



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1204 OF 2018

GEORGE NYAKUNDI OMBABA.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed as a mechanical engineer by the Ministry of Works on 26th December, 1988 where he worked without problem until 17th June, 2003, when he was served with a suspension letter accusing him of gross misconduct and lack of seriousness in performance of his duty. After some disciplinary process, he was served with termination letter dated 26th January, 2005 which backdated the effective date of the termination to 29th May 2004. He appealed against the dismissal but in vain and as a result he brought this by a plaint in the High Court which he amended on 29.10.2008 to seek the following:

- a) A declaration that the aforesaid dismissal of the claimant was wrongful and a nullity.
- b) Payment of salary from 17.6.2003 to the date of his normal retirement as allowed by the law in addition to other consequential entitlements.
- c) General damages
- d) Special damages equaling to kshs. 30,860,475.
- e) Exemplary damages costs and interest at court rates
- f) Any other relief as the court may deem fit.

2. The Respondent denied the alleged wrongful termination and averred that the claimant was summarily dismissed lawfully for gross misconduct. That he was notified of the commencement of disciplinary proceedings on 17th January, 2003 and was subsequently dismissed by the letter dated 26th January, 2005 with effect from 29th May, 2004. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard to conclusion by the High court but on appeal the judgment was set aside and fresh trial ordered vide the court of appeal judgment delivered on 9.6.2017. Thereafter the file was transferred to this court on 9.10.2018 that due to jurisdictional issue under the new constitution of Kenya. During the fresh hearing, only the claimant testified but the respondent did not call any evidence. Thereafter the respondent filed written submissions but the claimant who is a layman acting person never filed any.

Claimant's evidence

4. The Claimants composed of 3 persons including a judge, a magistrate and a government officer conversant with the law testified that he was employed as an Assistant Mechanical Engineer by the Ministry of Works (MOW) on 26th December, 1988 and later rose to become a Mechanical Engineer. That he worked without problem until 27th June, 2003, when he was served with the suspension letter dated 17.6.2003 signed by a Mr. Kariuki for the Permanent Secretary (PS). That the letter cited the reason for the suspension as 4 counts of gross misconduct and lack of seriousness in the performance of his duty all of which were viewed as a serious breach of discipline which would render him liable to summary dismissal. That he made a written defence as directed but he later received a letter from the Public Service Commission (PSC) dated 26th January, 2005 dismissing him with effect from 29th May, 2004. The letter informed him of his right of appeal and he appealed by the letter dated 7.3.2005 but he was later notified that it was unsuccessful. He made a second appeal on 17.6.2006 and when it was dismissed again, he brought this suit.

5. He however further testified that his dismissal was done wrongfully without following the procedure laid down by the Public Service Regulations made under section 13 of the Public Service Commission Act, Cap 185, Laws of Kenya. First, the letter of suspension ought to have been written by the Permanent Secretary in person, which in this case was not done. Second, he was not afforded a hearing before the dismissal by a competent committee composed of 3 persons including a judge, a magistrate and a government officer conversant with the law. That it is only such a committee that could have recommended for his dismissal.

6. He further testified that he had a good defence because the Bowser alleged to have been lost through his negligence was sold by the Government through the Ministry of Public Works at a public auction; that he never submitted fake documents to the Engineers' Board for the purpose of registration as his credentials and that no evidence to the contrary was availed by the Respondent; and that the two counts of absenteeism were false because he had letters to prove that he was present. He therefore urged the Court to declare his termination wrongful and a nullity and order that he be paid all his dues and damages as set out in the plaint.

7. Upon cross examination, the claimant maintained that he was not given an opportunity to defend himself by the right person. That the PS was the only person with the delegated in this case and he lacked authority to further delegate the power to any other person. That under Regulation 34, 3 persons are supposed to sit in the panel and the chairperson must be a judge or magistrate or a government officer who is conversant with the law. He concluded by stating that there were documents to prove that the bowser was sold through open tender as per the government procedures.

Submissions

8. As earlier observed herein above, the claimant never filed written submissions after the hearing and if he did, they were not placed in the file. On the other hand, despite the failure to tender any evidence, the respondent filed written submissions. However, and with profound respect, my effort to understand the said submissions was futile because they made no sense. To a larger extent, they were unrelated to the case before the court and to say the least an embarrassment to the court. They appeared to be a cut and paste plagiarism by the counsel and frankly speaking, irrelevant to the case before the court. That all I will say about the said submissions.

Analysis and determination

9. After careful consideration of the pleadings, evidence and submissions, there is no dispute that the claimant was employed by the respondent as a Mechanical Engineer from 4.1.1988 until 26.1.2005 when he was dismissed by the letter from the PS. The issues for determination are:

- a) Whether the dismissal of the claimant was wrongful.
- b) Whether the Claimant is entitled to the reliefs sought

Wrongful dismissal

10. The Claimant's cause of action in herein arose in 2004 before the coming into force of the Employment Act 2007 and as such the law applicable in this case the Employment Act that was repealed by the 2007 Act. Under the said regime an employer could dismiss an employee for cause or no cause provided that, where any express procedure for doing so was stipulated in the contract between the parties, the same was complied with. Such procedure included service of the agreed termination notice and where non was stipulated, a reasonable notice. In default of the notice, the employer could just pay the salary for the notice period. On the other hand, where contract provided for a hearing before termination for a cause, the employer was bound to accord the employee a chance to air his/her defence before the dismissal.

11. In this case, the dismissal letter cited the reason for the dismissal of the claimant's services as gross misconduct but with no particulars of the said misconduct. However, before the dismissal was done, the claimant was served the suspension letter dated 17.6.2003 follows stating as follows:

"GROSS MISCONDUCT

Records held in this office reveal that you have been involved in various acts of indiscipline as indicated below: -

- ***You absented yourself from duty without permission on 28th and 29th September 1989. You were strongly warned and 2 days pay was recovered from your salary.***
- ***In a letter dated 30th October 2000 you were advised to be civil while responding to official letters and to always forward letters through your officer in charge.***
- ***In the year 2001 you made an attempt to be registered as an Engineer with the Engineers Registration Board by submitting fake documents***
- ***You were involved in loss of water bowser GK D 267 and a trailer GK C 889. The Chief Mechanical & Transport Engineer addressed you on the loss but your explanation was not accepted because you did not tell the truth.***

The above conduct shows a lack of seriousness in duty performance and it is viewed as a serious breach of discipline which can render you liable to summary dismissal from service on account of gross misconduct.

However before this is done you are hereby called upon to defend yourself.

Your explanation if any should be received in this office within 21 days from the date hereof failure of which you will be dismissed without any further reference to you. Meanwhile you have been suspended from exercising the powers and functions of your office with effect from 29th May 2003 on account of gross misconduct. While on suspension you are not entitled to any salary and you should not leave your duty station without permission from the Chief Mechanical & Transport Engineer. You should be reporting to him twice a month on dates and times to be determined by him. Yours faithfully

A.W. Kariuki

For: Permanent Secretary.”

12. The claimant denied the alleged misconduct and the respondent did not tender evidence to prove the same. Even if the respondent had proved the alleged misconduct, the question that arises is whether the dismissal was done in accordance with the disciplinary procedure stipulated under the contract of service between the parties in. The claimant was a public officer and as such the Public Service Regulations made under section 13 of the Public Service Commission Act, Cap 185, Laws of Kenya formed part of his contract. The relevant provision of the said regulations is Regulation 34 which the claimant contended that it was not adhere to by the respondent before his dismissal. The said regulation provides that:

“(1)Where an authorized officer considers it necessary to institute disciplinary proceedings against a public officer to whom this regulation applies on the ground of misconduct which, if proved, would, in his opinion, justify dismissal from the public service, he shall, after such preliminary investigation as he considers necessary, and after consulting the Attorney General as to the terms of the charge, forward to the Public officer a statement of he charge, or charges framed against him together with a brief statement of the allegations in so far as they are not clear from the charges themselves, on which each charge is based; and shall invite the public officer to state in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate himself.

(2) (a) If the public officer does not furnish a reply to a charge or charges forwarded under paragraph (1) within the period specified or in the opinion of the authorized officer he fails to exculpate himself, the authorized officer shall forward to the commission copies of the statement of the charge, or charges, the reply, if any, of the public officer, and the comments of himself and, where applicable of the head of department thereon and the commission shall appoint a committee, which shall consist of not less than three members, to investigate the matter.

(b) The chairman of the committee shall be a judge, magistrate or a public officer with legal qualifications, and all members shall be selected with due regard to the standing of the public officer concerned.

(c)The head of the public officer’s department or the authorized officer concerned shall not be a member of the committee.

(3) The committee shall inform the public officer that on a specified day the charges made against him will be investigated and that he shall be allowed or, if the committee so determines, shall be required to appear before it to defend himself.

(4) If witnesses are examined by the committee, the public officer shall be given an opportunity of being present and putting questions on his own behalf to the witnesses and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(5) The committee may permit the authorized officer or the public officer to be represented by a public officer or an advocate.

(6) If during the course of investigation grounds for the framing of additional charges are disclosed, the authorized officer shall follow the same procedure as was adopted in framing the original charges.

(7) The committee having investigated the matter, shall forward its report thereon to the commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation and the report of the committee shall include:

(a) A statement whether in the committee’s judgment the charge or charges against the public officer have been proved and the reasons thereof;

(b)Details of any matters which in the committee’s opinion aggravate or alleviate the gravity of the case; and

(c) A summing up and such general comments as will indicate clearly the opinion of the committee on the matter being investigated; but the committee shall not make any recommendation regarding the form of punishment to be inflicted on the public officer.

