



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2252 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 25th February, 2019)

ARCH. FRANCIS KARIUKI NJUGUNA.....CLAIMANT

VERSUS

NATIONAL CONSTRUCTION AUTHORITY.....RESPONDENT

JUDGMENT

1. On 16th December 2015, the Claimant through the firm of Njuguna, Kahari and Kiai Advocates, filed his Memorandum of Claim on even date. The Claimant seeks the following prayers:-

a. A declaration that the termination of his employment was unlawful, irregular, null and void.

b. Reinstatement or re-engagement on the same as was.

c. Payment of salary and/or benefits from the day of dismissal to the date of reinstatement.

d. General damages for breach of contract.

e. Cost of the suit and interest.

f. In the alternative, special damages of KShs. 7,985, 765.71

Medical cover per month @

22,293.25 per month for 13 months.....KShs. 289,812.25

Personal accident cover @

KShs. 696.42 per month for 13 months..... KShs. 9,053.46

Airtime @ KShs.18,000.00 per

month for 13 months.....KShs 234,000.00

Leave allowance for 2015/2016 and 2016/2017.....KShs. 100,000.00

Salary @ KShs, 453,400.00 per month

from December 2015 to December 2016.....KShs. 5,894,200.00

Gratuity @ KShs. 318,000.00 for 3 years.....KShs. 954,000.00

One month's salary in lieu of notice.....KShs. 453,400.00

Total.....KShs. 7,985,765.00

2. It is the Claimant's case that in December 2013 he was employed by the Respondent at a salary of KShs. 398,000.00 which was bound to an annual increase. At the time of the termination, the Claimant was earning a basic salary of KShs. 453,400.00.
3. The Claimant avers that Clause 11 of his letter of appointment stipulated that he was entitled to 30 days annual leave. In his witness statement filed on 17th December 2015, the Claimant avers that he applied for leave on 24th September 2015 and proceeded for the same on 30th September 2015 after notifying all the relevant personnel. However, the Executive Director wrote to him seeking to have the Claimant show cause why disciplinary action should not be taken against his for being absent from work without official leave.
4. The Claimant responded on 19th October 2015 explaining the circumstances under which he had taken his leave. It is his case that he had not taken his full leave for that calendar year and also leave from July 2015.
5. He received a letter from the Chairperson of the Human Resource Committee of the Respondent, informing him that the matter had been forwarded to the Committee for deliberation and recommendation to the full board. He was required to furnish the Committee with a statement within 7 days and prepare for hearing scheduled for 25th November 2015.
6. The Claimant avers that he wrote a letter to the Respondent indicating his dissatisfaction in how the matter was handled, stating that he feared that the hearing was just a formality as a decision had already been made to terminate his employment.
7. On 27th November 2015, he served the Chairperson of the Human Resource Technical and Board Audit Committee with a grievance letter concerning the Executive Director's interference in his department's mandate. In his further witness statement dated 16th December 2015 and filed 7th June 2017, the Claimant avers that he demonstrated the instances where the Executive Director had abetted forgery in his department and that the Executive Director harboured ill will and malice in handling his leave application.
8. The Claimant avers that on 2nd December 2015, he wrote a letter to the Chairperson of the HR Committee to the effect that the hearing reconvened for that day was illegal and unprocedural.
9. It is the Claimant's case that at the hearing, he was informed that only the show cause letter would be relied upon to guide the hearing. He was not issued with the findings of the Committee or given sufficient time to respond to the allegations against him.
10. Subsequently, he was issued with a termination letter on 4th December 2015. It is the Claimant's case that his summary dismissal was unfair and unlawful as the Respondent did not follow the right procedure and neither did it conduct investigations.
11. During cross-examination, CW1 and the Claimant in this case, testified that leave was to be applied in the prescribed manner. It was also his testimony that his leave application was not returned to him.
12. He testified that the reasons for the show cause letter were communicated to him. It was also his testimony that his grievance letter came after the disciplinary proceedings had been instituted against him. It was also his testimony that the provision for gratuity applied for the period of his contract but he admitted that his contract did not proceed to December 2016.
13. Upon cross-examination, the Claimant testified that he forwarded his request for leave to the Executive Director and it was granted. He however admitted to not having the documents in his custody.
14. RW1, Paul Kariuki and the Respondent's HR Manager, sought to adopt his statement recorded on 27th September 2018, bundle of documents. In the Statement, he avers that the Claimant was offered terminal dues amounting to Kshs. 6,427,435.88 but the Claimant failed to undertake the requisite clearance process to enable processing of the money.
15. He testified that before someone could proceed on leave, his leave was to be approved. It was also his testimony that the Claimant was not cleared at the Respondent's premises.
16. During cross-examination, RW1 testified that at the time the Claimant proceeded on leave, his leave was due. He admitted that the Claimant's leave sheet indicated that his leave had been approved. He however contended that that was not procedural. It was his testimony that at the time the Claimant wrote a grievance letter, the disciplinary hearing had already been handled. It was his testimony that if the Claimant's grievance had been lodged before, the disciplinary hearing would have proceeded depending on the issues raised. It was also his testimony that the laptops and mobile phones had been issued to the Claimant but admitted that he did not have evidence that the Claimant was issued with those items.
17. Upon re-examination, he testified that they had records of the phone and laptop.
18. During cross-examination, RW2 Maurice Otieno Akech and the Executive Director of the Respondent, sought to rely on his witness statement dated 5th December 2018. In his statement, he avers that the Claimant absented himself from work from 30th September 2015 to 12th November 2015 without leave and other lawful cause, during which he missed two management meetings. When he returned to work, he did not inform the Executive Director.

19. Further, that the Respondent instituted disciplinary proceedings against the Claimant and issued him with a letter to show cause. By virtue of the Claimant being in a position of NCA2 grade, the Board's Human Resource Committee had to handle further proceedings.
20. The Claimant tendered further defence after he was served by that Committee. The Board reviewed the evidence before it and found it unconvincing and made recommendation to the Board. The Board resolved to terminate the Claimant's employment.
21. He avers that upon termination, the Claimant was offered salary in lieu of 1 months' notice, gratuity for the period covered, unutilized leave days and severance pay.
22. He testified that the Claimant never took leave in 2015 and that he was not aware of whether the Executive Director had denied the Claimant leave. It was also his testimony that the policy provided that an employee was to take leave within 30 days with the approval of the Executive Director.
23. It was his testimony that the Claimant's salary was not stopped yet it was a policy that salary would be stopped for anyone who proceeded on leave without approval. He further testified that the Executive Director had tried reaching the Claimant but admitted that the letter dated 8th October 2015 was not a letter trying to trace the Claimant but a show cause letter.
24. Upon re-examination, RW1 testified that the Claimants request to be granted leave for 15 days on 9th March 2015 was granted yet the Respondent did not report back within 7 days.

Submissions by the Parties

25. In the Claimant's written submissions dated 10th September 2018 and filed in Court on 18th December 2018, the Claimant submits that the Respondent violated all the procedures for termination of employment set out in Sections 45 and 35 of the Employment Act and the Human Resource and Administration Policy and Procedures hence the termination was unlawful, unprocedural, irregular and void. He relies on the case of **Daniel Kiplagat Kipkeibut vs. SMEP Deposit Taking Micro Finance Limited [2016] eKLR Cause No. 213 of 2015.**
26. It is the Claimant's submissions that he was never accorded a fair hearing as he was not given a chance to defend himself, he was denied crucial documents which were necessary for the preparation of his defence and was never accorded an opportunity to cross examine the Respondent's witnesses or to hear their evidence against them.
27. Further, the Respondent has consistently failed to respond to the Claimant's communication and was not informed that it was his right to have a counsel present, which is a requirement as was held in the case of **Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited [2014] eKLR.**
28. It is the Claimant's submissions that Respondent ignored the provisions of the Human Resource Manual, which actions violated all the provisions on fair administrative action as enumerated in article 47 of the Constitution.
29. It is the Claimant's submissions that he is entitled to the reliefs sought as required under section 49 of the Employment Act. He relies on the case of **Pamela Nelima Lutta vs. Mumias Sugar Company Limited [2017] eKLR Cause No. 293 of 2015.**
30. It is also his submissions that he is entitled to general damages for the loss suffered had he been allowed to serve for the period of the termination clause. He relies on the cases of **CPC Industrial Products vs. Angima Civil Appeal No. 197 of 1992** and **Kenfreight EA Limited vs. Benson K. Nguti [2016] eKLR Civil Appeal No. 31 of 2015.**
31. In its written submissions dated 14th January 2019 and filed 15 January 2019, the Respondent submits that there were sufficient grounds to terminate the Claimant's employment. The Respondent has enumerated and elaborated the procedure provided for in its manual and the procedure it followed up until the termination of the Claimant's employment.
32. The Respondent relies on the case of **Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union [2017] eKLR,** to justify its reasons for termination. It is also the Respondent's submission that under Section 27 (1) of the Employment Act an employer is entitled to regulate the working hours of each employee.
33. It is his submissions that it issued a notification of the hearing as required under Section 41 of the Act. The Respondent relies on the case of **Kenya Ports Authority vs. Fadhil Juma Kisuwa [2017] eKLR.**
34. The Respondent submits that the Claimant is not entitled to the prayers sought as the termination of his employment was fair and lawful. It is also its submissions that the prayer for salary for the remainder of the contract has no basis hence should not be awarded.
35. The Respondent also submits that the Claimant is not entitled to newspaper and airtime allowance as it was improperly claimed. He relies on the case of **Leonard Odindi vs. Kenya Ports Authority [2011] eKLR.**
36. The Respondent also submits that the Claimant's submissions introduce new facts which were never raised throughout the hearing. This is the issue of breach of the Code of Governance for State Corporation (Mwongozo Code). The Respondent also urges the court to view the Claimant's allegation that a grievance was raised, with a pinch of salt.
37. I have considered evidence on record from both parties. The issues for determination are as follows:-

