



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 30 OF 2015

CORNELIUS NGATIA KAHIHIA.....CLAIMANT

-VERSUS-

THE NAIROBI CITY WATER AND SEWERAGE COMPANY LTD.....RESPONDENT

JUDGMENT

1. The Claimant filed a Memorandum of Claim on 14.1.2015 alleging that the Respondent unfairly dismissed him for a false allegation that between January to August, 2020, he posted invalid transactions to 37 customer accounts amounting to Kshs. 150,192.00 for the period between January and August 2012. He further averred that he was dismissed without following a fair procedure as required by the law and prayed for the following reliefs:

a. To pay the Claimant as tabulated below:

i. 3 months' salary in lieu of notice = $(62,000 \times 3) =$ Kshs. 186,000.00

ii. Withheld salary/wages during the period March 2013 and November 2013 (Kshs. $47,000 \times 9$) = 423,000.00

iii. Severance Pay at the rate of fifteen days' pay for every completed year of service $(62,000 \times \frac{1}{2} \times 24) =$ Kshs. 744,000.00

iv. Damages for wrongful dismissal $(62,000 \times 12 \text{ months}) =$ Kshs. 744,000.00

v. Reinstatement of the Claimant to his former position

vi. Accrued annual leave for the year 2013 = Kshs. 62,000.00

Total Kshs. 2,159,000.00

b. Interest on (a) above from the date the same became due until payment in full.

c. A certificate of service.

d. Costs of the suit.

e. Any other relief this Honourable Court may deem fit to award under the circumstances.

2. The Respondent filed a Memorandum of Reply on 2.3.2015 contending that the claimant was dismissed for gross misconduct contrary to clause 8.23.2 (viii), (xii) and (xiii) of the Company's Human Resources Policies and Procedures Manuals and section 44 (4) (g) of the Employment Act. She further averred that a fair procedure was followed and as such the dismissal was fair. Therefore, she prayed for the suit to be dismissed with costs.

3. The matter proceeded for hearing on 10.3.2020 when both parties tendered evidence and but thereafter, only the Claimant filed his submissions.

Claimant's case

4. The Claimant, Cw1, testified that he was employed by the Respondent from 1989 without any disciplinary issue until 7.12.2012 when he was served with a show cause letter; that he responded to the said letter and availed all the documents that were required but on 25.2.2013, he was suspended without pay until 6.12.2013 when he was dismissed; that on 15.4.2013 he was invited to a disciplinary hearing where he denied the accusations and the Disciplinary committee referred the matter back for further investigations but he was never invited to a further hearing on 15.10.2013 as alleged in the dismissal letter dated 6.12.2013 despite having availed all the required documents to the investigator. He appealed against the dismissal by the letter dated 17.12.2013 and he was invited to a hearing on 2.5.2014 but he was not paid dues after the dismissal including leave for the year 2013 which he never took.

5. On cross-examination, he admitted that his disciplinary hearing took place on 15.4.2013 and he signed Attendance Register as number 3 on the list. He further admitted that he attended the hearing of his appeal and stated that he attended the disciplinary hearing on 15.4.2013 when he was directed to take the customer receipts to the Investigator but denied that he was invited to any other hearing on 15.10.2013. He further contended that his suspension from 25.2.2013 violated the Respondent's HR Policy and Procedures Manual because the suspension was without pay and it exceeded the 90 days ceiling erected by the Manual and as such the subsequent dismissal was rendered unfair. He contended that under the HR Policy and Procedures manual filed by the respondent, the suspension of 90 days can only be extended by 30 days after which the employee must be reinstated to his employment.

Respondent's case

6. Simon Gerry Itubo, the Respondent's Investigating Officer testified as Rw1. He told the court that in November 2012, he received instructions from the Security Manager, Mr. Peter Kithusya, to commence investigations on invalid agent transactions posted to Customers' Water Accounts between the month of January to August 2012; that the anomalies had been detected by the internal auditors with respect to 478 customer accounts which had resulted to a loss of Kshs. 8,435,976.77; and that 7 staff members including the Claimant had been adversely mentioned in the audit report.

7. He further told the court that he interviewed 80 customers and recorded their statements; that the customers denied paying such amounts to the agent-banks; that he checked the company records and found that no soft copies supported the payments from the agent banks; that he requested the banks for the uploaded accounts but the banks denied ever receiving such payments; and thereafter he requested the Claimant for documents he had used to update the payment but he failed to avail the same. Consequently, he concluded that the Claimant posted 37 invalid transactions to customer accounts without any supporting documents and prepared Investigations Report and forwarded it to the management for further action.

8. On cross-examination, he admitted that in his Witness Statement he erroneously indicated that the Claimant refused to record a Statement with the investigators. He further admitted that he indicated under paragraph 2 of the Witness Statement that the Claimant stated that he forwarded the documents to the auditor. He contended that he prepared the initial investigations report dated 11.2.2013 and a follow up report which he did not have in court.

9. He admitted that during the disciplinary hearing on 15.4.2013, it was recommended that the case be deferred for further investigations. He further admitted that he did a follow up report after the claimant wrote a statement dated 31.7.2013, which was 5 months after submitting the first report. He contended that the Claimant presented 27 receipts out of 37 in support of the transactions and stated that the remaining 10 were lost. Finally, he contended that possibly the 27 receipts presented by the claimant were not authentic.

10. Mr. George Otieno Okech, the Respondent's Industrial Relations Co-ordinator testified as Rw2. He adopted his Witness Statement dated 22.10.2019 and respondent's bundles of documents as his evidence-in-chief. In brief he stated that the claimant was implicated with posting of invalid transactions amounting to Kshs. 339,246.12, between January to August 2012, and he was issued with a show cause letter and he responded; that thereafter suspended from duty on 25.2.2013 under the respondent's HR Policy and Procedures Manual of March 2009 and on 15.4.2103, he was summoned to a disciplinary hearing. He further stated that the investigations report presented to the disciplinary committee indicated inter alia that the Claimant had posted 37 invalid transactions amounting to Kshs. 150,952, to customer accounts but the claimant contended that he forwarded the documents supporting the said transactions to the auditor and not the investigator.

11. Rw2 further stated that on 31.7.2013, the Claimant was called upon to make a further statement which he did thereafter and a further Investigations Report dated 18.9.2013 was issued confirming that the Claimant had posted invalid transactions. He contended that the offence by the claimant amounted to gross misconduct and the Claimant was accorded a fair hearing before the dismissal and on his appeal.

12. In cross-examination, he confirmed that the summary dismissal letter referred to Clause 23.2.2 of the HR Policy and Procedures Manual, which is in the 2013 Edition and not in the 2009 Edition of the Manual. He confirmed that the suspension letter referred to section 8.2.4 of the HR Policy and Procedures Manual which again is in the 2013 edition of the Manual and not in the 2009 edition. He admitted that the HR Policy and Procedures Manual used in the Claimant's case was the 2013 Manual which was approved by the Respondent's Board on 18.12.2012.

13. He further admitted that although the dismissal letter stated that a disciplinary hearing was conducted on 15.10.2013, the only disciplinary hearing conducted was on 15.4.2013. He contended that further investigations were done as recommended by the disciplinary committee but he admitted that the Claimant was never summoned for another hearing on 15.10.2013 as alleged.

14. He confirmed that the Claimant's suspension was not formally extended and he was not reinstated. He admitted that the suspension ran from 25.2.2013 to 6.12.2013 when he was dismissed. He further admitted that the HR Policy and Procedures Manual provides for suspension for 90 days with a possible extension of 30 days. He denied that the HR Policy and Procedures Manual was contravened by the failure to formally extent the suspension period or reinstate the claimant after the lapse of 90 days.

