



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1830 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ANTHONY MBUGUA KAMAU.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND SEWERAGE COMPANY..... RESPONDENT

JUDGMENT

1. Vide his Memorandum of claim dated 16th October 2021 amended on 5th January, 2019 and filed in Court on 11th January, 2019, the Claimant avers that his employment was unfairly and unlawfully terminated by the Respondent, a registered limited liability company.
2. His case is that he was employed by the Respondent in the year 1996 following his secondment from his previous employer, Nairobi City Council which had employed him in the same year in the position of a Data entry Assistant. He further averred that his monthly salary at the time of his separation with the Respondent was Kshs.30,878.70/-.
3. The Claimant avers that he performed his duties diligently and to the Respondent's satisfaction until 5th February, 2009 when he was allegedly summarily dismissed on the alleged ground of "*Lost Trust.*"
4. Aggrieved by the Respondent's decision to terminate his employment, the Claimant appealed against the decision vide his letter dated 8th December, 2010, which appeal he maintained was never acted upon by the Respondent until 4th October, 2012 when he received a letter from the Respondent dated on even date informing him that his appeal was unsuccessful.
5. The Claimant contended that the Respondent's actions were irregular, unlawful and malicious. He further argued that his summary dismissal was unlawful and unfair. In his Amended Memorandum of Claim, the Claimant seeks the following reliefs:
 - i. Three months' salary in lieu of proper notice Kshs.92,636.10/-.
 - ii. Severance Pay for the years worked
 - iii. Leave days' pay (21 days per year (Kshs.878.70/- x 3 years) = Kshs.92,636.10/-
 - iv. Unpaid salary for the period February 2009 to October 2012 (Kshs.30,878.70 x 44 months) Kshs.1,358,662.80/-
 - v. Unpaid end year bonus for 6 years at seven thousand (Kshs.7,000/-) per year Kenya Shillings Forty Two Thousand (Kshs.42,000/-).
 - vi. General damages for unlawful and unfair termination (Kshs.30,878.70 x 12) Kshs.370,544.40/-.
6. The Respondent in its Response admitted having engaged the Claimant. It however, denied that he performed his duties with honesty as claimed by the Claimant.
7. The Respondent further averred that the Claimant's suspension and subsequent summary dismissal was warranted and that due process was followed in accordance to the provisions of clause 8.23.2 (viii) and (xvi) and 8.24 of its Human Resource Policy and Procedures.

8. The Respondent maintained that the Claimant was suspended vide its letter dated 5th September, 2008 following allegations that he solicited and obtained a bribe of Kshs.31,000/- from one of the Respondent's clients.

9. It further averred that given the gravity of the allegations levelled against the Claimant he was given an opportunity to defend himself, which he did through his letter dated 15th October, 2008.

10. The Respondent contended that the Claimant was subsequently invited before its disciplinary committee on 27th January, 2009 through its letter dated 19th January, 2009.

11. The Respondent maintained that it did take into account the Claimant's defence before arriving at its conclusion to terminate the Claimant's employment.

12. The Respondent argued that the Claimant is not entitled to any of the reliefs he seeks from this Honourable Court and urged this Court to dismiss the Claim in its entirety with costs to the Respondent.

Evidence

13. The matter preceded for hearing on 12th November, 2019 and 23rd February, 2021 with the Claimant testifying on his behalf and Monica Oyieyo, the Industrial Relations Officer of the Respondent Company testifying on behalf of the Respondent.

Claimant's Case

14. In his evidence the Claimant, CW1 adopted his witness statement dated 5th January, 2019 and list and bundle of documents dated 5th January, 2019 numbered 1 to 12 as his evidence in chief.

15. In his statement CW1 reiterates the averment made in his Amended Memorandum of Claim. CW1 further testified that his duties while employed by the Respondent were to print water bills and run billing programmes.

16. CW1 testified that he was summoned by the Respondent's disciplinary committee on the allegation of having received a bribe of Kshs.31,000/- to adjust a customer's account. He maintained that he did not have the ability to make such an adjustment as he did not have access to the system that would allow the adjustment.

17. CW1 further testified that he was suspended by the Respondent on the account and appeared before the disciplinary committee four (4) months after his suspension, on 27th January, 2009, where he was asked to defend himself of the allegations.

18. CW1 stated that after the hearing he received a letter from the Respondent on 5th February, 2009 terminating his employment. He maintained that the said letter did not contain any reasons for his termination and that he was also not informed of his right to appeal against the Respondent's decision.

