



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1731 OF 2014

EVANS ANGWENYI.....CLAIMANT

VERSUS

NAIROBI CITY WATER & SEWERAGE

COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 30th September 2014 seeking terminal benefits plus compensation for unfair termination of his employment contract by the respondent vide the letter dated 16.7.2014 which was served on 10.9.2014. He also prayed for certificate of Service, costs and interest. The claimant averred that the reason for his dismissal was not valid and the procedure followed was not fair. He further averred that his salary as at the time of the dismissal was ksh. 104,878 per month.

2. The respondent file defence on 15th December 2015 admitting that she employed the claimant as pleaded in the claim but denied that she dismissed him unfairly. She averred that the claimant was dismissed for gross misconduct under section 44(4)(g) of the Employment Act after according him fair hearing as contemplated und the said Act. She further averred that she wrote the dismissal letter in time but the claimant delayed to pick it and further failed to exercise his right appeal. She therefore denied the reliefs sought by the claimant and prayed for the suit to be dismissed with costs.

3. The suit was heard on 14th October 2019 when both parties gave evidence and thereafter filed written submissions.

Claimant's case

4. The claimant testified as CW1. He stated that he joined the respondent (then a department of the Nairobi City Council) vide the letter dated 7/4/1998 as Accountant III. On 9/1/2014, he was suspended without pay on allegation that he 'un-procedurally and without authority, de-enrolled and edited 130 accounts in the CMS between December, 2010 and August, 2013, with the intention of denying the respondent revenue. The suspension was done to pave the way for investigations.

5. On 30/5/2014, he appeared before the Corporate Disciplinary Committee for hearing but thereafter, the respondent, vide the letter dated 11/6/2014 notified him that the Disciplinary Committee had noted the need for further investigations in order to arrive at a fair determination, and as such the case had been deferred to a future hearing date to be notified by the Secretary. However, on 9/9/2014, he received a call from the office advising him to collect his summary dismissal letter and he did so on 10/9/2014. The letter referred to the hearing held on 30/5/2014 and never mentioned the further investigations communicated by the letter dated 11/6/2014. He contended that his right of appeal was defeated by the late delivery of the dismissal letter dated 16/7/2014.

6. He denied the validity of the alleged misconduct contending that it was not proved against him. He further contended that he ought to have been reinstated instead of dismissal under Clause 8.24 paragraph 4 of the HR Policy Manual which limits suspension period to 90 days which ended on 9/4/2014. He contended that under paragraph 6 of the said Clause, the suspension can only be extended for 30 days after which the employee must be reinstated even if the disciplinary process has not ended. He therefore contended that the dismissal was unfair and prayed for the reliefs sought herein.

7. On cross examination, he contended that his work was Billing and denied the alleged de-enrollment of accounts which he said to be the work of cashiers at the Customer Care department. He admitted that he was the Supervisor of the Billing Team and contended that he never used to leave the office to visit customers. He denied knowledge of any de-enrolled accounts at Mathare Zone 4. He admitted that he attended hearing on 30/5/2014 but contended that he thereafter received the letter dated 11/6/2014 advising him that the case had been deferred for further investigations to be done after which he would be notified of the next hearing date. However, no other communication was made to him until he was called to collect the dismissal letter. Finally, he contended that the dismissal never took place until 9/9/2014 because the employer continued to remit his NSSF contribution until August 2014.

Defense case

8. Mr. Simon Gerry Itumbo, respondent's Investigations Officer, testified for the respondent as RW1. He stated the claimant was employed by the respondent in the Meter Reading and Billing Department and given Employee/ Profile Number 18877. In December 2013, he received instructions for the Ag. Security Manager, Mr Cosmas Kamuti to investigate a case of irregular de-enrollment and editing of 130 water accounts by the claimant on diverse dates between December 2010 and August 2013.

9. As a result, he interviewed and obtained statements from 20 owners of de-enrolled accounts, all of whom acknowledged that their accounts had substantial outstanding balances and they offered to pay. He stated that Mr. John Irungu Njuguna owner of Account No.1294895 and 17 other accounts named the claimant as the staff who helped his caretaker to close the water accounts with outstanding balances but the customer refused to record a statement. He contended further that Mr. Munene, Data Base Analyst, checked on the Data Base System and found that the claimant's profile number 18877 was used to de-enroll accounts with huge balances and also to edit the accounts details like names and locations.

