



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1956 OF 2013**

**ISAAC W. WEKESA.....CLAIMANT**

**VERSUS**

**KENYA FOREST SERVICE.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant brought this claim on 5.12.2013 alleging that his employment was unfairly terminated by the respondent on 20.2.2012 and prayed for the following reliefs

- a. A declaration that the Respondents continued custody of my dues is unfair wrongful and unlawful.
- b. A declaration that the termination was unfair and contrary to the law of Employment
- c. An order compelling the Respondent to reinstate the Applicant to his employment
- d. An order compelling the Respondent to release and disburse all the accrued dues, unpaid fees and compensation for loss of employment in the sum of Kshs.14,792,875 and interest of the same.
- e. An award for the costs of the suit
- f. Interest on the above items.
- g. Any other order this Honourable court deems just and fit to issue.

2. The respondent filed defence on 24.7.2014 denying the alleged unfair termination and averred that the termination was fairly done for gross misconduct after according the claimant disciplinary hearing. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 31.5.2018 when the claimant testified as Cw1 and the respondent called her HR Manager M/s Juliana Ochieng as Rw1. Thereafter both parties filed written submissions which I have considered herein alongside the evidence tendered.

**Claimant's Case**

4. Cw1 testified that he was initially employed by the department of Kenya Forests in the Ministry of Environment and Natural Resources before being upgrade to the respondent Parastatal. That his appointment by the respondent was confirmed by the letter dated 24.3.2011 and promoted to the rank of Inspector Forest Guard.

5. On 17.5.2011, Cw1 was served with interdiction letter and asking him to explain the allegation cited therein including beating members of public, robbing Kshs.139,000 in cash and 9 mobile phones from charcoal dealers and setting the impounded charcoal unprocedurally and using the proceedings for own cause.

6. Cw1 responded to the interdiction letter denying everything by his letter dated 25.5.2011 thereafter, he was charged with the said allegations before Orderly Room Proceedings before the Assistant Commandant, Retired Lt. Colonel C.J. Otieno on 11.8.2011. However, Cw1 contended that the charge sheet was not signed by the presiding officer, no evidence was adduced and the records of proceedings were

largely left blank. Cw1 further stated that the presiding officer orally imposed a fine on him and he appealed by his letter dated 15.8.2011.

7. Cw1 further testified that Disciplinary Committee communicated to him its decision by the letter dated 13.9.2011 whereby his interdiction was lifted and he was transferred to Turkana Zone. That despite reporting to the new station he was shocked to receive a letter dated 20.2.2012 stating that his disciplinary case had been reviewed and he was dismissed from service effective 15.12.2011 on account of misconduct.

8. Cw1 further testified that he appealed vide his letter dated 1.3.2012 but he was not heard on the appeal. However, by the letter dated 31.10.2012 the respondent notified him that his appeal was dismissed and his termination upheld. He contended that the appeal was not conducted as required by the respondents Disciplinary Code of Conduct and the Rules of natural justice and prayed for the reliefs sought in his suit.

9. On cross examination Cw1 contended that he worked for the respondent from 2.8.2010 after transiting from the Ministry. He further contended that he was posted to Kwale County as the officer in charge of enforcement. He admitted that he was accorded a hearing and found guilty of robbing money from charcoal dealers, and failure to prevent his juniors from beating up members of public. That he appealed against the conviction and the fine but he was not heard on the same and instead he was summarily dismissed from service.

10. He contended that dismissal was unfair because he was not accorded a hearing on his appeal before the sentence imposed by the Disciplinary Committee was enhanced from finding and transfer to summary dismissal. He further contended that No. P3 forms were shown to him to prove the injuries.

### **Defence Case**

11. Rw1 testified that the clamant worked for the respondent for only 9 months. That in May 2011, the respondent received a report that an operation was done by members of the service at Samburu, Taru and Kilimbasi Charcoal areas on the nights of 27th/28th April 2011 and a report was made to the effect that members of the public were severely beaten, Kshs.139,000 and 9 mobile phones forcefully taken from charcoal dealers, and the impounded charcoal was unprocedurally sold and the proceeds used on own cause. That as a result, investigations were commenced since the alleged offences were against the respondent's HR polices and procedure manual.

12. Rw1 further testified that the clamant was served with a show cause letter/interdiction letter dated 17.5.2011 citing the said offences against him and he responded by the letter dated 25.5.2011. That the explanation was found unsatisfactory, he was invited to appear before a Disciplinary Committee on 11.8.2011, and a sentence passed. That on 13.9.2011 the claimant was notified through the HR Department That his interdiction had been lifted and fine imposed for being found guilty.

13. Rw1 further testified that on 15.8.2011, the claimant prematurely appealed against the sentence and requested for the same to be set aside. As a result the respondent's Board of Directors considered the appeal and decided that the evidence tendered at the disciplinary hearing had revealed that the claimant was guilty of gross misconduct and set aside the earlier punishment and substituted it with summary dismissal from the service.

14. Rw1 further testified that the claimant appealed against the summary dismissal through his lawyers and the matter was referred to the Board of Directors who upheld the decision to dismiss the claimant. Rw1 therefore prayed for to the court to find that the dismissal of the claimant was lawful and dismiss the suit with costs.

15. On cross examination Rw1 admitted that she joined the respondent after the claimant left employment but contended that her testimony was based on office records. She further admitted that the respondent has a Disciplinary and procedure manuals. She further admitted that the claimant was charged under Regulation 5(2) (XIX) as opposed to 5(Z)(XIX). She further admitted that the charge sheet was not dated and signed by the presiding officer. She also admitted that the clamant was not accorded a hearing in his appeal and he was not served with the minutes/proceedings of the Board over his appeal. Finally, she admitted that the errors on the charge sheet did not affect the facts and the findings in the disciplinary case.

### **Analysis and Determination**

16. There is no dispute that the claimant was employed by the respondent until 20.2.2012 when he received the letter dismissing him from service effective 15.12.2011. The issues for determination are:-

- a. Whether the dismissal was unfair and unlawful.
- b. Whether the reliefs sought should be granted.

### **Unfair dismissal**

17. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair and therefore unlawful if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason is one that relates to the employees conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure on the other hand refers to according the employee a hearing before termination and in his appeal, payment of any accrued benefits and issuance of certificate of service to the employee after the termination is decided.

### **Reasons for dismissal**

18. On 13.9.2011 the Disciplinary Committee communicated its decision to the claimant that he was found guilty on the charge of taking bribes during an operation in Taru – Sambaru on 27th/28th April 2011, and failed to contain his juniors from harassing and beating up members of the public as a result of which actual bodily harm was occasioned on them. The committee further sentenced the claimant to pay a fine of Kshs.20,000 and severally warned him that any future indiscipline would be seriously punished. Finally, the committee lifted the interdiction and transferred the claimant to Turkana Zone.

19. There is no dispute that the claimant accepted the verdict by his letter dated 10.10.2011 and that he was received by Zonal Forest Manager Turkana Zone Office. In my view, the acceptance of the decision by the claimant meant that he acknowledged that he was guilty of the charges he was convicted of including taking bribes and failing to contain and stop his juniors from beating up and injuring member of the public.

20. The dismissal letter dated 20.2.2012 stated that respondents Board of Directors reviewed the disciplinary case in light of the evidence and directed that the clamant be dismissed from the service with effect from 15.12.2011 for gross misconduct. In view of the said acceptance of the guilty verdict by the claimant, I return that the respondent has proved on a balance of probability that there was a valid reason to justify dismissal of the claimant from service.

### **Procedure followed**

21. Under section 41 of the Employment Act, before terminating an employee on ground of misconduct, poor performance or physical incapacity, the employer must first explain the reason to the employee, in a language he understands and in the presence of another employee or shop floor official, and thereafter invite the two to air their representation for consideration before the termination is decided. For the reason that the claimant accepted the verdict of disciplinary proceedings dated 13.9.2011, I will not belabor the point that the procedure followed during the proceeding was fair upto the said verdict and its execution through lifting of the interdiction and transfer to the new station.

