



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.713 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2020)

ALBERT YAWA KATSENGA.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim on 15/5/2018. He avers that he was interdicted on allegations of involvement in a criminal offence on 27/10/2010. He avers that on 2/11/2015, the High Court in Criminal Appeal No. 37 of 2014 Albert Yawa Kasenga V Republic set aside his conviction by the lower Court.

2. He contended that the decision to dismiss him from employment was based on a decision that had been set aside by the Superior Court.

3. He further avers that he was never made aware of his dismissal until 27/2/2018 when he was issued with a letter dated 24/8/2015. The Claimant seeks the following reliefs:

i. A declaration that the termination of the Claimant's employment was unfair;

ii. A declaration that the Respondent's conduct based on its response to a decision of the High Court amount to contempt of Court;

iii. A declaration that the Respondent's conduct was illegal and contrary to section 41,44 (4) and 45 (2) of the Employment Act, 2017;

iv. An order directing the Respondent to immediately reinstate the Claimant;

v. Compensation for unfair and unprocedural termination of employment;

vi. The costs of this suit with interests herein at Court rates; and

vii. Any other relief that the Court shall deem fit and just to grant.

4. The Respondent filed a Statement of Response on 8/6/2018. It denies that the Claimant was never heard or accorded an opportunity to defend himself. It avers that despite the Claimant being acquitted of the criminal proceedings, it could not be precluded from taking disciplinary action against him.

5. It contends that the decision of the High Court did not delve into the merits of the decision of the trial Court. It avers that the Claimant's dismissal was attributable to his actions that constituted gross misconduct contrary to Clauses 6.13 of the Kenya Revenue Authority (KRA) Code of Conduct.

6. The Claimant filed a Response to the Statement of Response on 5/6/2018. He avers that the Respondent's disciplinary process did not guarantee that due process was followed.

7. After the hearing, the parties were directed to file written submissions but only the Claimant filed his submissions.

Claimant's case

8. The Claimant testified as Cw1 and adopted his Witness Statement dated 16/4/2018 as his evidence-in-chief. He stated that he held the position of Assistant Commissioner- Western Region. He stated that he was interdicted on 28/10/2010 and was thereafter issued with a letter by the Senior Deputy Commissioner, Human Resources informing him that investigations were being carried out against him for serious corruption offences.
9. He stated that he responded to the allegations and was scheduled to appear before a disciplinary committee on 2/9/2011. It was his testimony that though he presented himself, he was never invited into the meeting to defend himself.
10. He stated that he was charged on 5/11/2012 and the Chief Magistrate found him guilty of the offences. He stated that he appealed to the High Court which on 2/11/2015, quashed the decision of the lower Court.
11. He testified that he sought that his interdiction be lifted for him to resume work but he did not receive any response. He stated that his dismissal letter dated 24/8/2015 was handed over to him on 27/2/2018.
12. In cross-examination, he testified that it was alleged that he was corrupt and had solicited Kshs. 20,000/-.He testified that he was interdicted in November 2010 and in the letter, he was informed of the offence he had committed. He testified that during the interdiction period up-to August 2015, he receive half of his pay and medical benefits.
13. He testified that he was issued with a show cause letter by his employer and responded to the show cause letter. He testified that he was invited for a disciplinary hearing 2/11/2011. He testified that he was thereafter issued with a dismissal letter but he never received the dismissal letter through registered post.
14. He testified that he later learned that his dismissal letter was sent in August 2015. He testified that he never received the dismissal letter dated 28/3/2018 and that he learned about it in February 2018. He testified that during the time of employment, he was governed by Kenya Revenue Authority Regulation.
15. He testified that the offence of soliciting a bribe was provided for under Kenya Revenue Authority Code of Conduct. He contended that in November 2015 Judgment in his criminal case was delivered. He testified that he was dismissed before judgment was delivered.
16. He testified that in the criminal proceedings at Kisumu, the Complainant testified that he did not recall if he asked for a bribe. He testified that the Court found him not guilty of the offence.
17. He testified that he was dismissed in August 2015 and not in February 2018. He testified that he was told to collect his dues once cleared. He testified that clearing meant that he would have accepted his dismissal.
18. In re-examination, he testified that he never received the dismissal letter of 2015 but he visited the Respondent where he was issued with the dismissal letter in February 2018. He testified that the High Court acquitted him on 22/11/2015.It was his testimony that he was invited to a disciplinary hearing but he was not heard.

