



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 303 OF 2016

[Consolidated with Petition Number 3 of 2015]

BETWEEN

ABOUD SULEIMAN SALIMCLAIMANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Gikandi & Company, Advocates for the Claimant

Kiarie Kariuki & Company Advocates for the Respondent

JUDGMENT

1. In his Statement of Claim and Petition which were consolidated through a Ruling of the Court, made on 24th March 2017, the Claimant states that, he was employed by the Respondent State Corporation on 19th October 1984, in the position of General Worker Grade 2 [Cleaner], Personnel Department, based at Lamu.

2. He rose through the ranks to become Artisan 1 and Team Leader, of the Respondent's Emergency Team, based at Ukunda in Kwale. He was dismissed by the Respondent on allegations of gross misconduct, while holding this position, with effect from 23rd May 2008. His last monthly salary was Kshs. 51,980, inclusive of basic and house allowance.

3. He states, he was arrested on 15th May 2008 on allegation of corruptly soliciting for a benefit, under the Anti-Corruption and Economic Crimes Act. He was arraigned in Court on 19th May 2008. The Respondent wrote to the Claimant the same date, 19th May 2008, asking the Claimant to show cause why he should not be disciplined, for involvement in corruption and absenteeism. The Claimant replied explaining his position on 21st May 2008. The Respondent proceeded to issue the Claimant dismissal letter dated 21st May 2008, with the effective date stated as 23rd May 2008.

4. He was acquitted on 5th March 2009.

5. He prays the Court to find dismissal was unfair, and grant Judgment against the Respondent as follows:

a) Declaration that termination was unfair and unlawful.

b) The Claimant is paid half salary and allowances withheld by the Respondent for the period between arrest and acquittal.

c) The Claimant is paid full salary from the date of acquittal up to the date of reinstatement, provided the Claimant has not attained the mandatory retirement age of 60 years.

d) Reinstatement without loss of benefits or seniority.

e) In the alternative, the Respondent compensates the Claimant fully by way of general damages for unfair termination.

f) Interest on [e] above at the rate of 12% per annum or any other such rate as the Court may decree from the date of filing of the Claim to the date payment is made in full.

g) Costs.

6. The Respondent filed its Statement of Response on 20th June 2016. It is conceded that the Claimant was employed by the Respondent on terms and conditions outlined in the Claim. He was arrested by Anti-Corruption Officers on 15th May 2008. This information reached the Respondent on 16th May 2008, when the Claimant absented himself from work without permission. The Respondent issued letter to show cause to the Claimant, as stated in the Claim. The Claimant was subsequently dismissed by the Respondent under clause 25 of applicable CBA for involvement in fraudulent activities and unauthorized absence from duty. He was paid terminal dues amounting to Kshs. 63,240.

7. The Respondent is a stranger to the averments relating to the criminal trial. It was not a complainant. It did not participate in the trial. The Respondent prays that the Claim is dismissed with costs.

8. The Claimant and Respondent's Human Resource Officer Catherine Njeri Gatumbi, gave evidence for the respective Parties, and closed the hearing on 23rd July 2019. The Cause was last mentioned on 8th November 2019 when Parties confirmed the filing of their Closing Submissions.

9. The Claimant testified he was initially employed as a General Worker. He rose to the position of Artisan 1, Emergency Team Leader. He was arrested on the allegation that he had asked for a bribe from one Christopher Charles Bird, in order to reconnect his premises with power. The Claimant was tried and acquitted. He confirmed the relevant dates pleaded in the Claim with respect to arrest; trial; letter to show cause; and dismissal. He was a Public Officer, charged under the Anti-Corruption and Economic Crimes Act No. 23 of 2003. He was acquitted on 5th March 2009. He was not paid half his salary as required under this law. The Respondent did not reinstate the Claimant after his acquittal. Dismissal was based on the alleged crime. The Claimant testified he no longer wishes to be reinstated.

10. Cross-examined the Claimant testified he could not recall the exact details of his salary. He agreed it was the rate suggested by the Respondent. He was a member of the Kenya Electrical Trades and Allied Workers Union [KETAWU]. The Union had a CBA with the Respondent, which defined terms and conditions of employment.

11. The Claimant was in police custody on 16th May 2008. He communicated with his Supervisor to say he was in custody. He did not have permission to be absent. He received and replied to the letter to show cause. He had in the past been asked to show cause over unrelated allegations, which he did, and was spared. Christopher was the Complainant in the criminal trial. The Respondent was not concerned with the trial. Dismissal letter did not mention the criminal case. Clause 25 of the CBA relating to gross misconduct was cited by the Respondent in justifying dismissal. Clause 30 contained an internal grievance and dispute resolution procedure. The Claimant reported his grievance to the Union. There was no follow-up, under the CBA.

12. Redirected, the Claimant told the Court the letter to show cause, referred to the corruption allegations as well as the Claimant's absence from work. Past letters to show cause did not have relevance to the dispute at hand, having been addressed and concluded at the time they issued. The clause on dismissal under the CBA could not override the requirements of the Employment Act, and the Anti-Corruption and Economic Crimes Act.

13. Catherine Njeri Gatumbi confirmed the Claimant was an Employee of the Respondent. Dismissal was on account of absenteeism. He was absent on 16th May 2008. He was issued letter to show cause on 19th May 2008. He replied on 21st May 2008. He was dismissed the same day. He was paid terminal dues at Kshs. 63,240, which included 66 days of pending leave. There are no other benefits due to the Claimant. He was dismissed under clause 25 of the CBA. The CBA has a well-outlined dispute resolution mechanism. It was not followed before the Claim was brought to Court. The Respondent was not a main player in the criminal trial. The CBA did not provide that, he is paid half his salary after the criminal trial. The Respondent was focused on absenteeism, not corruption. The Claimant was given an opportunity to explain himself. He did so, was dismissed and paid terminal dues. His Claim is presented in afterthought.

14. On cross-examination, Catherine told the Court she still held the human resource docket, at time the Claimant was dismissed. He was paid 66 days of annual leave. He did not raise other demands. He appeared in Court on 19th May 2008. Show cause letter issued the same day. It stated the Claimant was absent, and involved in fraudulent activity. The CBA must be interpreted in conformity with the existing law.

The Court Finds:-

15. The facts relating to Claimant's employment history and terms and conditions of that employment with the Respondent, are not contested.

16. There is no doubt that the Claimant was arrested and charged, on the allegation that he attempted to solicit a bribe from one Christopher Charles Bird, to reconnect power supply to Bird's premises.

17. The Claimant was arrested on 15th May 2008. He was in custody on 16th May 2008. He failed to attend work on 16th May 2008. The Respondent alleged he was absent without lawful cause or leave of the Respondent.

18. On 19th May 2008, the Claimant was taken to Court. The same date, the Respondent wrote to the Claimant, seeking an explanation on his absence from work on 16th May 2008. The letter also required the Claimant to explain his involvement with fraudulent activities, which was

in reference to the corruption allegations made against the Claimant. Explanation was expected within 72 hours.

19. The Claimant replied on 21st May 2008 denying involvement in corruption. On the same date, the Respondent wrote to the Claimant the letter of dismissal, giving the effective date as 23rd May 2008.

20. The Respondent and Claimant's Union, KETAWU, have a CBA in place, which the Respondent argues, has a dispute resolution mechanism which the Claimant did not exhaust, before coming to Court.

21. The timelines given by the Respondent, in the process leading to dismissal, left no room for resort to the dispute resolution mechanism under the CBA.

22. Clause 30 requires an issue arising between Unionisable Employees and the Respondent shall:-

§ Be discussed between Shop Stewards and relevant Supervisor. **[The Respondent did not copy the letter to show cause to the Shop Stewards such as would have allowed the Claimant's absence from work, and involvement in fraudulent activities, are addressed at the workplace by the Shop Stewards and the Supervisor].**

§ Where there is no solution, the dispute would be escalated to Branch Committee of the Union and the Departmental Head; then, to the Branch Secretary and the Area Human Resource Officer; the County Labour Officer may also come in at this stage; the next level involves the Claimant's General Secretary and the Chief Human Resources Manager; Parties may after this, involve the Central Joint Industrial Council; and lastly the Parties may refer the dispute to the Cabinet Secretary of Labour, who invokes the formal Trade Dispute Machinery, under the Labour Relations Act. **[The timelines given by the Respondent did not leave any room for this elaborate dispute resolution mechanism to come into play. Neither the letter to show cause, nor the letter of dismissal was copied by the Respondent to the Union, to facilitate the internal dispute resolution mechanism, at any stage of the disciplinary process. The Respondent did not write to KETAWU seeking resolution of the dispute under the CBA]**

23. In the view of the Court, the submission by the Respondent on the need to exhaust internal dispute resolution mechanisms is not without merit; the Respondent should however have acted in a way that resort to such mechanism, was made achievable. It was not possible for the Claimant to invoke the mechanism between the date of his arrest 15th May 2008 and his rushed dismissal on 21st May 2008. It is doubtful also, whether the CBA mechanism could reasonably be invoked and exhausted, without the Claimant running afoul of the law on limitation of time under the Employment Act, and the narrow interpretation Courts have assigned to that law. Where a Party makes it impossible for a dispute to be taken through an internal dispute resolution mechanism, should that Party argue in Court that such mechanism was not exhausted? CBAs are meant to be implemented with the co-operation of the Parties. The Court must step in and assume its constitutional mandate, to protect Parties from the likelihood of being closed out from fair access to justice.

24. It also clear that the Respondent was aware the Claimant was charged with a crime under the Anti-Corruption and Economic Crimes Act. The Respondent referred to absence from work and fraudulent activities in its letter to show cause. It is disingenuous of the Respondent to separate Claimant's absence from work, from the corruption allegations. The Respondent was always aware that the Claimant was alleged to have solicited for a bribe from Respondent's customer, in order to reconnect the customer with electricity. Why would the Respondent feign ignorance of the circumstances leading to Claimant's absence from work on 16th May 2008?

25. The Claimant ought to have been suspended and placed on half salary, under Section 62 of the Anti-Corruption and Economic Crimes Act. The CBA clauses that suggest there could be instant dismissal, and suspension without pay, are outmoded and in contravention of both the Employment Act and the Anti-Corruption and Economic Crimes Act, under which the Claimant was charged. If there is any conflict between the CBA and the Law, the position that confers greater advantage on the Employee must prevail. In this case, the Court agrees that as a Public Officer, the Claimant ought to have been suspended on half pay for the period of his criminal trial. Instant dismissal was the wrong option, and clearly against the law. Section 62 of the Anti-Corruption and Economic Crimes Act states a Public Officer charged with corruption or economic crime *shall* be suspended at half pay, with effect from the date of the charge. The Officer *shall* continue to receive the full amount of any allowances. Full restoration of the Public Officer is expected, if the criminal proceedings are discontinued, or the Public Officer is acquitted. This law does not derogate from any power or requirement under any other law, under which the Public Officer may be suspended without pay. There is no law cited by the Parties, which allows a Public Officer to be suspended from the outset, without pay. The Act allows the Public Officer, when convicted of corruption or economic crime, time to exhaust his right of appeal, under the criminal justice system. During such appeal, suspension is extended but this time, without pay. There is no room for instant dismissal of a Public Officer charged with corruption or economic crime. These provisions of the law on suspension of Public Officers, must be upheld over any other contractual clauses that suggest a Public Officer could be dismissed instantly, or suspended from the start, without pay. The Respondent deep down was aware it misapprehended the law, and this is perhaps the reason the Respondent has dedicated large space in its Submissions, arguing that dismissal was not based on the allegations of corruption, but merely on his absence from work.

26. **The Court accedes to the prayer for arrears of half monthly salary for the period between 19th May 2008 and 5th March 2009 [10 months] at the rate of Kshs. 51,980 divided by 2 x 10 = Kshs. 259,000.** This is justified further by the fact that the Claimant was acquitted, and under the law which he was charged, ought to have resumed duty, as he was absolved of the allegations of corruption. He ought not to lose his arrears of salary and lose his job altogether. The only forum at which the allegations against the Claimant were tested, absolved the Claimant. The law requires half salary is retained by the Employer, the presumption being that this other half would be released to the Employee, once the Employee is absolved of the corruption allegations against him. The Court must enforce what the law presumes. The flipside is that half salary would be forfeited in event the allegations against the Employee are confirmed in a criminal process.

27. The Claimant does not pursue the prayer for reinstatement. He reckoned he is within the retirement bracket. Other factors militating against his return to the Respondent include limitation of the remedy of reinstatement under the Employment Act, to 3 years from the date of dismissal. He has been away from the position of Team Leader Ukunda, for 11 years today. He is likely to find the workplace to have changed, and he appears to have moved on himself. The corollary to this is that his prayer for full salary arrears, "from the date he was acquitted to the date he will be reinstated..." cannot stand. The date he would have been entitled to full salary would have been upon return

to work after he was acquitted, on 6th March 2009. For whatever reasons, it never happened, and is not likely to happen. So there can be no payment of arrears of salary ‘up to the time the Claimant will be reinstated.’ Prayers [c] and [d] of the Claim are declined.

28. The Court of Appeal, in **National Bank of Kenya v. Samuel Nguru Mutonya [2019] e-KLR** recently emphasized that where a Party pleads remedies in the alternative, having allowed the main remedy, the Court should not allow additional remedies pleaded by such a Party. Parties must take caution in pleading alternative prayers. It is prudent to plead the remedies serially, and let the Court decide. The Claimant herein states he prays for compensation for unfair termination, in the alternative to the prayer for arrears of salary which the Court has granted in terms above. He however pleads the alternative is ‘without prejudice to the foregoing.’ It is noted that the main remedy would be reinstatement, which the Claimant has withdrawn. Arrears of salary was a peripheral remedy and does not seem to be the main alternative to compensation for unfair termination. The Court understands him to say that grant of one remedy, should not, upon the consideration of the Court, preclude grant of the other remedy. The Court agrees with him, and holds the view that the pleading ‘without prejudice to the foregoing,’ places his prayers outside the restriction of the above Court of Appeal decision. Payment of arrears of salary is a statutory obligation under the Employment Act and in this case, would be justified once the Claimant was absolved of corruption allegations under the Anti-Corruption and Economic Crimes Act. An order for payment of this statutory obligation would not amount to compensation for unfair termination, though it is a factor in considering the amount of compensation. The Court is therefore not restricted to grant of salary arrears, but has the freehand in considering whether compensation is merited.

29. Was termination unfair? The allegations over which the Claimant was dismissed, were never investigated at the workplace, and the Claimant taken through a disciplinary hearing, to establish his guilt. He was asked to show cause and dismissed within a very brief period. The Respondent as stated elsewhere was aware that the Claimant had been arrested and charged over allegations of corruption. There would be an explanation for the Claimant’s absence on 16th May 2008. Where an Employee is arrested for a cognizable offence, punishable by imprisonment, and is not within 14 days lawfully freed, the Employer may under Section 44 (4) (f) of the Employment Act, summarily dismiss the Employee for gross misconduct. The Claimant was arrested for cognizable offence on 15th May 2008. He was available on 19th May 2008 when notice to show cause issued. 14 days had not elapsed from the date of arrest. The Respondent invoked Section 44(4)(a) of the Employment Act, rather than the correct Section 44 (4) (f), and summarily dismissed the Claimant. As for the criminal trial, the law required the Claimant is suspended on half salary. It did not demand immediate dismissal. Both Acts of Parliament applicable to the Claimant, as well as the CBA, required he is taken through a hearing. He was not heard at the workplace. He was rushed through the process to show cause, and hastily dismissed without a disciplinary hearing. As submitted by the Respondent, the disciplinary procedure under the CBA was not involved. He had worked for a considerable number of years- 24 in all. He was a Team Leader of Respondent’s Emergency Unit. He was only paid pending annual leave of 66 days, upon dismissal. He left employment with a paltry sum of Kshs. 63,240 after investing his labour for 24 years, in the Respondent State Corporation. He has withdrawn his prayer for reinstatement considering his age, and the age of mandatory retirement. He was paid pension. Termination did not adhere to the standards of fairness created under Section 41, 43 and 45 of the Employment Act. **The Court grants him, under Section 49 of the Employment Act and Section 12 of the Employment and Labour Relations Court Act, equivalent of 7 months’ gross salary in compensation for unfair termination, at Kshs. 368,860.**

30. Interest is pleaded at 12% on the compensatory award. The Court has discretion under Rule 29 of the E&LRC [Procedure] Rules in granting interest. The Claimant has not explained why interest on compensation should be from the date of filing the Claim. **He is granted interest on the compensatory award, at the rate of 12% pleaded by the Claimant, from the date of Judgment, till payment is made in full.**

31. **Costs to the Claimant.**

IN SUM, IT IS ORDERED:

- a) **It is declared that termination of the Claimant’s contract was unfair.**
- b) **The Respondent shall pay to the Claimant: arrears of withheld half salary at Kshs. 259,000; and equivalent of 7 months’ salary in compensation for unfair termination at Kshs. 363,860 – total Kshs. 622,860.**
- c) **Interest allowed on the compensatory award of Kshs. 363,860 at the rate of 12% as pleaded, from the date of Judgment till payment is made in full.**
- d) **Costs to the Claimant.**

Dated and delivered at Mombasa this 23rd day of January 2020.

James Rika

Judge