



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

CAUSE NUMBER 293 OF 2018

BETWEEN

SAID DINGO NYONDO.....CLAIMANT

VERSUS

KWALE WATER & SEWERAGE CO. LTD.....RESPONDENT

Rika J

Court Assistant: Andrew Mwabanga

Wandai Matheka & Company Advocates for the Claimant

Lewa & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 2nd May 2018. He states, he was employed by the Respondent, on 15th July 2010 as a Procurement Assistant. His first gross salary was Kshs. 22,000, paid monthly. It was improved to Kshs. 43,550 by the time he left employment.

2. He was required by the Respondent, through a letter dated 19th August 2016, to explain allegations that he had irregularly issued a receipt book, to one Mohammed Khamisi Kalandi, who then gave it out to Asha Mohammed Mlingo. He received a letter to show cause from the Respondent, on or about 8th September 2016. He was alleged to have issued the receipt book irregularly. The receipt book was used to collect revenue illegally from Respondent's Customers. Other allegations were, that he purposely misread tender amount on a bid placed by Suhufi Agencies Ltd, as Kshs. 15.7 million, instead of Kshs. 14.4 million; and that he was involved in an illegal industrial action. He responded to the allegations on 14th September 2016. He was interdicted on 14th September 2016. He was placed on half salary of Kshs. 21,775, for the period of interdiction from 23rd November 2016 to 17th July 2017. He attended disciplinary hearing on 25th April 2017, accompanied by his Trade Union Branch Chairman. He received a letter of summary dismissal dated 30th June 2017. He states that he was not heard in accordance with the requirements of fair procedure, and the reason given in justifying termination was not valid. He states, he was not allowed to take annual leave. He was paid salary of Kshs. 41,000, instead of Kshs. 43,550 for 7 months.

3. He prays for Judgment against the Respondent for: -

- a. 3 months' salary in lieu of notice at Kshs. 130, 650.
- b. Unpaid leave since 2010 at Kshs. 304,850.
- c. Salary deduction at Kshs. 17,850.
- d. Half-salary for the period of interdiction at Kshs. 195,975.
- e. 12 months' salary in compensation for unfair termination at Kshs. 522,600.

- f. Declaration that termination was unfair.
- g. Certificate of Service to issue.
- h. Costs.
- i. Interest.
- j. Any other relief.

4. The Respondent filed its Statement of Response dated 29th November 2018. It is not denied that the Claimant was employed by the Respondent. Sometime in 2016, the Claimant irregularly issued Mohammed Khamis Kalandi, a receipt book. Kalandi admitted in a letter dated 19th August 2016, that he received the receipt book from the Claimant. The Claimant was required to explain the incident, through a letter addressed to him by the Respondent, dated 10th August 2016. He did not reply to this letter and was therefore asked to show cause why he should not be disciplined, through a letter dated 8th September 2016.

5. He replied denying the allegations, and was fairly interdicted on 23rd November 2016, to pave way for investigations. He was summarily dismissed after investigations and disciplinary hearing, and is not entitled to half-salary withheld during interdiction. Hearing was conducted fairly. The Claimant was accompanied by his Trade Union Representative and was afforded all opportunity to state his case. He did not ask for any documents, before, during and after the hearing. He was summarily dismissed with loss of all benefits. He was found guilty of misreading a tender amount; failing to disclose the circumstances of misreading of the tender amount; altering related bond statements; issuing receipt books irregularly to Kalandi and Mwangunya; and participating in an illegal industrial action on 28th and 29th November 2016, yet he was not a member of the involved Trade Union. Between November 2015 and September 2016, the Respondent harmonised salaries which affected allowances, but not the basic salary of the Claimant. He was not subjected to illegal salary deductions. His Claim has no merit. The Respondent prays the Court to reject the Claim with costs.

6. The Claimant testified on 23rd July 2019. He closed his case on 26th November 2019, after his 2nd Witness failed to testify. Internal Auditor Stephen Ngala Safari, Technical Manager Kanzere Swalehe Kidzuga, and Human Resource Manager Susan Solomon Mlamba, all testified for the Respondent on 12th October 2020, when the hearing closed.

