

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 176 OF 2015

MICHAEL KARIITHI MUTHEE.....CLAIMANT

VERSUS

MATHIRA WATER & SANITATION CO. LTD.....RESPONDENT

JUDGMENT

1. The Claimant herein sued his erstwhile employer for the alleged unlawful and unfair dismissal from employment. The Claimant averred that he was employed on 2nd March 2009 by the Respondent as a sewer attendant/sewer operator earning Kshs. 11,450/- a month. He averred that he was given a 30 day suspension on 15th August 2012 upon certain allegations of failing to install a tank and switching off his telephone. The Claimant averred that on 26th September 2012 he wrote a letter explaining that installation of water pumps was not part of his duties with the Respondent and that his duty was to ensure proper functioning of the system and that he had not refused to install the water meter. The Claimant averred that on 2nd October 2012 he received a further suspension for 14 days as the matter was not finalized and he was to report back to work on 10th October 2012 to know the ruling on his case. He averred that on 16th October 2012 he received another letter of suspension and minutes of a disciplinary meeting that purportedly took place on 6th September 2012. The Claimant averred that on 21st November 2012 he received a letter of interdiction pending final decision. The Claimant averred that he received a letter of dismissal on 28th February 2013. The Claimant averred that he subsequently reported the matter to the union which reported the dispute to the Nyeri County Labour Officer on 10th October 2015. The Claimant averred that after several abortive attempts to meet and resolve the matter the Labour Officer gave the Claimant a certificate to file the claim in court. The Claimant averred that his dismissal was unfair and unlawful, that the dismissal was malicious, vexatious and in violation of the Claimant's rights to fair labour practices and that further he was condemned unheard. The Claimant averred that he was entitled to reinstatement without any loss of benefits and in the alternative an order compelling the Respondent to pay the Claimant his salary, allowances and other benefits until his retirement at the age of 60 years as well as compensation for the loss of employment. He also sought a certificate of service, costs of the suit and interest at court rates.

2. The Respondent filed its defence in which it averred that the Claimant's dismissal from employment was on account of gross misconduct in line with Clause 8 of his letter of employment as read together with Section 44(4) of the Employment Act. The Respondent averred that the Claimant, without leave or other lawful cause absented himself from his place appointed for the performance of his work on 13th August 2012, wilfully neglecting to perform his work which it was his duty to perform and acting in a manner that was insulting to a person in authority over him, failing and refusing to obey lawful and proper instructions which were within the scope of his duty and conducting himself in a manner which tended to bring the company into disrepute. The Respondent averred that the Claimant was suspended for failing to install a temporary water pump to remove waste from the retention pond at Kirigu so as to allow inspection of the submersible pump which had failed to pump the sewage. The Respondent averred that the other reason for suspension was the requisition of 40 litres of diesel from the commercial manager purportedly for use in the diesel powered generator while well aware that the generator was not in use due to lack of a battery to start it and the theft of some vital components. The Respondent averred that due to failure to install the pump, the pond filled up and raw sewage spilled into a public stream endangering the lives of residents by polluting a water body. The Respondent averred that it was part of the Claimant's duty and within the scope of his employment to install the water pump to clear the sewerage. The Respondent averred that the Claimant attended the disciplinary committee meeting on 6th September 2012 as borne out by the minutes of the day. It averred that the dismissal was given in accordance with the Employment Act. The Respondent averred that the Claimant through the union having reported the dispute to the Ministry was required to have the matter resolved within 30 days from the time of referral, the dismissal having taken place on 28th February 2013 the suit was statutorily time barred. The Respondent denied that the dismissal was malicious, vexatious or in violation of the Claimant's rights to fair labour practices and that he was condemned unheard. The Respondent averred that the Claimant was not entitled to reinstatement because of his misconduct and the theft of company property. The Respondent averred that the Claimant was not entitled to payment of salary till the age of 60 years as he has not earned or worked for the same. The Respondent urged the dismissal of the claim with costs.

