



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 924 OF 2015

CONSTANSIA ELIZABETH NABWIRE.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. This claim is brought by Constansia Elizabeth Nabwire against her former employer, Kenya Ports Authority. The claim is documented by a Memorandum of Claim dated 9th December 2015 and filed in court on 14th December 2015. The Respondent filed a Reply on 2nd June 2016.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called a former Human Resource Officer, Discipline, Marco Mulwa Ngolia. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent on 26th July 2002 in the position of Telephone Operator Grade PA 7 on contract basis. On 4th February 2005, her contract was renewed and she was appointed to the position of Clerical Assistant.

4. From 3rd May 2007, the Claimant was employed on permanent and pensionable terms. On 15th January 2010, she was promoted to the position of Revenue Cashier Grade HM4 and on 12th April 2012, she was translated to the post of Assistant Accountant (Revenue Receipts) Grade HM 4.

5. On 17th February 2015, the Claimant was issued with a show cause letter requiring her to respond to allegations of presenting forged documents for purposes of employment or career advancement. She responded to the show cause letter on 21st April 2015 and was later issued with a dismissal letter dated 29th September 2015.

6. The Claimant states that she was subjected to an unfair disciplinary process. She points out that the Respondent did not carry out proper investigations and she was not allowed to see the allegedly forged documents.

7. The Claimant claims the following:

- a) A declaration that the dismissal was wrongful and unfair;
- b) Reinstatement in the same position and under the same terms as before the dismissal;
- c) In the alternative:
 - i) One month's salary in lieu of notice.....Kshs. 98,850
 - ii) 12 months' salary in compensation.....1,186,200
 - iii) Pension per scheme
 - iv) Loss of future earnings to expected retirement date.....19,994,400

v) Leave allowance for 2015.....43,000

vi) Costs plus interest

The Respondent's Case

8. In its Reply dated 30th May 2016 and filed in court on 2nd June 2016, the Respondent admits having employed the Claimant. The Respondent states that the offer of employment was pursuant to the Claimant's own application dated 8th July 2002 which was considered and approved on the basis of the academic certificates attached to the said application, specifically the Kenya Certificate of Education (KCE) certificate.

9. The Respondent further states that on all occasions that the Claimant's contract was renewed, it was on the basis of a KCE certificate.

10. The Respondent avers that the Claimant was issued with a notice to show cause under the following circumstances:

a) The Respondent was directed by the Public Service Commission by letter dated 27th June 2012 and by the Ministry of Transport by letter dated 9th June 2012, to carry out a verification exercise to confirm the authenticity of its employees' academic qualifications;

b) The Respondent, in compliance with the aforesaid directives forwarded the KCE certificate presented to it by the Claimant, for authentication by the Kenya National Examination Council;

c) The Kenya National Examination Council responded on 22nd July 2013, and specifically stated that the Claimant's alleged certificate did not exist in their records and was therefore a forgery;

d) On the strength of that response, the Respondent was reasonably convinced that the academic documents presented by the Claimant and which formed the basis of her employment with the Respondent were fake. This was an offence which justified the summary dismissal of the employee hence the notice to show cause dated 17th February 2015.

11. The Respondent adds that the Claimant's request for a personal hearing was duly granted as communicated by letter dated 15th June 2015. At the hearing, the Claimant did not exculpate herself of the charge against her to the satisfaction of the Respondent's Disciplinary Committee. As a result, the Respondent was satisfied that the Claimant had committed an offence warranting summary dismissal.

12. The Respondent avers that the Claimant was afforded a fair hearing and she had full opportunity to inspect the documents in issue. The Respondent further avers that the verification and authentication exercise affected all its employees across all job groups without discrimination.

Findings and Determination

13. 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

14. The Claimant was dismissed by letter dated 29th September 2015 stating as follows:

"RE: DISMISSAL FROM THE SERVICES OF THE AUTHORITY

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

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 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

15. This letter cites submission of a forged academic/professional certificate as the reason for the Claimant's dismissal. The Respondent filed a report by the Kenya National Examination Council indicating that the Kenya Certificate of Education (KCE) certificate No 39140/020 assigned to the Claimant was indeed a forgery.

16. The Claimant told the Court that she had not sat the KCE examination and denied producing the said certificate. She was however unable to explain entries in her curriculum vitae indicating that she had attained Division II (47 points) in the KCE examination of November/December 1984 at Mombasa Secondary School. She also could not explain the same entry in her application for employment data form.

17. It seems to me that the Claimant knowingly submitted a forged certificate to procure employment from the Respondent. This amounts to gross misconduct and the Respondent had a valid reason to dismiss her as required under Section 43 of the Employment Act, 2007.

18. The next question is whether in effecting the dismissal, the Respondent observed due procedure. The Claimant was issued with a show cause letter on 17th February 2015 to which she responded on 21st April 2015. By her letter, the Claimant requested for personal hearing which request was duly granted.

19. The Claimant did not dispute these facts but suggested that the Respondent ought to have waited for investigations by government investigative agencies before taking action against her. The Court did not find any legal basis for this proposition.

20. In the final submissions filed on behalf of the Respondent, reference was made to the decision in **Banking, Insurance and Finance Union (Kenya) v Consolidated Bank of Kenya Limited [2014] eKLR** where my brother **Rika J** stated the following:

“Employers are not limited in initiating workplace disciplinary proceedings against Employees by police investigations and criminal trials against their Employees which may be initiated by public authorities, based on the same facts.”

21. This is the law as I understand it. Indeed, if an employer was required to await the outcome of investigations by some other body over which they have no control, then the procedural fairness requirements set out under Section 41 of the Employment Act would be completely ineffective. In **Milkah Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR** this Court held that such an employer would have abdicated its responsibility to its employees.

22. That said, the only question to ask is whether the Respondent availed the Claimant due procedure as required under Section 41 of the Employment Act and the answer to that question is in the affirmative.

23. The Court therefore finds and holds that the Claimant's dismissal was substantively and procedurally fair and the claim for wrongful dismissal is without basis. This dispenses with the prayers for reinstatement, compensation, notice pay and loss of future earnings.

24. Regarding the claim for pension, I am guided by the Court of Appeal in its decision in **Kenya Ports Authority v Fadhili Kisuwa [2017] eKLR** where it was held that a claim for pension must be supported by proof of membership and terms of payment of benefits. In the absence of such evidence, the claim thereon must fail. The claim for leave allowance was not proved and is dismissed.

25. On the whole, the Claimant's entire claim fails and is dismissed with costs to the Respondent.

26. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF FEBRUARY 2019

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JUDGE

Appearance:

Mr. Shimaka for the Claimant

Mr. Kongere for the Respondent