7. The Claimant restated that he was employed as a Procurement Assistant on 15th July 2010. He worked well and was promoted to Procurement Assistant 1. on 23rd May 2016. His salary was improved to Kshs. 43,550.

8. He was asked to explain the allegation that he had issued receipt book irregularly. He did not respond as required, because he was on study leave. He was subsequently issued a letter to show cause on 8th September 2016. He explained that receipt books were issued by the accounts department. He referred the Respondent to Kalandi, who worked in the billing department.

9. The Respondent interdicted the Claimant on 23rd November 2016. It was said that Kalandi alleged the Claimant issued to him receipt books for illegal revenue collection. Accounts department had custody of receipt books. The same receipt book series was shown to have been issued to one Jared.

10. The Claimant was placed on indefinite interdiction. He was placed on half salary. In April 2017, he was invited for disciplinary hearing. It was alleged he participated in illegal industrial activities. He was at home when the said activities were alleged to have taken place. The activities had not been declared illegal. He was a member of the tender committee. There were other members. Issues of misreading of bid amount would be dealt with internally. Bid Bond was a security document issued by a bank or insurance. It was not possible to alter the documents as alleged.

11. The Claimant attended hearing in the company of his Trade Union Branch Chairman. The Respondent made reference to documents the Claimant was not aware about. There was objection from the Claimant. The Respondent said it was not necessary to have the documents in advance of the hearing.

12. The letter of summary dismissal, dated 30th June 2017, was received by the Claimant on 17th July 2017. The same reasons given in the letter of interdiction, made up the reasons justifying termination. He was advised he could appeal within 14 days of the decision, but late receipt of the decision, meant the Claimant could not appeal in time. He sought legal redress, culminating in this Claim. Notice period under contract was 3 months. He never went on annual leave, and seeks annual leave pay from the year 2010. He was tied down to the Office alone. His monthly salary was Kshs. 43,550, in the beginning. It was irregularly reduced to Kshs. 41,000 monthly, between November 2015 and May 2016.

13. Cross-examined, the Claimant testified that he received the letter from the Respondent, asking him to state his position on the allegations relating to receipt books. He did not make an immediate response. He received letter to show cause. He replied. He was interdicted and invited for disciplinary hearing. He did not ask for any documents upon receiving all these letters. He was aware that Kalandi was in possession of an unauthorized receipt book. The Claimant worked in the procurement department at the time. His department was mandated to procure services and goods. He was not mandated to supply receipt books to individuals. Receipt books are issued by accounts department. The Claimant did not go for annual leave at any time. He never applied for leave. There were additional issues, other than the receipt book, which he was required to respond to. He mispronounced tender revolving around Gondoni Water Project. The Project was

investigated while the Claimant was on interdiction. He did not know who investigated. Redirected, the Claimant told the Court that the tender committee resolved to proceed with tendering based on the correct bid amount.

14. Stephen Ngala Safari told the Court it is his docket, to ensure Respondent's resources are utilized optimally. The Claimant used to receive requests for receipt books, from user departments. The requests went through various approvals. There were receipt books found to have been circulating unofficially. The Claimant was the custodian of the receipt books. It is incorrect to say he had nothing, to do with the receipt books.

15. Cross-examined, Safari testified that user departments, would request for receipt books. It was the procurement department, that sourced from suppliers. Accounts department received the receipt books. Serial No. 302001 is shown to have been issued to another person, not to the Claimant. Outsiders were using these receipt books. The receipt books were not available in Court. On redirection, Safari testified that series 3002001 was in a different batch from what was entrusted to the Claimant. There were 6 receipt books issued for Ukunda Station. They passed through procurement department. Involved Officers are not Witnesses in this Claim; they were taken through individual disciplinary processes.

16. Kanzere Swalehe Kidzuga told the Court there were 3 proposed Water Projects at Kwale. The Respondent sought for funding from sponsors. It went on, to procure, prepared tender documents, and called for bids nationally. Tendering went through the normal procedure. The Claimant served as secretary to the tender committee. One applicant complained that his tender was altered. The complainant directed his complaint to the Managing Director. This was with regard to Gandoni Water Project. Cross-examined, Kidzuga told the Court that the Claimant was a member of the tender committee. He was its secretary. The committee acted collectively. If a misreading of tender amount was made, it could be corrected. Kidzuga was a member of the committee. Bid Bonds issued from banks or insurance companies. It was not easy to alter bids. Redirected, Kidzuga told the Court that the Claimant made the wrong tender amount announcement, individually. He did not alert anyone that there was a wrong announcement. The matter was raised with the committee by the concerned county executive committee member.

17. Susan Solomon Mlamba deals with staff issues. She found the Claimant already interdicted, when she joined the Respondent. She attended the disciplinary session, and confirms the minutes on record, capture the disciplinary proceedings fairly. Due process was followed in terminating Claimant's contract. The Claimant made a request for certain documents at the hearing. He did not do so before the hearing. The Managing Director wrote the letter of dismissal as the accounting officer. The Claimant was accorded all opportunity to defend himself. He was allowed to call witnesses. He called none. Mlamba did not recall if the Claimant replied to the letter to show cause. He had a chance to appeal within 14 days. He did not do so. He was guilty of gross misconduct. Termination was fair.

18. Cross-examined, Mlamba told the Court, she alleged in her witness statement, that the Claimant issued receipt book to Mohammed Khamis. Khamis was not called as a witness in the proceedings herein. Receipt books are in the custody of procurement department. Procurement issues to the finance department. He was interdicted for issuing specific receipt book. Page 29 of Respondent's documents shows, receipt book issued to Jared. The record shows, the Claimant replied to the letter to show cause on 14th September 2016. He said he was not aware of reports linking him to receipt books issued to 3rd parties. He was not availed any report, linking him to irregularly issued receipt books. The disciplinary committee did not make recommendation with respect to Claimant's employment status. Dismissal letter states that the Claimant participated in an illegal demonstration. There was no order barring any demonstration. The Claimant joined the demonstration while already on interdiction. He received dismissal letter after 14 days given to appeal, had lapsed. He was on half salary when under interdiction. She did not know, if the Claimant was prosecuted. Redirected, Mlamba told the Court that the Managing Director had the final word on disciplinary sanction. Mohammed left employment. The Claimant states he was not familiar with allegations contained in the report. He did not make any request for the report before hearing.

The Court Finds: -

19. The Claimant was employed as a Procurement Officer, by the Respondent, through a contract dated 15th July 2010. Appointment became effective on 1st August 2010. He was promoted effective 1st July 2016, as Procurement Assistant 1, Job Scale 11. His gross salary rose from Kshs. 41,000 to Kshs. 43,550.

20. Through a letter dated 8th September 2016, the Respondent required the Claimant to show cause why disciplinary action should not be taken against him, based on the following allegations: -

- It was reported by Mohammed Kalandi, that the Claimant issued him a receipt book for revenue collection, contrary to work procedure, where accounts department issues receipt books to Cashiers.
- The receipt book was illegally used to collect revenue from customers in the name of the Kwale Water & Sewerage Company Limited.
- The Claimant received a request for a statement from the Respondent, through a letter dated 29th August 2016, but did not respond within the specified period of 7 days.

21. The Claimant replied on 14th September 2016. He explained he was not able to reply to the first letter of 29th August 2016, due to circumstances beyond his control. In his evidence before the Court, he stated he was on study leave. He denied that he issued a receipt book to Mohammed Kalandi. He stated he advised Kalandi that it was illegal to use a receipt book without following the laid down procedure; the Claimant did not issue Kalandi a receipt book; issuing of receipt books was the role of the finance department; the Claimant was not aware that the receipt book was used to collect revenue from customers; and the Claimant was not privy to the report made by Kalandi on the subject.

22. The Respondent was not satisfied with this explanation and interdicted the Claimant on half pay, on 23rd November 2016. Interdiction was based on the Claimant's reply, as well as Kalandi's disciplinary hearing held on 11th November 2016, whereof, Kalandi implicated the

Claimant in irregular issue of receipt book.

23. Some time passed, before the Claimant was invited to disciplinary hearing on 23rd April 2017. The charges were expanded beyond what was in the letters calling for statement, show cause and interdiction, which revolved around receipt book issued to Mohammed Kalandi. The Claimant was said to have issued unauthorized receipt books to another gentleman named Ali Mwangudya, for illegal revenue collection; the Claimant benefited financially from issuing these receipt books; he organized a cartel to facilitate illegal revenue collection; he participated in / attended an illegal demonstration held by unionized Employees, on 28th and 29th November 2016, while he was himself not unionized; he mispronounced tender sum for a bid made by Suhufi Limited; he altered bid bond statement for Suhufi Limited, in order to favour their tender award; and the Claimant made financial gain from alteration of the bid bond statement.

24. The disciplinary committee heard the Claimant, and concluded that the Claimant was implicated by other officers – Kalandi, Mlingo, Mwangudya- in the irregular issuing of receipt books. It was concluded that the Claimant was “*privy to access all matters of receipt books...*” In unclear language, the committee found also that, “*the committee could not quantify how much Saidi [the Claimant] accused for unless Mwangudya submit m-pesa transaction statement to the committee.*” It was recommended that the case be taken to police for external investigation since Saidi, denied all the allegations despite the evidence provided; and Ali Mwangudya to provide m-pesa statement that shows he divided cash collected from unauthorized receipt books to the cartel.

25. With these conclusions and recommendations, the Managing Director wrote to the Claimant on 30th June 2017, summarily dismissing the Claimant. The letter of summary dismissal makes reference to the disciplinary hearing, and a resolution made by the disciplinary committee, to dismiss the Claimant with loss of all benefits. The reasons given in justifying the decision are a replica, of the accusations made in the letter inviting the Claimant to disciplinary hearing.

26. The disciplinary process was not objective, rational and consistent with the minimum standards of fairness, prescribed under Sections 41, 43 and 45 of the Employment Act 2007.

27. Starting from the conclusion of the process, it is clear there was no link, between the decision of the Managing Director, and the conclusions and recommendations of the disciplinary committee.

28. The committee’s resolution, determining that the Claimant is summarily dismissed, which the Managing Director cited in justifying his decision, is not recorded anywhere. It is not in the proceedings of the disciplinary committee. It is not in any communication made by the committee to the Managing Director, after closure of the disciplinary proceedings. Who informed the Managing Director that the disciplinary committee had resolved to have the Claimant summarily dismissed?

29. The Managing Director seems to have stepped in, taken over the disciplinary process, and concluded a process the disciplinary committee, had left hanging. He ran away with the disciplinary process, and in doing so, blurred the outcome. The committee recommended involvement of the police. It recommended that Mwangudya is recalled, to supply m-pesa statements, showing how the alleged loot was shared by the cartel. Were the police involved and was Mwangudya called to supply m-pesa statements? Why did the Managing Director reach his own conclusions, before the committee collected all the evidence, and before the police came in?

30. The Managing Director regurgitated and copy -pasted the allegations made against the Claimant at the disciplinary hearing, as the reasons for dismissal. As stated elsewhere in this Judgment, these allegations were not all contained in the letters calling for statement, show cause and interdiction. The Claimant did not have the benefit of responding to all the allegations from the outset. These allegations kept mutating.

