



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

CAUSE NUMBER 506 OF 2018

BETWEEN

FREDRICK S. WESONGA ADIERI.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Sharia Nyange Njuguna & Company Advocates for the Claimant

Carol Mburugu Advocate for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 14th December 2019. He states he was employed by the Respondent Tax Authority, as a Graduate Trainee, Grade KRA 12, on 30th October 2006. His starting gross monthly salary was Kshs. 46,734.

2. He was gradually upgraded and his salary reviewed upwards. He was made permanent and pensionable on 23rd July 2009. He was promoted to Revenue Officer, KRA 9, effective from 13th May 2010. His gross monthly was improved to Kshs. 110,000.

3. He was interdicted with other colleagues on 1st March 2012, on the allegation that he was involved in release of containers from the Port of Mombasa, without payment of requisite taxes. The Respondent terminated Claimant's contract on 31st August 2018. As at the time of termination, the Claimant earned a monthly salary of Kshs. 181,000. He was not paid notice, transport allowance, annual leave, leave allowance, laundry allowance etc. He was discriminated against, as his colleagues who were taken through the criminal trial, are still in employment. Termination was without justification and was not fairly executed. He prays for Judgment against the Respondent for:-

a. A declaration that termination was unfair and unlawful.

b. Reinstatement.

Alternatively:

c. 3 months' salary in lieu of notice at Kshs. 543,000.

d. Transport allowance at Kshs. 15,000 monthly, from 2012 to 2018, at Kshs. 1,080,000.

e. Annual leave for the year 2012 to 2016 at Kshs. 162,900.

f. Leave allowance for the year 2012 to 2016 at Kshs 180,000.

g. Laundry allowance at Kshs. 3,000 monthly for the year 2012 to 2016 at Kshs. 216,000.

h. Compensation for unfair termination at Kshs. 2,172,000.

Total...Kshs. 4,353,900.

i. Certificate of Service to issue.

j. Any other suitable relief.

k. Costs.

4. The Respondent filed its Statement of Response on 21st January 2019. It is conceded that the Claimant was employed by the Respondent at the time and positions outlined in the Statement of Claim. As of 1st March 2012, the Claimant was a Border Control Officer stationed at gate 9/10 at the Port of Mombasa. His role was to allow exit of consignments through the said gate, after carrying out standard verification exercises. Containers were fraudulently cleared without payment of taxes, between 6th October 2009 and 1st February 2010, occasioning revenue loss of Kshs. 33.9 million. Investigations carried out established that the Claimant was on duty when the loss occurred. He was charged before the Chief Magistrate's Court Mombasa with offences relating to the loss. The criminal trial is ongoing.

5. He was interdicted on 1st March 2012, under the Respondent's Code of Conduct. The Code allows the Respondent to interdict where an Employee has been charged with a criminal offence, or is charged with corruption or economic crime, such as that which, the Respondent was investigating. He was invited to a disciplinary hearing on 28th July 2016. His contract was terminated on 31st August 2018.

6. The Respondent states that *"the Claimant will be paid his withheld salary and allowances up to and including 31st August 2018, as well as 3 months' salary in lieu of notice. He will be paid pension benefits..."* Termination was carried out in strict compliance to the relevant Laws, Regulations and Respondent's Code of Conduct. Termination was fair. The Respondent prays the Court to dismiss the Claim with costs.

7. The Claimant presented, and rested, his case on 20th November 2019. Francis Kiogara Gitonga, Respondent's Assistant Human Resource Manager closed the hearing on 24th February 2020. The matter was due for mention on 4th June 2020. Due to the coronavirus pandemic, the Court did not physically convene for mention as slated. It is confirmed Parties filed their Closing Submissions as directed, and the physical file has been forwarded to the Trial Judge at Chaka, Nyeri County for preparation of the Judgment.

8. The Claimant restated in his oral evidence, his employment history, the terms and conditions of employment with the Respondent, and the circumstances leading to termination. The letter of interdiction is dated 1st March 2012, approximately 2 years after the alleged fraudulent release of container at the Port.

9. In 2010, the Claimant with colleagues, learnt of 4 containers which were leaving the Port without proper documents. 3 had already left. The Claimant used to evaluate documents using Simba System. Some Officers were arrested at arraigned in Court. The Claimant was lined up as a Witness. He was commended after the incident.

10. In 2012, he was called from his annual leave. He was arrested by CID Officers from the Port and informed he was being taken to Court over the same incident. The initial charge sheet in Court was consolidated with the second one, incorporating 10 accused persons. The first sheet had 5 accused persons. The Claimant was interdicted after this.