Respondent's case

19. Frankline Kiogora the Respondent's Assistant Manager – Human Resource Management testified as RW1. He adopted his Witness Statement dated 8/6/2018 as his evidence in chief.
20. He stated that the Claimant's dismissal on 24/8/2015 was based on investigations carried out by the internal affairs. He stated that it was established that, he had contravened the Kenya Revenue Authority Code of Conduct by soliciting a bribe contrary to section 4.1 of the Kenya Revenue Authority Code of Conduct and that he lacked integrity and dishonesty contrary to Section 4.1.1 of the Code of Conduct.
21. He stated that the Claimant was summoned to a disciplinary hearing on 2/9/2011. He testified that the Claimant's salary was stopped on 26/8/2015 and that his dismissal letter was sent through registered post and corroborated by the letter dated 15/5/2018.
22. He stated that the High Court at Kisumu did not delve into the merits of the case but faulted the police for prosecuting the case on behalf of the EACC thus acquitted the Claimant on those grounds. According to him, the Kenya Revenue Authority Code of Conduct and the Employment Act allows for summary dismissal in the event of gross misconduct.
23. In cross-examination, he testified that the Kenya Revenue Authority Code of Conduct provides for the process of termination, which includes disciplinary process at different levels. He testified that the Claimant was invited to a disciplinary hearing but he was not aware of the composition of the disciplinary panel. He further testified that the minutes of the process were not produced in Court.
24. He stated that there was an appeal process in place. He testified that there was a dismissal letter addressed to the claimant and that at that time, the Claimant had been acquitted of the criminal charges but the Court's decision was irrelevant at that stage.
25. Upon re-examination, he maintained that the Claimant was invited to a disciplinary hearing that took place on 2/9/2011.

Claimant's submissions

26. The Claimant submitted that the Court should be guided by previous decisions, which emphasized the need of an employer to furnish the employee with valid reasons and grounds of misconduct as required under Section 41 and 45 of the Employment Act. In support of this position, he relied on the case of **Liz Ayan v Leisure Lodge Limited [2018] eKLR** where the Court held that where an employer fails to adhere to the mandatory provisions of Section 41 of the Employment Act, the resulting termination is unfair.
27. He submitted he was invited to a disciplinary hearing but was not granted audience to defend or give testimony on the accusations levelled against him. He averred that there are no records of the disciplinary proceedings were produced by the Respondent. He relied on **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** where the Court explained that the minimum standards of fair procedure are set out under section 41 of the Employment Act.
28. He submitted that the various requests for lifting the interdiction are an indication that he was not aware that he had been dismissed on 24/8/2015. He urged the Court to rely on Article 47 of the Constitution as read with Section 4 (1) of the Fair Administrative Action Act, which binds the Respondent in performance of his administrative action, which includes employment and termination.
29. He further submitted that the failure by the Respondent to take into consideration its Code of Conduct, which allows for an appeal procedure to be followed should an employee be found guilty of an offence.
30. He submitted that the Supreme Court in **Kenfreight EA Limited v Benson K. Nguti [2019] eKLR** addressed the question of what an award of damages should be based on. He submitted that in the event reinstatement is not an appropriate remedy, this Court has jurisdiction to order the payment of dues equal to what he was entitled to had he been reinstated after the decision of the High Court in November, 2015.
31. He submitted that under Article 21 of the Constitution, it is a fundamental duty of the state and any organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. It is therefore his submission that Wilson Gaconi the Deputy Commissioner Human Resource, Kenya Revenue Authority be found personally liable for the disdain overtly exhibited in the letter dismissing the decision by the High Court.
32. I have examined the evidence and submissions filed herein. From the Respondent's Appendix 7, the Claimant was charged with the offence of soliciting for a bribe. He was therefore placed on suspension on half pay with effect from the date of the charge. This letter of suspension is dated 26.10.2010.
33. He was served with a show cause letter dated 22.7.2011 for which he responded to via his letter of 2.8.2011. It is true that following this suspension, the Claimant was then dismissed vide a letter dated 24.8.2015 sent to his postal address No. [...], Mombasa.
34. Despite the fact that the Claimant averred that he did not receive this letter, he admitted that Box [...] Mombasa was his address. This Court therefore takes it that the Claimant was dismissed vide the letter dated 24.8.2015.
35. Before the dismissal the Respondent indicated that the Claimant was invited for a disciplinary hearing vide a letter dated 3/11/2010 and another dated 30/8/2011.
36. It is not clear how the disciplinary process proceeded though as Minutes of the said process were not supplied to Court.
37. From the proceedings of the Court, the Claimant was charged before Court for the offence of corruption. At the time of his suspension and dismissal, he had also been charged and found guilty.
38. Indeed this position is factual and Section 43 of Employment Act 2007 states as follows:-
- 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".***
39. For there to be a termination of service, the reason relied upon by the employer must be valid and which existed at the time of dismissal. Indeed the fact of being charged with an offence of soliciting for a bribe and being found guilty in a valid reason that led to the dismissal of the Claimant in 2015.
40. The issue of due process is however not clear. The Claimant had averred that he was never subjected to any disciplinary hearing.
41. As to whether he was, is not proved by the Respondent as no Minutes of the disciplinary proceedings are exhibited.
42. On this ground, therefore and in view of Section 45(2) of Employment Act 2007, the process leading to the Claimant's termination was unfair.
43. In the circumstances, I award him 4 months' salary as compensation = 4 x 128,500 = 514,000/=

Less statutory deductions

44. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties