



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 186 OF 2016**

**STEPHEN MAIGWA WACHIRA.....CLAIMANT**

**V**

**KENYATTA UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1. Stephen Maigwa Wachira (Claimant) was offered employment as a Senior Accounts Clerk by Kenyatta University (Respondent) on 10 September 1990 (the Claimant was promoted in the course of employment to Assistant Accountant).
2. Around June 2014, upon receipt of a report about malpractice in the maintenance stores, the Respondent caused investigations to be conducted. A report was released on 30 June 2014 and it recommended further investigations and suspension of certain employees.
3. On 25 July 2014, the Respondent suspended the Claimant pending investigations into allegations of having failed to verify that products delivered to the University were to specifications.
4. Upon receipt of the suspension letter, the Claimant wrote to the Respondent on 5 August 2014 seeking particulars/documents of the allegations to enable him to prepare a defence.
5. The Respondent replied on 15 September 2014 advising the Claimant that he could not be furnished with the particulars/documents as investigations were continuing.
6. On 24 June 2015, the Respondent invited the Claimant to attend a disciplinary hearing on 1 July 2015. The allegation in the invitation letter was failing to ensure that welrod welding rods and the 1x1x2 mm metal tubes which the University had ordered were delivered and instead 1x1x1.2 mm metal tubes and fontac welding rods which the University had not ordered were delivered and received without authority.
7. The Claimant made a written response, and also appeared before the Disciplinary Committee, and on 27 July 2015, he was notified of dismissal from service.
8. The Claimant was aggrieved and on 11 February 2016, he commenced these proceedings alleging unfair termination of employment and breach of contract.
9. The Respondent filed a *Response* on 4 April 2016 prompting the Claimant to file a *Reply to the Response* on 2 June 2016.
10. The Cause was heard on 27 June 2019 and 4 December 2019. The Claimant and the Respondent's Procurement Officer testified.
11. The Claimant filed his submissions on 10 January 2020 (should have been filed/served by 4 January 2020) while the Respondent filed its submissions on 20 February 2020.
12. The Court has considered the pleadings, evidence and submissions and adopted the Issues for determination as identified by the Claimant in his submissions.

**Unfair termination of employment**

**Procedural fairness**

13. The Claimant was issued with a notice setting out the allegations to confront. He made a written response and thereafter was invited to and did attend a disciplinary hearing where he made an oral defence.

14. Minutes of the hearing filed in Court show that a Union representative was present.

15. However, after the suspension and before the disciplinary hearing, the Claimant requested the Respondent to furnish him with certain documents in order to prepare a defence. The Respondent declined to give the Claimant the document because investigations were ongoing.

16. The right to be afforded an opportunity to be heard within the employment relationship will in appropriate circumstances include furnishing an employee with relevant documents to adequately prepare.

17. In the case at hand, the records sought by the Claimant were not restricted or confidential documents and the Respondent did not demonstrate any valid reasons for refusing to supply the Claimant with the same.

18. The Court is therefore satisfied that the Respondent was not in substantial compliance with the statutory procedural fairness requirements as envisaged under section 41 of the Employment Act, 2007.

### **Substantive fairness**

19. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of not only proving the reasons for the dismissal of the Claimant but that the reasons were valid and fair.

20. The Claimant was Assistant Accountant in charge of the Maintenance Stores. He also served as Secretary of the *Inspection and Acceptance Committee*. Among members of the Committee include a member from the user department.

21. The duty of the *Inspection and Acceptance Committee* is acknowledged under the Public Procurement and Disposal Act. The duties include verifying and confirming that goods delivered after procurement meet the tender specifications.

22. The duties are similar to those of stores in charge but distinct.

23. The Respondent contended that the Claimant was negligent because he accepted delivery of materials which did not meet the tender specifications.

24. The Claimant, however, maintained that a member of the user department was alerted when the products were delivered, and the person verified the same before they were accepted and that there was a Clerk of Works who had the technical knowledge on the specification of goods delivered.

25. The Claimant also testified that the Clerk of Works being the expert assured him that the goods met the specifications as outlined in the Local Purchase Orders.

26. The Respondent did not contest the Claimant's evidence that there was a Clerk of Works, and that he (Clerk of Works) had the technical know-how relating to the procured materials.

27. The duties of the *Inspection and Acceptance Committee* under section 48(3) of the *Public and Procurement and Disposal Act, 2015* include a review of goods to ensure compliance with tender specifications. It is not the duty of one person or the Secretary of the Committee.

28. The procured materials were of a technical nature and not all members of the *Inspection and Acceptance Committee* would have the technical knowledge to interpret the specifications. It was therefore reasonable of the Claimant to rely on the advice of the expert or the whole Committee.

29. The Court notes that the Respondent did not produce a copy of the *certificate of inspection and acceptance*, or minutes of the Committee while inspecting and accepting the materials in question.

30. It also appears to the Court that the Respondent mixed the Claimant's role and duties as In-Charge Stores and Secretary, *Inspection and Acceptance Committee*. The roles are distinct.

31. Without contrary evidence that the *Inspection and Acceptance Committee* and/or the Clerk of Works did not give a seal of approval to the acceptance of the products, the Court concludes that the dismissal of the Claimant was not only not in accord with justice and equity as contemplated by section 45(4)(b) of the Employment Act, 2007, but not fair.

### **Constructive dismissal**

32. The Claimant did not plead *constructive dismissal* but introduced the head of claim through his submissions.

33. In urging *constructive dismissal*, the Claimant contended that he was not heard before suspension without pay.

34. Since *constructive dismissal* was not pleaded, it would be prejudicial to the Respondent for the Court to consider it.

## **Reinstatement and Compensation**

35. The Claimant was dismissed on 27 July 2015. More than 3 years have elapsed since the dismissal and therefore reinstatement is not available by virtue of section 12(3)(vii) of the Employment and Labour Relations Court Act.

36. In lieu, the Court will award compensation.

37. The Claimant served the Respondent for about 14 years, and in consideration of the long period of service is of the view that compensation equivalent to 12 months' salary would be appropriate (gross salary as of June 2014 was Kshs 96,601/-).

## **Discrimination**

38. The Claimant prayed for general damages for injurious and discriminatory conduct. He did not prove that he was discriminated against or set out the particulars of the discrimination.

## **Breach of contract**

### **Salary during suspension**

39. The Claimant was suspended without pay and he did not receive a salary up to dismissal on 27 July 2015.

40. The suspension of an employee without pay without contractual authority, under the common law, is unlawful (see *Mckenzie v Smith* (1976) IRLR 345).

41. The Court has looked at the *Terms of Service for Staff in the Senior Clerical, Catering, Administrative and Technical Staff, 1988*. The Terms do not provide for suspension without pay.

42. The Respondent did not disclose any other legal basis for suspending the Claimant without pay.

43. The Court consequently finds that the Claimant is entitled to withheld pay during suspension which he computed as Kshs 1,593,648/-.

### **Accrued leave**

44. The Claimant made a plea for 30 days leave for 2014.

45. Annual leave with full pay is both a contractual and statutory entitlement.

46. The Respondent did not produce the Claimant's leave records and by dint of section 10(3) & (7) of the Employment Act, 2007, the Court will allow this head of the claim in the sum of Kshs 53,121/60.

### **Overtime, pension and other allowances**

47. The Claimant did not lay an evidential foundation for an award of overtime pay and the unspecified allowances and relief is declined.

## **Conclusion and Orders**

48. The Court finds and declares that the dismissal of the Claimant was unfair, and further that the Respondent was in breach of contract.

49. The Claimant is awarded

(a) Compensation	Kshs 1,159,212/-
(b) Salary during suspension	Kshs 1,593,648/-
(c) Accrued leave	Kshs 53,121/60
<b>TOTAL</b>	<b>Kshs 2,805,981/60</b>

50. The Claimant to have costs on half-scale for failing to file submissions within agreed timelines without any explanation.

**Delivered, dated and signed in Nairobi on this 28<sup>th</sup> day of February 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Gachoka instructed by Mwaniki Gachoka & Co. Advocates

For Respondent Mr. Thuo instructed by Njoroge Regeru & Co. Advocates

Court Assistant Judy Maina