



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 204 OF 2016

CHARLES MUSUNGU ODANA.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The subject matter of this dispute is Certificate No. 604317/020 for Kenya Certificate of Secondary Education (KCSE) Examination in November/December 1999, allegedly forged by the Claimant for purposes of securing and retaining employment with the Respondent.
2. The Claimant's claim is contained in Memorandum of Claim dated 16th March 2016 and amended on 16th December 2016. The Respondent's defence is contained in a Memorandum of Response dated 1st July 2016 and filed in court on 4th July 2016.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource Officer, Prisca Atieno Rabongo. Both parties further filed written submissions.

The Claimant's Case

4. The Claimant was employed by the Respondent as a casual labourer on 26th January 2001. He rose through the ranks to the position of Machine Clerk, Grade HG.1.
5. On 18th February 2015, the Claimant was issued with a show cause letter on allegations of forging a KCSE certificate by altering his Mathematics Grade from E to D Plain. He appeared before the Disciplinary Committee and was dismissed on 29th September 2015.
6. The Claimant states that prior to his dismissal, he had been summoned to appear before the Ethics and Anti-Corruption Commission in Mombasa where he produced his original KCSE certificate which was duly verified.
7. The Claimant contends that his dismissal was wrongful and unfair. He therefore claims the following:
 - a) A declaration that his dismissal was unjustified and unfair;
 - b) An order compelling the Respondent to reinstate him to his employment;
 - c) One month's salary in lieu of notice in the sum of Kshs. 57,590;
 - d) Salary for the month of September 2015 in the sum of Kshs. 57,590;
 - e) Compensation for unfair termination of termination being 12 months' salary amounting to Kshs. 691,080;
 - f) 25 days' leave pay for 2015 in the sum of Kshs. 57,590;
 - g) Loss of earnings for 24 years to retirement
 - h) Costs plus interest.

The Respondent's Case

8. In its Memorandum of Response dated 1st July 2016 and filed in court on 4th July 2016, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim.
9. The Respondent states that by their respective letters dated 27th June 2012 and 9th July 2012 the Public Service Commission and the Ministry of Transport directed that academic and professional certificates for all public service employees be authenticated.
10. Pursuant to the aforesaid directions, the Respondent wrote to the Kenya National Examination Council (KNEC) requesting them to verify and confirm the authenticity of all its employees' academic certificates.
11. Consequently, KNEC vide its letter dated 22nd July 2013, submitted to the Respondent a list of 122 employees, including the Claimant, who had altered their academic certificates.
12. Upon receiving the letter from KNEC, the Respondent established a Disciplinary Committee to commence disciplinary proceedings against the affected employees and to afford them a fair hearing.
13. The Respondent avers that the Claimant was afforded a fair hearing during the disciplinary process and was consequently dismissed for gross misconduct in accordance with Section K 4 (c) (xvi) of the Respondent's Disciplinary Handbook 2015 and provisions of employment law.
14. The Respondent further avers that KNEC, being the body mandated to set and maintain examination standards, award certificates to candidates and confirm authenticity of certificates issued by the Council was the final authority on the issue of authenticity of the Claimant's certificates.
15. The Respondent maintains that the Claimant's dismissal was lawful as he had contravened the Respondent's regulations by presenting a forged copy of his certificate which formed part of the basis of his employment.

Findings and Determination

16. There are two (2) issues for determination in this case:
 - a) Whether the Claimant's dismissal was lawful and fair;
 - b) Whether the Claimant is entitled to the remedies sought.

The Dismissal

17. On 29th September 2015, the Respondent wrote to the Claimant as follows:

"RE: DISMISSAL FROM THE SERVICES OF THE AUTHORITY

You will recall that you were issued with a letter inviting you to show cause why you should not be dismissed from the services of the Authority, for reasons contained in the said letter.

Further, you will recall that you appeared before a disciplinary committee and accorded a personal hearing in which you accepted that you had presented to the Authority a forged academic/professional certificate.

The offence you committed amounts to gross misconduct justifying dismissal in accordance with Section K 4 (c) (xvi) of the Disciplinary Handbook 2015.