11. He was not asked to show cause before interdiction. He uncovered fraud, but instead of being promoted, he was arrested and charged for the offence. He wrote to the Respondent complaining, which prompted the Respondent to invite him to a disciplinary hearing, through a letter dated 25th January 2016. This invitation came 4 years after the alleged fraudulent removal of containers.

12. He was not supplied with any documents at the hearing, other than a charge sheet and interdiction letter. He was not availed any report incriminating him. He did not participate in any fraud. He had worked for 11 years, without any disciplinary warning. He had 23 years left in his contract. He was 38 years at the time of giving evidence before the present Court. He seeks reinstatement. Termination took place on 31st August 2018, 6 ½ years after the alleged fraud occurred. His salary was stopped on 31st August 2018. Colleagues implicated in the fraud are still working. The Claimant was discriminated against. He did not know why others were not interdicted on being charged.

13. On cross-examination, the Claimant's evidence was that paragraph 14 of his Statement of Claim, alleging all his co-accused are still in gainful employment, is erroneous. He meant some are still in employment. His office was at the gate. Clearance Agents brought documents there. He would confirm payment of taxes through the Simba System. He would then remove the goods from the System. The Clearance Agents would then move on to other clearing entities. It was not possible for a container to move from the Port, without being removed from the System. The Claimant ensured enforcement at the gate. He conceded 4 containers were irregularly removed. There is another pending criminal case, involving loss of 22 containers. 10 Employees were charged. The criminal trial is ongoing. The Respondent has a Code of Conduct. It provides for interdiction once criminal proceedings have been instituted. The Claimant was invited for disciplinary hearing. He was heard. A decision was made 2 ½ years after the hearing. It is possible to be reinstated, while the criminal trial is going on. He reported to the Respondent once every month while under interdiction. He did not work during interdiction. Laundry allowance is given to Employees in Customs. The letter of employment contained a clause on termination. Redirected, the Claimant told the Court it is possible for an investigator to say who has cleared consignment from the Simba System. Clearance of the suspect containers was not done through the

Claimant's profile. Signature and stamps were involved. None was attributed to the Claimant. No report was supplied to the Claimant prior to the hearing. Termination letter stated termination was with immediate effect. The Claimant has not been convicted.

14. Assistant Human Resource Manager, produced charge sheets, listing the names of Respondent's Employees, including the Claimant, who were charged, over the fraudulent removal of containers from the Port. All had their contracts terminated. Leave pay and leave allowance are not due to the Claimant. Most of his prayers are addressed in the letter of termination. He was taken through a fair disciplinary process. Compensation is not due.

15. Cross-examined, the Witness confirmed that the Claimant worked from the year 2006. He was in long service. Respondent's records did not show the Claimant to have other disciplinary issues. He is facing criminal trial. The Witness told the Court he was not familiar with all the names contained in the consolidated charge sheet. He was not a Witness in the criminal trial. He was not aware if the Claimant had been acquitted. He was not present at the disciplinary hearing forum. Charge sheet states the Claimant was arraigned in 2012. He was interdicted in 2012. He was invited for disciplinary hearing on 25th January 2016. Termination was on 31st August 2018, 6 years after interdiction. The Respondent alleged in the letter of termination that there was circumstantial evidence against the Claimant. It was alleged the Claimant was on duty when the containers were removed. The Assistant Human Resource Manager did not have particulars of the containers. He did not know exactly when they were removed. He did not know if Border Control section worked 24 hours. Containers were not lost; they exited irregularly. There was loss of revenue. Investigators gave evidence before the disciplinary hearing. The minutes of the disciplinary proceedings, evincing that Investigators presented any evidence thereat, are not available. There was no evidence that the Claimant indeed, was on duty when the containers were removed. The Human Resource Manual, clause 8.2.7, states that disciplinary proceedings should be determined within 6 months of interdiction. Termination was more than 5 years after interdiction. Redirected, the Witness told the Court that the Code of Conduct defines gross misconduct. Clause 8.2.7 does not limit the period of interdiction.

16. The employment history, the terms and conditions of employment of the Claimant, and the fact that his contract was terminated by the Respondent on 31st August 2018 are not disputed facts.

17. The issues are whether termination was fair, based on valid ground, and executed fairly, under Sections 41, 43 and 45 of the Employment Act 2007? Whether the Claimant is entitled to the prayers sought?