3. The suit was dismissed for non-attendance on 10th June 2019 but on application the suit was reinstated for hearing and after hearing the Claimant and the Respondent's witness David Gathogo Kamau. The Claimant testified that he was employed as a sewer attendant and was accused of refusal to install a pump at the sewerage. He stated that the task was not part of his docket and that he had no power to install sewerage pump. He testified that he had no such skill as you must be an electrician. He stated that he could not install the pump without an electrician and at the time there was no electrician. He stated that he was at the workplace on the material day and Robinson Kabakia was not there at 3.30pm. He said that he did not take the diesel and that the electrician was to collect the fuel order. He stated that the dismissal was not proper as he was heard and the determination was that he goes back to work. He stated that he was told to resume and pay for the pipe which he was surcharged Kshs. 1,500/-. He testified that he received another letter which indicated that he should go through the full Board and that is how he got dismissed. He stated that he had not seen the full minutes of the meeting. He stated that his dismissal was unfair and unlawful. In cross-examination he testified that the letter in the Respondent's bundle of documents indicated that the generator was not serviceable. He stated that he did not requisition the diesel and that it was requisitioned by someone else. He was referred to his bundle of documents and the minutes therein and stated that the ones for the full Board were not seen. He was referred to the Respondent's bundle and stated that the recommendation was for the adoption of the Board resolutions. He admitted receiving the dismissal letter. He was referred to the minutes in his bundle and he responded that the minutes indicated that he was accused of leaving work early. He testified that the charges

were misplaced. He stated he did not steal the pipe. He maintained he was not away from work before time. He stated that the electrician is the one who had requisitioned the diesel. He said that it was not his responsibility to install the pump. He stated that the letter of dismissal gave the reason for the dismissal and that the committee deliberated and recommended his dismissal. He later stated that he was heard but they did not recommend his dismissal. He testified that he did not appeal the decision. In re-examination he stated that he attended one disciplinary hearing and the recommendation was that he return to work. He stated that the Board minutes recommended the adoption of the Board resolution. He testified that he had not seen the Board resolutions. He was referred to the 30 day suspension letter and stated that he was at work at the material time but was not at work at 6.00pm. He stated that he left at 5.00pm and did not requisition diesel as he has no authority to requisition. He testified that his name does not appear on the requisition. He stated that he would have been dismissed had he made any mistake. He stated that it was indicated that the electrician should explain why there was no installation. He maintained that he did not commit any offences.

4. The Respondent's witness testified that he was the Managing Director of the Respondent and that in 2012 he was the company's commercial manager. He stated that the Claimant was suspended per letter of 15th August 2012 and the letter clearly stated the reason for the suspension. He testified that the Claimant was to install pump together with his colleague and they did not install it. He stated that the Claimant did not inform the supervisor and when the supervisor started looking for the Claimant the Claimant was not at work in the daytime and even at 6.00pm. He stated that the Claimant had absconded his duties and that the Claimant was called for a disciplinary hearing on 6th September 2012. He stated the committee found that the Claimant had a poor working relationship with his immediate supervisor. He stated that the Claimant had stolen a 3" pipe. He said the sewer pond overflowed and raw sewage flowed to the river endangering the lives of citizens, expenses for the company for action by NEMA and WARMA. He said the Claimant was found to be difficult to be accessed by the supervisor through phone and the Board decided to appoint a committee to investigate. He said the Claimant was summoned to appear and that he did appear. He testified that the Claimant was given notice of suspension and was thereafter dismissed. He stated that the committee adopted the resolution for the dismissal of the Claimant. He stated that the letter of dismissal was very clear as the Claimant was not dismissed for failing to install a pump as he was not an electrician. He said the Claimant was to work with an electrician in installing pump. He stated that the Claimant was found guilty and that there were grounds for dismissing him. In cross-examination he stated that the Claimant was a sewer attendant at the sewerage treatment plant at Kirigu. He stated that the Claimant was dismissed for failing to oversee the repair of the pump. He testified that the Claimant was not a technician but was an attendant at the sewerage plant. He stated that the committee recommended that the Claimant be reinstated and closely monitored for 6 months, surcharged for the 3" pipe and that the Claimant was to be accessible. He stated that the final decision was to be by the final organ of the company that determined the issue. He stated that there were no minutes to show the decision was overturned. He testified that the Claimant's dismissal was for failure to supervise the repair of the pump leading to overflow to Kirigo river. He was referred to the fuel order and confirmed that it was cancelled and was in the name of Muhara. He stated that the Claimant was coordinating the issue of fuel for the pump to be repaired. In re-exam he stated that the Claimant stole company property which is gross misconduct and grounds for summary dismissal. He testified that the third finding was that the Claimant abandoned his workplace, was not on site and could not be reached on phone. He said that was gross misconduct and there was need for the Claimant to work with the electrician and he did not. He stated that the findings of the committee were overruled by the Board. He testified that the dismissal was on gross misconduct for absconding the station and theft of the pipe. He conceded the dismissal was not on account of non-installation of the pipe. He stated that there was reason to terminate the Claimant who was heard by both the staff committee and the committee of the Board as there were grounds to terminate. That marked the end of oral testimony and the parties were to file written submissions.

