



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 148 OF 2020

FREDDY KIPKORIR LANG'AT.....CLAIMANT

VERSUS

THE CO-OPERATIVE UNIVERSITY OF KENYA...RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent vide a Statement of Claim dated 10th March 2020. The Claimant avers that he was employed by the Respondent as a Chief Security Officer from 2nd June 2015 which position he has held and served diligently. He averred that however on 9th August 2019 the Respondent issued him with suspension letter accompanied with a charge sheet, instructing him to attend a disciplinary hearing on 19th September 2019. The Claimant avers he was not satisfied with the procedure and outcome of the disciplinary hearing and thus filed an appeal on the basis that he had neither been issued with evidence nor statement of his alleged accusers. He avers that he was never issued with any documents relied upon by the Respondent in the disciplinary process even after formally requesting for the same and that his appeal was determined without him being given a chance to look at any documentary evidence. The Claimant avers that the decision to terminate his employment was discriminatory, irregular, malicious, made in bad faith, unjustifiable and a clear breach of contract. He particularises the breach to include: falsely accusing him, summarily dismissing him and hurriedly advertising his position at work and contends that he has as a result suffered immense losses for which the Respondent is wholly liable. He prays for judgment against the Respondent for an Order of reinstatement and alternatively, a declaration that the termination of his employment by the Respondent was unfair, unprocedural and unlawful; and that the Respondent does issue him with a Certificate of Service as per law and pay him compensation for wrongful termination at 12 months' salary together with interest at Court's rates.

2. In reply, the Respondent filed a Statement of Response dated 1st April 2021 averring that the Claimant was appointed on 2nd June 2015 and began employment with the Respondent on 11th June 2015. It averred that on 5th July 2019 and 8th July 2019, the Claimant was absent from duty without leave and was thus issued with a Show Cause for the same on 11th July 2019. The Respondent avers that the Claimant responded with reasons on why he was absent from duty but the response was found to be unsatisfactory. The Respondent averred that as a consequence the matter was referred to the Staff Disciplinary Committee. The Respondent avers that since his employ, the Claimant had been requested to present his Discharge Certificate from his former employer, the National Police Force but which he had neglected to submit and that the Respondent's Deputy Vice Chancellor thus wrote to the Deputy Inspector General of Police to confirm the Claimant's date of discharge from service. The Respondent averred that elicited a response on 11th July 2019 communicating that the Claimant's last day in service was 30th January 2016 when he tendered his resignation and that he was an Inspector of Police and not Chief Inspector of Police as he had alleged. The Respondent averred that this confirmed the Claimant had not resigned from the Police force prior to commencing his employment with the Respondent and was drawing salaries from two Government institutions. It avers that it thus made a decision to suspend him from duty on half pay pending the disciplinary proceedings. The Respondent further avers that the Claimant was charged with breach of professionalism with offences of absenteeism from duty without leave or reasonable cause and drawing salary from two Government employers before the Non-Teaching Staff Disciplinary Committee. The Respondent avers that the Claimant pleaded guilty to both counts and the committee went on to hear his explanation on the offences before making the decision to terminate his services for gross misconduct. It avers that the Claimant was also notified of his termination and right to appeal the said decision which he did vide a letter dated 10th December 2019 and when he appeared before the Respondent's Appeal Committee on 23rd January 2020, he acknowledged having drawn two salaries as alleged and had only taken leave from the Police Force but not resigned at the time he began employment with the Respondent. The Respondent avers that the Appeals Committee upheld the decision to terminate the Claimant's services as he had not tendered any new evidence to mitigate his case and communicated the same to the Claimant vide the letter of 29th January 2020. The Respondent also filed a witness statement made on 30th June 2020 by Anne Jemimma Mmata who urges the Court to find the Claimant's termination by the Respondent was lawful and procedural and dismiss his case with costs.

