



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC NO. 115 OF 2018

IN THE MATTER OF COMPLAINTS AND JURISDICTION ON CASES OF DISPUTE BETWEEN EMPLOYERS AND IN THE MATTER OF UNFAIR TERMINATION SECTIONS 47 AND 87 OF THE EMPLOYMENT ACT NO 11 OF 2007 LAWS OF KENYA.

BETWEEN

JOSEPH MAINGI KARIUKI.....CLAIMANT

-VERSUS-

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination, and for payment of compensation as per his Amended Memorandum of Claim filed on 13th December, 2019.
2. It is stated that, the claimant was employed by the respondent on 3rd November, 1986 in the ministry of defence, income tax department which was moved to Kenya Revenue Authority since 1996 and served diligently causing him to receive various commendations and promotions.
3. He stated that on 8th December, 2016, he was arrested over corruption allegations and charged under EACC case number 1 of 2016 at Kericho Law Courts and was later interdicted by the Respondent vide a letter dated 17th January, 2017 on the basis of the corruption charges.
4. The claimant was summoned for a disciplinary hearing by a letter of 22nd January, 2018 and was dismissed from employment by a letter of 1st August, 2018 which he appealed but the appeal was dismissed summarily though he was not invited for the Appeal hearing.
5. He averred that he was terminated from employment while the criminal case was still ongoing. He stated that the interdiction and the eventual termination amounted to double jeopardy.
6. That the criminal case was concluded and the claimant was absolved from any wrong doing and was acquitted therefrom.
7. He contends that he ought to have been suspended throughout the hearing of the corruption charges as envisaged under section 62(2) of the Anti-corruption and Economic Crimes Act as read with clause 8.1.2 of the Kenya Revenue Authority Code of conduct.
8. He averred that his termination from employment is unfair and prayed for judgement against the Respondent for;
 - a. **A declaration that the decision made by the Respondent on 1st August, 2018 terminating the claimant's employment was unlawful and without justifiable cause**
 - b. **An order reinstating the Claimant to his position as a supervisor.**
 - c. **Reinstatement to employment with back pay of all salary and allowances without loss of seniority.**
 - d. **In the alternative, the claimant be compensated at the rate of his salary and allowances from the date of the unfair termination till retirement together with pension.**

e. Damages for the unlawful termination.

f. Costs of the claim; and any other order the Court may deem fit to award.

9. The Respondent entered Appearance on 15th February, 2019 and filed a response to the claim the same day which was later amended and filed on 18th May, 2020. It stated that the Claimant did not perform his duties with diligence as alleged rather that he was negligent in the performance of his duties causing him to be dismissed from employment in accordance with section 44(4) of the Employment Act and in line with Clause 6.2.5.4 and Clause 6.2.5.9 of the Respondent's code of Conduct.

10. The Respondent stated that it was notified of the claimant's arrest by the Anti-Corruption Commission by its letter dated 22nd December, 2016 and in line with the law interdicted him by the letter of 17th January, 2017. Thereafter the Respondent conducted investigation of the conduct of the claimant vis a vis the Respondent's code of conduct and found that the claimant had committed some malpractices; that on 21st November, 2016 he visited a taxpayer in Litein Electronic shop without authorization from his supervisor and issued the taxpayer with summons (VAT 78A) that was not signed as required by DTD Compliance and Debt Operational Manual in contravention of Clause 6.2.5.4 and clause 6.2.5.9 of the Respondents code of conduct.

11. Consequently, the claimant was issued with a Notice to Show cause why disciplinary action should not be taken against him for negligence of duty which he responded to alleging that the visit to the tax payer was on a familiarization tour and the lack of signature was a mistake on his part.

12. The disciplinary hearing was conducted on 29th January, 2018 based on the Show cause letter of negligence of Duty which the panel found the claimant culpable and was dismissed from employment which he appealed but the Respondent upheld the decision of the disciplinary committee.

13. It is stated that section 62(4) of the Anti-Corruption and Economic Crimes Act does not bar the Respondent from taking an action against its employee. Further that the Respondent terminated the services of the claimant due to the claimant misconduct and not as a result of the corruption charges.

14. The Respondent thus stated that the claimant was legally dismissed from employment for gross misconduct under Section 44(4) of the Employment Act and prayed for the claim to be dismissed with costs to the Respondent.

15. The Respondent avers that the claimant will be paid his pension benefits in line with KRA Pension Trust Deed and Rules, salary and allowances up to and including 1st August, 2018, 3 months salary in lieu of Notice and he will be issued with a certificate of service.

16. This cause proceeded for hearing on the 28th January, 2021 where the Claimant (CW-1) sought to rely on his statement filed on 17th October, 2019 together with the further statement of 17th July, 2020 and on cross examination he testified that that he is 53 years of age and that he was interdicted on 17.1.2018 not in the year 2017. He admitted that he was paid his terminal dues being withheld salary during his suspension, 3 months salary in lieu of Notice and his pension, but that the only issue left is whether he was unfairly terminated from employment. He testified that he was given investigations report before the disciplinary hearing was conducted and a further investigation report was carried out 2 months after the disciplinary hearing which he was not afforded an opportunity to defend himself on the findings therein. Also that in this report new charges were levelled against him. He contended that the 2nd investigation report, titled internal memo dated 16th April, 2018 failed to capture the discussion of the disciplinary hearing but still absolved him from all the allegations against him but was surprised that the respondent terminated his services.

17. The Respondent on the other hand called one witness Frankline Kiogera, (RW-1) the Relations Manager at the Respondent, who testified that the claimant was fully paid and therefore there is no pending claim between the claimant and the Respondent. On cross examination, he testified that there was only one investigation report and the 2nd Report was merely presented to the panel after the panel sought for some clarifications and that the 2nd report did not go into any fact finding.

Submissions.

18. The Claimant submitted that the Respondent was biased from the onset when in the notice to show cause letter, it was indicated that summary dismissal against the claimant was being contemplated, showing that the Respondent had a pre-determined mind even before conducting the disciplinary hearing. On the disciplinary hearing the claimant submitted that he appeared before the panel together with a colleague who was not allowed to make any presentation before the Panel. Subsequently that the Appeal was conducted in summary manner contrary to Clause 9.1.5 of the Respondent code of conduct.

19. He submitted that, he was not given a chance to defend himself with regards to the 2nd investigations Report which indicated new allegations beside those in the Notice to show Cause. The Panel Nevertheless absolved the claimant from all the charges as per the report and was shocked to receive termination letter when all indications demonstrated otherwise, on that basis he submitted that the termination demonstrated malice, vendetta and bad faith against him.

20. It was also submitted that the panel that heard the disciplinary hearing was incompetent, since the Chief Manager in charge of discipline and welfare at the Respondent's employ, one Mr. Gaconi issued the Notice to show cause letter, letter of negligence, was in charge of the disciplinary hearing and was the one who wrote the termination letter. According to the claimant the said Mr. Geconi became the jury, judge and the executioner therefore the entire disciplinary process was biased. Also that other 2 employee who had been charged with him were pardoned and retained at work indicating that the claimant was discriminated against.

21. The Claimant in conclusion submitted that the Respondent has not demonstrated any reason for dismissing him from employment as was held in **Mary Chemweno Kiptui –v- Kenya Pipeline Company Limited [2014] ekr** and urged this Court to find that his dismissal was unfair in the circumstances and allow the claim as prayed.

22. As at the time of this judgment the Respondent had not filed any submissions.

23. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of the claimant.

2. Whether due process was followed before the claimant dismissal.

3. Whether the claimant is entitled to the remedies sought.

REASONS

24. The claimant was terminated vide a letter of termination dated 1/8/2018 which indicated that he was terminated due to negligence of duty. The letter further indicated that:-

“Reference is made to this office's letter of Interdiction Ref: Conf/86106054 dated 17th January, 2017 and that of Show Cause Ref: Conf/86106054(26) dated 18th December 2017 on negligence of duty whose charges are well within your knowledge and your subsequent representations (written and oral) thereof.

Management has considered your representations but found them unacceptable since your culpability is evidenced based on the fact that on 21st November 2016 when you worked as Compliance Officer – DTD in Kericho you visited a taxpayer Litein Electronics Shop without authorization by your supervisor contrary to Domestic Taxes Departments Instructions which provide that “where a visit to a taxpayer is authorized, officers should do so as a team with transport provided for by the authority.”

Further, you served the taxpayer with summons (VAT 78A) that was not signed contrary to Section 3.8 Paragraph 7(a) of DTD Compliance and Debt Operational Manual.

The malpractices stated here above amounts to negligence of duty on your part since you did the work carelessly and improperly. There are serious offences as per the provisions of the KRA Code of Conduct Clauses 6.2.5.4 and 6.2.5.9 and provide lawful grounds for the Authority to separate with you as read with the Employment Act 2007 Section 44.4(c).

Consequently, your services are hereby terminated with immediate effect for committing the above stated malpractice”.

25. Prior to this termination, the claimant was charged with offence of corruption contrary to Section 39 as read with Section 48 of the Anti-corruption and Economic Crimes Act No. 3 of 2003. The claimant was charged on 6/12/2016.

26. On 17/1/2017, the claimant was interdicted from service on account of the charges he was facing pursuant to Section 62 (1) of the Anti-Corruption and Economic Crimes Act No.3 of 2003 which states inter alia that

“a public officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge and the KRA code of conduct Section 8.1.2 which provides that the authority may interdict an employee from the performance of the function of his/her office “when criminal proceedings have been instituted against him/her”.

27. The interdiction letter was drafted by one Mukuriah Nelson – Deputy Commissioner – HR.

28. On 20/12/2017 while the criminal charges were pending against the claimant, he was served with a show cause letter dated 18/12/2017 indicated that following an investigation report written by intelligence and strategic operations department Ref. No. KRA/EX1/IAD/RPTS/VOL.V/(LB)/114 dated 19th September, 2017, he had committed some malpractices in that;

“on 21st November 2016, he visited the taxpayer Litein Electronics Shop without authorization by his supervisor contrary to Domestic Taxes Department instructions which provides “where a visit to a tax payer is authorized, officers should do so as a team with transport provided for by the authority.”

That you served the taxpayer with summons (VAT 78A) that was not signed as required by DTD compliance and debt operational manual...”

29. It was indicated the acts complained of amounted to negligence of duty on his part and serious offence of gross misconduct as defined by the KRA Code of Conduct section S.8.4 S.10.2 S.10.9 and S.12.13 which if confirmed may cause him to be summarily dismissed from employment.

30. The claimant responded to this show cause letter on 3/1/2018 indicating that the visit to the tax payer was authorized by their team leader

and states manager who even signed the work ticket and gave keys to Mr. Ngure thus authorizing him to drive like before.

31. He admitted he forgot to append his signature on the form VAT 78A but it bears his name and mobile number making it authentic and a bona fide document.

32. After this response to the show cause letter, the claimant was invited to appear before a disciplinary committee as scheduled on 22/1/2018. The claimant appeared before the disciplinary committee as scheduled on 22/1/2018.

33. The minutes of the disciplinary hearing held has however not been produced before this court for this court to assess what transpired during the meeting and to assess what the findings of the committee were and whether they were based on valid reasons.

34. The claimant averred that he was given the investigation report before the disciplinary hearing was conducted and a further investigation report was carried out 2 months after the disciplinary hearing for which he was not afforded an opportunity to defend himself on the findings.

35. He also indicated that the 2nd investigation report titled Internal Memo dated 16/4/2018 failed to capture the discussion of the disciplinary hearing but still absolved him from all allegations against him.

36. As indicated above, it is not clear what transpired during the disciplinary hearing. Neither the claimant nor the respondent exhibited the minutes of the disciplinary hearing held for the claimant.

37. This court is unable to access the evidence produced against the charges preferred against the claimant.

38. This court is also unable to find out what the findings of the disciplinary committee were and what therefore enabled the respondent to make a determination to terminate the services of the claimant.

39. Section 43 of the Employment Act 2007 envisages that for there to be a proper termination there must be valid reasons to warrant the termination.

40. Given that this court has not been given an opportunity to assess the validity of the reasons for the termination from the disciplinary hearing and the evidence adduced therein it is my finding that there were no valid reasons established by the respondent to warrant termination of the claimant.

2. DUE PROCESS

41. On issue of due process, it is apparent that the claimant was subjected to a criminal process after his arrest by the police while facing the criminal charges, he was also subjected to the respondent's internal disciplinary process.

42. The claimant submitted that when he appeared before the disciplinary committee, his witness was barred from making any representation contrary to Section 41 (2) of the Employment Act 2007.

43. The claimant also averred that investigation had been carried out against him without his involvement and further investigation held 2 ½ months after his purported disciplinary hearing.

44. He therefore contends that he was not given an opportunity to make presentation on the further investigation and this was in breach of the law.

45. He averred that the investigation report absolved him of the allegation and further charges against him.

46. Despite this, the claimant was still terminated. Indeed as indicated above, the minutes of the disciplinary hearing were never submitted in court.

47. It is also true that there was an investigation report against the claimant and a further investigation report carried out after the disciplinary hearing and therefore the claimant had no opportunity to respond to allegations against him.

48. This was in breach of the Employment Act 2007 Section 41 and also against the provision of the Fair Administration Action Act 2015.

49. It is my finding that indeed the claimant was denied an opportunity to a fair disciplinary process.

50. Section 45 (2) of the Employment Act 2007 states as follows;

“45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure”.

51. Given that there were no valid reasons to warrant termination of the claimant and also given that the disciplinary process was flawed, I find the termination of the claimant unfair and unjustified.

REMEDIES

1. Having found for the petitioner as above, I award him compensation equivalent to 10 months' salary, for the unfair and unjustified termination;

10 x 191,000 = 1,910,000/=

Less statutory deductions

2. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF OCTOBER, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okoth for Claimant - present

Gitau for Respondents - present

Court Assistant - Fred