The Court Finds:-

18. **Validity.** The reasons justifying termination are disclosed in the letter of termination dated 31st August 2018. It was alleged that the Claimant was on duty, on 8th December 2009, 12th December 2009, 24th December 2009 and 19th January 2010, when a total of 12 containers left the Port irregularly, without payment of requisite taxes.

19. On cross-examination, Assistant Human Resource Manager Franklin Kigora Gitonga told the Court the following:-

- The letter of termination states the Respondent had circumstantial evidence against the Claimant.
- The Respondent alleged the Claimant was on duty when the containers were lost.
- Gitonga did not have particulars of the containers.
- Gitonga could not tell exactly when the containers left the Port.
- Gitonga did not know the rules on container leaving the Port.
- The Investigating Officer gave evidence before the disciplinary hearing, but minutes of the disciplinary hearing were not available before the Court.

20. Oral evidence given by Gitonga does not establish valid reason, or reasons justifying termination. This is compounded by default by the Respondent, in exhibiting documents that would have shown whether the Respondent's decision to terminate, was based on valid reason. There is no report of any investigation on record. The minutes of the disciplinary proceedings are not exhibited.

21. The Court does not see any valid reason or reasons, to justify termination.

22. **Procedure.** This was manifestly below the threshold of fairness, contemplated by Section 41 and 45 of the Employment Act. The Claimant was interdicted on 1st March 2012. Interdiction was under Part 8. A. of Respondent's Code of Conduct. He was not suspended under Part 8. B, but interdicted under Part 8. A. Part 8.2.7 is clear that cases of interdiction, will be determined within 6 months. The Claimant was called before the disciplinary panel on 28th January 2016, 4 years after interdiction. Termination was on 31st August 2018, 6 years after interdiction. Obviously there was fundamental flaw in the procedure. Not only was the Claimant kept waiting for an inordinately long time to be heard; he was kept waiting for an additional 2 years to learn of the Respondent's decision. Delayed hearing was not recorded in any minutes availed to the Court.

23. Termination was unfair, both on account of substantive justification and procedural fairness.

24. The Claimant had worked for about 12 years for the Respondent. Gitonga conceded that the Claimant had a clean record, prior to the

allegations that he was involved in fraudulent removal of containers from the Port. Termination was unfair both on validity of reason and fairness of procedure. The Claimant was relatively young, still in his 30s at the time of interdiction. He told the Court he was 38 years, as of the date he gave evidence, and expected he would have worked for another 23 years. This was reasonable expectation, for an Employee serving a public body.

25. The Court does not think the remedy of reinstatement is proper, because the Claimant is still or was still at the time of recording his evidence before the present Court, an accused person in a criminal case which has/had not been finalized. While this Court is not bound by the findings and conclusions of the Court in the criminal trial, there is a possibility that the evidence against the Claimant in that trial is sufficient, to convince the Court to convict him. This Court would have given its blessings to a convict to go back to work. The Respondent would be hard-pressed to retain a convict in its payroll. Reinstatement would not be a reasonable, effective or practicable remedy. There would have been otherwise, a very strong case, to grant an order for reinstatement, but the fact that the Claimant is still fighting to exonerate himself from criminal culpability, and could end up being convicted, restrains the Court from granting an order of reinstatement.

26. The Claimant's gross salary as at the date of termination, was Kshs. 181,000. For reasons stated at paragraph 24 and 25 of this Judgment, the Court grants to the Claimant, ***equivalent of 10 months' salary in compensation for unfair termination at Kshs. 1,810,000.***

27. The prayer for 3 months' salary in lieu of notice is conceded at paragraph 14 of the Statement of Response and paragraph 10 of Gitonga's Witness Statement. ***It is granted at Kshs. 543,000.***

28. The Claimant has not persuaded the Court about transport allowance claimed at Kshs. 1,080,000. Similarly, he fails to convince the Court on his plea for annual leave pay, leave allowance and laundry allowance.

29. ***The prayer for Certificate of Service to issue is conceded and granted.***

30. ***Costs to the Claimant.***

IN SUM, IT IS ORDERED:-

a. It is declared termination was unfair.

b. The Respondent shall pay to the Claimant equivalent of 10 months' salary in compensation and 3 months' salary in notice, totaled at Kshs. 2,353,000.

c. Certificate of Service to issue.

d. Costs to the Claimant.

Dated, signed and issued at Chaka, Nyeri County, under Judiciary Covid-19 Guidelines and Rule 38 of the E&LRC [Procedure] Rules 2016, this 29th day of June 2020

James Rika

Judge