3. The Claimant and the Respondent's witness testified. Their evidence did not depart from their pleadings and statements. The parties thereafter lodged their written submissions which are analysed below.

4. Claimant's Submissions

The Claimant submits that termination of his employment was never based on any contravention of work ethics and he was never furnished with information, material and evidence to prepare for his defence. He submits that the Respondent relied on what was said to be a communication from the Police which the Claimant was never made aware of and there was thus no proof that he committed the allegations more so because the letter from the Kenya Police made no inferences on the allegations of salaries. He further submits that fraud by itself is not a fact but a conclusion reached after the facts of the relationship or transaction complained of have been reviewed. The Claimant submits that civil fraud is pleaded by the person who was defrauded, who needs to prove that the other person materially misrepresented the fact, that the fact was false and he knew it was false, that he did so with the intention of getting the victim to act on the misrepresentation, and that the victim acted reasonably in believing the misrepresentation. In addition, the victim needs to show they suffered an actual damage as a result of the misrepresentation and the alleging party must demonstrate they suffered damage as a result of their reliance upon the false representation. The Claimant submits that on the contrary, in this case neither the dismissal letter nor the Minutes of the Disciplinary state the damage he caused the Respondent and no evidence was tendered in Court to prove he caused damage or injury to the Respondent. Further, the Police never commenced any criminal investigations against him for drawing any alleged salaries and the dismissal letter never cited any provisions of the Police or rules he had violated and neither was there indication of any clause of his contract he had contravened. The Claimant submits that the salary he earned from the Respondent was for the services he rendered and that there was no conflict of interest during that period.

5. He further submits that the parties herein willingly entered into a valid contract in terms of Section 9 and 10 of the Employment Act and was therefore binding upon them. The Claimant cited the decision of the Court in the case of **Katiwa Kanguli v Bamburi Cement Limited [2015] eKLR** on this aspect. He further cited the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR** where the Court held that parties are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved. It is the Claimant's submission that apart from the Respondent not demonstrating that he drew salaries, it has also failed to table evidence showing he was absent from his work station as alleged and that it is trite law that whoever alleges a fact must prove. The Claimant submits that the Respondent's witness admitted in the course of the hearing that the Claimant was not furnished with the documents relied upon or minutes of the meeting. The Claimant submits that it is therefore clear that the disciplinary process was not fair and an indication that the Respondent wanted to get rid of him by all means as the Respondent did not follow the formal procedure of disciplinary under Clause 1.16(e) of the Respondent's HR Policies and Procedures Manual. The Claimant submits that also, the Respondent did not give him the notice prescribed at Clause 13 of the Terms and Conditions of Service and which thus rendered termination of his contract unlawful and unfair and to this end relied on the case of **Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR**. The Claimant submits that having demonstrated he was unfairly terminated from his employment, he is entitled to compensation under Section 49 of the Employment Act and that on quantum the governing statutory provisions in determining wrongful and unfair dismissal are set out under Section 50 of the Act. He urges grant of the prayers in his claim with costs.

6. Respondent's Submissions

The Respondent submits that it has demonstrated in its pleadings and testimony before this Court that it adhered to procedure as stipulated under Section 41 of the Employment Act and that the Claimant was duly notified of the allegations against him. On procedural fairness it relies on the cases of **Mary Chemwono Kiptui v Kenya Pipeline Company Limited [2014] eKLR** and **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR**. It urges the Court to also find that it complied with the procedures set out in its Terms and Conditions of Service for non-teaching Staff and the HR Policy Manual and that it accorded the Claimant a fair hearing. It further submits that it acted in accordance with justice and equity in terminating the Claimant's employment for gross misconduct and that it had valid and fair reasons to do the same as required under Section 45 of the Employment Act. The Respondent submits that Section 11 of the Public Officer Ethics Act 2003 states that a public officer shall not use his office to enrich him and others and the Claimant drawing salaries from two government institutions therefore contravened this provision of the law. The Respondent further submits that the Claimant admitted to having only taken leave and not resigned from the Police Force when he took up employment with the Respondent and that it was thus the duty of the Respondent as a public institution to discipline a dishonest public officer. The Respondent submits that given the Claimant did not tender any evidence showing that he did not receive any salary from the Police Force, it had a valid reason to institute disciplinary proceedings and subsequently terminate his employment. The Respondent submits that the Claimant is not entitled to any of the reliefs sought since his termination was justified and procedure was followed. It relies on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court affirmed that a termination of employment passes the fairness test when there is both substantive justification and procedural fairness.

7. The Claimant was dismissed for the alleged offence of having two salaries from Government institutions contrary to the Public Officer Ethics Act. It is stated that the Claimant was a serving Police officer and only resigned his position at the National Police Service in January 2016 yet he was employed by the Respondent in June 2015. From a reading of the law, the Claimant did commit an infraction as the Public Officer Ethics Act bars the conduct of a public officer earning two salaries from the Government. The Claimant therefore was in breach of the Respondent's HR Policies and Procedures Manual. Under Section 41 of Employment Act, there is procedure laid out for fair hearing. In the case of **Walter Ogal Anuro v Teachers Service Commission (supra)** there is onus on the Respondent to have procedural fairness. In the said decision, Ndolo J. stated thus:-

..... for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.

8. The learned Judge expressed the test succinctly and as such in keeping with the dictates of the law an analysis of the process is necessary since the Court has found there was genuine reason for the employer to terminate the contract given the letter from the Police Service confirming the resignation date of the Claimant as being in January 2016 yet he had been with the Respondent from June 2016. The inference is that he was serving two masters at the same time which in the eyes of the Respondent and the law was sufficient basis for termination. The Claimant was issued with a letter of suspension on 9th August 2019 by the Respondent. The letter of suspension was accompanied by a charge sheet. He was required to attend a disciplinary hearing on 19th September 2019. In my view, the time was sufficient to prepare for the hearing. However, the Respondent never availed the crucial documents needed for the process to be deemed fair as no correspondence was shared with the Claimant in relation to the allegations made. The Respondent may have been privy to information which would have caused it to determine the matter against the Claimant. This means the Claimant having not been presented with the case he was to face suffered ignominy is an unfair process that led to his termination.

9. The decision of **Walter Ogal Anuro v Teachers Service Commission** (*supra*) held in paragraph 23 thereof as follows:-

23. It is not in contest that the Claimant was taken through some form of a disciplinary process. However, upon analysis of both the investigation and the disciplinary processes, the Court formed the opinion that the Respondent failed the test of procedural fairness in that it did not take its investigations full circle. In the light of the seriousness of the allegations against the Claimant and the resultant consequences, the Respondent should have done more, but it took the easy option and placed the Claimant and the impostor on the same chopping block. For this reason, I find the termination of the Claimant's employment by way of summary dismissal unfair for want of due procedure.

In this case, the Respondent similarly did not go the whole way by disallowing the Claimant an opportunity to defend himself. The tenets of procedural fairness encompass advance and reasonable notice of not only the steps to be taken in the disciplinary process but also documentation to prepare a defence where such documentation is in the custody of the Respondent as in this case. Put another way, if one is accused of misleading the employer and the evidence for such is the correspondence with a third party, it is incumbent upon the employer to lay the whole case against the employee by availing the full accusation and await the response or defence of the employee. In the final analysis the termination herein is found to have been *ipso facto* unfair for want of procedure. The Claimant would be entitled to recover compensation for the same which in view of the time the Claimant was an employee of the Respondent will be compensated by 5 months salary being Kshs. 660,570/- as well as costs of the suit. Judgement entered for: -

- a. Kshs. 660,570/- as compensation
- b. Costs of the suit
- c. Interest at Court rates on the sum in a) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021

NZIOKI WA MAKAU

JUDGE