



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 581 OF 2015

DAVID KARIMI.....CLAIMANT

VERSUS

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.... RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 24.4.2015 alleging that his employment was unfairly terminated by the respondent on 24.2.2015 and prayed for Ksh.9,028,500 made up of terminal benefits plus compensation for the unfair termination.
2. The respondent filed her defence on 10.6.2015 denying the alleged unfair termination and averred that the termination was grounded on justifiable reasons and a fair procedure was followed. She therefore prayed for the suit to be dismissed with costs.
3. The Claimant gave evidence and called two witnesses while the respondent called one witness. After the hearing both parties filed written submissions.

CLAIMANT'S CASE

4. The Claimant testified as CW1. In brief he stated that he joined the respondent in 1978 as a Clerical Officer and rose through the ranks to a management position of Registration Officer earning Kshs. 195000 per month.
5. He further testified that on 26.8.2014, he received a show cause letter alleging that he presented a forged academic certificate, namely EACE 1975. The letter alleged that the index number on the certificate had been changed from K410106 to K410105, the grades for 2 subjects had been changed and the overall results was changed from Division 3 to Division 2. He responded to the show cause letter denying the alleged offences. In his response he enclosed a letter from the principal of his former school together with several documents, including result slips, as evidence that the certificate was genuine and that his index number for EACE 1975 was indeed K410105 and not K410106 which belonged to Peter Manguye Muthoka.
6. The Claimant further testified that he appeared before a disciplinary committee and defended himself of the offence of using a forged academic certificate to secure employment. However, the employer was not satisfied with his defence and proceeded to dismiss him from service by the letter dated 24.2.2015, without any police investigations.
7. Subsequently, he was arrested and charged with the offence of forging the said certificate. However, he stated that the charge was withdrawn on 7.5.2019 after Kenya National Examination Council (KNEC) wrote a letter dated 18.4.2019 to the Director of Criminal Investigations indicating that the claimant's certificate was genuine and not forged.
8. On cross-examination, the claimant admitted that he had seen the KNEC verification report in court but denied knowledge whether or not the respondent requested for a print out of the results from his former school.
9. M/s. Peninah Khabuchi, Secretary Jamuhuri High School testified as CW2. She stated that her duties include record keeping of examination result slips and certificates from KNEC pending collection by the candidates. She produced a hardcover book register for KCSE and EACE for 1965-1986 where she records the candidates when they collect their certificate.
10. Referring to the entries in the said register, she confirmed that the claimant's index number was K410/105 and he collected his certificate on 17.1.1977 the same day with Peter Manguye Muthoka whose index number was K410/106. She further confirmed that index number K410/104 belonged to Joseph Otanga. She also produced a certified copy of the claimant's EACE certificate in which he scored grade 3 in Lugha Ya Kiswahili and grade 8 in physical science while his aggregate results was Division II. She concluded by stating that the said

Register of Certificates was copied and served on the respondent.

11. M/s. Jane Nabiki Kashu, Principal Research Officer KNEC, testified as Cw3. She stated that she is in charge of the Records and Archives and therefore the custodian of examination results records at KNEC. She produced results print out for EACE 1975 for Jamhuri High School and stated that the only source of a printed certificate and result slips from the candidates is either the candidates themselves or the school.

12. She further testified that after the EACE was disbanded, the examination information was forwarded to KNEC as database. On being taken through page 543 and 544 of the results print out, she admitted that the same had anomalies because some index numbers were shared by two candidates including index number 4103/100, 4103/110 and 4103/113. She further admitted that the verification report she made to the respondent was from the said database which had incorrect information.

13. On Cross examination, she confirmed that when she received a request for verification from the respondent, she relied on the said database to verify the certificates presented. She reiterated that KNEC does not retain copies of examination certificates.

DEFENCE CASE

14. M/s. Carlyne Okulu, the Human Resource Manager for the respondent testified as RW1. She stated that the respondent received a circular from the Public Service Commission dated 22.6.2012 requiring all public institutions to verify certificates of their employees. In compliance, the respondent sought verification from KNEC and the latter gave a report indicating that 13 out of the entire staff had presented forged certificates including the claimant.

15. She testified that the report indicated that the claimant had altered the index number from 106 to 105, the grade for Lugha ya Kiswahili from 9 to 3, the grade for Physical Science from 9 to 8 and the aggregate grade from Division III to Division II. As a result, the claimant was served with a show cause letter and in response to the letter he stated that he had personally initiated the verification process from the KNEC and Jamhuri High School.

16. She further testified that on 5.9.2014, the Principal of the school wrote to the respondent indicating that the claimant's index number was 105 and enclosed a copy of the Hand Delivery Book of how students had collected their certificates. As a result, the respondent wrote another letter to KNEC for further verification and KNEC responded by the letter dated 26.9.2014 reiterating that the claimant's certificate contained alterations.

17. RW1 further testified that, on the basis of KNEC's verification report, the claimant was invited to a disciplinary hearing after which he was dismissed on 24.2.2015 on account of the same report from KNEC which indicated that he had forged his 1975 EACE Certificate.

18. On cross-examination, RW1 admitted that the verification Report from KNEC did not attach the alleged forged certificate or any other document. She further admitted that the claimant responded to the show cause letter attaching a letter from Jamhuri High School indicating that his index number was 105 and not 106. She further confirmed that the school also wrote a letter to KNEC and copied to the respondent reiterating that the claimant's index number was 105 and not 106. However, she maintained that the claimant was dismissed on the basis of the verification report by KNEC.

19. She admitted that the reason for terminating the claimant's services was not valid but contended that the letter correcting the error in the verification report was served after the termination of the claimant's services. She contended that NSSF had no means of verifying that the certificate had not been forged after KNEC had advised that it was forged.

ISSUES FOR DETERMINATION

20. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent from 1978 to 24.2.2015 when he was dismissed on allegation that he had forged his EACE certificate and used it to secure employment from the respondent. The issues for determination are:

- a. Whether the reason for the termination was valid and fair.
- b. Whether fair procedure was followed.
- c. Whether the reliefs sought should be granted.

ANALYSIS AND DETERMINATION

a. Whether the reason for the termination was valid and fair

21. The termination letter dated 24.2.2015 cited the reason for the dismissal as follows:

“... a decision has been reached to terminate your services with immediate effect for presenting a copy of certificate to the fund that had been obtained from a forged document as confirmed by KNEC”

22. Under section 43 of the Employment Act, the respondent is obligated to prove on a balance of probability that the cited reason was valid

and fair. The termination letter acknowledged that the claimant made written representations and also appeared before the disciplinary committee where he denied the offence. The truth of the claimant's representations during the disciplinary hearing was confirmed by CW3, KNEC's officer who had written the verification report that led to the dismissal of the claimant. CW3 confirmed that the data base she relied on had errors which led her to give a wrong report about the claimants index number and grades in the EACE certificate.

23. The claimant produced a letter by Cw3 to the Director of Criminal Investigations indicating that her verification report was based on the erroneous database and that the letter led to withdrawal of the forgery case against the claimant. RW1 admitted that going by the evidence of Cw3, the reason for the termination was not valid. She however blamed KNEC for the dismissal and contended that the letter correcting the earlier verification report was written after the dismissal of the claimant.

24. After considering the evidence and the submission presented, there is no dispute that the reason cited for dismissing the claimant was not valid. The certificate in issue was confirmed to be genuine by the same person who had described it as fake. Under Section 43 of the Employment Act, termination of employment is unfair within the meaning of section 45 of the Act if in legal proceedings challenging the termination, the employer fails to prove the reason for the termination.

b. Whether fair procedure was followed.

25. The Claimant was served with a show cause letter and he gave a written defence. Thereafter he was accorded a hearing before a Disciplinary Committee. Applying the foregoing facts to the provisions of section 41 of the Act, I return that the termination was done after following a fair procedure. Section 41 provides that:

(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.

(c) Whether the reliefs should be granted

26. In view of the finding that the reason for the termination was not valid, and that termination of the claimant's employment was unfair, I find that the claimant is entitled to damages under section 49 (1) of the Employment Act. The termination letter offered him one month salary in lieu of notice which he said that it was never paid to him. However he prayed for 2 months salary in lieu of notice but no documentary evidence was produced to support that claim. I, therefore award him one months salary I lieu of notice. In addition I award him the maximum 12 months salary compensation for unfair termination because he had served the respondent for over 36 years and that he did not expect to get another job at the age in which he was dismissed.

27. The claim for 45 leave days was not rebutted by leave records and I allow it as prayed. Likewise, the claim for salary for the 24 days worked in February 2015 has not been disproved by evidence and therefore allow it as prayed.

CONCLUSION AND DISPOSITION

28. I have found that the dismissal of the claimant from service was not grounded on a valid reason and as such it was unfair and unlawful. I have further found that the claimant is entitled to the reliefs sought and proceed to enter judgment as follows:

Notice	Kshs. 195,000
Compensation	Kshs. 2,340.00
Leave	Kshs. 292,500
Unpaid Salary	<u>Kshs. 156,000</u>
TOTAL	<u>Kshs. 2,983,500</u>

The award is less statutory deductions but in addition to costs and interest at court rates from the date of this judgment.

Dated, signed and delivered in open court at Nairobi this 6th day of March, 2010.

ONESMUS N. MAKAU

JUDGE