



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

CAUSE NO.11 OF 2019

WANYAMA MURABWA JOHN.....CLAIMANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSIONRESPONDENT

JUDGMENT

1. The Claimant by a Memorandum of Claim dated 26th September 2019 sought the following orders against the Respondent:-

- b. Reinstatement of the Claimant to employment.
- c. Punitive damages for unlawful termination of the claimant.
- d. General damages for unlawful termination of the claimant.
- e. Kshs. 244,510/- being unpaid half salary for the period starting from October 2017 upto March 2018.
- f. Kshs. 1,760,490/- 18 months unpaid salary from April 2018 to October 2019.
- g. Costs of the suit.
- h. Interest at court rates.

2. The Claimant filed together with the Memorandum of Claim a verifying affidavit, list of witnesses, Claimant's witness statement, witness statement of Kennedy Wechuli , Vincent Wabwoba and list of documents all dated 26th September 2019 with bundle of the documents exhibits 1-16.

3. The Respondent entered appearance on 4th November 2019 and filed response to the claim dated 2nd July 2021 , list of witnesses dated 2nd July 2021, Respondent's witness statement of Peter Mulele dated 2nd July 2021 and annexures marked PM1-PM6.

4. The case was heard inter-partes on the 22nd September 2021 with the parties each calling one witness. The Claimant was represented by Mr. Otsiula instructed by the law firm of J.B. Otsiula. The Respondent was represented by its in-house Counsel Nancy Koros.

5. The Claimant testified in his case. The Claimant adopted his witness statement dated 26th September 2019 as his evidence in examination in-chief and produced bundle of documents under his list of documents exhibits 1-16 dated 26th September 2019 as his evidence. He was cross-examined by counsel for the Respondent.

6. The Respondent called one witness Peter Mulele. The witness adopted his witness statement dated 2nd July 2021 as his evidence in examination in-chief and produced the documents marked PM1,PM2,PM3,PM4,PM5 and PM6 as the Respondent's evidence in examination in-chief. He was cross examined by counsel for the Claimant.

7. The parties filed written submissions. The Claimant's submissions are dated 12th October 2021. The submissions of the Respondent are

dated 18th October 2021.

The Claimant's Case

8. The Claimant's case is that he was employed by the Respondent on a permanent and pensionable basis as a constituency office clerk at Webuye West Constituency Bungoma Region on the 1st day November 2012 and was on 3 months' probation period which he completed and was confirmed to employment and issued with appointment letter dated 22nd August 2013. That his salary was Kshs. 97,801/-. These employment terms are not disputed by the Respondent. The Claimant told the court that he worked harmoniously under 3 supervisors with good appraisal reports which were kept in his personal file. That on the 26th December 2016 he was transferred to Kanduyi constituency from Webuye West constituency and one Gregory Odhiambo Ouko was deployed there as his immediate supervisor. The Claimant states that on the 28th May 2017 the Respondent started nominations for candidates for the 2017 general elections of which the said supervisor assigned him the work of receiving Bankers cheques from aspirants and issuance of OMR receipts. That on the 5th day of June 2017 while sleeping at home he received a call from the said Supervisor ordering him to return nomination papers for 3 aspirants. He states that he replied he had no nomination papers for any candidate hence upon contacting the aspirants they brought the papers and were cleared the following day. The Claimant states that his supervisor issued him with a show cause letter on the 29th September 2017 and backdated to 25th September 2019 whose contents have never been substantiated. The Claimant states that the said supervisor issued him with a show cause letter after realizing that the Respondent's human resources department had summoned the Claimant through mobile phone call on the 29th September 2017 the same day to appear before the disciplinary committee on the 1st October 2017 hence did not have a fair chance to prepare and respond to the allegations. The Claimant states that the allegations on alteration of polling station diaries for 6 polling stations were malicious and unsubstantiated as he is not the author or marker of the diaries. He was interdicted by letter of the Respondent dated 4th October 2017 and received letter of dismissal dated 16th March 2018 at age 48 years and his efforts to overturn the decision was fruitless. That the same panel which heard him in the first stage proceeded to determine his appeal denying him a fair chance to be heard. That he had no previous warnings or complaints by previous supervisors. The Claimant was cross examined on his case by the Counsel for the Respondent.