15. He admitted that the Claimant was entitled to 30 days leave per year but he never applied for the same. He further testified that the reason

why the Claimant was not paid his terminal dues was because he did not clear with the Respondent as directed vide the dismissal letter.

16. He admitted that the Claimant's appeal was heard on 2.5.2014, the decision made on 15.7.2014 and the was communicated to him vide the letter dated 6.8.2014. He contended that Clause 8.25 of the HR Policy and Procedures Manual provides that the outcome of an appeal ought to be communicated within 30 days from the date the decision is made.

17. He testified that the Claimant's appointment letter dated 5.9.2005 provided for 3 months' notice and 26 leave days. He testified that the Claimant was employed in Grade 8 and his leave allowance was Kshs. 72% of his basic pay.

18. In re-examination, he changed his earlier testimony to say that the Claimant appeared for the hearing on 15.10.2013. He further stated that the claimant's appointment letter provided for summary dismissal without pay.

Claimant's submissions

19. The Claimant submitted that the Corporate Disciplinary Committee in its minutes of 15.4.2013, observed that the investigations were not completed and deferred the case for further investigations. He contended that without the report for the further investigations on the alleged 37 invalid transactions the Respondent failed to establish the reasons for dismissal as per section 47 (5) of the Employment Act. The claimant further submitted that by not being invited to attending the disciplinary hearing on 15.10.2013, he was not given an opportunity to defend himself before the committee since the hearing held on 15.4.2013 was not adjourned before conclusion.

20. He submitted that the Respondent suspended him without pay for a longer period than that provided under clause 8.24 of the HR Policy and Procedures Manual. He contended that the respondent violated the said Clause by failing to reinstate him after the lapse of the 120 days whether or not that the disciplinary proceedings had lapsed.

21. He argued that his appeal was allegedly heard by a corporate disciplinary committee that does not exist in the human resource manual. He further submitted that the appeal decision was not communicated within 30 days. He maintained that the procedures followed by the Respondent before dismissing him were not fair and urged the court to find that he has discharged his burden of proof of unfair termination as required under section 47 (5) of the Employment Act.

22. As regards the reliefs sought, the claimant submitted that he is entitled to 3 months' salary in lieu of notice in accordance with clause 8.27.1 of the HR Manual and section 49 (1) of the Employment Act, being kshs. 62,000 x 3 = kshs 186,000. He further contended that he is entitled to compensation for unfair termination being kshs. 62,000 x 12 =Kshs. 744,000. He justified the said compensation by citing his long service of 24 years and the fact that the respondent had violated the disciplinary procedure laid down in her own HR Policy and Procedure Manual.

23. He further contended that he is entitled to Kshs. 318, 000 being salary 6 months 11 days withheld from 26.5.2013 when the 90 days' suspension without pay lapsed to 6.12.2013 when he was dismissed. He contended that since the suspension was never extended, he ought to have been reinstated to work as required by the HR Policy and procedures Manual.

The issues for determination and analysis.

24. I have carefully considered the pleadings, evidence and submissions presented by both parties and found no dispute that the claimant was employed by the respondent until 6.12.2013 when he was summarily dismissed from employment for alleged gross misconduct. There is also no dispute that the claimant was not paid any dues after the dismissal. The main issues are: -

a. Whether the Claimant's summary dismissal was unfair and wrongful.

b. Whether the Claimant is entitled to the reliefs sought.

Whether the summary dismissal was unfair and wrongful

25. Section 45 of the Employment Act provides:

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.”

Whether there was valid and fair reason for the dismissal

26. The reason cited for the summary dismissal in the letter dated 6.12.2013, was gross misconduct of posting invalid transactions to 37 customers' accounts amounting to kshs. 150,952 between January 2012 and August 2012, contrary to Section 44(4) (g) of the Employment Act, Clause 8.23.2 (viii), (xii) and (xiii) of the Respondent's HR Policies and Procedures Manual and the respondent's Code of Conduct for Employees. The claimant denied the said offence and contended that on 10.12.2012, he presented all the requested supporting documents to the auditors and later to the investigator.