22. However, the claimant protested against the procedure followed by respondent in reviewing the already executed decision and enhanced the sentence from fine and severe warning to one of dismissal. It is the claimant's case that the procedure followed was unfair and unlawful because it was not according to the respondents disciplinary policy and procedure manual.

23. I have perused the respondent's Disciplinary Code 2009 which was filed by the respondent on 22.9.2014 in support of written submissions filed the same date in respect of an objection to the suit. Paragraph 7(4) allows for enhancement of sentence by the Director or a Gazetted Officer. However, paragraph 7(5) provides that no enhancement of sentence can be made without according the employee a hearing.

24. In addition, paragraph 12 provides for revision of proceedings of inquiry. The paragraph provides that:

***“12(1) The director, or a gazette officer nominated for that purpose by the Director, may also call for and review any proceedings and may, on revision confirm, reduce, suspend or set aside any conviction or sentence or may order a retrial; provided that such revision or order shall not be made after the expiry of thirty days from the date of the completion of the original proceedings.”***

25. The foregoing brings out two major hurdles before the revision of sentence or proceedings can be validly done. First, the revision must be done within 30 days from the close of the original proceedings. Secondly, the revision must yield to a lower sentence.

26. In this case, the original Inquiry proceedings closed on 13.9.2011 when the verdict and sentence were communicated to the claimant by the Director through the Deputy Director HR and Administration. On the other hand the revision was done vide letter dated 20.2.2012 and backdated to 15.12.2011. Whether looked from the date when the revision was communicated or the backdated effective date, the review was done outside the 30 days limitation period.

27. Secondly, the sentence passed at the review proceedings was high than the sentence passed at the Inquiry proceedings. That was wrong because under paragraph 12, of the Displinary Code, the review should only yield a lesser sentence and should the review lead to an enhanced sentence, paragraph 7(5) of the Disciplinary Code requires that the employee must first be accorded a hearing by the Director.

28. In addition, to the foregoing procedural lapses, the court observes from the dismissal letter that the review of the proceedings and the enhancement of sentence was done by the Board of Directors. The respondent did not state the provisions of the Disciplinary Code upon which the Board reviewed the sentence passed by the Director after the Inquiry proceedings. Consequently, I find and hold that the procedure followed by the respondent to dismiss the clamant from service was in breach of section 41 of the Employment Act, rules of natural justice and paragraph 7 and 12 of her Disciplinary Code 2009 and that rendered the dismissal unfair within the meaning of section 45 of the Employment Act.

### **Relief**

29. In view of the foregoing, I make declaration that the termination of the claimant was unfair, and contrary to the law of employment. As rightfully submitted by the respondent the prayer for reinstatement is not tenable because under section 12(3) of the ELRC Act, the court in barred from reinstating employee if 3 years have lapsed after the date of separation. In this case, the separation was done on 20.2.2012 and the 3 years lapsed on 20.2.2015.

30. However, under section 49(1) of the Employment Act, I award the claimant one month salary in lieu of notice plus 12 months salary

compensation for unfair dismissal. In awarding the compensation, I have considered the respondents submissions and the long service of over 10 years and the fact that the claimant never secured any other job since 2012.

31. The claim for salary from March 2012 till retirement age of 60 years is dismissed for lack of merits as there is no legal or contractual basis for the same.

32. The claim for salary arrears due to half pay during the interdiction period between May and September 2011 is allowed being Kshs.21,225 x 5 = Kshs.106,125.

33. Finally, the claim for gratuity was proved but I leave it between the parties to deal with it as provided by HR Manuals and scheme rules.

### **Conclusion and Disposition**

34. I have found that the dismissal of the claimant after exparte review proceedings done out of time by the respondent's Board of Directors is unfair and unlawful. I have further found that it is too late in the day to order for his reinstatement but compensatory damages are in order. Consequently I enter judgment for the claimant as follows:-

- a. Notice .....42,450
- b. Compensation.....509,000
- c. Salary arrears.....106,125

**657,975**

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The award is subject to statutory deductions. The claimant will also have costs plus interest from the date hereof.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January 2019**

**ONESMUS N. MAKAU**

**JUDGE**