1. *Whether there were valid reasons to terminate the services of the Claimant.*

2. *Whether the Claimant was subjected to due process before termination.*

3. *Whether the Claimant is entitled to remedies sought.*

38. On the 1st issue, the Respondent contend that they dismissed the Claimant from his services “for being absent without official leave from the place appointed for performance of your official work from 30th September to 12th November 2015”.

39. In response to this allegation the Claimant contended that he had applied for leave on 30th September 2015 and the leave was to commence on the same date. On 8/10/2015, the Claimant had been served with a show cause letter to explain why disciplinary action should not be taken against him for being absent. He was expected to respond to the show cause letter within 7 days.

40. He contended that he received this letter on 16/10/2015 and so replied to it on 19/10/2015. He also explained he never received any communication resending his leave.

41. The Claimant indeed admitted he proceeded on leave without it being approved.

42. The Respondent on their part contend that the leave of the Claimant was never approved and cited their Human Resource Manual which states as follows:-

“13.1.7- Absence without leave

An employee, who absents himself from duty without permission or just cause for a period of two days shall have their salary stopped. In an event that such an employee does not report back within seven (7) days or more and efforts have bene made to trace the officer without success, he shall be regarded as having deserted duty and will be liable for summary dismissal”.

43. This clause indeed provides incidences of summary dismissal if an employee is absent for 7 days but the operative word is that **efforts must have been made to trace the officer without success** (emphasis is mine).

44. In the case of the Claimant, there was no effort to trace him even through his email or telephone number. Indeed the Respondents were aware that he had applied for leave even if it had not been approved. There is no evidence from the Respondent of the efforts made to trace the Claimant while on ‘leave’.

45. During the leave period, the Claimant contends that he even undertook 2 major activities for the Respondent including being involved as an Inter-Ministerial Task Force preparing a Cabinet Memo which he did in October 2015. He was also instructed to do some work on email and he did.

46. The Respondent has not denied that he carried out such activities during his leave period. It is therefore apparent that the Respondent was aware of the Claimant’s whereabouts. It cannot however be gainsaid that applying for leave cannot be a panacea to proceed for leave.

47. The Respondent’s policy were clear that leave had to be applied for a month earlier than the due date. Clause 4.4.5 at page 84 of Respondent’s documents indicate that:-

“Before any employee proceeds on leave, he/she must apply for such leave in a prescribed form and approval granted before proceeding.....”.

48. The Claimant failed to apply for leave in the prescribed form and only indicated on the 30/9/2015 that he was proceeding on leave on that day. In this regard, it is my finding that he breached express provisions of the Human Resource Manual and therefore there was a valid reason to warrant his termination.

49. On the 2nd issue, there is also evidence that Claimant was subjected to some due process. He was called for a disciplinary hearing.

50. The Claimant however contends that he was not allowed to call witnesses and those who testified in his case testified in his absence and so he was not allowed to cross-examine them. Other than lack of witnesses against the Claimant, the disciplinary process employed by the Respondent in disciplining their staff is found at Clause 13.5 of the Respondent’s Manual. The process starts with investigation and then deliberation by a disciplinary committee before it escalated to the Executive Director.

51. In the case of the Claimant, there was no investigation done. If an investigation was done, no report was produced. It is my finding that the disciplinary process meted against the Claimant was done in contravention of the Respondent’s own disciplinary processes as provided for in their Human Resource Manual. This also was in breach of proper laws and procedures provided under the Fair Administrative Action Act wherein he was condemned based on evidence if any given in his absence.

52. It is therefore my finding that the dismissal of the Claimant was unfair and unjustified in terms of Section 45(2) of the Employment Act 2007 which states as follows:-

(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".

53. In terms of remedies, given that the Claimant absented himself by proceeding on leave without an approval, I will award him:-

1. 4 months salary as compensation for the unfair termination = $4 \times 453,400 = 1,813,600/=$.

2. The Claimant is also entitled to 1 month salary in lieu of notice = 453,400/=

3. In addition to this the Claimant is entitled to the terminal dues previously offered to him by the Respondent to tune

4. of Kshs.6,427,435.88.

TOTAL amount due is = 8,694,435/=

5. The Claimant is also entitled to costs of this suit plus interest at Court rates with effect from the date of this Judgment.

Dated and delivered in open Court this 25th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Moenga for Respondent – Present

Miss Nafula holding brief Njuguna for Claimant – Present