



LIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 799 OF 2016

ABDALLAH AHMED SHARIFF.....CLAIMANT

-VERSUS-

NATIONAL SOCIAL SECURITY FUNDRESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th March, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 05.05.2018 through Mukele Moni and Company Advocates. The claimant changed its Advocates to J.A. Guserwa & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. The sum of Kshs. 851, 500.40 being one month salary in lieu of notice Kshs.170, 300.08; and gratuity for the period worked Kshs. 681, 200.32.
- b. 12 months' gross pay being compensation for unlawful dismissal.
- c. An order reinstating the claimant back to employment with the respondent.
- d. Costs of the suit.
- e. Interest on a, b, and c, at court rates.
- f. Any other relief as the court may deem just and fit to grant.

The respondent filed the memorandum of defence on 09.03.2018 through the Federation of Kenya Employers. The respondent prayed that the Court finds that the claimant's termination was lawful and fair and to dismiss the claimant's suit with costs to the respondent.

The claimant filed a response to the memorandum of defence on 27.04.2018.

To answer the **1st issue** for determination, the Court returns that there is no dispute that parties were in a contract of employment. The respondent employed the claimant effective 30.06.2006 as an Assistant Enforcement Officer. Around 14.04.2014 he was to the position of Research Officer.

To answer the **2nd issue** for determination the Court returns that the claimant's employment was terminated on 31.10.2014 at a time the claimant earned a monthly consolidated salary of Kshs.170, 300.00. The claimant's employment was terminated on the ground that there was a discrepancy between the certificate held by the respondent and the records held by KNEC about the claimant's KCSE examination. The letter stated that the verification revealed as follows:

- a. The claimant registered and sat for the 1995 KCSE examination at Kakamega High School under index No. 603001187 but the index number was altered from 603001187 to 603001087.
- b. All the subject grades had been altered. The mean grade had also been altered from D to C- (minus).

The letter of termination referred to the show-cause letter dated 26.08.2014, claimant's representations on 04.09.2014 and appearance before

the disciplinary committee on 29.09.2014 over the matter. The termination was effective 31.10.2014 and he would be paid one month's salary in lieu of notice once he cleared. On 01.04.2015 the claimant appealed against the termination. By the letter dated 28.10.2015 the termination was upheld.

The **3rd issue** for determination is whether the termination was unfair. The claimant's case is that his termination was unfair because he was not accorded due process thus no notice of termination issued; not informed particulars of allegations; no evidence was provided on the alleged discrepancies on his KCSE certificate; failing to show he was involved in altering his KCSE certificate; denial of opportunity to make representations on the allegations against him; absence of a union floor representative at disciplinary hearing; the allegations were not investigated; and acting unjustly and inequitably.

The respondent's case is that the termination letter was the notice of termination; show-cause letter of 26.08.2014 set out the allegations and invited the claimant to explain discrepancies in his KCSE certificate; the show-cause letter set out the details of the allegations; the claimant was given the KCSE certificate by KNEC he had presented to support his application for employment and the KNEC records and asked to explain; the claimant stated his certificate had been altered and he carried the burden to show the one he presented at application for job was authentic; the claimant was aware of his entitlement to appear with a representative but failed to do so; minutes of disciplinary hearing of 29.09.2014 show that the claimant was given an opportunity to make representation and he brought Mahmoud Sebit as his witness; the termination was procedural; and the reasons were investigated and valid.

The Court has considered the evidence. The Public Service Commission wrote to the respondent the letter dated 27.06.2012 requiring the respondent to authenticate academic certificates for the respondent's employees and if the certificates are found not authentic, the respondent to take disciplinary action in accordance with applicable service regulations. The Commission required the exercise to be carried out annually and annual reports filed with it. The verification with KNEC showed that the certificate the claimant presented when he applied for employment was not genuine.

The claimant testified that he received the show-cause letter to explain the allegation that he had forged his form 4 KCSE certificate. He replied that he was not aware of the forged certificate. He attended the disciplinary hearing but not given chance to explain. He was later terminated from employment. His case was that he was never shown the KCSE certificate that he had forged. On appeal the termination was upheld. He stated that he was not paid the one month in lieu of notice.

The Court finds that the respondent followed the due procedure of a notice and hearing. The claimant was heard including at the appeal stage. Taking the disciplinary steps invoked into account, the Court returns that the procedure was not unfair in view of sections 41 and 45 of the Employment Act, 2007.

On the reasons, the evidence is that the claimant submitted a KCSE certificate for mean grade C- (minus) and which was duly certified as true copy of original at the time of employment. It was so certified on 29.06.2006. By the letter dated 19.08.2014 the KNEC verified the discrepancies in the claimant's KCSE certificate subject of the allegations herein. The Court considers that the material before the respondent as at the time of termination were sufficient that the reason for termination was valid in terms of section 43 of the Employment Act, 2007.

The Court therefore returns that the termination was not unfair and the claimant is not entitled to compensation in that regard.

The **4th issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

- a. There is no dispute that the claimant is entitled to one month pay in lieu of notice now awarded by the Court at Kshs.170, 300.00.
- b. The claimant has not established the basis for gratuity and the prayer will fail as alternative arrangements for pension existed per section 35 of the Act.
- c. The prayer for reinstatement was surrendered as the 3 years of limitation for grant of the remedy had lapsed.
- d. In view of parties' margins of success and costs follow the event, the respondent to pay 50% of the claimant's costs of the suit. While awarding the partial costs, the Court has considered that the respondent has not denied that despite demand, it has failed to pay in lieu of the termination notice as claimed and awarded.

In conclusion the suit is hereby determined and judgment entered for the claimant against the respondent for:

1. The respondent to pay the claimant a sum of **Kshs.170, 300.08** by 01.05.2020 failing interest at court rates to be payable thereon from the date of filing the suit till full payment.
2. The respondent to pay 50% of the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 13th March, 2020.**

BYRAM ONGAYA

JUDGE