10. He further testified that the foregoing finding and the fact that the claimant's password ought to be changed after every 30 days for security reasons, he made conclusion that it was within the claimant's knowledge that his profile number was used to do the irregular de-enrollment and editing of 130 accounts without authority, and which denied the respondent revenue. He then prepared the investigations report dated 19/3/2014 recommending for disciplinary action to be taken against the claimant. He contended that system was supposed to block the profile automatically if the claimant failed to change his password within 30 days.

11. On cross examination, he admitted that the 130 water accounts were from different locations. He admitted that the show cause letter was in respect of accounts in Mathare, but denied knowledge that the claimant's area of work was Kibera, Pangani and Westlands. He admitted that he had none of the statements allegedly collected from the 20 customers plus John Irungu Njuguna who declined to record any statement. He denied knowledge that the claimant met Mr John Irungu Njuguna and confirmed that the Customer merely reported to him that his caretaker told him that he was helped by the claimant to close the accounts. He further admitted that the he never interviewed the caretaker.

12. Rw1 also admitted that he never logged into the System to confirm whether the claimant's password was used to de-enroll the said accounts. He confirmed that during the disciplinary hearing the union officials submitted that he (Rw1) was not a Data Base Analyst and that there were many cases involving use of passwords and which were leading to victimization of innocent officers. He further confirmed that the claimant's case had been deferred vide the letter dated 11.6.2014 (exh.3) and contended that he did not participate in the decision making after the hearing.

13. He admitted that the respondent's HR Manual provides for suspension period of 90 days extendable by 30 days only, after which the employee is reinstated whether or not the disciplinary process is completed.

Claimant's submission

14. The claimant submitted that his dismissal was unfair and unlawful because the employer failed to prove that it was grounded on valid and fair reason and that a fair procedure was followed as required under section 45 of the Employment Act. He contended that the he told the disciplinary committee that he never worked or visited Mathare Area where the alleged de-enrolled accounts were situated, and that enrollment and de-enrollment of accounts was a function of the Customer Care department and not Billing Department where he was stationed. He further submitted that during the said hearing, the issue of usage of password in the respondent and staff falsely accused was raised.

15. As regards the procedure followed, the claimant submitted that section 41 of the Employment Act and Clause 8.24 paragraph4 &6 were not followed. He contended that Rw1 admitted during cross examination that under the said provisions of the HR policy Manual, suspension period is 90 days extendable by 30 days after which the employee is reinstated. He therefore the claimant urged that any disciplinary process done after 9/5/2014, including the disciplinary hearing held on 30.5.2014, was irregular, un-procedural, null and void.

16. He relied on **Daniel Kipkeibut v Smpet Deposit Taking Micro Finance Limited [2016] e KLR**, **Nicholas Muasya Kyula v FarmChem Limited [2012] LLR 235 235(ICK)**, **CMC Aviation Limited v Muhammed Noor [2015] e KLR** and **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] e KLR** where the courts agreed that for termination to pass the test of fairness, the employer must prove both substantive and procedural fairness including the timelines set out under the HR Policy and Procedure Manuals. He urged the court to find that the respondent did not prove the reason cited for the dismissal and further that she did not follow a fair procedure, and proceed to award the reliefs sought.

Respondent's submissions.

17. The respondent submitted that, under section 47(5) of the Employment Act, the burden of proving unfair termination lies on the employee. She urged the court to find that the claimant did not adduce any evidence to prove that he was unfairly or wrongfully dismissed and instead find that dismissal was lawful, fair, legal and procedural.

18. She further submitted that the reason for the dismissal was valid because Rw1 testified that the claimant de-enrolled and edited 130 accounts between December 2010 and August 2013 un-procedurally and without authority using his Profile number 18877. She further contended that the said changes must have been done by the claimant because he is the only person with the knowledge of the password because he was changing it after every 30 days. She contended that the claimant deserved summary dismissal under section 44(4) (c) of the Employment Act because he willfully neglected to perform his duties as required; or he carelessly and improperly performed his duties which was his duty to have performed carefully and properly.

19. She relied on **Thomas Sila Nzivo v Bamburi Cement Limited [2014] e KLR** where the court held that the employer had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the employer and her property and was therefore justified in summarily dismissing him under section 44(4) (g) or (c) of the Employment Act. She submitted that the reason for the termination related to the claimant's conduct and it was explained to him in the dismissal letter that she had lost confidence in him and his services to her.

20. In addition, the respondent submitted that the dismissal of the claimant was done in accordance with fair procedure as set out under section 41 of the Employment Act. She contended that the claimant was invited to the hearing in the company of the persons he wished to have them at the hearing. She further contended that the claimant was accorded a fair hearing before the dismissal as required by the law.

21. As regards the reliefs sought, she contended that the claimant is not entitled to any relief because he has not proved on a balance of probability any cause of action against her as the dismissal was lawful, fair and procedural. However, she admitted the claim for Certificate of Service but denied the claim for salary for the period of suspension contending that the suspension letter entitled him only to house allowance and medical benefit. He therefore prayed for the suit to be dismissed with costs.

Issues for determination

22. There is no dispute that the claimant was employed and later dismissed by the respondent vide the letter dated 16/7/2014 and which was served on 10/9/2014. Under section 45 (2) of the Employment Act termination of employment of an employee is unfair if the employer fails to prove that the termination was grounded on valid and fair reason(s), and that fair procedure was followed. The issues for determination herein are: -

- (a) Whether the dismissal was grounded on a valid and fair reason.
- (b) Whether a fair procedure was followed.
- (c) Whether he is entitled to the reliefs sought.

Reason for the termination

23. The dismissal letter dated 16th July 2014 cited the reason for the dismissal as follows:

“... between December 2010 and August 2013 you un-procedurally and without authority de-enrolled and edited a total of 130 water accounts in the customer Management System (CMS) with intention to deny the Company's rightful revenue.

Following your appearance before the Corporate Disciplinary Committee on 30th May, 2014 on the above case, the committee found you guilty of the offence as charged. Please note that the said conduct amounts to gross misconduct as provided under section 44 subsection (4) paragraph (g) of the Employment Act, Clause 8.23.2(viii) of the Company's Human Resource Policies and Procedures Manual and the Company's Code of Conduct for all Employees.”

24. Under section 43 the Employment Act, the employer has the burden of proving that the reason for the termination of his employee's services in any legal proceeding where the termination is impugned. In this case the respondent called Rw1 as the only witness to prove the validity of the reason cited for the summary dismissal of the claimant. It was alleged that Rw1 investigated the claimant's misconduct. He contended that he interviewed the customers whose accounts were de-enrolled by the claimant.

25. However, the said customers never gave evidence before the disciplinary committee or before this court. Likewise, Mr. Munene, the Data Base Analyst who alleged that the claimant's profile number 18877 was used to de-enroll and edit the 130 accounts in issue also did not give evidence before the disciplinary committee and this court. Rw1 admitted that he is not a trained Data Base Analyst and that he never logged into the System to confirm that the claimant's password was used to de-enroll the accounts. He also confirmed that he did not know whether the claimant was not working in Mathare area where the de-enrolled accounts were situated.

26. The claimant denied the alleged offence and contented that enrollment and de-enrollment of accounts is a function of the Customer care while he was based at the Meter Reading and Billing department. He further denied that Mathare area where the de-enrolled accounts were situated, did not fall within his area of assignment being Kibera, Pangani and Westland. He further contended that as a Supervisor in the Billing department, he worked from the office and never went out to the field to meet customers.

27. After careful consideration of the evidence and the submissions by both parties, it is clear that the respondent has failed to prove on a balance of probability that the claimant committed the alleged offence. As observed above, crucial witnesses were not called to give evidence before the disciplinary committee and also before this court. I therefore find that no reasonable employer could have dismissed the claimant, in the absence of the said crucial evidence to connect the claimant to the offence of de-enrollment and editing of 130 water accounts with huge outstanding balances. In my view, the respondent did not even prove herein that the alleged de-enrollment and editing of 130 water accounts in the respondent's CMS took place. Consequently, I return that the respondent has failed to prove a valid and fair reason for dismissing the claimant.

The Procedure followed

28. The claimant contended that he was dismissed without following a fair procedure because first, he was suspended for longer period than what is provided for under Clause 8.24 paragraph 4 & 6 of the respondent's HR Policy and procedure Manual and as such the disciplinary

action taken against him after the lapse of the maximum stipulated period of suspension, was unfair, unlawful, null and void. Second, he contended that by the letter dated 11.6.2014, the respondent notified him that his case had been referred for further investigations and that he would be advised on the next hearing date only to be called three months thereafter to collect a backdated dismissal letter.

29. Rw1 contended that the claimant was heard by the disciplinary committee in the presence of his union officials. However, he admitted that the respondent's HR Manual provided that after the lapse of the extension period of suspension, the employee should be reinstated, whether or not his case has ended. I have carefully considered Clause 8.24 paragraph 4 & 6 of the respondent's HR policy and Procedure Manual. It provides as follows:

“In the event that an employee is suspended, the duration shall not exceed 90 calendar days. The corporate disciplinary committee shall ensure the cases are deliberated and completed within the stipulated period...”

For purposes of this manual, suspension shall be for a period of 90 days. If by the lapse of the period there is need for extension of the suspension period, the same shall be extended for a further period of 30 days only. After the expiry of the extended period, the employee shall be reinstated notwithstanding the fact that the disciplinary process will not have been completed.”

30. The foregoing stipulation is couched in mandatory terms and was drafted by the respondent voluntarily to form part of the binding terms of the contract of service between her and the claimant. It therefore binds the respondent and as such it is enforceable by the court. In view of the un rebutted evidence by the claimant that his suspension started on 9/1/2014 and ended on 10/9/2014 when he was served with the dismissal letter, I agree with his submissions that he ought to have been reinstated to his job after serving a maximum suspension period of 120 days, from 9/1/2014. I also agree with his submissions that any disciplinary action taken against after the lapse of 120 days from 9/1/2014 was unfair, un-procedural and unlawful including the disciplinary hearing on 30/5/2014 and the summary dismissal by the letter dated 17/7/2014 because the procedure followed violated the respondent's own policy and as therefore not in accordance with fairness and equity.

31. The forgoing view is fortified by **Pamela Nelima Lutta v Mumias Sugar Co. Ltd [2017] e KLR**, where Onyango J had the following to say in relation to disciplinary action taken after the lapse of the suspension period set out under the Policy Manual: -

“No reason was communicated for the extended suspension. For this reason, the suspension was irregular. This also means that any disciplinary action taken after the 21 days, was irregular. Having already failed to comply with its own procedure by keeping the claimant on suspension for more than 4 months during a period when she had not even been called to show cause, I find that the disciplinary procedure was flawed as to make the whole procedure unfair and in breach of the respondent's disciplinary policy.”

Reliefs

32. In view of the finding herein above that the respondent has failed to prove that the dismissal of the claimant was grounded on a valid and fair reason and that the procedure followed was fair, I now hold that the dismissal was unfair and unlawful within the meaning of section 45 of the Employment Act. Accordingly, I further hold that the claimant is entitled to salary in lieu of Notice plus compensation for the unfair and unlawful dismissal under section 49(1) of the Act. I therefore award him 3 months' salary in lieu of notice because clause vi of the Appointment Letter dated 7/4/1998 provided for a notice period of three months before termination. I further award him 12 months' salary as compensation for the unfair dismissal considering his long service over 16 years without any warning letter.

33. In addition to the foregoing, I award the claimant his unpaid salary for the whole period he was on suspension from 9/1/2014 to 9/9/2014 when the dismissal was communicated which equals to 8 months. Although the suspension letter entitled the claimant house allowance plus medical benefit, he stated that he was not paid the same. The said evidence was not rebutted by the respondent through documentary

Evidence

4. Finally, the claim for Certificate of Service is allowed as prayed since the respondent averred that she is more than willing to issue the same.

Conclusion and disposition

5. I have found that the termination of the claimants' services was unfair and within the meaning of section 45 of the Employment Act because it was not founded on valid and fair reason and fair procedure was not followed. I have further found that he is entitled to the reliefs sought and consequently, I enter judgment for him as follows:-

(a) Notice (3 months)	Ksh. 314,634
(b) Compensation(12 months)	Kshs.1,258,536
(c) Unpaid salary (8 months)	<u>Kshs. 839,024</u>
Total	<u>Kshs. 2,412,194</u>

The said amount is subject to statutory deductions, but in addition to
costs and interest at court rates from the date hereof

Dated, signed and delivered in open court at Nairobi this 29th day of April 2020

ONESMUS N. MAKAU

JUDGE