The Respondent's case

9. The Respondent's case is that the Claimant, their former employee was issued with a notice to show cause by his supervisor, the returning officer of Kanduyi Constituency dated 25th September 2019 on the following grounds:-

- I. On the 20th September 2017 the Claimant alterations on entries on 6 polling station diaries without the knowledge of the returning officer
- II. The Claimant misplaced /caused the disappearance of three statutory forms the statutory clearance forms for three candidates during nominations of candidates for the general elections in 2017
- III. During the verification of the results at the tallying center for the general elections, the Claimant plucked off form A series from the white ballot boxes in contravention of regulation 83 and 86 of the Elections General Regulations 2012.

10. The Respondent states that the Claimant appeared before its disciplinary committee on the 1st October 2017 and despite being given opportunity to exculpate himself he was unable to exculpate himself. That the Claimant was interdicted vide letter dated 4th October 2017 and was required to show cause within 14 days why further disciplinary proceedings should not be instituted against him. That the Claimant responded to the letter and appeared before the committee on the 22nd January 2018 to defend himself further. That the returning officer also appeared before the committee and gave his evidence leading the committee to find the Claimant guilty of insubordination and that he did not perform his duties as required. That the Respondent terminated the Claimant's employment on account of gross misconduct pursuant to section 44(4)(c) of the employment act and its Human resources manual. That the Respondent gave the Claimant 6 weeks to appeal against the termination and the Claimant appealed vide letter dated 24th April 2018 and the appeal was found to have no merit and the Claimant informed vide letter dated 19th September 2018. The Claimant vide letter dated 1st November 2018 wrote to the Chairman of the Respondent for review of his termination which upon deliberation by the Respondent was found not have merit for lack of new material facts. The statement of defence denied the allegations on the unfair chance to defend himself and the same panel hearing case at first instance and on appeal. The witness was cross examined by counsel for claimant.

Legal analysis and findings

11. Issues for determination

The Claimant in his memorandum of claim states the following as issues in dispute:

- a. Unlawful termination of employment by way of summary dismissal
- b. Unpaid benefits of employment to the Claimant
- c. Respondent's violation of the Claimant's right to employment
- d. Reinstatement of the Claimant

The Respondent did not identify issues for determination.

12. After carefully analyzing the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows:-

- i. Whether there were valid and justifiable reasons for the termination of the Claimant from employment
- ii. Whether the termination from employment was lawful and fair
- iii. Whether Claimant is entitled to reliefs sought.

THE RELEVANT LAW

13. Section 45(i) of the Employment Act provides that no employer shall terminate the employment of the employee unfairly. A termination of employment by an employer is unfair if the employer fails to prove:-

- (a) 'That the reason or 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 was that the employment was terminated in accordance with fair procedures:'

14. Section 45 (4) of the Employment Act further states,

'A termination of Employment shall be unfair for the purposes of this part where :-

- '(a) The termination is for one of the reasons specified in section 46 or
- (b) it is found that in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment.'

15. The Procedure for termination of the employment of an employee is defined under Section 41 of the Employment Act.

" An employer shall before terminating the employment of an employee, on grounds of misconduct, prior 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 another employee or a shop floor union representative of his choice present during his explanation".

16. The Court of Appeal has held the provisions of section 41 of the Employment Act to be couched in mandatory terms. The Court of Appeal in *Postal cooperation of Kenya -vs- Andrew K. Tanui (2019)* pronounced itself on procedural fairness as herein under:-

- (i) Four elements must thus be discernable for the procedure to pass muster:-...**
- (ii) The reason or which the employer is considering termination**
- (iii) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and**
- (iv) Hearing and considering any representation made by the employee and the person chosen by the employee.'**

It is against the above legal criteria this court proceeds to determine the instant claim.

ANALYSIS OF THE ISSUES AND FINDINGS

(i) On whether there were valid and justifiable reasons to terminate the services of the Claimant.

17. The letter of termination of service by the Respondent's Commission Secretary is dated 16th March, 2018. The letter addressed to the Claimant is titled 'Termination of Service' .

The letter having referred to the show cause letter, the commission 15 sessions of 1st October 2017, and 22nd January 2018, section 6(a) of the Election Offences Act on making false entries in any record, section 44(4c) and section 10.2.7(3 &5) of the Respondent's policies and Procedures manual which provide it is gross misconduct for an employee to willfully neglect to perform any work he has duty to perform or carelessly and improperly performs any work which from its nature it was his duty to perform..., that it is gross misconduct to disobey those placed in authority over him... and of the states in part, 'consequently your services as a Constituency Administrative Assistant with

the Commission are terminated with effect from the date of this letter on account of insubordination and improper performance of duties”.

The above are in summary the reasons given in the said letter.

The court takes note that in the show cause letter dated 25th September, 2017 there is issue not raised in the termination of service letter being that the Claimant and a lady called Narerian retreated to a corner in the tallying hall and started plucking off the Form A series from the ballot boxes. That these contravened certain aspects of regulation 83 and 86 of the Election General Regulations 2012.

18. The Claimant told the court he had no record of prior warning letter or disciplinary issues yet had served approximately 5 years. There was no evidence of evaluation placed before the court on the Claimant's performance by RW who told the court he is in charge of the disciplinary section, there were no investigations on the offence under section 6(a) cited in the said letter of termination of service, the only document is the show cause letter and even the complainant, the supervisor, accuser was not called as a witness before the interdiction or his record at the hearing session produced. The court notes that there was no prior notice of the charges the Claimant was to face before the disciplinary Committee. The show cause letter did not refer to any disciplinary hearing hence cannot amount to notice.

19. The Claimant during cross examination told the court that he was served with this show cause letter on the 29th September 2017, at 8.00 pm by his supervisor at their office and the human resources person by phone invited him to defend himself before the committee of Respondent on 1st October 2017 at Nairobi. The Claimant told the court that the supervisor backdated the letter and issued it to him to travel to Nairobi after he realized the human resources had summoned him for hearing for 1st October 2017. The Respondent did not call evidence to rebut this claim and this is tantamount to unfair hearing for lack of sufficient notice to prepare for response in writing and prepare for the hearing and for lack of explanation in writing of the charges the Claimant was to face before the disciplinary committee in violation of provisions of section 41 of the Employment Act. The Claimant's right to be accompanied by fellow employee was also violated.

20. RW told the court he was a Human Resource Officer of the Respondent deployed to the disciplinary Section. He told the court that on 25th September, 2017 the Returning Officer Kanduyi addressed show cause letter implicating the Claimant of misconduct. That he was tasked to prepare a discussion paper by head of the Human Resource. The witness (RW) told the court that after his brief a show cause letter was to be issued to the Claimant. That the show cause letter was done and served to Claimant. The said letter was not produced in court. The only show cause letter before court was one by the Returning Officer Kanduyi dated 25th September 2017 which led (RW) to prepare the discussion paper. RW told the court that there was invitation for Claimant to appear before the disciplinary committee on 1st October 2017. The Claimant told the court he was called by Human Resource on phone on the night of 29th September 2017 to appear on 1st October, 2017 at Nairobi. It is clear from the evidence before court there was no formal notice inviting the Claimant to disciplinary proceedings or informing the Claimant of the charges he was to face or his rights to be accompanied by fellow employee in violation of with the Provisions of Section 41 of the Employment Act.

21. The Claimant told the court that he proceeded to appear before the Respondent's Committee on 1st October, 2017 as summoned. RWI told the court that upon appearance the Claimant was unable to defend and exculpate himself of the accusation by Respondent and a letter of interdiction was issued. The Respondent had a duty to prove to court the reasons for termination were valid. The Respondent did not notify the Claimant in advance of the charges he was to face before the Respondent disciplinary Committee on the 1st October, 2017 or even inform him of his rights which led to his interdiction for employment. The Respondent did not produce the minutes of the proceedings on the 1st October, 2017. The letter of interdiction dated 4th October, 2017 refers to the letter to show cause by the Returning Officer confirming the position of the court that there was no notice of charges facing the Claimant at the disciplinary Committee in violation of section 41 of the Employment Act. The letter to show cause cannot amount to notice of disciplinary proceedings as the Claimant was supposed to respond in writing for Respondent to consider the answers. The letter did not invite Claimant to hearing. It is after such consideration then a notice of disciplinary would have been issued with respect to the aspect of the response which the Respondent would have found unsatisfactory. Again the notice would then have to comply with all the provisions of section 41 of the Employment Act as safeguard of the employee's rights. The RW told the court he was not in attendance of the proceedings of 1st October 2017. He did not issue notice of the hearing. The court believes the Claimant that he was issued the letter on 29th September, 2017 night to appear at the Respondent's hearing on 1st October, 2017 at Nairobi.

22. The court notes only two issues from the show cause letter are mentioned in the interdiction letter and the letter on termination of services by the Respondent.

The court will proceed to consider the two issues:-

(i) The Claimant made alterations on entries in six (6) polling stations diaries without knowledge of the Returning Officer who was the complainant.

23. The Claimant denied the allegation and told the court there was no evidence by Respondent that he did any alterations. The Claimant told court he was not author of the contents of the polling station diaries. That the authors were Presiding Officers. The Respondent did not produce any evidence in court to make the court believe the Claimant was culpable of this offence. The Returning Officer did not testify in court. There was no evidence placed before the court of any investigations report or the minutes demonstrating that the Claimant was guilty. The RW was not a party to the proceedings and without the minutes on record, RW evidence on what transpired at the said proceedings can only be hearsay. The Court believes the Claimant's evidence that he did not make any alterations at true. Only the authors of the polling station diaries could confirm the authenticity of the diaries entries. There was no evidence before court of their interrogation on the entries.

The Counsel for Respondent submits that the Claimant testimony before court was not a clear account of how he handled the polling station diaries. The court does not place weight on the handling of the diaries as the issue was alteration of entries of which the court finds could only have been established upon investigations involving the authors of the entries. That was not done. In the circumstances the court

finds that was not a valid and justifiable reason produced before court to terminate the employment of the Claimant.

ii. On the issue of causing disappearance of statutory clearance form from 3 candidates during nominations

24. The court finds that there was no evidence that the same happened and if it happened the role of the Claimant. A complaint report by the aspirants to the returning officer would have been helpful. The Respondent did not disclose the names of the alleged candidates nor was a report to the Respondent by the Returning officer on what appears to be a serious offence produced in court. Again the record of the disciplinary proceedings is not produced. The court finds the Claim was not established to have existed and hence was not a valid reason to terminate the services of the Claimant.

25. The issue of plucking off form A series from the white ballots was not stated in the letter of interdiction or in the letter of termination. The court thus finds that this was not a valid reason for the termination.

26. The Respondent attached without reference in the submissions a decision by my brother Onesmus Makau in *Vincent Ouso Ochuodho v Intercontinental Hotel limited*. The court notes that in that case the Respondent produced evidence in court that it had valid reasons to terminate the services of the employee including the investigation findings. The Claimant in that case had been served in presence of the human resource officer. The record of notice of charges was established. This was not the case here. No evidence was placed before the court to prove the existence of valid reasons of the termination of the instant Claimant and no investigation report or record of the disciplinary proceedings were produced. It is the burden of the employer to prove there were valid and justifiable reasons for termination of the employment. This prove should be by way of records. A record of prior warnings on the issues or similar issues, a record of investigation report, a record of poor performance, a record of the disciplinary proceedings and related records. None of the above was produced. The nature of allegation against the Claimant required documentation prove. The Respondent, failed to prove the alleged reasons stated in the letters of interdiction and termination existed.

27. The court finds in all circumstances of the case that the employer did not act in accordance with justice and equity in terminating the employment. The court finds there were no valid or justifiable reasons to terminate the employment of the Claimant.

(ii) Whether the Procedure for the Claimant's termination for employment was lawful and fair.

28. Procedural fairness is a mandatory requirement in the termination of employment services. The procedure is as set out above under section 41 of the Employment Act and in the court of Appeal decision in the *Postal Corporation case* (supra).

In the 1st instance of the appearance before the disciplinary committee, the court has already found the Claimant's rights under section 41 were violated. In the 2nd session leading to the termination the last paragraph of the letter dated 4th October, 2017 being interdiction notice states:

“ you are further required to show cause within fourteen (14) days from the date of this letter why you should not be summarily dismissed as per Section 10.2.6 of the Commissions Human Resources and Administration Policies and Procedure Manual”. RW in his statement states at paragraph 10 as follows: “The Claimant responded vide a letter dated 10th October, 2017 and appeared before the disciplinary Committee on the 2nd January 2018 to defend himself. That the Returning Officer also appeared before the Committee to give evidence.’

29. The Claimant was invited for the 2nd session via letter dated 18th January, 2018. The interdiction letter had already made a finding without basis as per earlier finding and was in violation of Section 41 of the Employment Act. The court finds the Claimant was not, in the 2nd session afforded opportunity to prepare for his defence as he was not issued with the investigation reports or the proceedings record of the 1st session which he requested for in his letter dated 8th April, 2018 addressed to the Respondent's Secretary (Claimant's document No) and referred in his Appeal dated 24th April, 2018.

On the appeal, the Respondent in response to the appeal wrote a letter dated 19th September, 2018 to effect that the Commission plenary had noted there were no new facts adduced to exculpate the Claimant from the earlier accusation(PM 6). The letter does not disclose if the Commission Plenary is the authorized body to hear the appeals and no minutes were produced. The court finds that without record and in view of the serious issues raised in the appeal to the Respondent and the lack of investigation report, the Respondent did not do justice in the appeal by the Claimant. The court finds that the Respondent was too casual in the manner it handled the appeal and the entire proceedings which this court finds strange for a public body entrusted with a critical role of conducting its affairs in a transparent manner. The issues raised against the Claimant are on offences under the Election offences Act which places burden of proof beyond reasonable doubt.

30. The court finds that there was material non-compliance with procedural fairness in the manner of termination of the Employment of the Claimant. The court finds in all circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment. In conclusion the court finds that the procedure of termination of the Claimant's services was unlawful and unfair.

(iii) Whether the Claimant is entitled to the orders Sought?

31. On claim for Reinstatement to employment

On finding of wrongful termination the court has powers to grant remedies under Section 49 of the Employment Act. On reinstatement the court considers the practicability of the order and the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances. No special circumstances have been demonstrated by the Claimant why he should be reinstated. Section (12) 3(vii) of the Employment and Labour Relations Court of 2011 provides that court can order reinstatement

of any employee within three years of dismissal; subject to such conditions as the court deems fit to impose under circumstances contemplated under any written law. The Claimant's letter of termination is dated 16th March, 2018. Three years have since lapsed. Due to time lapse the order of reinstatement is not available to the Claimant.

32. On the damages, the Claimant submits he be awarded kshs. 5,000,000/- considering he was hired on a permanent and pensionable basis and has had to go for almost 3 years without salary and income. The court is guided by provisions of Section 49 of the Employment Act. The Claimant to buttress claim for grant of reliefs sought relies on case of *Kenfreight (EA) Limited -vs- Benson K Nguti (2019) Eklr* and repeats the remedies under Section 49 of the Employment Act. Damages for wrongful dismissal are capped to maximum of 12 months gross monthly salary at the time of dismissal under Section 49 (1) (c) of the Employment Act. The court has no authority to exceed compensation for unlawful damages outside this provision of the statute.

The Claimant was unfairly treated by the Respondent in the entire process of termination of services. The Claimant was terminated at age of 48 years and is unlikely to get equivalent or other suitable employment. He was engaged on 26th October, 2012 upto 2018 when he was terminated from employment. His nature of job is unique to the Respondent. He is unlikely to get similar or suitable engagement in the future. He was without any prior disciplinary issues. The court find in the circumstances an award of the maximum 12 months gross monthly salary of Kshs. 97,801.04 (per Claimant's payslip exhibit No. 3) at time dismissal is justified.

The Claimant is awarded kshs.1,173,612.48 as damages for unlawful termination subject to statutory deductions.

33. On claim for punitive damages for unlawful termination of the Claimant, the court finds that the same are not available under Employment Claims.

34. The Claimant further seeks kshs. 244,510/- being unpaid ½ salary for the period starting October, 2017 upto March 2018. This is the period he was on interdiction pursuant to Respondent's later dated 4th October, 2017. The court having found there was no valid and justifiable reason for the decision of termination of the Claimant's services, and there being no dispute that the Claimant's half of his salary was withheld during the interdiction period, I allow the claim for the withheld ½ salary from the date of interdiction to the date of termination being 4th October, 2017 to 16th March, 2018 as claimed for Kshs. 244,510/.

35. On the Claim for kshs.1,760,490/- 18 months withheld salary from April, 2018 to October 2019 the court finds the same unjustified as the Claimant's services had already been terminated pursuant to the termination of services letter dated 16th March, 2018. This claim is disallowed.

CONCLUSION AND DISPOSITION

36. **I have found that the termination of the Claimant's employment contract by the Respondent was unfair and unlawful. I have also found the order of reinstatement is not available to the Claimant. I now enter judgment for the Claimant against the Respondent in the following terms:-**

a. Compensatory damages for 12 months at monthly gross salary at dismissal of Kshs. 97,801.04 x 12 months total sum awarded of Kshs.1,173,612.48/=

b. I allow the claim for the withheld ½ salary from the date of interdiction to the date of termination being 4th October, 2017 to 16th March, 2018 as claimed for total sum of Kshs. 244,510/=.

The award in (a) and (b) above is subject to statutory deductions.

c. I also award the Claimant interest on the award sum (a and b above) at court rates from the date of judgment until payment in full.

d. Costs of this suit shall be borne by the Respondent.

WRITTEN, DELIVERED AND SIGNED THIS 6TH DECEMBER 2021 AT BUNGOMA

J.W. KELI,

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT- BRENDA

FOR CLAIMANT- MR. OTSIULA ADVOCATE

FOR RESPONDENT:- ABSENT.