5. The Claimant submitted that the issues for determination were whether the termination of employment of the Claimant by the Respondent was lawful as envisaged by the Employment Act, and secondly, if the court were to find the Claimant was unlawfully terminated what reliefs is he entitled to. On the first issue, the Claimant submitted that the dismissal on 28th February 2013 was after the report of the staff finance committee meeting which had deliberated on the Claimant's case and made recommendations. The Claimant submitted that the recommendations were a strong reprimand and close monitoring for 6 months, surcharge for the 3" pipe and the Claimant and his supervisor were to endeavour to work together as a team. It was submitted that the electrician was also supposed to explain why he had failed to do his part as instructed by the supervisor. The Claimant submitted that the report alluded to in the dismissal letter was never produced in court and there were no minutes to support the dismissal of the Claimant. The Claimant submitted that the surcharge was effected per the payslip for November 2012 in line with the recommendations of the committee. He submitted that the installation of the pump was not within his docket a fact conceded by the Respondent's witness. The Claimant submitted that the fuel requisition was by Muhara and the Respondent never demonstrated that it was connected to the Claimant. The Claimant submitted that he had proved by evidence that his dismissal was unlawful and he was entitled to claim the sums due on his claim being 12 month's compensation, one month salary in lieu of notice and service for 3 years.

6. The Respondent submitted that the Claimant failed to obey lawful orders and absconded duty. It submitted that the Claimant committed acts of gross misconduct and the Respondent was entitled to terminate the services of the Claimant. The Respondent relied on the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR** where Nduma J. held that the burden of proving an unfair termination took place shall rest on the employee while the burden of justifying the grounds for the termination or wrongful dismissal shall rest on the employee. The Respondent submitted that the court should hold that there were valid reasons for the suspension and eventual termination of employment. The Respondent also cited the case of **Anthony N. Kang'ang'a v Mathira Water & Sanitation Company [2019] eKLR** which it submitted is on all four with the present case. The Respondent submitted that the Claimant was served with an interdiction letter stating the charges and notifying the Claimant he would be summoned for a disciplinary hearing and he had a union representative. The Respondent submitted that there was fair procedure under Section 41 and the valid reason for termination under Section 43. The Respondent submitted that the suit was a waste of judicial time as the Claimant had even admitted his guilt. The Respondent urged the dismissal of the suit with costs.

7. The Claimant was a sewer attendant and from all accounts he was required to help resolve a problem that occurred at the retaining pond at Kirigu. He asserts that the installation of the pump required an electrician and none was available at 3.00pm. He was also accused of switching off his phone. It is apparent that the Claimant was responsible for the repairs to the pump alongside the electrician. They failed to execute the repairs and thereafter the Claimant went missing. He did not satisfactorily explain his absence at his work place nor did he demonstrate that the dismissal was in any way unfair or unlawful. The record shows he was given not only room to give an explanation but also a hearing and that his case was considered not once but a few times before the determination was made to relieve him of his duty. Under Section 43 of the Employment Act, it is imperative that the employer has good reason for the action taken while the employee has to demonstrate that there was failure to adhere to the law in the dismissal. In this case, the Claimant failed to demonstrate lack of procedure or

process or unfairness in the dismissal. The Respondent demonstrated good cause for the dismissal. In the premises the suit would only be fit for dismissal. There shall be no order as to costs.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 30th day of March 2020

Nzioki wa Makau

JUDGE