



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.1273 OF 2016

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

JAMES ANDAKO.....CLAIMANT

VERSUS

NATIONAL INDUSTRIAL TRAINING AUTHORITY.....RESPONDENT

JUDGMENT

1. James Andako instituted the suit vide a Statement of Claim dated 29th June 2016 against National Industrial Training Authority (NITA) and is seeking a declaration that his dismissal from the Respondent's employment was unprocedural, unfair, unlawful and unconstitutional. He also seeks various contractual reliefs as set out in the Statement of Claim.
2. The Claimant avers that he was appointed by the Respondent as a Manager, Internal Audit in November, 2013.
3. He avers that through a letter dated 19.02.2016 he was sent on compulsory leave purportedly to allow for investigations into alleged serious anomalies in the operations of the Internal Audit Department, to be carried out.
4. That without appearing before any investigator nor being given any investigation report, he was then issued with a Notice to Show Cause letter dated 16.03.2016 which he responded to within 10 days as instructed therein, contrary to the outlined procedure. That he was then issued with another letter dated 08.04.2016 inviting him to make oral submissions on his defence before the Human Resource Governance and Administration Committee of the Respondent's Board. It is the Claimant's averment that the Respondent summarily dismissed him by way of a letter dated 27.04.2016 after his oral submissions.
5. He further avers that his dismissal letter did not make reference to any documents supporting the allegations against him and that the letter notified him that he could appeal the decision within seven days, contrary to the outlined procedure of giving 14 days. He says he did appeal against the Respondent's decision raising issues with the disciplinary process but without according him a hearing, the Respondent upheld its decision to summarily dismiss him vide a letter dated 13.05.2016.
6. The Respondent filed a Response dated 19th September, 2016 and also filed a Witness Statement by its Director General, Stephen Ogenga who admits that the Claimant was an employee of the Respondent as pleaded. He further states that the Claimant's obligations as per his letter of appointment included undertaking his duties within certain set targets and in a manner that was results oriented and timely, so as to achieve the goals, objectives and set targets of the Authority. That the Claimant's employment was also governed by the provisions of the Employment Act, 2007, the Respondents Human Resource Policy and Procedure Manual as well as other administrative circulars as could be rolled out periodically over time.'
7. He further states that he is aware the Respondent's Board of Management received confidential information from whistle blower of serious anomalies in the operations of the Internal Audit Department, which was headed and manned by the Claimant. That after the Respondent's Board approved that investigations be commenced, the C
8. That however, the Claimant refused to co-operate with the committee to explain the reasons for the established failed reconciliation of the vote book with the cash book, which action amounted to insubordination and gross misconduct. That the investigating committee of the Board completed its preliminary investigations and unanimously resolved that the Claimant had failed to perform his duties with due care and skill as expected and he was consequently issued with a notice to show cause letter.
9. It is his statement that the Claimant was accorded appropriate opportunity to defend himself but was unable to satisfactorily explain his underperformance and neglect of his duties leading to loss to the Respondent. That the Board then resolved to summarily dismiss him after

considering his evidence and both written and oral responses and finding that he had violated the Authority's policy on prudent financial management and practice as outlined in its Finance Policy Manual and having particularly contravened provisions of the Respondent's Human Resource Manual.

CLAIMANT'S SUBMISSIONS

10. The Claimant submits that the Respondent did not avail any witness for cross examination and to testify in support of the defence case and that it has thus not called forth any evidence to rebut the evidence of the Claimant. He relies on the case of **KENYA POWER & LIGHTING COMPANY LIMITED V KENNETH LUGALIA IMUGUA [2016] eKLR** where the Court was emphatic that a statement which violates the non-derogative Article 50(1) of the Constitution is to be out rightly disregarded. Section 50 of the Kenya Constitution provides that every person has a right to have any dispute that can be resolved by the application of law be decided in a fair and public hearing before a court or if appropriate another independent impartial tribunal.

11. He further submits that the Respondent failed to comply with **Section 45 of the Employment Act** as it did not have a valid and fair reason for termination and did not also follow proper procedure. That considering the allegations levelled against him by the Respondent amounted to serious professional failures that would affect his reputation as a competent Auditor, it was important that he be furnished with all the relevant information.

12. The Claimant submits that failure by the Respondent to furnish him with the investigation report among other documents demonstrated it had made up its mind to dismiss him. That the only conclusion that can be drawn is that the allegations in the Notice to Show Cause were trumped up charges geared towards ensuring he was kicked out by all means as no evidence of any investigations having been carried out was tabled.

13. In submitting on the fatality of not availing the investigations report, the Claimant relies on the decisions in the cases of **SUNIL KUMAR CHHABRA V G4S SECURITY SERVICES LIMITED [2013] EKLr AND LAWRENCE LIEN SHOONA V EAST AFRICA PORTLAND CEMENT COMPANY LIMITED [2018] eKLR**. He urges this Court to be guided by the said decisions and find that he was heavily prejudiced and not accorded substantive and procedural fairness. It is his submission that it is the right of an employee to be afforded copies of the documents that form the substance of the charge and having not sighted a copy of the report after investigations and all the relevant documents, he was being invited into a process that was unfair ab initio.

14. The Claimant also submits that the Respondent breached its own Human Resource Manual which entitled the Claimant 21 days to respond to the Notice to Show Cause and required that a hearing be conducted upon lodging an appeal. He submits that the letter inviting him for oral submissions was itself defective as it did not advise him of his right to be accompanied at the hearing with an employee of his choice as stipulated under **Section 41 of the Employment Act**.

15. That the Court in **SABINA MUTUA V AMEDO CENTRE KENYA LIMITED [2017] eKLR** stated that taking oral submissions of the employee without allowing the employee to interrogate any material and evidence against them denies the employee that crucial element of cross-examination and or interrogation of any reports against them and thus offend the procedural requirements of the law. That in **MICHAEL ODHIAMBO OPIYO V BIDCO AFRICA LIMITED [2021] eKLR**, the Court stated that fair hearing includes notification of the date, venue, time and charges in good time so that the employee prepares for the hearing and attends the meeting with either a fellow employee or union officials of his choice, not those chosen by the employer.

16. It is submitted by the Claimant that on similar issues before this Court, the Court in **NAIROBI ELRC CAUSE NO. 625 OF 2016 KAHARA MBUGUA VS. NITA** found the dismissal of the respondent's Manager Finance was unfair and proceeded to award him damages for unfair termination. That additionally, in **ELRC CAUSE NO. 130 OF 2016, PURITY MWIRIGI VS. NITA** the Court reinstated the respondent's Procurement Manager who had faced a similar allegation as regards CIC General Insurance payment and which finding again exonerates the Claimant herein. The Claimant submits that he has established sufficient grounds to avail him the remedy of reinstatement and that the Respondent is a large public body in which the Claimant can comfortably serve if the Court was to order that he be reinstated.

17. That alternatively, he is entitled to the remaining period of his permanent and pensionable contract translating to 60 months' salary as compensation for unfair termination together with a certificate of service. It is the Claimant's submission that since he was treated in an unfair manner from the suspension until eventual termination, he is also entitled to compensation for unfair termination and exemplary damages. He urges the Court to be guided by the provisions in **section 49(4) of the Employment Act, 2007** and cites the cases of **MOSES KAUNDA MORO V CMC MOTORS GROUP LTD [2013] eKLR** and **RAEL MWIYATHI MUTINDA V KENYA COMMERCIAL BANK LIMITED [2019] eKLR** in support of this submission.

18. It is submitted by the Claimant that this Court is empowered under **Section 12(4) of the Employment and Labour Relations Act** to make such orders as to costs as it considers just and that he thus prays for costs of the suit that he has incurred since he had no alternative. Further, that this Court is clothed with jurisdiction to give the Claimant appropriate relief to protect his rights under **Article 41 of the Constitution** as well as the Employment Act.

RESPONDENT'S SUBMISSIONS

19. The Respondent submits that the Claimant's insubordination is an offence under **Section 44 (4a & 4e) of the Employment Act, 2007** and that he violated **Sections 197 (1)i and 198 (ia & b) of the Public Finance Management Act, 2012** and **Section 10.22.1 (i) of the Respondent's Human Resources & Procedures Manual** which constituted the reason for termination of his employment. It submits that it was thus justified to summarily dismiss the Claimant as under **Section 44 (3) and (4) of the Act** and in line with **Section 10.35.2 of the Respondent's Human Resource Policy and Procedures Manual**. The Respondent further submits that it has discharged its burden under Section 47(5) of the Employment Act and established there was a valid and fair reason for dismissal. That relying on the Court of Appeal decision in **CFC STANBIC BANK LTD VS. DANSON MWASHAKO MWAKUWONA [2015] eKLR**, this Honourable Court should

consider the employee's conduct which amounted to misconduct.

20. It is the Respondent's submission that it also complied with **section 41 of the Employment Act** by inviting the Claimant for a hearing and giving him an opportunity to exonerate himself before fairly summarily dismissing him as per the law. That the procedure it utilised duly complied with the stipulated policy and the law whilst the Claimant on the other hand did not prove that he did not get a fair hearing at his disciplinary hearing or appeal.

21. The Respondent further submits that the prayer for reinstatement is not available to the Claimant even if it was found that the termination was lawful as it can only be made within three years from the date of termination. That the Claimant is not entitled to payment for the balance of his contract as was held in the case of **IDRIS OMAR ABDI V GARISSA WATER AND SEWERAGE COMPANY LIMITED [2021] eKLR** where the Court in dismissing a similar prayer relied on the reasoning applied in the decision in **D. K. NJAGI MARETE V TEACHERS SERVICE COMMISSION [2013] eKLR** where it was held that:

“This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. In Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko & 51 Others v. Nairobi City Water & Sewerage Company Limited [2013] eKLR and the unreported Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East Africa Limited, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.”

22. It submits that however if the Court is to find there was unfair termination of employment, such a remedy is available only under the strict conditions of **Section 49 of the Act**. That the Court should take into account the length of service of the Claimant, the grounds for the termination of his employment, the manner in which he was dismissed including the payment of his dues while on compulsory leave which was in the circumstances, suspension from work to enable investigations in his case to ensue and that awarding nominal damages of Kshs. 100,000 would be fair and just.

23. That in all, the Court should ensure fairness to both parties and fundamentally, the provisions of Article 41 of fair labour practice which are applicable to both the employer and the employee should apply. The Respondent also submits that the award of interest similar to costs is a discretionary award available to the court and that the Court should exercise the discretion in favour of the Respondent by denying this prayer.

DETERMINATION

24. (a) The main issue is whether the Respondent had a valid reason to terminate claimant's employment.

(b) The next issue which is closely related to the above question is whether the Respondent followed the right procedure in terminating claimant's employment.

(c) Is claimant entitled to his prayers as listed in the memorandum of claim.

25. The sequence of events that led to the termination of the claimant's employment were as follows:-

(a) The claimant was employed by the Respondent as its Manager Internal Audit since November, 2013.

(b) In 2016 February the Respondents apparently received an undisclosed information of serious misconducts in the Internal Audit Department and as a result sent the Manager (the Claimant) on compulsory leave to make way for investigations. This was on 19th February, 2016.

(c) On 16th March, 2016 the Claimant was served with notice to show cause and several charges were contained therein.

(d) On 24th March, 2016 the Claimant responded to the notice to show cause.

(e) After the notice to show cause the Claimant was invited for an oral hearing on 8th April, 2016. The same took place on 12th April, 2016.

(f) The board then issued the Claimant with a summary dismissal letter dated 27th April, 2016.

(g) He made an appeal on 3rd May, 2016 but the appeal was dismissed and his summary dismissal was upheld on 13th May, 2016 without any further hearing.

26. The reasons given by the Respondent for summary dismissal were *“gross misconduct as outlined in the summary dismissal letter dated 27th April, 2016”*. In their submissions Respondent claims Claimant contravened Section 197 and 198 of Public Finance and Management Act.

27. The Claimant avers he was not furnished with the relevant information. The charges against him were serious charges of among others failing to perform his duty and to undertake continuous audit between January 2015 and October, 2015 resulting in overlap in payment of outstanding imprest and daily subsistence allowance. The Respondent claimed they made losses through irregular payments.

28. No evidence was adduced by the Respondent to demonstrate this negligence by the Claimant or losses made by the Respondent resultant thereto.
29. He was also charged of failing to reconcile vote book and cashbook in respect of 2015/2016 statements when asked to do so by the Audit Committee.
30. The Claimant in his defence says there was no document produced to prove he was instructed to reconcile the vote book.
31. He was also charged of failing to audit process and procedures required in payment of staff medical insurance.
32. The issue of medical claims payment he is accused of approving, he explained that the same was approved by tender committee and the final mandate was with the Finance Department.
33. Further Claimant produced a schedule of periodic meetings of the board audit committee from November, 2013 to January, 2016.

He avers that all the meetings and resolutions, systems in NITA are as a result of work of his hands and applications of his professional expertise in building a strong internal controls in state corporations. All these he states are a result of individual audits carried out and reports discussed by the board. He therefore justified his input in discharging his duties as an internal auditor.

34. He also defended himself that the accused overlap in imprest payments was not a failure of the internal audit but the specific departments discharged with the said payments.
35. The court found the Claimant made comprehensive and detailed response to the charges brought against him by the Respondent and by his response dated 24th March, 2016.
36. He claims he was not however given sufficient time to respond to the notice to show cause as provided in their Human Resource Manual (NITA) which provides 21 periods but was given less than 10 day.

He also says he was not availed the investigation report which was the gist of his being now issued with a notice to show cause.

37. It is trite law that in disciplinary hearing a Claimant must be availed materials and evidence against him. In the case of **SABINA MUTUA VS AMEDO CENTRE KENYA LIMITED (2017) eKLR** stated that taking oral submissions of the employee without allowing the employee to interrogate any material and evidence against them denies the employee that crucial element of cross examination and or interrogation of any reports against them and this offend the procedural requirement of the law.

38. Similarly in the case of **MICHAEL ODHIAMBO OPIYO VS BIDCO AFRICA LIMITED (2021) eKLR** the court stated that fair hearing includes notification of date, venue and time and charges in good time so that the employee prepares for hearing and attends the meeting with either a fellow employee or union official of his choice, not those chosen by the employer.

39. Having considered the evidence and the facts and law by all the respective parties, I find that on the issue of the reasons given for termination for such weighty charges and yet there has not been documentary or even oral evidence to prove the same except some claims which are not proved. The charges that he contravened Sections 197 and 198 of the Public Finance and Management Act refer to losses occasioned by negligence of a Public Officer. Those losses alleged by the Respondent have not been tabled in court. The court finds the Respondent has failed the test of giving a valid reason as provided in Section 41 (1 and 2) and 45 (2) of the Employment Act.

40. The other issue which is closely related to the one of reasons given is the procedure followed to inform the Claimant of his wrong doing and the procedure in the disciplinary meeting.

41. The Claimant was invited to an oral meeting on 8th April, 2016 for a meeting on 12th April, 2016. He was asked to prepare to give oral submissions. He was not given an option to take a fellow employee or a shop floor union representative.

42. No evidence was given of the minutes of the said committee meeting and so there is no verification how the disciplinary meeting was conducted.

43. In the case of **PATRICK ABUYA VS INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA & ANOTHER (2015) eKLR** in a claim for unfair termination, the court held that procedural fairness required not only an advance and reasonable notice of steps to be taken but time for an employee to prepare psychologically as such employee is always under a threat of losing livelihood. The court held that the Respondents action of inviting Claimant on 4th March, 2014 for a hearing the following day when according to her had absconded and his whereabouts were unknown was ill motivated and was not in consonance with the statutory requirements of procedural fairness. The court added that this was equally not in accord with justice and equity as envisaged in Section 45 (4) (b) of the Employment Act.

In view of the fact that the dismissal was unprocedurally unfair the court did not consider whether or not reasons for termination were valid.

In agreement to the above, giving a valid reason and applying procedural fairness is mandatory in termination of employee by an employer.

44. The court found the procedure followed by the Respondent, did not comply with the provision of Section 41 of the Employment Act.

The Claimant apart from not being availed the investigation report and other relevant documents, he was not given ample time to prepare for his response to the notice to show cause and also he was not given the opportunity to have his representative at the hearing.

45. In the case of **MAINA MWANGI VS THIKA COFFEE MILLS LIMITED (2012) eKLR** the Claimant had sued the Respondent for unfair termination. The court found that it was not clear from the evidence given by the Respondent if it had in place a clear performance management policy. Further the court found that Section 41 of the Employment Act 2007 must be adhered. Specific charges must be put to the employee and opportunity to defend himself given to the employee and the employee should be allowed the assistance or presence of a fellow employee or a trade union representative at the hearing.

46. The court in the end found that there was no valid reasons given by the Respondent in justifying termination and that termination was not proceeded by a fair procedure.

47. Also the case of **PATRICK ABUYA VS INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS (SUPRA)** also makes mandatory for the Respondent to adhere to fair procedure during the disciplinary hearing.

48. The Respondent chose not to adduce evidence at the hearing and so did not avail their witnesses for cross examination and to support their defence case any further.

Any how the court can still forgo oral evidence and go by the pleadings. There is no prejudice necessarily in that regard.

49. However having considered the evidence and the law in its totality, this court finds the reasons given by the Respondent for terminating the Claimant from his employment were not valid and the process followed was not proceeded by fair procedure.

50. Judgment is entered in favour of the Claimant and a declaration is made that the Claimant was unfairly terminated.

ISSUE NO.3

51. The Claimant is entitled to some of the reliefs prayed.

RELIEFS AWARDED

52. The prayers for the Claimant to be reinstated to his position is overtaken by events as provided in Section 49 of Employment Act and Section 12 (3)(vii) of Labour Relations Court Act. Section 12 (3) (vii) of the Labour Relations Court Act provides that reinstatement can only be awarded within three years of dismissal.

Also in the case of **KENYA AIRWAYS LIMITED VS AVIATION AND ALLIED WORKERS UNION KENYA AND 3 OTHERS (2014) eKLR** it was held that the remedy for reinstatement should not be given except in very exceptional circumstances.

53. In the case of **SOTIK HIGHLANDS TEA ESTATES AND KENYA PLANTATIONS AND AGRICULTURAL WORKERS UNION – CIVIL APPEAL NO.23 OF 2017** the court of appeal held that the trial judge erred in reinstating the grievant without considering relevant circumstances after expiry of 3 years which he had no power to do.

54. The Claimant prays for damages for distress, mental anguish and untold suffering. The court is persuaded that the Claimant can be ably compensated by an award of 10 months equivalent of his salary for the illegal and unlawful termination.

This is supported by the case of **KIMAKIE CO-OPERATIVE SOCIETY VS GREEN HOTEL (1988) eKLR 242** where the court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick.

55. The prayer for 60 months award reminder of the Claimant's employment will not be awarded as the court is of the view that the ten months compensation is sufficient compensation. As ruled by the Honourable Court in the case of **D. K. NJAGI MARETE VS TEACHERS SERVICE COMMISSION (2013) eKLR** where it was held that these remedies are not meant to facilitate unjust aggrieved enrichment of employees, they are meant to redress economic injuries in proportional way.

CONCLUSION

In conclusion the Claimant is awarded Kshs.3,105,010 (310,501 x 10) as general damages and for distress and anguish and in full and final plus interest at court rates.

He is also awarded costs.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE