



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 381 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 6th February, 2020)

ALLAN MWANGI MUTURI.....CLAIMANT

VERSUS

KENYA AIRWAYS AUTHORITY.....RESPONDENT

JUDGEMENT

1. The Claimant, Allan Mwangi Muturi filed a Statement of Claim dated 12th March 2015 for unlawful termination of his services against the Respondent, Kenya Airports Authority.
2. He avers that he was employed by the Respondent as a Manager Procurement and Logistics and given an appointment letter dated 30/01/2004. That the Respondent confirmed his employment with effect from 01/11/2004 and that on 14/03/2014, he was promoted to General Manager Procurement and Logistics.
3. He avers that the functions of his office are specifically prescribed in the **Public Procurement and Disposal Act, 2005 (PPDA), Regulation 8 of the Public Procurement and Disposal Regulations, 2006 (PPDR), the directives of the Public Procurement Oversight Authority (PPOA), the job description, and the Respondent's purchasing procedure and procurement work instructions.**
4. That during his 10 years' service with the Respondent, he worked under two senior MDs and never received any warning letter and that his conduct has never been subject of any disciplinary procedure.
5. He avers that on 27/08/2013, he received an Interdiction Letter directing him to cease discharging any responsibility with immediate effect. The letter stated that he had defied the directives from the Cabinet Secretary, Permanent Secretary and the Board of Directors in procuring goods and services using provisions of the procurement law with respect to "the clause on direct procurement".
6. The letter further requested him to show cause why disciplinary action should not be taken against him for gross insubordination of the board; failure to discharge his responsibility of offering practical solutions to the crisis; and demonstrating incompetence and lack of commitment to resolving the crisis. The crisis being referred to is a fire that broke out at the JKIA on 07/08/2013, which gutted down the international arrivals building and other parts of the terminal building.
7. He annexes copies of **Minutes** for meetings held on 10th, 12th, 13th, 14th, 16th August 2013 together with copies of **emails, a memo and a brief to the Chairman of the Board dated 26/08/2013**, all of which were communication on the procurement processes to be embarked on in helping restore the terminal to normal operations.
8. The Claimant avers that in a meeting held on 19/08/2013, the PS requested him to obtain a contractor with a signed contract and the listed items were given specific timelines and further states that the specifications were completed and received at the procurement department on the same day at 7.01pm and dispatched on 8.01pm, as confirmed by one bidder.
9. He contends he was not informed of the "No Objection to award letter" released by the World Bank on 23/08/2013 and that if the procurement department had received the said information, it would have passed the same to the Tender Committee for approval of the variation.
10. That although the procurement process directed by him obtained a competent contractor who saved the Authority about 100% saving, the Ag MD was not delighted and at 5pm on 27/08/2019, she served him with the letter of interdiction.

11. He denies he was issued with any verbal or written directive by the Ag MD who was his immediate supervisor and avers that he was not afforded a verbal or written warning as required by the Respondent's HR procedures, the law and the Constitution.
12. He avers that he responded in writing on 10/09/2013 providing a list of procurements that had been requisitioned and processed by the Procurement Department and the Tender Committee in the previous 14 working days since 07/08/2013.
13. That the list included both Direct Procurements and Restricted Tenders with many more having values below Kshs. 500,000/= yet he was interdicted for not using the clause on direct procurement.
14. That on 06/11/2013 he was invited to appear before the Staff Committee of the Board on 19/11/2013, which committee did not find grounds for the interdiction and recommended his reinstatement with immediate effect.
15. That however the PS called an urgent BODs meeting on 20/12/2013 and introduced new allegations against him with the meeting resolving to terminate his employment, almost 20 days after the interdiction period had expired.
16. He avers he was not afforded an opportunity to respond to the new allegations and that the reasons for the termination were different from those given for interdiction, which he had been cleared.
17. The Claimant continues to aver that his termination letter was backdated to 06/01/2014 but dispatched by registered mail to him on 17/01/2017, thus demonstrating how the termination was malicious, a witch-hunt and illegal.
18. That the Respondent acted unlawfully by putting him on half salary while on interdiction and disregarded the rules of natural justice and that further, no notice of termination of his services was issued prior to the effective date of termination. He particularise the special damages as follows:

a. Payment of 7 years' salary to age 60 official retirement age (Kshs. 548,541 x 12months x 7years) Kshs. 46,077,044.00

In the alternative and without prejudice:-

b. Three months' salary in lieu of notice Kshs. 1,645,623.00

c. Salary for 12 months from the date of termination on 06/01/2014 (Kshs. 548,541 x 12) Kshs.6,682,492.00

d. The equivalent of one month's salary for each year worked at the Respondent for 10 years Kshs. 5,485,410.00

19. The Claimant prays for judgment against the Respondent for:-

a. A declaratory order that the interdiction of the Claimant and the subsequent disciplinary proceedings was unconstitutional, unlawful, unprocedural, unfair, null and void and therefore of no effect.

b. A declaratory order that the termination of the Claimant's services by the Respondent was unlawful.

c. An order to compel the Respondent to unconditionally reinstate the Claimant to his position of General Manager Procurement & Logistics or any other reasonably suitable position at the same wage or in the alternative to this remedy loss of earnings for the remaining 7 years to retirement age at gross pay including projected pension and all other benefits deemed to have been accrued including but not limited to medical, leave and other benefits as granted to other employees.

d. In further alternative to prayer (c) above, the Respondent be ordered to pay:-

i. Three months' salary in lieu of notice Kshs. 1,645,623.00

ii. The equivalent of one month's salary for each year worked at the Respondent for 10 years Kshs. 5,485,410.00

iii. Salary for 12 months from the date of termination on 06/01/2014(Kshs. 548,541 x 12) Kshs.6,682,492.00

iv. Salary and allowances earned but unpaid up to and including 20th December 2013.

v. Pension benefits as provided for under staff pension scheme trust deed and rules.

e. General damages for unlawful termination

f. Certificate of service

g. Costs of the claim.

h. Interest on c, d (i), (ii), (iii) and (iv) above at Court rates.

20. The Respondent filed a Statement of Response dated 7th May 2015 admitting to have employed the Claimant but denying that it unlawfully terminated his employment.

21. It avers that the Claimant's job purpose was to plan and direct procurement of goods, works and services, to provide leadership in procurement and disposal process, review procurement policies and procedures to increase efficiency and relevance to the changing business environment and to provide secretariat to the tender, procurement and disposal committee including coordination of their activities.

22. Further, that his job complexity was to analyse the current market position and business prevailing at the time and recommend procurement method and procedure that would lead to realization for value for money.

23. It avers that the Claimant's interdiction was procedural and lawfully done and did not require prior notice or a hearing to be given and was further meant to enable it conduct full and proper investigations. With regards to the disaster that befell JKIA, it contends that the Claimant was engaged in personal endeavours which did not allow him to fully concentrate and discharge his duties as expected during the crisis period.

24. It avers that the Tender committee meeting held on 10/08/2013 discussed adjudication, approval and award of tenders for consultancy services, recovery of ICT services at JKIA and paving blocks for tents and not the procurement legal framework to be followed during procurement of any goods, services and works.

25. That the tender committee was only required to ensure that where another procurement method other than open tender was proposed, adoption of that alternative method would be in accordance with the Public Procurement and Disposal Act. That with the tender committee having agreed to urgent measures to solve the crisis all tenders involving the restoration project were to be done through direct procurement.

26. The Respondent continues to aver that the Claimant was absolved by the disciplinary committee but not from the offences he had been found culpable of after investigations were finalised. That at the end of the interdiction period, its board met and resolved to terminate his employment and pay all his terminal dues.

27. That the Claimant was granted both an oral hearing and a written representation and avers that the HR Manual provides that an employee on interdiction is entitled to half pay of his basic salary and full house allowances.

28. That the Respondent was under a statutory duty to implement decisions of the tender committee and the board and the Claimant's failure to follow the proposed method of procurement to address urgency in the crisis amounts to gross insubordination of the board.

29. It contends that the reasons given for termination of the Claimant were lawful and justifiable and termination of his employment was in accordance to the law. That if the Claimant has not been paid his terminal dues, it is because he has failed to clear with the Authority as required by law and it prays that this Court dismissed the Claim with costs to the Respondent.

30. The Respondent filed two Witness Statements made by its Ag. General Manager Human Resource, Carol Chibutsa on 11/06/2019 and the other made by its Manager, Administration & Staff Welfare, Elias Githinji on 03/07/2019. Carol states that the Claimant did not respond to the Respondent's letter dated 06/11/2013 and neither did he show up for the meeting as informed. Both Carol and Elias state that the Respondent has at all times been keen in settling the Claimant's terminal dues.

Claimant's Submissions

31. The Claimant submits that he relies on the case of **Fredrick Saundu Amolo –v- Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR** where Mbaru J held:-

“Therefore, before an interdict can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. This is what can be cited as the 3-dimension criteria;

First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a prima facie case;

Secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and

Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict is made.”

32. That **Clause N6 of the KAA-HR Manual** contains the disciplinary procedure, which was never adhered to by the Respondent because no preliminary investigation was tabled; no counselling was conducted; there was no verbal caution or reprimand; and no recommendation was issued to his immediate supervisor.

33. Further, the PS, Ministry of Transport usurped the powers of the MD and acted ultra vires **page 106 of the Manual** as it is the MD who

was to recommend to the board the summary dismissal of an employee against whom investigations confirm they were in breach of discipline.

34. That he only learnt about his dismissal when he rushed to court to stop his further interdiction in a different suit (*ELRC Cause No. 9 of 2014, Milimani*) which he withdrew after finding out he was dismissed.

35. He submits that the board solely relied on information by the PS and did not grant him a hearing and that the CS, PS and MD arm twisted the board so as to remove him from the Respondent's organization. That the Respondent has to date not shown why direct procurement was the best option available and submits he could not be a party to such unfair competition.

36. He submits that he was victimized for performing his duties in accordance with the PPDA contrary to **Article 236 of the Constitution**, which further prohibits dismissal, removal from office or demotion without due process of law.

37. That there was a predetermined decision to terminate his employment evidenced from the Ag. MD's brief of 26/08/2013 at annexure **AMM 14** which sought for his interdiction and that approval for the same was granted in the board meeting of 26/08/2013.

38. That **Clause N8(1) of the HR Manual** provides that interdiction shall not exceed 3 months but while his interdiction ought to have expired on 27/11/2013, he was dismissed 5 months after the said date.

39. That the dismissal did not adhere to **Section 41 of the Employment Act** and that he will be requesting the Court to take judicial notice that the president fired the Ag. MD, PS and the CS for mis-procurement and corruption charges and who were involved in his sacking.

40. The Claimant relies on the case of **Rebecca Ann Maina v & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where the Court found that where an employee facing disciplinary action legitimately feels that the process is manned with irregularities or stage managed towards his dismissal, the court will intervene.

41. He submits that the same board that was to constitute an appeals committee was the same one that disregarded the recommendation by the staff committee for his reinstatement. That this made him lack confidence in the whole process and since the Respondent failed to show how he was incompetent, his termination was unfair.

Respondent's Submissions

42. The Respondent submits that the Claimant's negligence in performing his duties was a ground for summary dismissal under **Section 44(4) (c) of the Employment Act**.

43. That this Court should rightly note that the termination letter dated 06/01/2014 pointed out that one of the reasons for termination was the Claimant failing to respond to the grounds raised in the interdiction letter.

44. It submits that in compliance with **Section 43 of the Employment Act**, it has adduced evidence in support of the reasons for termination of the Claimant's services.

45. That even though the staff committee recommended the Claimant's reinstatement to the board, **Clause N. 10(4) (b) (ii) of the HR Manual** provides that only the board can make the final decision for an employee of Grade 7.

46. That the Claimant failed to appeal the dismissal as stipulated under **Clause N.12 of the HR Manual** and instead chose to file this claim.

47. It submits that in support of the tender committee's decision, it relies on **Section 74 of the Public Procurement Disposal Act** which states that:-

1. "A procuring entity may use direct procurement as allowed under subsection (2) or (3) as long as the purpose is not to avoid competition.

2. A procuring entity may use direct procurement if the following are satisfied:-

a. There is only one person who can supply the goods, works or services being procured; and

b. There is no reasonable alternative or substitute for the goods, works or services.

3. A procuring entity may use direct procurement if the following are satisfied:-

a. There is an urgent need for the goods, works or services being procured;

b. Because of the urgency the other available methods of procurement are impractical; and

c. The circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity."

48. It is submitted by the Respondent that termination of the Claimant's employment complied with **Section 45 of the Employment Act** and that the Claimant has not adduced evidence to the contrary or to the effect that the disciplinary procedure was unfair as alleged.

49. That the Claimant did not also raise any complaints during the disciplinary proceedings regarding any irregularities and that it is absurd for him to allege irregularities in the process that initially recommended his reinstatement.

50. That wrongful dismissal cannot arise where the same is carried out in accordance with the terms of contract as was held in **Gitau vs. East African Power and Lighting Co. Limited (1986) KLR 365** cited in the case of **Darn Otieno v Stanbic Bank Kenya Limited [2012] eKLR**.

51. The Respondent submits that in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, the Court held that reinstatement should not be given except in '*very special circumstances*'.

52. That in the instance case, 6 years have lapsed since the Claimant's services were terminated with the position also having been filled and that it is untenable to reinstate him should the Court find the termination unfair.

53. Further, under **Section 12(3) of the Industrial Court Act**, the Court can only order reinstatement of an employee within 3 years of dismissal.

54. It submits that the prayer for 7 years' salary to age 60 is unfounded in law because employment contracts are not a lifetime commitment by an employer to an employee and that the Claimant can only be compensated as stipulated under **Section 49 of the Act**.

55. That should the court find the termination was unfair, it proposes that the Claimant be compensated in accordance with Section 49 of the Employment Act as follows:- one month's salary in lieu of notice; 6 months' salary for unfair termination; and any outstanding leave days. The Respondent however reiterates that it is the Claimant who has refused to collect his benefits which were offered to him.

56. I have considered the averments and submissions of both Parties. The issues for this Court's determination are as follows:-

- 1. Whether there were valid reasons to terminate the Claimant.**
- 2. Whether due process was followed before the termination.**
- 3. Whether the Claimant is entitled to remedies sought.**

57. On issue No. 1, the disciplinary process against the Claimant stated vide a letter dated 27th August 2013 interdicting the Claimant for the following reasons:-

“Dear Allan,

RE: INTERDICTION

BACKGROUND

Subsequent to the fire incident at the Arrivals Terminal at JKIA on 7th August 2013, an Emergency Management and Business Continuity team was constituted to develop a roadmap with a view to normalizing operations at JKIA. The Cabinet Secretary or his designated nominee chairs this Steering Committee and members are drawn from all government agencies and the airlines.

The mandate of this committee is to "restore essential services to enable JKIA operate". To meet this objective, procurement of materials, goods and services have to be fast tracked.

BOARD ACTION AND RESOLUTION

The Board through its Technical and Finance Committee directed Management to utilize the provisions of the procurement law and use the clause on direct procurement which is allowed under emergencies in order to fast track the restoration of JKIA facilities.

The Cabinet and the Principal Secretaries have equally, advised the Board and Management to use "direct procurement" in the current emergency situation at JKIA.

Please note that the Director of PPOA was invited on the 12th of August to advise and clarify issues in relation to procurement. He stated that it's within the law to use direct procurement during an emergency. However, you acted contrary to the directives of the Board and advice from both the Cabinet Secretary and the Principal Secretary.

The Board and Management are expected to provide leadership together with other agencies of government in restoring

JKIA and implementing the critical services within the agreed timelines.

SHOW CAUSE

As the General Manager- Procurement and Logistics, you have defied the directives from the Board in procuring goods and services using the provisions of the procurement law with respect to "the clause on direct procurement". This action has resulted in the Corporation losing many critical days in delivering on its mandate during this crisis.

Please show cause why a severe disciplinary action should not be taken against you for:

1. Gross insubordination to the Board

2. Failure to implement directives of the Board

3. Failure to discharge your responsibility as the General Manager - Procurement and Logistics by offering practical solutions to the crisis

4. Demonstrating incompetence and lack of commitment to *resolving the crisis*.

You are hereby* interdicted from work **and you should cease to discharge your responsibility with immediate effect. As per the Human Resource Policy, you will be eligible to payment of half your basic salary and full house allowance. You are further advised that you will not report to the office premises unless otherwise requested by a duly authorized person.*

You are hereby directed to hand over your duties to the Manager Logistics; Mr. Hobadiah Orora with immediate effect and your interdiction takes effect from 27th August 2013. You will be advised by the undersigned on the next cause of action.

Yours faithfully,

Signed

Lucy Mbugua

Ag. Managing Director"

58. The Claimant responded to this letter of interdiction also showing cause why severe disciplinary action should not be taken against him.

59. In his response vide the letter dated 10th September 2013, the Claimant pointed out that: he conducted the procurement process as per law and had no power to unilaterally decide to use Direct Procurement method.

60. The Respondents responded to this letter asking him to submit a further response adducing the specific issues are itemised in the interdiction letter.

61. The Claimant again responded to his letter and reiterated his previous averments in the initial response to the show cause and interdiction letter.

62. On 4th December 2013, there was a meeting of the board where issues of the interdiction of Claimant was considered and the finding as per the minutes attached show that the committee found no plausible reasons to interdict the Claimant as there was no written Board resolutions for which he was given specific directives and which he failed to implement.

63. Another Board meeting was held on 20th December 2013, which now recommended the termination of the Claimant.

64. In considering whether there were valid reasons to warrant termination of the Claimant, I note that indeed he was accused of failing to implement directions of the board which directives were never submitted to this Court and there is no indication that he was actually given certain directives which he failed to obey as failure to discharge his duties and responsibilities and even incompetence in his work.

65. The Claimant explained how he performed his duties in procurement of goods and services. The 1st committee of the board found the explanation plausible.

66. It is noteworthy that the board meeting of 20.12.2013 changed the first finding without hearing the Claimant and made a unilateral decision to terminate the Claimant's services.

67. In this case, though the Respondent avers that they had valid reasons to terminate services of the Claimant, there is no evidence of the validity of the reasons, the Claimant having exonerated himself in his reply to the show cause letter and also having been found not culpable by the board that initially heard him.

68. Section 43 (1) & (2) of Employment Act 2007 states as follows:-

1. "In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".

69. In my view, the Respondent failed in this as there is no proof that the Claimant acted as accused.

70. On issue of due process again, Section 41 of Employment Act states as follows:-

1. "Subject to section 42 (1), 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.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make".

71. There is also no proof that the Claimant was given any hearing by the board sitting on 20/12/2013 which decided to terminate him. In the circumstances I find the termination of the Claimant unfair and unjustified as envisaged under Section 45(2) of Employment Act 2007 which states as follows:-

2. "A termination of employment by an employer 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".

72. In terms of remedies, I find Claimant is entitled to maximum compensation for the mistreatment meted out against him and I award him as follows:-

1. 12 months' salary as compensation for the unfair and unlawful termination = 12 x 548,541 = 6,582,492/=

2. 3 months' salary as notice pay = 3 x 548,541= 1,645,623/=

3. Pension benefits from the pension scheme.

4. Issuance of a certificate of service

5. Equivalent of one month salary for each year worked for the Respondent as decided by the board on 20/12/2013 = 10 x 548,541= 5,485,410/=

TOTAL awarded = 13,713,525/=

Less statutory deductions

6. Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 6th day of February, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jepkorir holding brief Magee Wa Magee for Claimant

Oketch for Respondent