



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 820 OF 2014

MAURICE ADONGO ANYANGO.....CLAIMANT

VERSUS

KENYATTA INTERNATIONAL CONFERENCE CENTRE.....RESPONDENT

JUDGMENT

1. The claimant's claim is contained in the amended claim filed on 12th October 2018 which seeks the following reliefs –

a) A declaration that the interdiction letter dated 21st January 2016 and subsequent termination letter dated 30th May 2016 by the Respondent be declared illegal, irregular, null and void and unconstitutional.

b) Reinstatement of the Claimant's employment without loss of benefits to present;

Alternatively, to (b) above:

i) Compensation for unlawful termination, 12 months' gross salary equivalent to Kshs.1,224,000

ii) All accrued terminal benefits from the time of employment

to date.

c) Three months' basic salary in lieu of notice Kshs.306,000

d) Unpaid leave for 45 days (Equivalent to 2 months' salary) Kshs.204,000

e) Costs of the suit;

f) General damages for ruin of career;

g) Interest on (c), (d) and (e) from 16th November 2016 being filing date of JR. 126/2016 until payment in full.

2. The respondent admitted in her defence that she dismissed the claimant from service but contended that the dismissal was fair and lawful. She averred that the claimant breached his contract of service and his statutory obligation by failing to discharge his duties with regard to the World Trade Organisation (WTO) Conference procurements. She further averred that the claimant was afforded a hearing by a committee in which he admitted the offence and he was dismissed.

3. Both parties tendered evidence and filed written submissions.

Claimant's Evidence

4. The claimant testified as CW1 and adopted his written statement filed on 29th May 2018 and his bundles of documents as exhibits. In brief he stated that he joined the respondent on 30th November 2005 as a Procurement Assistant. In April 2015, he was appointed the Acting Procurement Manager, Job Group 3 earning acting allowance but retained his salary as Procurement Assistant.

5. He further testified that on 23rd June 2015, he was appointed the Secretary of the respondent's Tender Committee and on 21st January 2016 he was served with an interdiction/show cause letter by the respondent's Board of Directors Chairperson. The letter cited investigations into procurement irregularities related to the WTO's Conference. However, CW1 denied all the allegations levelled against him by his response to the show cause letter.

6. CW1 further testified that the respondent invited him to disciplinary hearing by letter dated 22nd March 2016 and he appeared and made his defence. Thereafter, he was served with a dismissal letter on 30th May 2016 citing the reason as breach of obligations, policies and manuals and in particular failing to:-

(a) Ensure that KICC procurement and supply chain activities and those concerning WTO Conference are in compliance with the laid down laws, regulations, policies and procedures.

(b) Notify your employer, KICC of procurement irregularities and advise on the legally acceptable way to deal with concerned tenders in line with your obligations as acting Procurement and Head of KICC Procurement Unit.

(c) Ensure documentation and management of ICC Procurement proceedings and records in accordance with procurement regulations.

7. CW1 further testified that he was aggrieved by the dismissal and appealed and on 3rd August 2016 he attended the hearing of his appeal before the same Board of Directors who dismissed him and on 9th August 2016 the Board rejected his appeal. He contended that the procedure followed was not fair because under the Human Resource Manual, he was not supposed to be heard by the Board of Directors in the first instance but only on appeal.

8. He further contended that there was no valid and fair reason to warrant his dismissal. He produced a report by the Auditor General which was read and passed by Parliament on 23rd October 2018 to prove that he was not implicated in relation to the WTO Conference procurement irregularities. He however disputed the report by the Auditor General dated September 2018 filed by the respondent which purported to include his name by altering the report after going through the Parliament. He contended that only the report he produced was genuine because it was a copy supplied by Parliament after it was read and approved.

9. In view of the foregoing, he maintained that the procurement irregularities were done by other people outside his office and without involving him. He, therefore, prayed for the reliefs sought in the suit.

10. In cross examination CW1 admitted that as the Acting Procurement Manager, he dealt with procurement with regard to WTO Conference in Nairobi under the tender committee in which he was the Secretary. He however contended that the committee never passed any tenders because they were all rejected. He contended that the committee had the mandate to reject or approve tenders. He further contended that he was guided by the PPOA 2005 and Regulations under the Act. He maintained that, the tenders in this case were being done without his knowledge and outside his office.

11. He admitted that he was served with show cause letter and responded thereto. He further admitted that he was called before a disciplinary committee for hearing and thereafter dismissed. He also admitted that he appealed against the dismissal and that he was heard by the full Board of Directors but the appeal was dismissed. However, he maintained that the procedure was flawed because under Clause 10.17 of the Human Resource Manual, he was supposed to be heard by a committee convened by the Chief Executive Officer and not the Board because he was substantively in Job Group 4. He denied knowledge whether the Chief Executive Officer had also been taken through disciplinary process by the Board in connection with the same irregularities. He contended that the substantive Manager was on sick leave at the time.

12. CW1 admitted that the dismissal letter offered him 3 months' salary in lieu of notice plus benefits. He however contended that the offers made in the termination letter could not have cleared him from wrongful termination. He maintained that the tender committee rejected the tenders and advised the Chief Executive Officer, Mr. Fred Simiyu but thereafter the tenders were done outside his office, without involving him. He therefore contended that he cannot take responsibility for the said procurement process done by other people without his involvement.

Defence Case

13. M/s Christine Mutema Maluki, an Assistant Human Resource Manager testified as RW1. She also adopted her written statement dated 15th March 2019 and produced a bundle of documents as exhibits. In brief, he stated that the claimant was employed as Procurement Assistant from 1st December 2005 and from 16th February 2015 he was appointed the acting procurement Manager Job KICC Grade 3.

14. RW1 further testified that the claimant misconducted himself by abdicating his duties in respect of the WTO Conference at KICC Nairobi in 2015. She testified that a fair procedure was followed before the termination of the claimant's services. First he was served with a show cause letter and thereafter he was accorded a disciplinary hearing by a committee of the Board on 22nd March 2016 before dismissal on 20th May 2016. Second he was heard on his appeal by the full Board on 3rd August 2016 before the appeal was dismissed on 9th August 2016.

15. RW1 further testified that the termination letter offered him terminal dues. She contended that the interdiction letter was signed by the Chairman of the Board because the Chief Executive Officer was also interdicted in respect of the WTO Conference. She further contended that the claimant did not do clearance in order to have his terminal dues paid to him.

16. In cross examination RW1 admitted that the claimant was substantively in Job Grade 4 but he was acting in Job Grade 3 and drawing an acting allowance for that position. She further admitted the committee of the Board that heard the claimant ought to hear cases for Job Grade 1 – 3 while all the others Job Grade 4 – 8 were handled by the Management.

17. RW1 stated that the claimant was the Secretary of the tender committee but the Chief Executive Officer was the signatory. She admitted that she had no evidence that the tender committee passed any of the tenders awarded. She further stated that the claimant's role was coordination of procurement but the procurement process was initiated by the respective departments. She admitted that she had no evidence that the respective departments initiated any procurement process. She further admitted that there was no document to prove that the claimant participated in awarding any signal tender towards the WTO Conference. She stated that all the tenders were awarded by the Chief Executive Officer. She contended that 13 tenders were awarded through irregular manner but there was no evidence that the claimant was involved.

18. RW1 maintained that the claimant abdicated his duty by breaching Regulations of the PPOA but admitted that there was no documentary evidence to prove that the claimant received tender applications and failed to conduct the opening and procurement. She admitted that the tenders were awarded away from him and without his knowledge. She however contended that if the claimant was vigilant, he would have noticed irregularity and notified the Chief Executive Officer that tenders were being wrongfully awarded. She admitted that she did not know whether the claimant complained to the Chief Executive Officer.

Issues for Determination

19. There is no dispute from the pleadings, evidence and submissions that the claimant was employed by the respondent as Procurement Assistant, Job Grade KICC 4 on 16th April 2005 and on 23rd June 2015 he was appointed the acting Procurement Manager. There is further no dispute that he was dismissed from service vide the letter dated 30th May 2016. Section 45(2) of the Employment Act bars employer from unfairly terminating employment of his employee. Under Subsection 2, termination is unfair if the employer fails to prove—

- (a) that the reason for 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; and**
- (c) that the employment was terminated in accordance with fair procedure.**

20. The issues for determination are therefore –

- (a) Whether the reason for termination was valid and fair.
- (b) Whether a fair procedure was followed in terminating the claimant's services.
- (c) Whether the claimant is entitled to the reliefs sought.

Analysis and determination

Valid and Fair Reason for Termination

21. A valid and fair reason is one which relates to the employee's conduct, capacity and compatibility, or employer's operational requirement. Under Section 44 of the Act, the employee has a right to challenge his dismissal in court as in this case and when he does so, the burden of proving that the reason was valid lies with the employer under Section 43 and 45 of the Act.

22. The reason for terminating the claimant's services herein was cited in the termination letter dated 30th May 2016 as follows –

“The reason for your dismissal is breach of your obligations arising under your contract of service, the Laws of Kenya including procurement laws and regulations as well as KICC Policies and Manuals in that you especially failed to: -

- (a) Ensure that KICC procurement and supply chain activities and those concerning WTO Conference are in compliance with the laid down laws, regulations, policies and procedures.*
- (b) Notify your employer, KICC of procurement irregularities and advise on the legally acceptable way to deal with concerned tenders in line with your obligations as acting Procurement and Head of KICC Procurement Unit.*
- (c) Ensure documentation and management of KICC Procurement proceedings and records in accordance with procurement regulations.”*

23. After careful consideration of the evidence on record, it is a fact that the 13 tenders in issue herein were awarded by the Managing

Director through irregular manner and without involving the claimant and the tender committee. Five of them were awarded on 13th July 2015, about 3 weeks from the date of the appointment of the claimant to act as Procurement Manager. The other tenders were awarded in September and October 2015 again by the Managing Director without involving the claimant and the tender committee.

24. RW1 admitted that there was no evidence that any department of the KICC initiated the procurement process which could have been brought to the claimant and the tender committee before the tenders were awarded by the Managing Director.

25. The only time the claimant and the tender committee was involved was in relation to the following tenders: -

- (a) Supply and installation of conference visual equipment – KICC/40/15 – 16.
- (b) Supply and installation of computerised conference management system (CMS) – KICC/41/15 – 16.
- (c) Supply and installation of office furniture – KICC/46/15 – 16.
- (d) Proposed supply and installation of electronic surveillance system in KICC 49/15 – 16.
- (e) Proposed refurbishment of Shimba Hills – KICC/57/15 – 16.

26. The said tenders were brought to the Tender Committee on 13th November 2015 but they were all Rejected by the committee and referred back to the Tender Processing Committee for re-evaluation. In my view the Tender Committee was only being used as a rubber stamp to sanitize the irregular procurement process which had already been done by the Managing Director in July, September and October 2015.

27. Again from the evidence on record, it is clear that that procurement was done secretly by the Managing Director and without seeking any advice from the claimant. It is also clear from the Auditor General's Report dated September 2018 that the Board of Directors was also directly involved in the flawed procurement process by participating in the revision of the cost of the design, supply and installation of computerised conference management system tender. The report further accused the Board of the failure to carry out its oversight and fiduciary role as expected given the haphazard a manner in which the projects were initiated, implemented or not implemented at all.

28. In view of the foregoing therefore, I return that the claimant did not take part in the irregular awarding of the said tenders and he was not aware when they were being awarded. I also return that the Managing Director and the Board of Directs knew about the irregular tenders because they are the ones who participated in awarding the same.

29. As regards the records of the procurement proceedings, it is my view that the claimant was not involved in the awarding of the irregular tenders and as such no record of procurement proceedings involved were availed to him by the Managing Director and the Board. One wonders how the claimant was expected to keep regular records from irregular procurement exercise. That in my view was impossible.

30. The upshot of the above analysis is that that respondent has not proved on a balance of probability that the reason for dismissing the claimant was valid and fair as required by Section 43(1) and 45 (2) of the Employment Act.

The Procedure Followed.

31. In addition to the burden of providing the reason for the termination, Section 45(2)(c) of the Act requires that the employer must prove that a fair procedure was followed before terminating the employee's services. The said provision requires that the procedure must be in accordance with justice and equity. Under Section 41 of the Act, the employer must first accord a hearing to the employee before dismissing him for misconduct. The hearing must be done in the presence of another employee or shop floor union official of the accused employee's choice.

32. In this case the claimant was served with show cause letter and he responded to the same in writing. Thereafter he was invited to an oral hearing in the company of another employee of his choice. There is no dispute that the claimant was heard by the Committee of the Board of Directors and the verdict to dismiss him communicated by the letter dated 30th May 2016. Finally, it is common knowledge that the claimant appealed against the dismissal and he was heard on his appeal by the full Board of Directors but the appeal was rejected.

33. Applying the facts of the case to the provisions of Section 41 and 45 of the Employment Act, I am satisfied that the respondent has proved on a balance of probability that a fair procedure was followed before dismissing the claimant. He was informed of the charges he was facing and asked to show cause why disciplinary action should not be taken against him. Thereafter he was invited to an oral hearing by letter dated 15th March 2016 which gave him the right of being accompanied by a fellow employee of his choice. The said process fell within the four corners of a fair hearing as contemplated in Section 41 of the Act.

34. The claimant contended that the procedure followed was flawed because the Board of Directors had no mandate to hear his disciplinary case in the first instance. According to him his substantive position was Job Grade KICC 4 and his case should have been dealt with by a disciplinary committee constituted by the Managing Director with an appeal to the Board.

35. However I am of a contrary view because the case against the claimant was in respect of his alleged misconduct while discharging the duties of Procurement Manager Job Grade KICC 3. The case had nothing to do with his duties while acting in his substantive position of Job Grade KICC 4. I therefore dismiss the claimant's contention that the Board had no mandate under the Human Resource Policies and Manual to deal with his disciplinary case in the first instance.

Reliefs

36. In view of the finding that the respondent did not prove valid and fair reason for dismissing the claimant, I make declaration that the termination letter dated 30th May 2016 was illegal, irregular and unfair.

37. I will however not order reinstatement because 3 years have lapsed since the dismissal. Under Section 12 of the Employment and Labour Relation Court Act the court has no jurisdiction to grant such reliefs if 3 years have lapsed from the date of separation.

38. I however award the alternative prayer of damages under Section 49 of the Employment Act. He is awarded three months' salary in lieu of notice which was offered in the termination letter. He is also awarded compensation for unfair termination equalling to 12 months' gross pay. In awarding the latter I have considered the fact that the claimant had worked for the respondent for over 10 years without any warning letter and he never contributed to the termination through misconduct. I have also considered the fact that he was dismissed at the age of 48 years as per the Wealth Declaration Form produced as exhibit and he now is over 51 years which means his chance of getting another job is diminished.

39. I further grant the claim for 45 leave days because the same was shown to be due by leave form produced by the claimant and which was not rebutted by the respondent by leave records. I however dismiss the claim for general damages for ruining of career because it is not well founded.

Conclusion and Disposition

40. I have found that the dismissal of the claimant was unfair and unjustified because it was not grounded on a valid and fair reason. I have further found that the claimant is entitled to the remedies sought and consequently I enter judgment for him against the claimant against the respondent as follows based on gross pay of Kshs.90,175 as per the promotion letter and pay slip for May 2016: -

- (a) 3 months' salary in lieu of notice Kshs.270,525
- (b) 12 months compensation for unfair termination Kshs.1,082,100
- (c) 45 leave days x Kshs.46,675 x 1/20 = Kshs.105,018.75

Total Kshs.1,457,643.75

The said sum is less statutory deductions but in addition to costs and interest at court rates from the date hereof.

Dated, signed and delivered at Nairobi on this 17th day of January 2020.

ONESMUS MAKAU

JUDGE