19. He averred that following his termination he did write to the Respondent in December 2010 to appeal its decision and did not receive any response until 11th April 2012, 2 years from the date of his appeal, upholding the decision to terminate his employment. He further averred that he also filed an appeal against the decision in his appeal, which appeal was found to be unsatisfactory. The decision was communicated vide the Respondent's letter dated 4th October 2012.

20. CW1 maintained that no evidence was tendered by the Respondent to support the allegation of bribery as was levelled against him and that the Respondent only called Wafula (a colleague) to testify in the disciplinary hearing.

21. CW1 further maintained that the Respondent neither notified him of his right to be accompanied by a member of staff of his choice at the disciplinary hearing nor did it issue him with a copy of its Human Resource Manual prior to him appearing before the disciplinary committee.

22. He averred that his Claim against the Respondent is warranted and therefore urged this Court to allow it as prayed.

23. On cross examination CW1 stated that he was initially employed by the Nairobi City Council and was latter seconded to the Respondent in the year 2004. He further testified that he was fully under the Respondent's employment as at 5th November 2004.

24. CW1 acknowledged that the reasons for his suspension as indicated in his letter of suspension dated 5/9/2008 were firstly, that he received Kshs.31,000/- bribe secondly, that he had made a fraudulent adjustment to a customer's account and lastly, that he was implicated in a corrupt deal. He admitted that these were the same charges that were levelled against him at the disciplinary hearing.

25. On further cross examination CW1 conceded that he was accorded an opportunity to be heard during his appeal.

26. On re-examination CW1 stated that his gross salary at the time of his separation from the Respondent was Kshs.30,106/-.

Respondent's case

27. RW1, **Monica Oyieyo** adopted her witness statement dated 26th June 2019 as her evidence in chief. In her statement RW1 reiterates the averments made in the Respondent's Memorandum of Reply.

28. RW1 further testified that the Claimant's summary dismissal was warranted and that due process was followed. She further testified that the Claimant was accorded an opportunity to defend himself at the disciplinary hearing and that his defence was duly considered by the Respondent.

29. RW1 stated that the Claimant's defence was unsatisfactory and given that his duties with the Respondent were sensitive in nature, the Respondent lost trust in him leading to his summary dismissal.

30. RW1 maintained that the Claimant is not entitled to the reliefs sought in his Claim and urged this Court to dismiss the Claim with costs to the Respondent.

31. On cross examination RW1 stated that the person who received the Kshs.31,000/- bribe was Wafula (the Claimant's colleague) who in turn handed it over to the Claimant. She emphasised the fact that as per the records in her possession the staff acted in collaboration as the client did not give the bribe directly to the Claimant.

32. RW1 further testified that there was an admission made by Wafula on the receipt of the Kshs.31,000/- bribe to adjust a customer's account, which amount was later on handed over to the Claimant.

33. On the issue of the delay in hearing the Claimant's appeal, RW1 testified that it was occasioned by the backlog of cases. She further stated that the Claimant's right to appeal was not infringed as contended by the Claimant.

34. She further stated that the Claimant's conviction was based on the evidence of Wafula who admitted having received the bribe and later handed it over to the Claimant herein. She stated that the Claimant denied the allegations levelled against him at the disciplinary hearing.

35. RW1 testified that following the disciplinary hearing Wafula was dismissed for loss of trust and gross misconduct while the Claimant's termination was on the basis that the Respondent had lost trust in him.

36. RW1 on further cross examination stated that the Respondent's manual did not provide for termination on account of loss of trust but rather allowed it to terminate an employee's employment on any ground it deems fit.

37. Parties thereafter filed and exchanged their written submissions to the claim.

Submissions by the Parties

38. The Claimant submitted that his termination was unfair and unlawful as the Respondent failed to follow due process as outlined in Sections 41, 44 and 45 of the Employment Act, 2007 and was without lawful cause. To buttress this argument the Claimant cited and relied on the Court's findings in the cases of **Moi Teaching and Referral Hospital v James Kipkonga Kendagor (2019) eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR**

39. He further submitted that he was not furnished with any information and/or the reason behind his termination, on grounds of "Loss of trust".

40. He argued that his summary dismissal was without valid reason and was done without compliance with fair procedure as provided in the Employment Act.

41. The Claimant maintained that his termination was based on unfounded allegations that were not supported by independent evidence other than the sole testimony of one Mr. Richard Wafula who admitted to receiving the bribe of Kshs.40,000/- from one of the Respondent's clients.

42. The Claimant further submitted that as was admitted by DW1 in cross examination he had no mandate and/or power to alter water bills, which was the sole reason why Mr. Wafula allegedly received the bribe to hand over to him to alter the bill.

43. The Claimant argued that no evidence was adduced by the Respondent at the hearing to support the allegation that he had received any bribe. He further argued that the Respondent's actions of terminating his employment was unfair and unlawful as the evidence tabled before it remained uncorroborated and unfounded.

44. The Claimant maintained that having proved that his termination was unlawful and unfair he is entitled to the reliefs sought in his Claim. For emphasis the Claimant cited and relied on the case of **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd (2014) eKLR**.

45. In conclusion the Claimant urged this Court to find that the Claimant's termination was wrongful, unlawful and illegal and that as a result thereof he is entitled to the reliefs sought in his Statement of Claim.

Respondent's Submissions

46. The Respondent on the other hand submitted that the Claimant's suspension and subsequent dismissal was for lawful cause and was on

the account of loss of trust and gross misconduct following allegations that he had received a bribe in order to fix a customer's account.

47. The Respondent further submitted that the Claimant did not act alone but was in the company of Daniel Waweru Kinyua and Mr. Wafula who both admitted the charges and were equally terminated on the ground of loss of trust.

48. The Respondent maintained that the Claimant's termination was done in accordance with the provisions of Clause 7.24.4 and 7.26.8 of its Human Resource Policy Manual that allowed the Respondent to summarily terminate the employment of a member of staff guilty of gross misconduct.

49. The Respondent further submitted that the Claimant's actions were contrary to the provisions of Section 11 (1) of the Public Officer's Ethics Act, 2003 that expressly provides that public officers such as the Claimant should not accept favours or gifts in exchange for services.

50. The Respondent maintained that the Claimant has failed to discharge the burden of proof as required under the provisions of Section 47 (5) of the Employment Act thereby making his termination legally sound and therefore valid.

51. The Respondent further maintained that based on the facts as presented and the evidence adduced as proof in this matter, its evidence weighs against the Claimant's case further confirming that his termination was warranted and procedural. It further submitted that the Claimant's termination was therefore on valid grounds and thus justified. For emphasis the Respondent cited and relied on the case of **Mc Kinley v B. C. Tel. (2001) 2 S.C.R. 161**.

52. On the issue of procedural fairness, the Respondent submitted that the Claimant's dismissal was regular and done in strict conformity with the provisions of Section 41 and 45 of the Employment Act, 2007. To buttress this argument the Respondent relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR**.

53. The Respondent avers that the Claimant was accorded a fair hearing and was given a chance to defend himself before its disciplinary committee but failed to disapprove the allegations levelled against him thus warranting his dismissal. It maintained that all the safeguards for ensuring a fair hearing were availed to the Claimant.

54. On whether the Claimant is entitled to the reliefs sought in his Claim, the Respondent submitted that the Claimant is not entitled to any reliefs from it as his termination was lawful and fair.

55. On the Claim for three (3) months' salary in lieu of notice, the Respondent submitted that the Claimant is not entitled to the same given that his employment contract provides that where a member of staff is summarily dismissed as was the case for the Claimant, the Respondent may terminate without notice or payment in lieu of such notice. The Respondent argued that the Claimant being bound by the terms of his employment contract cannot therefore claim for any compensation under this head. For emphasis the Respondent cited and relied on the cases of **Fina Bank Limited and Spares and Industries Limited (Civil Appeal No. 51 of 2001)**, **Givan Okallo Ingari & Another v Housing Finance Company of Kenya Limited (2007) eKLR** and **Muthuri v National Industrial Credit Bank Limited (2003) 1 KLR** where the courts maintained that parties are bound by the terms of the signed employment contracts.

56. The Respondent further submitted that the Claimant's claim is statute barred by dint of the provisions of Section 90 of the Employment Act and should therefore be dismissed with costs to the Respondent. To fortify this argument the Respondent cited and relied on the cases of **Attorney General & Another v Andrew Maina Githinji and Another (2016) eKLR** and **Banking Insurance Union (K) v Bank of India Industrial Cause No. 1201 of 2012**.

57. It is further argued that this Court lacks the jurisdiction within which to extend time for filing the Claim and subsequently entertain the claim as is. Reliance was made to the cases of **Michael Maina Nderitu v Kenya Power & Lighting Company** and **Ga v Makerere University (1972) EA 65** where it was held that once a suit is time barred the Court lacks jurisdiction to entertain the claim.

58. In conclusion the Respondent urged this Court to find that the Claimant's suit is without merit and to proceed and dismiss it with costs to the Respondent.

Analysis and Determination

59. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto there is no dispute that the Claimant was employed by the Respondent herein as from the year 1996 until 5th February, 2009 when he was summarily dismissed. The issues for determination therefore are:

- i. Whether the Claimant's termination was valid both procedurally and substantively;
- ii. Whether the Claimant is entitled to the reliefs sought.

Unfair termination

60. Under Section 45(2) of the Employment Act termination of an employee's contract of service is unfair in the event his employer fails to prove that it was founded and/or grounded on a valid reason which relate to the employees conduct, capacity and compatibility and that in arriving at the decision to terminate the services of such an employee fair procedure was followed.

Reason for termination

61. The reason cited for the summary dismissal of the Claimant in the Respondent's letter dated 5th February 2009 was on account of "loss of trust."

62. The Claimant maintained that the allegations levelled against him were unfounded and that the same were not corroborated by an independent witness. He argued that his conviction was solely on the account and admission by one Mr. Wafula who admitted having received a bribe from one of the Respondent's customers and handing the amount to the Claimant to facilitate the alteration of his bill.

63. The Respondent on the other hand maintained that it had a valid reason being "**Loss of Trust**" following the Claimant's alleged participation in a scrupulous deal where the Claimant alongside other members of staff were alleged to have received a bribe in exchange for the alteration of a customer's bill.

64. From the foregoing analysis I find that the Respondent had a valid reason for termination. The question that now arises is whether due procedure was followed by the Respondent.

Procedure followed

65. Section 41 of the Employment Act, 2007 provides for the procedure to be followed while terminating the services of an employee.

66. The Section provides as follows **an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

67. The Claimant in evidence and submissions admitted that he was indeed invited and appeared before the Respondent's disciplinary committee for hearing.

68. However, he maintained that his conviction was on the basis of an admission made by one Mr. Wafula whose evidence was not corroborated. He argued that he did not receive any bribe as was alleged by Wafula.

69. The Claimant also stated that he was not informed of his right to be accompanied by another member of staff at the hearing.

70. I have perused the Respondent's letter dated 19th January, 2009 inviting the Claimant to appear before its disciplinary committee on Tuesday 27th January, 2009 at 9.00 am and it clearly indicates that the Claimant was allowed to attend the hearing in the presence of a union representative of his choice.

71. For reasons best known to the Claimant he attended the hearing alone and after the Committee had reached its verdict argued that the evidence relied upon by the Respondent was not supported by an independent witness.

72. The Claimant did not front any witness of his own at the hearing to disapprove the allegations levelled against him.

73. In my view and as supported by the evidence on record, the balance as to whether fair procedure was followed tilts in favour of the Respondent.

74. In the end, I find that the Respondent did comply with the provisions of Section 41 as read with Section 44(4)(g) of the Employment Act, 2007, clause 23.2 of the employment contract and its Human Resource Manual.

75. Having found that the Respondent has proved on a preponderance of evidence that it had a valid reason for dismissing the Claimant and that it followed a fair procedure, the court finds and holds that the Claimant's summary dismissal was fair and lawful within the meaning of section 45 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought

76. In view of the foregoing finding, the claim for compensation for unfair termination under Section 49(1) of the Employment Act is dismissed.

77. The Claim for unpaid end year bonus for six years is also dismissed as the Claimant did not prove that this was a benefit under his employment terms and he was entitled to the same.

78. The claim for unpaid salary for the period February 2009 to October 2012 is equally dismissed as by allowing the same this Court would be encouraging the unjust enrichment by the Claimant as he did not render any services during the said period. I rely on the cases of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** and **D. K. Njagi Marete v Teachers Service Commission [2013] eKLR**.

79. The Claim for severance pay is equally dismissed as the Claimant's termination was not as a result of redundancy.

80. Having found that the Claimant's summary dismissal was valid substantively and procedurally, he is not entitled to notice pay as pleaded.

81. In conclusion the Claim fails in its entirety and is accordingly dismissed.

82. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER, 2021

MAUREEN ONYANGO

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 had 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 Civil 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.

MAUREEN ONYANGO

JUDGE