



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1590 OF 2010

ANTHONY MUTHUMBU WACHIRA.....CLAIMANT

v

KENYA AIRPORTS AUTHORITY.....RESPONDENT

JUDGMENT

1. On or around 28 February 2006, the Kenya Airports Authority (Respondent) offered Anthony Muthumbi Wachira (Claimant) employment as General Manager – ICT.
2. In the course of 2009, the Respondent’s Internal Audit conducted a scheduled audit of projects undertaken by the ICT department.
3. The audit raised several queries and on 18 May 2010, the Claimant made a detailed response to the queries.
4. The Claimant also appeared before the Board Audit Committee around 4 June 2010.
5. The Respondent’s Board discussed the audit report as a result of which a *show-cause notice* was issued to the Claimant by the Respondent’s Managing Director on 1 October 2010.
6. The *show-cause notice* requested the Claimant to respond within 7 days to allegations of failure to competently perform his duties as required during the implementation of Local Area Network and Wide Area Network projects.
7. The Claimant responded to the *show-cause notice* on 4 October 2010 seeking to be furnished with certain documents/reports.
8. On 5 October 2010, the Respondent supplied the Claimant with a copy of the Audit Report but declined to furnish minutes, on grounds of confidentiality.
9. On 14 October 2010, the Claimant gave a detailed response and on 18 October 2010, the Respondent’s Managing Director invited him to appear before the Staff Committee of Board on 21 October 2010.
10. On 29 October 2010, the Managing Director wrote to the Claimant to inform him that his representations had been found unsatisfactory and therefore it had been decided to summarily dismiss him from employment.
11. The Claimant was not satisfied with the decision and on 10 November 2010 approached the High Court seeking judicial review orders.
12. On 20 December 2010, the Claimant instituted these legal proceedings alleging unfair termination of employment and breach of contract.
13. The Respondent filed a *Memorandum of Response* on 14 June 2011 denying that the dismissal of the Claimant was unfair and/or that it was in breach of contract.
14. On 22 July 2011, the then Industrial Court stayed these proceedings pending the hearing and determination of the judicial review proceedings by the High Court.
15. The High Court found that the dismissal of the Claimant was unfair but still dismissed the judicial review proceedings on 11 October 2012.
16. The Respondent appealed to the Court of Appeal against the decision of the High Court, and on 30 July 2013, the Court stayed the Cause pending the outcome of the Appeal.

17. After the Court of Appeal determined the Appeal, the parties appeared in Court on 29 July 2015 and sought directions.
18. On 1 February 2017, the Claimant filed an *Amended Memorandum of Claim* to introduce a head of claim for discrimination and violation of the rights to fair administrative action, access to justice and fair hearing.
19. The Respondent filed an *Amended Memorandum of Response* on 22 February 2017.
20. The Cause was heard on 13 November 2017, 18 December 2017 (Nzioki wa Makau J), 12 March 2018, 13 June 2018, 5 July 2018, 22 November 2018, 7 November 2019 and 2 December 2019.
21. The Claimant filed his submissions on 14 February 2020 (should have been filed and served by 20 December 2019) while the Respondent had filed its submissions on 31 January 2020 (the submissions were filed by the Federation of Kenya Employers which was not on record during the hearing. The Court has not seen any Notice of Change of Advocate in the file).
22. The Court has considered the pleadings, evidence and the submissions, and identified the Issues for determination as examined hereinafter.

Unfair termination of employment

Procedural fairness

23. Sections 35(1), 36, 41 and 47(5) of the Employment Act, 2007 set out the primary/guiding principles on procedural fairness. The employee should be informed of contemplated dismissal, notified of the allegations to confront and be afforded an opportunity to make representations, preferably in the presence of a colleague or union representative.
24. The Claimant was notified of the allegations to respond to and was requested to make written representations which he did. Thereafter, the Claimant was invited to appear for an oral hearing before the Board and he did.
25. Despite the foregoing, the Claimant pleaded and contended that 2 members of the Staff Disciplinary Committee had sat in the Audit Committee and thus he was prejudiced.
26. Within the employment arena, it is not unusual for an employer to initiate a disciplinary process and proceed to hear the employee and make a decision.
27. The Court admits that there will be exceptions and more so in big corporates with human resource departments and standing and/or ad hoc disciplinary panels.
28. However, a Claimant alleging bias or prejudice on the part of the disciplinary committee ought to produce sufficient evidence to demonstrate bias or prejudice.
29. The Claimant did not produce any evidence of bias, conflict of interest on the part of the Disciplinary Committee or prejudice occasioned to him.
30. The Claimant also challenged the process on the ground that he was not accorded 7 days to appear before the Board as required by the Respondent's *Disciplinary Policies*.
31. The invitation to the Claimant to appear before the Board was dated 18 October 2010 and the hearing was scheduled for 21 October 2010, clearly giving the Claimant less time than contemplated under the Policies.
32. The Respondent did not attempt to explain why the Claimant was given less time than provided for.
33. The Claimant further challenged the process on the ground that the charges against him were general and vague and that he was unable to understand them.
34. The Claimant also lamented that he was not supplied with a copy of the Final Audit Report and that its contents were altered.
35. The Claimant was supplied with a copy of the initial Audit in March 2010. After his concerns were heard, the Audit report was reviewed.
36. In the circumstances, the Court is unable to agree with the Claimant that he was unable to understand the substance of the allegations against him and the department he headed or that the incorporation of management comments in the audit report amounted to unilateral alteration of the audit report.
37. The Court also notes that the Claimant did not raise issues with the charges being vague or general in his responses.
38. The Claimant also pleaded that his rights to fair administrative action and fair hearing were violated.
39. In regard to the right to fair administrative action, it was incumbent upon the Claimant to prove that the Respondent was exercising an

administrative function rather contractual power as an employer in subjecting him to disciplinary action. He did not. (see the distinction in between fair administrative action and employer's contractual authority in *Chirwa v Transnet* (2007) ZACC 23).

40. From the foregoing, the Court is of the view and finds that the Respondent was in substantial compliance with the statutory procedural fairness requirements.

Substantive fairness

41. The ground leading to the summary dismissal of the Claimant was *your failure to competently perform your duties as required under your contract of employment the Authority incurred losses of about Ksh Six Million (6 million)*.

42. The particulars related to the Respondent's website, over tendering for switches and internet concerns among others.

43. It was also alleged that the Claimant had confirmed that a contractor had installed certain equipment but which equipment had not been installed, and unsatisfactory response to audit queries thus imputing integrity concerns.

44. These are the reasons the Respondent was required to prove and prove as valid and fair reasons to dismiss the Claimant by dint of sections 43 and 45 of the Employment Act, 2007.

45. The Respondent failed to address the question of substantive fairness in its submissions but opted to dwell on the procedural fairness aspects.

Respondent's website/Internet

46. The Respondent, based on the audit report had pinpointed areas of concern as slow internet services; lack of bandwidth management tool; centralised topology of the network; content management; maintenance; flight information display; tender notices; mail accessibility; failure to account for all switches for the LAN/WAN project at JKIA; fibre and no UTP link; UPS concerns; networking of training room; expired antivirus licences among others.

Switches

47. In the LAN/WAN project, the audit established that the out of 68 cisco switches supplied, only 61 were being actively used; out of 38 Small Form-Factor Pluggable Connectors (SFP), only 21 could be verified; some switches were over-specified; UPS missing from specified locations.

48. The audit report also established that some of the switches had been over-specified leading to additional costs and that poor work had been done at the JKIA ICT change management training room.

49. The Claimant gave detailed responses to the allegations and were the Court to give a blow by account narration of the response, this judgment would unnecessarily run into hundreds of pages.

50. Some of the major explanations he raised were that ICT staff were not involved in the audit and that he had requested the audit team to do a fresh verification which was not done and that he visited the project sites and established that project deliverables had been attained.

51. The Claimant also asserted that after a joint verification with an officer from the Audit Office (Mr. Njaaga) on 20 May 2010, 21 May 2010, 2 June 2010 and 3 June 2010, it was established that the audit report had inaccuracies in respect to the Clean Power and UPS installation and specifications, the supply and installation of switches and SFPs.

52. In regard to the over-specification of Port specification switches, the Claimant explained that the Cisco Catalyst Switch Guide showed lower specification switches would not have been sufficient for the Respondents purposes.

53. He also stated that the extra switches were to cover for redundancies and gave an example where an extra switch was used to replace a damaged one at Wilson airport.

54. The Respondent's first witness confirmed that the Claimant was not in office during the commencement of the audit and that he never met with the Claimant during the audit. He also confirmed that the ICT staff did not accompany the audit team to the field.

55. He also confirmed that all the switches were accounted for but were not used and thus there was no redundancy and that the projects were certified by other ICT staff and not the Claimant.

56. Under the Procurement legislative framework, a Certificate of Completion must be issued before payment is made.

57. Certificates of Completions were issued by persons other than the Claimant. It was not explained why these persons signed the Completion Certificates if the project had not been executed according to the terms of the tender(s).

58. In the circumstances, the Claimant, though the Head of ICT cannot be wholly blamed. The persons who signed the Completion Certificates were equally senior.

59. The Court, therefore, finds that the reasons for summary dismissal of the Claimant did not constitute valid or fair reasons.

Compensation

60. The Claimant served the Respondent for about 4 years and in consideration of the length of service, the Court is of the view that compensation equivalent to 4 months gross salary would be appropriate (gross salary at the time of separation was Kshs 585,717/-).

Salary in lieu of notice

61. With the conclusion that the dismissal of the Claimant was procedurally fair, the Court declines to award salary in lieu of notice.

Severance pay

62. The Claimant sought Kshs 8,070,894/- on account of severance pay. The Claimants' case was not one of redundancy and therefore severance pay is not available to him as a remedy.

63. In the submissions, the Claimant substituted the head of the claim with one for service pay.

64. A copy of the Claimant's payslip produced show that he was contributing to the National Social Security Fund and was also a member of a pension scheme. By dint of section 35(5) & (6) of the Employment Act, 2007, the Court is not eligible for service pay.

65. If there was any other foundation to the claim for severance pay, it was not disclosed.

Unpaid salary balances

66. The Claimant contended that he was entitled to Kshs 468,575/- being salary increments authorised by the Respondent's Board on 10 December 2010.

67. The Respondent did not controvert this head of the claim and it is allowed.

Annualised medical cover

68. Entitlement to a medical cover is an inchoate benefit which actualises when a claim is made. The Claimant did not prove that he actually incurred any medical expenses which the Respondent did not cause to be made good.

Discrimination

69. The Claimant did not prove to the required standard that he was discriminated against or the nature of discrimination.

Conclusion and Orders

70. From the foregoing, the Court finds and declares that the summary dismissal of the Claimant despite being procedurally fair, was not for valid and fair reasons.

71. The Claimant is awarded

(a) Compensation	Kshs 2,342,868/-
(b) Salary balances	Kshs 468,575/-
TOTAL	Kshs 2,811,443/-

72. The Claimant is also entitled to the dues set out in the dismissal letter and the Respondent should compute and pay the same.

73. The Claimant is denied costs for failing to file/serve his submissions within agreed timelines.

Delivered, dated and signed in Nairobi on this 2nd day of March 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kanjama instructed by Muma & Kanjama Advocates

For Respondent Mr. Tiego instructed by Onsando Ogonji & Tiego Advocates

Court Assistants Sikulu/Lindsey