The Board in its 312th Board Meeting held on 24th September 2015 resolved that employees who were found to have contravened Section K (4) (c) (xvi) of the Disciplinary Handbook 2015 be dismissed from the services of the Authority with immediate effect in accordance with Section K. 10 (o) of the Disciplinary Handbook 2015. You are accordingly dismissed from the services of the Authority with immediate effect.

You are required to surrender any property of the Authority in your possession to your Head of Department within the next 48 hours on receipt of this letter. If you are in occupation of Authority quarters, arrange to vacate the same within seven (7) days from the date of this letter.

By a copy of this letter, the Senior Human Resources Officer (Reward & Job Evaluation) is advised to arrange for payment of your terminal dues less any amounts that may be owing to the Authority.

Please acknowledge receipt by signing this letter and the duplicate provided herein.

(Signed)

S.J. Chingabwi

General Manager

Human Resources and Administration

FOR: MANAGING DIRECTOR

18. This letter accuses the Claimant of submitting a forged academic/professional certificate for purposes of securing employment and advancing in his career with the Respondent. In support of its case, the Respondent filed a report from KNEC indicating that although the Claimant was a *bona fide* candidate who had registered and sat for the 1999 KCSE examination at Viyalo Secondary School under index number 604137020, he had altered his subject grade in Mathematics from E to D (plain).

19. On his part, the Respondent completely disowned the certificate showing grade D (plain) in Mathematics which he claimed to have seen for the first time during the proceedings before the Disciplinary Committee. He told the Court that he had all along submitted his genuine certificate showing that he had attained grade E in Mathematics.

20. Section 43 of the Employment Act, 2007 provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

21. It is now clear that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment. The Court of Appeal affirmed this position in its decision in ***Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR*** by citing with approval the following excerpt from the Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642:

“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

22. The ‘range of reasonable responses test’ is itself in consonance with the standard of proof in internal disciplinary proceedings being, on balance of probability. In assessing an employer’s action therefore, the Court is not expected to supplant its own decision with that of the employer. In other words, the Court does not ask what it would have done in the circumstances of the particular case; all the Court asks is whether overall, the employer acted responsibly and reasonably and if the answer to this question is in the affirmative, the Court should not interfere with the employer’s decision.

23. The Claimant denied ever presenting the impugned KCE certificate and went ahead to produce his genuine certificate showing grade E in Mathematics. What is intriguing however is that apart from the varying grades in Mathematics, the two certificates are otherwise similar. The Court asked two questions in this regard; first, who had access to the Claimant’s details to facilitate forgery of his certificate and second, who stood to gain from the forgery?

24. In advancing his case, the Claimant stated the following:

- a) That he did not need a D (plain) grade in Mathematics to qualify for the position of Trainee Fireman Grade HG 4 as advertised by the Respondent in August 2006;
- b) That no where in his Employee Details Form had he declared grade D (plain) in Mathematics;
- c) That even after being served with a show cause letter in February 2015, he was, two months later in April 2015, invited for a promotion interview for the position of Assistant Superintendent.

25. The Claimant’s assertions may well be correct. Nevertheless, the Claimant failed to answer the two critical questions as to who had access to his details and who stood to benefit from the forgery. I need to add that although an enhanced grade in Mathematics may not have been required for the position of Trainee Fireman in August 2006, there was no evidence that it would not have been an advantage not only for the particular position but also for future career progression.

26. Applying the ‘range of reasonable responses test’ it seems to me that the Respondent had a valid reason for dismissing the Claimant as required under Section 43 of the Employment Act. Additionally, the Claimant was subjected to due disciplinary procedure as required by

Section 41 of the Act as well as the Respondent's Disciplinary Handbook.

27. The Court therefore finds and holds that the Claimant's dismissal was justifiable and fair. The claims for reinstatement, compensation, notice pay and loss of earnings therefore fail and are dismissed.

28. The claims for salary for the month of September 2015 and leave pay for 2015 were abandoned at the trial.

29. In the end, the Claimant's entire claim fails and is dismissed with costs to the Respondent.

30. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Olugafor the Claimant

Mr. Obinju for the Respondent