



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1334 OF 2013

KENYA COUNTY GOVERNMENT WORKERS

UNION.....CLAIMANT

VERSUS

NAIROBI CITY WATER & SEWERAGE

COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Kenya County Government Workers Union (Union) instituted legal proceedings against the Nairobi Water & Sewerage Co. Ltd (Respondent) on 20 August 2013 and the Issue in Dispute was stated as Wrongful dismissal of 36 employees of the Nairobi Water & Sewerage Co. Ltd.
2. The Respondent filed a *Response to the Memorandum of Claim* on 13 May 2014 contending that the Cause was statute time barred and that the termination of employment of the 36 Grievants was lawful.
3. On 30 September 2014, one of the Grievants Joshua Laichena withdrew from the proceedings, and on 23 October 2014 the firm of Brian Otieno & Co. Advocates filed a *Notice of Appointment* to come on record for the Union.
4. On 29 June 2015 the firm of M’Njau & Mageto Advocates filed a *Notice of Change of Advocate* to come on record for Samuel Onyancha, the 23rd Grievant.
5. A ruling on the limitation objection was delivered on 10 February 2017.
6. The Respondent was dissatisfied with the ruling and it filed a *Notice of Appeal* on 16 February 2017 (the Court was not informed on the status of the Appeal).
7. The parties filed witness statements, documents and supplementary documents ahead of the hearing which commenced on 21 May 2018.
8. When the hearing resumed on 17 July 2018, the Court declined to allow the Respondent’s application to file further documents. The Union concluded its case on the same date.
9. On 18 July 2018 the Respondent filed an application to review the order declining to allow introduction of further documents. The application was dismissed on 24 July 2018 for non-attendance.
10. The Respondent’s case was taken on 25 July 2018 and on 17 December 2018. The Union filed its submissions on 29 January 2019 while the Respondent filed its submissions on 26 February 2019.
11. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination into 2
 - (i) Whether the termination of the employment of the 36 Grievants were unlawful, and
 - (ii) Appropriate remedies/orders.

Unfair termination of employment

Process leading to termination

12. The 36 Grievants contracts were terminated variously on 23 June 2006, 7 November 2006 and 12 January 2007.
13. One dismissal was in 2004 and another in 2009.
14. At the time the Grievants were being terminated from employment, the general law of employment did not require as a mandatory step, a hearing.
15. The Court notes that the Union has relied extensively on case law based on the Employment Act, 2007. This Act does not apply in the instant case except to the Grievant who was dismissed in 2009 (however, he did not testify to prove his case).
16. Section 41 of the Employment Act, 2007 now makes it mandatory that a hearing be conducted if the ground for termination of employment is *misconduct, poor performance or physical incapacity*.
17. The Union, in the view of the Court cannot invoke a statutory right to a hearing anchored on the Employment Act, 2007. If there was any other statute providing for a right to a hearing, the Union did not draw it to the Court's attention.

Contractual protections/provisions on hearing

18. If there was any contractual agreement requiring a hearing, such as in a *collective bargaining agreement*, such agreement was not produced in Court or proved during testimony.
19. After the termination(s), the Grievants individually wrote to the Respondent, appealing.
20. The Respondent produced minutes which demonstrate that the appeals by the Grievants were heard with the participation of the Union on 2 December 2011, 20 December 2011 and 22 February 2012.

Lawful cause for the terminations

21. On the reasons for termination of the Grievants employments, the law at the material time was that an employer could terminate the services of an employee for no reason, for a bad reason or for a good reason provided that damages equivalent to the notice period was paid.
22. The validity or fairness of the reasons was not a consideration in determining the lawfulness of a termination of employment, unlike the present regime which in sections 43 and 45 of the Employment Act, 2007 now require proof of the reasons leading to termination of employment.
23. The grounds/reasons advanced for the termination of the Grievants employment(s) were forgery of certificates from Kenya National Examinations Council, Department of Industrial Training and Kenya Accountants & Secretaries National Examinations Board.
24. The Respondent produced in Court a letter from the Ministry of Labour and Human Resource Development dated 23 February 2006 showing the results of a verification exercise to determine which of the 89 certificates forwarded to the Ministry were genuine and which were fake.
25. The Respondent also produced letters from the Kenya National Examinations Council dated 16 February 2006, 19 March 2006, 14 September 2007 and 10 June 2012 confirming that the certificates which had been presented to it for verification were fictitious.
26. The Kenya Accountants & Secretaries National Examinations Board on its part wrote to the Respondent on 24 October 2005 indicating which of the certificates forwarded to it for verification were genuine and which ones were not genuine.
27. In the view of the Court the use of *non-genuine or forged* certificates to secure employment and/or promotion was and is still a lawful ground for the employer to bring the relationship to an end.
28. Such conduct is a demonstration of dishonesty and was and is still a criminal offence which was a lawful reason for an employer to terminate the contract of an employee.
29. In the view of the Court, it is immaterial that the Respondent did not report or involve the Police after it established that the certificates presented by the Grievants were forgeries.
30. The Court therefore finds that the Respondent had lawful cause to terminate the employment of the Grievants.
31. The Court also notes that although the Union mounted a challenge to the terminations, some of the Grievants had actually admitted in writing that they had presented forged certificates (Mary Wairimu Magundu, Stephen Nganga Gichiru, Samson Ndungu, Joseph M.J, John Njenga Mwangi, James Munyi Njogu and Alexander Ndunda just to mention a few).

Conclusion and Orders

32. The Court finds and holds that the termination of the Grievants employments' were lawful.

33. The Cause herein lacks merit and is dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 1st day of March 2019.

Radido Stephen

Judge

Appearances

For Union Brian Otieno & Co. Advocates

For 23rd Grievant M'Njau & Mageto Advocates

For Respondent Mbugwa, Atudo & Macharia Advocates

Court Assistant Lindsey