31. The disciplinary committee did not make a conclusion on all the allegations in the expanded list. There were only 4 conclusions. There were 14 allegations made against the Claimant, when he appeared before the disciplinary committee. The Managing Director based his decision on 6 findings, which are all not supported by the disciplinary committee. For example, the Managing Director states the Claimant participated in an illegal demonstration. This is not in the conclusion of the disciplinary committee, and was not in the letters heralding disciplinary process. Secondly, the Managing Director alleges that the use of unauthorized receipt books, resulted in loss of Kshs. 2.4 million. Where is this in the conclusions of the disciplinary committee? The Managing Director also refers to misreading of the tender sum, relating to Suhufi Agencies Limited. There was no conclusion by the committee on this as well. It is difficult to see where the Managing Director got his conclusion from.

32. To compound these defects in the disciplinary process, the persons mentioned as having implicated the Claimant, do not seem to have been called at the disciplinary hearing, and their evidence implicating the Claimant, tested by the Claimant. Mwangudya was not availed to the Claimant for questioning. Other colleagues were not called as witnesses for the Respondent. The tenderers, who were victims or victors, in the alleged machinations of the Claimant, were not presented at the disciplinary hearing. The Respondent did not explain to the Court how the Claimant could possibly alter bid bonds, which are secured through banks or insurance companies. Technical Manager, Kidzuga confirmed that bid bonds are issued by banks and insurance companies, and it is not easy to alter them. It was accepted by Respondent’s witnesses that any fault with the tendering process, would be taken collectively by the committee. Remedial action would be taken collectively by the committee. The Respondent did not present any member of the tender committee at the disciplinary hearing or in Court, to establish what the Claimant’s fault, in discharging his role as secretary to the tender committee, was. The Claimant prepared a professional opinion to the Managing Director, dated 23rd September 2016, explaining in detail how the tender process was conducted. The Managing Director does not seem to have taken into account this opinion, in summarily dismissing the Claimant. No receipt books, regularly or irregularly issued by the Claimant, were exhibited before the Court. No witness who was issued with a receipt irregularly, was presented before the Court. The Claimant’s colleagues who were said to have implicated him, and who, in the view of the Respondent, belonged to a cartel whose leader was the Claimant, and who would be accomplices to the Claimant, did not come face to face with the Claimant at the disciplinary hearing. Police investigation recommended by the disciplinary committee, did not materialize. The Respondent did not establish valid reason or reasons, in summarily dismissing the Claimant.

33. Procedure was flawed. Whereas the necessary letters/ notices before the disciplinary hearing took place were issued, the charges were not consistent throughout the proceedings. The Claimant was not availed the report made by Mohammed Kalandi from the time he was required

to respond to the report on 19th August 2016, right through the letter to show cause, interdiction and invitation to disciplinary hearing. The proceedings in the Kalandi disciplinary hearing, which was the basis for the action against the Claimant, were not availed to the Claimant in time for his own hearing. The investigation report prepared by County Executive Member for Water Services, Hemed Mwabudzo, is dated 14th November 2016. It was not availed to the Claimant at any time. Human Resource Manager, Mlamba confirmed that the Claimant was not availed any report, linking him to the matters he was accused of, before the hearing. The Court does not think it was necessary for the Claimant to have made a demand for these reports. It was for the Respondent to make full disclosure of evidence against the Claimant. In his response to the letter to show cause, the Claimant told the Respondent he was not privy to the report made against him by Mohammed Kalandi, and that the contents of the report remained unclear to him. Should this not have prompted the Respondent to disclose the report or reports against the Claimant, in preparation for the disciplinary hearing?

34. The Managing Director wrote his letter summarily dismissing the Claimant, on 30th June 2017. The Claimant was given 14 days, from 30th June 2017, to lodge an appeal. He was advised that failure to appeal, would lead to summary dismissal becoming effective. He received the letter on 17th July 2017, after the appeal period had expired. He was, by this default on the part of the Respondent, denied his right of appeal.

35. ***Termination was unfair under Sections 41, 43 and 45 of the Employment Act.***

36. The Claimant merits compensation for unfair termination. He worked for 7 years for the Respondent. The Respondent did not exhibit any warnings, issued to the Claimant in those 7 years. There is no complaint of a disciplinary nature prior to 2016, recorded against the Claimant. There is no complaint about his performance. He was promoted and his salary improved, in the course of his service. In his letter of appointment, it is indicated he was being absorbed into regular employment, suggesting that he had worked irregularly for the Respondent, before 2010. His contract was term-indefinite. The Claimant expected to work until retirement. He did not have any proven contribution to the circumstances leading to termination. He did not author his own misfortune. He was not paid terminal dues, after 7 years of service. His last salary as shown in the letter dated 26th November 2015, addressed to the Claimant by the Respondent, was Kshs. 41,000 monthly. ***He is granted equivalent of 7 months' salary in compensation for unfair termination, at Kshs. 287,000.***

37. The contract gave a 3 -month notice of termination. ***The prayer for 3 months' salary in lieu of notice is allowed at Kshs. 123,000.***

38. The Claimant was denied half salary for the period of interdiction. As the Court has concluded that the Respondent did not establish reasons warranting dismissal, there can be no justification in withholding of the Claimant's half salary. Withholding was made on the understanding that if the Claimant was exonerated, he would be paid what was withheld, and if convicted, forfeit half the salary for the period he did not work, the period of interdiction. The Respondent failed to establish the allegations against the Claimant, and failed to have him criminally prosecuted and convicted. There can be no justification in denying to the Claimant salary for a period he was still contracted to serve the Respondent. His contract was in place until the date of termination. ***He is allowed half salary for a period of 9 months, at Kshs. 184,500.***

39. The Claimant seeks annual leave pay, for the entire 7 years worked. He told the Court he did not take annual leave the whole period. He was not paid anything in lieu of leave. The Respondent, in particular Human Resource Manager Mlamba, did not supply the Court with Claimant's annual leave records. The Respondent was contented to plead at paragraph 11 of the Statement of Response, that the Claimant received payment of "all leaves he did not take." There is no evidence of payment. There is no evidence from the Respondent, of which leave the Claimant took or did not take. The Respondent, as the custodian of employment records, ought to have disproved the oral evidence of the Claimant on annual leave, through documents. It is not sufficient to say to the Court that the Claimant received payment "of all leaves he did not take." The Court accedes to the prayer for annual leave. The Claimant was entitled to 30 days of annual leave under his contract. The contract also contained a forfeiture clause on untaken leave. The Court has repeatedly stated in many of its Judgments, that forfeiture of leave clauses, have no support in the Employment Act. ***The Claimant is granted annual leave over a period of 7 years, at Kshs. 287,000.***

40. The Court is not able to agree with the Claimant, that there was illegal deduction of his salary, from Kshs. 43,550 to Kshs. 41,000 from November 2015 to May 2016. The former rate was given on 28th March 2013. The latter arose from adjustments made upon harmonization of salaries and allowances made by the Board. The decision was communicated to the Claimant in a letter dated 20th November 2015. He accepted the decision, which affected his allowances and not his basic salary. He did not complain from 2015, until he was summarily dismissed. The prayer is declined.

41. ***Certificate of Service to issue.***

42. ***Costs to the Claimant.***

43. ***There shall be a stay of execution of this Judgment for 30 days from the date of delivery.***

44. ***Interest allowed at the rate of 16% per annum, from the end of the stay period.***

IN SUM, IT IS ORDERED: -

a. It is declared that termination was unfair.

b. The Respondent shall pay to the Claimant: compensation for unfair termination equivalent of 7 months' salary at Kshs. 287,000; 3 months' salary in lieu of notice at Kshs. 123,000; withheld salary at Kshs. 184,500; and annual leave pay at Kshs. 287,000 – total Kshs. 881,500.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Stay of execution of this Judgment granted for 30 days from the date of its delivery.

f. Interest allowed at the rate of 16% per annum from the end of the stay period.

Dated, signed and released to the Parties electronically at Nairobi, under Covid-19 Ministry of Health and Judiciary Guidelines, this 15th day of December 2020.

James Rika

Judge