



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 94 OF 2016

RICHARD ATANDI JOHN.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. Richard Atandi John, the Claimant in this case was an employee of Kenya Ports Authority, the Respondent herein. He brought this claim following his dismissal on 12th January 2016, on allegations of forgery of an academic certificate.
2. The Claimant's claim is documented by a Memorandum of Claim dated 26th January 2016. The Respondent filed a Memorandum of Reply on 10th August 2016.
3. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Prisca Atieno Rabongo. The parties also filed written submissions.

The Claimant's Case

4. The Claimant states that he was employed by the Respondent as a Casual Staff Grade PA.12 on 7th April 1998. On 15th January 2007, the Claimant's terms and conditions of service were changed from casual to contract and he was subsequently offered a two-year contract in the position of Courier Messenger at Grade HG 3 Segment 1.
5. The Claimant rose through the ranks to the position of Driver Grade HG 1 on permanent and pensionable terms of service. He pleads his monthly salary at this time as Kshs. 105,198.59.
6. The Claimant avers that sometime in the year 2008, he applied for a transfer to Personnel Department, Welfare Section to work as a bus driver.
7. The Claimant adds that while recommending the transfer, the Principal Administration Officer notified the Ag. Personnel Manager that besides being a qualified driver Classes B, C, E, F and G, the Claimant held a National Trade Test Certificate Grade III in motor vehicle mechanics.
8. The Claimant denies ever forging any certificate and states that he did not present any academic certificate for purposes of employment or promotion. He states that he dropped out of school in class 8 and was employed on casual terms of employment upon production of a copy of his National Identification Card.
9. The Claimant further avers that if indeed he had a Form Four Certificate as alleged, his Head of Department would have stated that important fact in his recommendation to the Personnel Manager.

10. The Claimant was dismissed from the services of the Respondent with effect from 12th January 2016 on the ground that a Committee of Inquiry formed by the Respondent to hear his case had found that he had forged a certificate.

11. The Claimant states that he appeared before the Committee of Inquiry following a directive by the Court in ***ELRC Cause No 258 of 2015: Ecla Jesang Kiprop & 3 others v Kenya Ports Authority*** in which the Court determined that the Claimants should subject themselves to a disciplinary process initiated by the Respondent.

12. The Claimant further states that he appeared before the Committee of Inquiry on 25th November 2016 following a hearing notice dated 24th November 2015.

13. The Claimant claims that he was neither given reasonable or sufficient notice to prepare and present his case before the Committee nor was he given an opportunity prior to, during or after the hearing to peruse the purportedly forged certificate.

14. The Claimant states that the Committee of Inquiry was composed of the following officers of the Respondent:

a. Yobesh Oyaro: Head of Procurement & Supplies Grade HE 2 – Chairman

b. Amani Komora: Head of Human Resources Grade HE 2 - Member

c. A Principal Internal Auditor Grade HM 1 - Member

d. Irene Mbogho: Senior Human Resource Officer Grade HM 2 – Secretary

15. The Claimant claims that the Committee of Inquiry was not lawfully constituted as the Chairman and members were not appointed with due regard to the standing of the Claimant being at Grade HG 1 and further that the Chairman of the Committee should have been an officer at Grade HM 1 to HM 3. Further, at least one member should have been from his Department.

16. The Claimant therefore maintains that the Committee of Inquiry lacked jurisdiction to hear and determine his case on the ground that it was unlawfully and irregularly constituted.

17. The Claimant submits that the Respondent failed to observe the requirements of Articles 25(c) and 41 of the Constitution and Sections 41, 43, 44, 45 and 47 of the Employment Act.

18. The Claimant further submits that the Respondent failed to observe the provisions of Section K 10 (c) and Table 1 and (m) of the Disciplinary Handbook 2015.

19. The Claimant seeks the following remedies:

a. A declaration that any meeting held by the Respondent to consider and determine the complaint against the Claimant was and remains null and void;

b. A declaration that the dismissal of the Claimant from employment conveyed by letter dated 12th January 2016 was un-procedural, unconstitutional, unlawful, null and void and is thereby quashed and any consequential orders or actions are hereby set aside;

c. A mandatory injunction ordering the Respondent to reinstate the Claimant to his position as Driver Grade GH 1 without loss of benefits and a further order directed at the Respondent, by itself, its servants, agents or anyone acting on its behalf otherwise howsoever from evicting the Claimant from House No. KHL BLOCK JB—Door 5;

d. A declaration that the purported dismissal based on the ground of forgery of KCSE Certificate amounts to gross abuse of office by the Respondent's Management and the irregularly constituted Committee of Inquiry hence attracting general damages to be borne by the Respondent;

e. Costs of the claim.

The Respondent's Case

20. In its Memorandum of Reply dated 8th August 2016 and filed in court on 10th August 2016, the Respondent admits that the Claimant was its employee.

21. The Respondent however denies that the Claimant was earning a monthly salary of Kshs. 105,198.59. The Respondent further denies that the Claimant was employed upon production of his National Identification Card.

22. The Respondent states that the Claimant was employed and promoted on the basis of a 1990 KCSE Certificate he produced alleging that he had attended Subukia Secondary School.

23. The Respondent further states that in the year 2012, the Public Service Commission and the Ministry of Transport issued circulars

directing that academic and professional certificates of all public service employees be authenticated.

24. Pursuant to the aforesaid directions, the Respondent wrote to the Kenya National Examinations Council (KNEC) requesting them to verify and confirm the authenticity of all its employees' academic certificates.