27. The burden of proving the validity of the alleged offence lies with the respondent under section 43(1)(2) and 45 of the Act. Rw1 testified that in he interviewed 80 customers during his investigations, but they all denied paying such amounts. Likewise, he checked with the agent banks about the payments and they denied receiving such payments. Rw1 admitted that during cross examination that the Claimant indicated to him during the investigations that he forwarded all the documents supporting the alleged invalid transactions to the auditor. Further, the investigations report dated 11.2.2013, prepared by Rw1, shows that indeed the Claimant stated that he forwarded his supporting documents to the auditor but did not avail the documents to the investigator for verification.

28. During the hearing held on 15.4.2103, the claimant presented the documents in support of the said invalid transactions and the Corporate Disciplinary Committee deferred the case and recommended further investigations. Rw1 confirmed during re-examination that the claimant availed only 27 out of the 37 required documents and recorded a statement dated 31.7.2013. My reading of the said statement indicates that the said 10 missing receipts were due to misfiling by different staff but he finally retrieved them and presented same to the Security Office and they were acknowledged on 31.7.2013.

29. In view of the foregoing clear statement, which was produced by the respondent as an exhibit, I find that the claimant presented to the respondent all the 37 supporting documents in respect of the alleged invalid transactions as for purposes of further investigations as directed by the Corporate Disciplinary Committee. I further find that the respondent did not conduct verification of the authenticity of the said documents during the further investigations as directed by the disciplinary committee on 15.4.2103. The foregoing view was corroborated by the RW1 during re-examination when he stated that:

“He (claimant) was required to avail 37 documents but he provided 27 only. The 27 were possibly not authentic.”

30. Flowing from the foregoing analysis, I must hold that the respondent has failed to prove a valid and fair reason to justify the summary dismissal of the claimant herein as required by section 43 and 45 of the Employment Act on 6.12.2013.

Whether a fair Procedure was followed.

31. The claimant contended that his prolonged suspension was unlawful and he ought to have been reinstated after serving 90 days' suspension plus an extension of 30 days from 25.2.2013. However, he contended that the suspension was never formally extended after the lapse of 90 days and he was not reinstated until 6.12.2013 when he dismissed.

32. Clause 8.24 of the HR Policy and Procedures Manual provides:

“In the event that an employee is suspended, the duration shall not exceed 90 calendar days. The corporate disciplinary committee shall ensure the case are deliberated and completed within the stipulated period. An employee shall be given a minimum of 10 working days' notice by the Human Resource Manager to appear before the Corporate Disciplinary Procedure. The affected employee shall be informed of the outcome of his/her case within one month on conclusion...”

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 expiry of the extended period, the employee shall be reinstated notwithstanding the fact that the disciplinary process will not have been completed.”

33. In view of the foregoing Clause, I agree with the claimant that the prolonged suspension was in violation of the express provision of the respondent's own HR Policy and Procedures Manual, and consequently the ensuing dismissal was vitiated by the deliberate breach of the said mandatory procedure under the HR Manual. In my view an employer should not expect to have a fair separation with his employee to arise from an unfair process, like in the instant case where the employer was bound to reinstate the claimant whether or not the disciplinary proceedings had been concluded on not.

34. As regards the issue of fair hearing, it is common ground that the claimant was summoned for hearing on 15.4.2013 before the respondent's Corporate Disciplinary Committee and when he appeared in the company of his union representative. However, when he presented documentary evidence as his defence, the case was deferred for further investigations. It is also a fact that the claimant complied with the recommendation by the committee but he was never invited to the hearing again until he received the summary dismissal letter dated 6.12.2013. The question that arises is whether the claimant was accorded a fair hearing before the summary dismissal.

35. Section 41 of the Employment Act provides:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under

section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

36. Applying the foregoing mandatory provisions of the law to the facts of this case, I do not find that the Claimant was subjected to a conclusive disciplinary hearing. The disciplinary committee having deferred the case for further investigations, the claimant ought to have been invited to hearing in the company of another employee or union representative of his choice to offer his defence, for consideration before dismissal could be decided. Having found that the claimant was unlawfully suspended without pay for 120 days, and thereafter he was dismissed without being accorded a fair hearing, I must hold that the respondent has also failed to prove that she dismissed the claimant after following a fair procedure.

37. Flowing from the foregoing finding and my earlier finding that the respondent has failed to prove a valid reason to justify the summary dismissal, I must now proceed to hold that the said dismissal of the claimant was wrongful and unfair within the meaning of section 45 of the Employment Act.

Whether the Claimant is entitled to the reliefs sought

Notice period

38. In view of the finding that dismissal of the claimant was unfair, I further find that he is entitled to salary in lieu of notice plus compensation under section 49(1) of the Employment Act. Under Clause 8.27.1 of the HR Policy and Procedures Manual and the Letter of employment dated 5.9.2005 the claimant is entitled to 3 months' salary in lieu of notice being kshs. 62,000 x 3 = Kshs 186,000. In addition, award him 12 months' salary as compensation for the unfair dismissal being Kshs. 62,000 x 12 = Kshs. 744,000. In awarding the said compensation I have considered the claimant's long service of 24 years without any disciplinary issues.

Withheld salary

39. I already found that the suspension of the claimant was unlawful because it violated express provisions of Clause 8.24 of the respondent's own HR Policies and Procedures manual, which in essence formed part of the contract of service between the parties herein. The claimant was entitled to a reinstatement with full benefits after the lapse of the maximum 120 days suspension permitted under the said Clause 8.24 of the HR Manual whether the disciplinary process was concluded or not. There is no contention that the 120 days' suspension period, from 25.2.2013, ended on 24.6.2013. The claimant prayed for salary for the 9 months of suspension but after the hearing he submitted for only 6 months and 11 days from 26.5.2013 when the 90 days' suspension lapsed. Consequently, I award him the same being kshs. 398230.76.

Severance Pay

40. The Claimant is not entitled to severance pay as his termination was not as a result of redundancy under section 40 of the Employment Act.

Re-instatement

41. The prayer for reinstatement fails for reason that section 12 (3) (vii) of the Employment and Labour Relations Court Act provides that reinstatement can only be ordered within 3 years after dismissal. In the instant case, the claimant was dismissed on 6.12.2013, almost 7 years ago.

Accrued annual leave

42. Clause 5.2.1 of the HR Policy and Procedure Manual provides that an employee is entitled to 30 days leave. Clause 5.2.1.2 provides:

“When leaving NCWSC, it is at the discretion of the staff member's manager or MD whether outstanding leave is taken during the period of notice or converted into cash payment. Payment for leave accrued and not taken will be calculated at a rate based on current salary and working days in a year...”

43. The Claimant was suspended for about 8 months in the year 2013. The claimant did not prove that he was bound not to leave the Nairobi without permission of the Employer. It follows that he was a free man for the 8 months' suspension and therefore he is not entitled to claim leave for that period.

44. The Claimant is entitled to a certificate of service under section 51 of the Employment Act.

Conclusion and disposition.

45. I have found that the summary dismissal of the claimant from service by the respondent was unfair within the meaning of section 45 of the Employment Act. I have also found that the claimant is entitled to some of the damages sought in her suit. Consequently, I enter judgment for him in the following terms: -

Notice	Kshs. 186,000
Compensation	Kshs. 744,000

Withheld salary Kshs. 398,230.76

Total **Kshs. 1,328,230.76**

The above award is subject to statutory deductions but the Claimant is awarded costs of the suit together with interest at court rates from the date hereof.

Dated and delivered at Nairobi this 1st day of October, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their 1450 consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE