referred to above and after legal instructions were given on 21st December, 2018.
5. The Claimant responded to the Show Cause letter stating that he stopped the construction as instructed but it was subsequently discovered that the alleged illegal construction had an approved plan.
6. The Claimant was subsequently invited to appear before a disciplinary committee on 2nd May, 2019. He appeared as directed and thereafter continued to serve the respondent until the 17th May, 2019 when he received a letter dismissing him from service with effect from 21st December, 2018 for failing to take lawful instructions.
7. The Claimant averred that the termination was unfair and unlawful for the reason that no lawful instructions from a superior existed that was capable of being disobeyed as the construction had an approved plan number 1032 of 2011 and which record the respondent had in custody. Further, the respondent breached section 76(2) of the County Government Act by punishing the Claimant in a manner which was in breach of the law since no ground for summary dismissal existed under section 44(4)(c) of the Employment Act.
8. The Claimant thus sought a declaration that the termination of employment was unfair and unlawful. He further sought reinstatement to employment without loss of seniority and benefits. In the alternative the Claimant sought the sum of Kshs. 1,001,000/= as compensation for unfair termination of service.
9. The respondent on its part vide memorandum of response filed on 28th January 2020 pleaded that the Claimant was engaged as a Planning Assistant at the time of dismissal from service and further averred that it was ironical for the Claimant to seek to foster self-righteousness oblivious of the grave misconduct that led to his dismissal.
10. According to the respondent, the notice to Show Cause letter was very clear on the reason for which the Claimant was dismissed from service. The respondent pleaded that the Claimant's behaviour amounted to gross misconduct and contravened section 44(4)(c) of the Employment Act. The respondent further averred that the Claimant's actions resulted to violation of the County Public Service Human Resource Manual.
11. The Claimant was duly informed of the reasons for his termination and what he needed to Show Cause for. He was given a chance to be heard and put in his written response to the charges. He attended the disciplinary hearing in the presence of a representative of his choice and where he was accorded ample time to state his case in defence. The respondent therefore followed due process in terminating the Claimant's service.

12. At the hearing the Claimant relied on as his evidence in chief, his statement recorded on 24th July, 2019. He further stated that on 21st December, 2018 while at work, he received a call from Acting CEO -Planning informing him that there was an illegal construction going on at Elgon View. He sent his junior officers to the site and they stopped the construction. The information was shared on the work WhatsApp group. In the evening he received a letter accusing him of gross misconduct for failing to stop an illegal construction. He was asked in the said letter to Show Cause to which he responded. He was later called for a disciplinary hearing and thereafter dismissed from service. According to him, he later discovered there was no illegal structure. The building was actually approved by the responded. It was his evidence that he was asked to act without a notice yet a notice was necessary before stopping an illegal construction. The Claimant further stated that at the conclusion of the disciplinary hearing the recommendations was that he be issued with a first warning.

13. In cross examination he stated that he received verbal instructions from one Jackton Kiprono and that it was normal to receive verbal instructions. He further stated that the alleged misconduct was stated in the Show Cause letter and that he responded to the same. He further stated that he knew about the approval when he received the Show Cause letter. He was invited for the disciplinary hearing which he attended and was given a chance to explain his case. It was further his evidence that he presented the approvals before the Committee and told them the construction had been stopped. According to him the construction was not illegal and that he produced the drawings to show what he was being told to stop was not illegal.

14. The respondent's first witness Mr. William Koech stated that he was the Secretary to the County Public Service Board (CPSB) for Uasin Gishu. He informed the court that he would adopt his statement recorded on 12th April, 2021 as his evidence in Chief. It was his evidence that the Claimant was given instructions to stop a building under construction contrary to the bylaws but the Claimant omitted to do so. He was therefore issued with a Show Cause letter to which he responded. He was thereafter summoned for a disciplinary hearing which he attended and defended himself. The Committee thereafter recommended the Claimant's dismissal from service.

15. In cross-examination he stated that the Claimant was issued with verbal instructions first then followed by written instructions on 21st December, 2018. The instructions were given by the Chief Physical Planning Officer Mr. Kiprop. It was his evidence that the building did not have a valid approval and further that approvals can expire. He further stated that he was not aware if the Claimant posted the approval in the work WhatsApp group. He stated that the Committee resolved that the Claimant be issued with a first warning letter. The Committee never recommended dismissal. The Board however resolved to dismiss he Claimant. In re-examination he stated that the Board was not bound by he recommendations of the disciplinary committee.

16. The respondent's second witness Mr. Jackton Kiprop stated that he worked at the material time as Chief Officer in charge of Urban Development. The Claimant was part of the Surveillance team. He was the one in charge of the team. He stated that he sought to adopt his statement recorded on 20th January, 2020 as his evidence in chief. He stated that in December, 2018 he issued verbal instructions to the Claimant to stop construction of a building on ELDORET/MUNICIPALITY/BLOCK 13/83 and 84. The building according to him was not approved as per the physical planning. The approved plans as per the previous Municipality were published in the media and that all developers were required to regularize the approvals. The developer in this particular case had not complied. The Claimant was therefore asked to stop the construction but failed to do so . He was therefore issued with a Show Cause letter to which he responded and later invited for a disciplinary hearing.

17. In cross-examination he stated that the development on Block 13 ws not approved. However, none of the members of the approval Committee was called as witness and further that he had not filed copies of media publications in court, however notice was given to all developers. It was his evidence that he was not aware if the development on Block 13 was still going on. He further stated that he was aware the developer challenged the stoppage in Court.

18. Mr. Kiprop also stated that approvals expire and as per the notice published in the media, the approval to Block 13 had expired. The developer was therefore supposed to regularize the approval.

19. He further confirmed that the disciplinary committee recommended that the Claimant be issued with a first warning.

20. In closing submissions, Mr. Kisuya for the Claimant submitted that the law enjoins an employer to terminate employment based on existence of misconduct as stipulated in section 44(4) of the Employment Act, 2007 and the procedure to be adopted must meet provisions of section 41 of the Employment Act. According to Counsel, no misconduct existed as no lawful/legal instructions from a superior existed that was capable of being disobeyed as the construction in question had been approved. The Claimant could not therefore be said to have breached section 44(4) (c) of Employment Act. Further the respondent breached section 76(2) of the County Government Act by punishing the Claimant in manner in breach of the law as no proper command existed capable of being obeyed.

21. Ms Nasiloli for the respondent on the other hand submitted that the Claimant's failure to obey lawful orders amounted to insubordination which was a proper ground for summary dismissal.

22. Regarding procedural propriety of the dismissal, counsel submitted that the Claimant was accorded a fair hearing within the meaning of section 44 of the Employment Act and as provided for in the County Public Service Human Resource Manual. The Claimant was issued with a Notice to Show Cause letter on 21st December, 2019, he was thereafter invited for a disciplinary hearing on 2nd and 3rd May, 2019 where he appeared and was heard and thereafter dismissed.

23. Section 43 of the Employment Act stipulates that in any claim arising out of termination of a contract of employment the employer shall be required to prove the reasons for termination and if the employer fails to do so , a termination shall be deemed unfair within the meaning of section 45 of the Act.

24. Under Section 43, a termination is unfair if the employer fails to prove that the reasons for termination are valid and that the reason for termination was a fair reason related to the employees conduct capacity or compatibility or based on the operational requirement of the employer and that the termination was carried out through a fair procedure.

25. The Claimant herein was terminated for failure to carry out lawful instructions of his superior. That is to say he failed and or ignored to stop construction of a building which according to the respondent was unapproved. According to the respondent's two witnesses when the respondent transitioned from Municipality of Eldoret to Uasin Gishu County Government a media advertisement was made calling on developers to renew or regularize previously approved plans. According to the two witnesses the developer in this particular case did not regularize the approval which had expired. Both witnesses however did not produce before me any document or material to support the allegation of advertisement and failure on the part of the developer to regularize the previously obtained approval.

26. According to the Claimant, he stopped the development as instructed but later learnt that the construction actually had an approval. He was therefore surprised when he was issued with a Show Cause letter and later on a summary dismissal after disciplinary hearing.

27. Section 45 of the Act cited earlier provides that a termination of employment would be considered unfair if the employers fails to prove that the reasons for termination are valid and that the reason for termination is a fair reason related to the employees conduct.

28. There seems to have been some confusion or lack of clarity about the status of plans previously approved by the Municipality of Eldoret when it transitioned to County Government Uasin Gishu whereas the respondent claims notices were issued in the print media on the issue and those whose plans were previously approved and or expired called upon to regularize them with the County Government, no evidence was produced before the Court to support this allegation. Further the Claimant and Mr. Koech informed the Court that before stoppage of Construction is done, the developer is issued with a written notice. No such notice was tabled before this court.

29. The confusion around the status of the previous approvals mitigated the accusation against the Claimant that he failed to stop the Construction. In any event the respondent's witnesses stated that the developer challenged the stoppage in Court. It was therefore not clear whether the continuance of the construction was on the strength of the existence of the previously approved plan or the alleged failure on the part of Claimant to stop the construction.

30. It is most probable that this lack of clarity could have been the rationale behind the disciplinary committee recommending that the Claimant be issued with a first warning.

31. The Board however proceeded to summarily dismiss the Claimant. The respondent stated that the Board was not bound by the recommendations of the disciplinary committee. Whereas this may be so, in ignoring the recommendation of the Committee, natural justice required that the Board reviews the evidence presented before the Disciplinary Committee and be persuaded that the Committee could have made an error or considered irrelevant factors in reaching their recommendation. The Board could not rely on new or independent evidence unknown to the Committee and the Claimant to vary or ignore the recommendation of the Committee.

32. The court is of the view therefore that the evidence before the Disciplinary Committee did not constitute valid and fair reasons for summarily dismissing the Claimant. The dismissal in the Court's view was disproportionate and excessive in the circumstances hence unfair.

33. The Claimant sought an order for reinstatement and also compensation for unfair termination. Both orders cannot be granted at the same time. They are alternate to each other.

34. The Claimant stated that he was employed in November, 1998 by the respondent's predecessor and continued working until 17th May, 2019 when he received a letter dismissing him from service with effect from 21st December, 2018 some five months earlier.

35. The Claimant therefore at the time of dismissal had served the respondent for nineteen years and five months. He could most probably be nearing retirement. An order of reinstatement may therefore not be appropriate in the circumstances.

36. The Court will therefore for the observations made above concerning the grounds for his summary dismissal order that the Claimant be compensated with twelve months pay for unfair termination of service as well as one month salary in lieu of notice if it was not paid at the time of termination. Further the Claimant shall be entitled to his pension and all other benefits accrued by the time he was unfairly terminated

37. In conclusion the Court awards the Claimant as follows: -

(a) One month's salary in lieu of notice 77,000

(b) 12 month's salary as compensation for Unfair termination 924,000

1001,000

(c) Pension and other benefits accrued as at The time of summary dismissal

(d) Costs of the suit.

(e) Items (a) and (b) shall be subject to taxes and statutory Deductions.

38. It is so ordered.

DATED AT ELDORET THIS 19TH DAY OF OCTOBER, 2021 DELIVERED AT ELDORET THIS 19TH DAY OF OCTOBER, 2021

GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON 2021-10-19 10:19:04

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-10-19 10:19:04