25. Consequently, KNEC vide its letter dated 22nd July 2013, submitted a list of 122 employees, including the Claimant, who had altered their academic certificates.

26. The Respondent states that from the record submitted by KNEC, the Claimant had neither registered nor sat for the 1990 KCSE examination at Subukia Secondary School as indicated in the Claimant's certificate submitted to the Respondent and further that the Centre Code number 11004, appearing on the Claimant's certificate belonged to Dr. Aggrey High School and not Subukia Secondary School.

27. The Respondent goes on to state that upon receiving the afore-stated letter dated 22nd July 2013 from KNEC, and acting in accordance with its Disciplinary Handbook, 2015, it established a Disciplinary Committee to commence disciplinary proceedings and afford the affected employees a fair hearing.

28. The Respondent avers that the Claimant was afforded a fair hearing before a duly constituted Disciplinary Committee in accordance with the Respondent's Disciplinary Handbook, 2015.

29. The Respondent further avers that KNEC, which is the body whose core mandate is to *inter alia*, set and maintain examination standards, award certificates to candidates and confirm authenticity of certificates or diplomas issued by KNEC, upon request by the Government, public institutions and other entities was the final authority on the issue of authenticity of the Claimant's academic certificate.

Findings and Determination

30. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

31. The Claimant's dismissal was conveyed by letter dated 12th January 2016 stating:

“RE: DISMISSAL FROM THE SERVICES OF THE AUTHORITY

You will recall that you were issued with a letter inviting you to show cause why you should not be dismissed from the services of the Authority for reasons contained in the said letter.

Further, you will recall that you appeared before a disciplinary committee and accorded a personal hearing in which you denied that you had presented to the Authority a forged academic/professional certificate.

However, the Committee established that indeed you forged the said certificate.

The offence you committed amounts to gross misconduct justifying dismissal, in accordance with Section K 4 (c) (xvi) of the Disciplinary Handbook 2015.

The Board in its 314th Board Meeting held on 3rd December 2015 resolved that employees who were found to have contravened Section K 4 (c) (xvi) of the Disciplinary Handbook 2015 be dismissed from the services of the Authority with immediate effect in accordance with Section K. 10 (o) of the Disciplinary Handbook 2015. You are accordingly dismissed from the services of the Authority with immediate effect.

You are required to surrender any property of the Authority in your possession to your Head of Department within the next 48 hours on receipt of this letter. If you are in occupation of Authority Quarters, arrange to vacate the same within seven (7) days from the date of this letter.

By a copy of this letter, the Senior Human Resources Officer (Reward & Job Evaluation) is advised to arrange payment of your terminal dues less any amounts that may be owing to the Authority.

Please acknowledge receipt by signing this letter and the duplicate provided herein.

Muthoni Gatere (Miss)

FOR: MANAGING DIRECTOR

32. The dismissal letter accuses the Claimant of presenting a forged academic/professional certificate to the Respondent. In her testimony before the Court, the Respondent's Human Resources Officer, Prisca Atieno Rabongo stated that the Claimant had submitted a 1990 KCSE result slip indicating an aggregate grade of D (plain) from Subukia Secondary School and a school leaving certificate from the same school issued on 11th July 2011.

33. The Claimant denied ever submitting these documents and stated that he dropped out of school before sitting the Kenya Certificate of Primary Education (class 8) examination. He denied having filled an Employee

Details Form produced by the Respondent, showing that he had attended Subukia Secondary School between 1987 and 1990 and Subukia Youth Polytechnic between 1992 and 1994.

34. The question before the Court is whether in the circumstances of this case the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act which provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

35. The burden placed on an employer by Section 43 is to demonstrate a reason that would move a reasonable employer to terminate employment. This is what is commonly referred to as the '*reasonable responses test*' as captured by **Ngcobo JA** in the persuasive decision of *Nampak Corrugated Wadeville v Khoza (JA 14/98) [1998] ZALAC 24* thus:

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

36. The Claimant denies ever submitting any of the impugned documents. He told the Court that he had completed and signed an Employee Details Form which was not before the Court. This detail does not appear in the record of the proceedings before the Committee of Inquiry nor is it part of the Claimant's witness statement filed in court on 12th February 2016.

37. Moreover, the Claimant did not explain to the Court why he did not produce a copy of the Employee Details Form he says he had completed. Assuming that this document had been retained by the Respondent, the Claimant ought to have served a production notice.

38. Knowing the gravity of the charges against him and the potential adverse effect on his employment with the Respondent, the Claimant ought to have taken the trouble to gather all the evidence in his favour. The Court was unable to understand how three documents being a KCSE result slip, school leaving certificate and an Employee Details Form all bearing the Claimant's name could end up in the Respondent's possession without the Claimant's participation.

39. Applying the '*range of reasonable responses test*' it seems to me that in the circumstances of this case, the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act.

40. On the issue of procedural fairness as required under Section 41 of the Employment Act, it is evident that the Claimant was subjected to a disciplinary process right from show cause letter to personal hearing. The Court did not see any complaint from the Claimant regarding any stage of this procedure.

41. The averment that the Committee of Inquiry was not properly constituted was also not proved. I therefore find and hold that the Respondent fully complied with the procedural fairness requirements set out in the law and in its Disciplinary Handbook.

42. In the ultimate, the Court finds and holds that the Claimant's dismissal was justifiable and fair. His entire claim consequently fails and is dismissed with costs to the Respondent.

43. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Mr. Akanga for the Claimant

Mr. Obinju for the Respondent