(8) The commission, after consideration of the report of the committee, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter to the committee for further investigation and

report.

(9) The Commission shall decide on the punishment, if any, which should be subjected on the public officer or whether he should be required to retire in public interest.

13. The Claimant admitted that he was served letter dated 17th June, 2003 which outlined charges of misconduct against him and notified him of the intended dismissal. The letter also invited him to write his defence within 21 days and in default, he would be dismissed. Final the letter suspended him from duty without pay, ordered him not to leave the duty station without permission from the Chief Mechanical & Transport Engineer, to whom he was to report to twice every month, on dates and time to be determined by him. He contended that the suspension was unlawful because the letter was written by unauthorized person as opposed to the PS personally who alone was clothed with delegated powers to do so.

14. The claimant further contended that he responded to the said letter denying the alleged misconduct and thereafter the matter was forwarded to an incompetent Ministerial HR advisory committee, which never accorded him a hearing but just recommended for his dismissal. That thereafter he was served with a dismissal letter dated 26.1.2005. He contended that under Regulation 34, provided that he or a person with knowledge in law before his dismissal. For that reason, he urged the court to declare that he was wrongfully dismissed.

15. After the foregoing analysis, it is clear that the respondent did not comply with the mandatory procedure set out by Regulation 34 of the Public Service Regulations. The claimant was not given an opportunity to defend himself before a committee, headed by a judge or magistrate or person with legal knowledge, appointed by the PSC to investigate and report to the commission on the alleged misconduct. All what the happened was that the after the PSC received recommendation for dismissal from the PS, it just made decision to dismiss the claimant and instructed the PS to convey the decision that he was dismissed from service with effect from 29.5.2004 on account of misconduct. The failure to accord the claimant a hearing as required by the regulations amounted breach of contract and it rendered the dismissal wrongful. I however do agree that the show letter signed by A.W. Kariuki for the PS was irregular. If it had been by Kariuki in person, and not for the PS, the letter would wrongful and invalid for lack of authority.

Reliefs

16. In view of the forgoing finding, I make a declaration that the dismissal of the claimant/plaintiff from his employment in the public service of Kenya was wrongful. However, I decline to declare that the dismissal was a nullity because it was done by the correct person.

17. In addition, to the foregoing declaration the claimant prayed for his withheld salary from the date of suspension on 17.6.2003 to the date he would retired normally at the age of 55 years. It is however, common knowledge that although he was appointed on permanent and pensionable terms, there was no guarantee that would work till his retirement age. Under section 14 of the repealed Employment Act, that was in force then, provided for termination of an employment contract by a notice in writing or payment of salary in lieu of notice. That where the contract did not stipulate for any notice period, the termination was to be by a reasonable notice.

18. In view of the foregoing finding that service up to retirement age was not guaranteed, I award the claimant from 17.6.2003 when he was suspended until 26.1.2005 when he was wrongfully dismissed from employment. In awarding the said salary arrears, I have considered the fact that during the suspension period, the claimant was bound strict instructions not leave his duty station and report twice a month to the Chief Mechanical & Transport Engineer on date and time to be dictated by the said officer. He was therefore still bound by the contract of service throughout the whole period of suspension and could not therefore look for another job without being punished for leaving his duty station against the strict instructions not to leave the station. However, after the wrongful dismissal, he was free to look for another job and mitigate the loss occasioned by the dismissal. Consequently, and for that reason in addition to the fact that service till retirement age was not guaranteed, I declined to grant salary for the period between the date of dismissal and the expected age of normal retirement.

19. The claimant's produced payslip for January 2003 showing that his gross pay was kshs 37,690 made up of kshs.16,190 basic pay, kshs.20,000 house allowance and kshs.1,500 medical allowance. The period of his suspension from 17.6.2003 to 26.1.2005 was approximately 20 months and as such, he is entitled salary arrears of kshs.753,800.

20. The claim for pension for 30 years has not been substantiated. However, he is entitled to pension from the government under terms provided by the Pensions Act and the regulations thereunder.

21. The claim for loss of investment opportunities must also fails for want of particulars and evidence.

Conclusion and disposition

22. I have found that the dismissal of the claimant was wrongful because it was done without complying with the mandatory disciplinary procedure provided by Regulation 34 of the Public Service Regulations. I have further found that the claimant could not look for another job during the suspension period, because he was bound by the terms of his contract and the instruction given vide the suspension letter not to leave his work station without permission and to be reporting to his supervisor twice a month on the dates and time to be dictated by the supervisor as per suspension letter. Finally, I have found that he is entitled to the salary for the of suspension which ended by the said wrongful dismissal. Consequently, I enter judgment for the claimant in the sum of kshs.753,800. He will also have costs plus interest at court rates from date of filing the suit. The award given is subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 8th day of March, 2019

ONESMUS N. MAKAU

JUDGE