



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1968 OF 2014

ZAKAYO MULINGE MUTUKU.....CLAIMANT

- VERSUS -

KENYA ELECTRICITY GENERATING COMPANY LIMITED....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 10th April, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 04.11.2014 in person. He subsequently appointed Kamende D.C & Company Advocates to act in the suit. The claimant prayed for judgment against the respondent for:

- a) Determination that the claimant was wrongfully, unfairly and unlawfully terminated.
- b) 12 months pay in compensation for unfair, wrongful, and unlawful termination as the Court may think fit.
- c) One month pay in lieu of termination notice (as introduced by consent order at the hearing on 19.12.2018).
- d) Reinstatement of the claimant to his position of protective services officer.
- e) An order for payment of costs and any other relief that the Court may deem fit and fair to grant.
- f) One month pay in lieu of termination notice.

The memorandum of response was filed on 16.01.2015 through David Kiptum & Company Advocates. The respondent prayed that the action be dismissed with costs. Mr. Masinde Boniface Advocate from that firm of advocates urged the respondent's case at the hearing of the suit.

The reply to the memorandum of response was filed on 09.02.2015.

There is no dispute that the claimant was employed by the respondent by the letter dated 11.04.1996 as a Protective Service Officer. The claimant worked for 18 years until when he was dismissed from service on 01.08.2014.

The claimant received a show-cause letter dated 17.04.2014 alleging that he had forged the police officers' attendance register on 12.03.2014. In his letter of reply dated 26.04.2014 the claimant stated that when security department started deploying armed police patrols at Wanjii, Tana and Sagana falls, each police officer was to be paid a daily rate of Kshs.500.00. He presented, as per procedure, the register for the police officers who had worked for 14 days for the period 23.02.2014 to 08.03.2014. He attached a letter requesting for payment because the same had not been paid. He further explained that the security supervisor for the contracted firm had confirmed that there was no absenteeism for the period in question. Thus, he denied the allegations as was levelled against him.

The claimant attended the disciplinary committee hearing on 27.05.2014. The claimant's explanation was found unacceptable and by the memo dated 21.07.2014 he was dismissed from the respondent's service effective 01.08.2014 per section 44(4) (g) of the Employment Act, clause 11 of the employment contract, and Human Resources and Administration Policies clause 2.3.8 (g) and Procedure clause 7.3.1(g).

He was paid his salary up to 31.07.2014, his last day at work. He was also to be paid one month salary in lieu of notice and 48 accrued leave days. He would receive a separate communication on his benefits from the Staff Retirement Benefits Scheme. The payments were subject to the claimant's clearing with the respondent.

By the letter dated 05.08.2014 the claimant appealed against the dismissal on the ground that the allegations of fraud from which the

disciplinary complaint against him arose were unfounded, false and malicious. He stated that the attendance register for the police officers at Wanjii power station in issue was genuine and not forged as was alleged. The police officers had signed the register and they had been on patrol on the dates in issue. He stated that he had got the register from the police officer in-charge after the respondent's main register had mysteriously gone missing and could not be found. He said he had therefore acted in good faith with the sole purpose of completing the claims by the police officers for their services rendered between 23.02.2014 to 08.03.2014. He further stated that at the disciplinary hearing he had noted that the missing registers had been kept and had some added forged entries for 23.02.2014 to 08.03.2014. He had not been involved in the investigations to establish the truth and he had a clean record of service spanning over 18 years. He stated that the dismissal from service had therefore been arbitrary and overly punitive. He pleaded that he was 48 years old and he had invested all his youthful years in the service of the company.

In his testimony, the claimant lamented that the chairman and secretary of the disciplinary committee were the same persons he had previously investigated. Further he testified that he protested against their presence at the disciplinary hearing but his concerns were overruled and the hearing proceeded. Further on 05.09.2014 he had attended the hearing of the appeal and the chairperson was related to the informer one Francis Omondi whose report was the cause of the dismissal. The claimant lamented that he had not been given a chance to cross examine the police officers subject of the register that was allegedly forged. The Claimant was concerned that the disciplinary committee had introduced a new document at the hearing (the original register with forgeries) without giving him prior information in that regard.

The disciplinary committee's report was for the meeting of 27th to 30th May 2014 and concluded that there was evidence of forgery of signatures and charges to defraud the company of Kshs. 6,000.00 and the allegations had been proved. The Court observes that the report did not show the record of the evidence establishing the alleged forgery of signatures. The report then concluded that the claimant be dismissed with full benefits.

The respondent had initially failed to comply with the directions to file a witness statement and failed to call a witness on the initial hearing date. The matter had proceeded to submissions and directions on judgment made.

Subsequently the respondent applied for reopening of the case and by consent order of 15.03.2019, the respondent was allowed to adduce evidence in the suit by calling one witness to testify on the issue of validity of the reasons for the claimant's termination and solely based on the pleadings and documents on record. The respondent's case was that the claimant was lawfully terminated from employment on the basis that the claimant forged some documents exposing the respondent to financial loss of Kshs. 6,000.00. Further, the respondent's case was that it was not about the amount involved but the issue was one of integrity in view of the sensitive position the claimant held.

The respondent's witness (RW) was one Simon Theuri, the respondent's Acting Head of Security and Integrity effective January 2019 and previously, from July 2012 to December 2018, served as the Assistant Manager Security and Integrity. RW's evidence was that the respondent's head office at Stima Plaza in Nairobi received a complaint against the claimant from an officer known as Francis Omondi. The complaint was about the forgery of the police attendance register where police signed for attendance and the register was used to compute payment for each police officer at Kshs.500.00 per day of reporting at the respondent's installations to enhance security. Francis Omondi was the finance officer at the respondent's Upper Tana station. The claimant wrote to the respondent's engineer for payment of police officers for 2 weeks. The said Francis Omondi noted that the register had the names of the police officers in one hand-writing yet different police officers had reported at different times. The register in issue was for Wanjii Power Station in Murang'a County. Francis asked for the original register at Wanjii and noted that from 23.03.2014 to 08.03.2014 the police officers had not reported on duty. The supervisor of the Administration Police Officers had indicated on the original register that on the material dates the police officers had not reported on duty. Francis Omondi checked against the copy of the register presented by the claimant and which showed that for 5 days from 3rd to 8th there were entries that police officers had reported on duty. The original and copy of the register had not been filed or exhibited in Court. The respondent's case was that the original register had been available during the disciplinary hearing. RW testified that in his letter of appeal the claimant had challenged the contents of the original register thereby confirming to the Court that the claimant had seen the register during the disciplinary hearing.

In cross-examination, RW confirmed that the claimant enjoyed the delegated authority per the letter dated 27.03.2012 by the Chief Engineer, Upper Tana Stations. The delegated duties, amongst others, included to liaise with the police and other relevant authorities for any police security assistance and any requirement for the fulfilment of operations within Upper Tana area; to prepare budget for the claimant's section and forward copies to the Chief Engineer for any guidance; and to authorise and sign for staff under the claimant's control travel allowance claims up to a limit of Kshs.20, 000.00, mileage returns, attendance sheet and claim for variables allowance, overtime returns and timesheets. RW further confirmed that the claimant had written the letter dated 12.03.2014 forwarding a request for payment of Kshs.500.00 per day from 23.02. 2014 to 08.03.2014 for each police attendance at Wanjii Power Station per list attached. The sum of Kshs.28, 000.00 was requested for and the request had been through the Chief Engineer, Upper Tana Stations. RW testified that the Chief Engineer had never said that the request in the letter of 12.03.2014 had not been genuine. RW confirmed that the complaint had been by Francis Omondi and there had been an investigation report but the said complaint and investigation report had not been exhibited. RW testified that there had been no expert report on the alleged forgery and there was no expert report on the handwriting on the register and in issue in the allegations against the claimant. RW further testified that the report of the disciplinary hearing did not state the names of the police officers in issue and whose signatures might have been forged as was alleged against the claimant. Further there were no particulars on the amount per police officer as may have been fraudulently claimed as was alleged against the claimant.

RW further testified that in the letter of explanation dated 26.04.2014 the claimant had stated thus, **"It has come to my knowledge that the reportee went and collected all security registers without giving explanation for the same. It should be noted that he is not the custodian of the said documents and one wonders his motive of collecting registers."** And further in the letter of appeal dated 05.08.2014 the claimant had stated thus, **"During the disciplinary committee hearing on the 27th July 2014 I was surprised that the missing register had been kept and had been added clearly forged entries for the dates 23rd February 2014 to 8th March 2014 and in particular the entries for 3rd March 2014 to 8th March 2014 purported to be signed by unknown person is not true."** RW then testified that in view of that quoted position by the claimant, the claimant was thereby levelling the allegations of forgery against a person in the respondent's organisation who had taken the register other than attributing the same to the claimant.

The 1st issue for determination is whether the dismissal was unfair. The Court returns that there is no reason to doubt the claimant's evidence of exculpation or innocence. In particular the respondent failed to discharge the statutory burden (under sections 43 as read with 47(5) of the Employment Act 2007) of proving that as at the time of termination, there was a valid or genuine reason to terminate the claimant's employment. Further the respondent has failed to rebut the claimant's evidence on the circumstances leading to the termination including the claimant's denial of the alleged forgery. The Court returns that accordingly, the termination was unfair for want of a genuine or valid reason.

While making that finding, the Court finds that the respondent at the disciplinary hearing and at the appeal stage failed to show how the claimant was culpable in circumstances whereby the missing original register had been taken away by Francis Omondi without due process to maintain the integrity of the register's contents. The Court further finds that the Chief Engineer, Upper Tana Stations is the one who had delegated the duty in issue upon the claimant and throughout the disciplinary proceedings he was not involved as the principal holder of the duty and in any event, he had not made adverse reports in that regard. Further, the Court considers that the respondent failed to show the particulars or details of the allegations as levelled against the claimant in terms of the dates, names of police officers, and the signatures in issue. The Court finds that the allegations became unfounded by failure to establish such particulars of the complaint as may have been levelled or reported by Francis Omondi and then failure to table the investigation report as RW referred to in his evidence and finally, the disciplinary committee's failure to delve into such details of the allegations at the disciplinary hearing. The officer in charge of the police officers deployed at Wanjii Power Station (one Cpl. Kennedy) had written on 07.04.2014 to the claimant asking for payment of the allowances for 14 days from 23.02.2014 to 08.03.2014 and there is no reason to doubt that the claimant had acted within the delegated authority and honestly requested that the respondent pays accordingly.

The Court has also considered the specific delegated duty in the letter by the Chief Engineer – Upper Tana dated 27.03.2012 thus, **“2.c. To establish and maintain records and data for all Security Operations/Incidents in the area and make copies of the same available to the Assistant Protective and Investigations Manager through my office.”** Francis Omondi was the finance officer at the respondent's Upper Tana stations and the delegation does not mention him as relates to the security records such as the register in the allegations levelled against the claimant. The Court returns that the respondent had failed to consider the serious irregularity by which the said Francis had secretly taken the register without knowledge of the claimant and the Chief Engineer. The Court returns that the respondent has failed to establish the basis for errors in the original register as being attributable to the claimant. Indeed at the disciplinary hearing and the appeal stage the claimant lamented that the original register had glaring alterations and which was a surprise to him – and the Court returns that the flow of events show that the register must have been altered towards unfairly implicating the claimant as per his witness statement because he was never involved in any cash transactions with the police officers in question; no money was lost by the respondent; and Omondi who took the registers was not a custodian of the same and he appears to have taken the register outside his scope of duty and without authority that eventually led to the claimant's unfair predicament.

It was submitted for the respondent that as held by the Court of Appeal in **Judicial Service Commission –Versus- Gladys Boss Shollei & Another [2014]eKLR**, the disciplinary proceedings were anchored on a contractual relationship and the employer was not empowered to provide penal sanctions. In the instant case it was clear that the alleged misconduct was fraud or forgery bordering criminal culpability but no criminal proceedings were preferred by the respondent against the claimant. Looking at the material on record, the Court has returned that the respondent has failed to establish that the alleged reason for termination existed as at the time of termination and as envisaged in section 43 of the Employment Act, 2007. Further, the material on record show that the case that was levelled against the claimant was not a borderline case where one employer would reasonably not dismiss while the other would reasonably dismiss the employee as the respondent acted. The material on record shows that the claimant's principal; the Chief Engineer – Upper Tana Stations was not involved at all; his immediate supervisor was not involved or mentioned at all; no evidence linked the claimant to the alleged forgery of the register; and further no evidence linked the claimant as a beneficiary of the Kshs.6, 000.00 involved. It was a clear case that the allegations as levelled had not been established at all and in any event, by its own standards was disproportionate (in a case of loss of Kshs. 357, 250.00 against Francis O. Omondi the respondent had imposed a 1st warning whereas in the claimant's case involving alleged loss of Kshs. 6, 000.00, the respondent's imposition of abrupt dismissal). The Court returns that the case fell outside the opinion in **British Leyland UK Limited –Versus- Swift [1981] IRLR 91** quoted in **Judicial Service Commission –Versus- Gladys Boss Shollei & Another [2014]eKLR**, thus, **“There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair; even though some other employers may not have dismissed him.”** In the instant case the Court has returned that it was quite unreasonable that the respondent dismissed the claimant in view of the Court's findings as already stated in this judgment and the cited opinion does not even begin to apply in the present case.

As submitted for the claimant, the allegation of forgery as was levelled against the claimant by the respondent was serious and the respondent failed to meet the test as set by the Court of Appeal in **Zakayo Michubu Kibuange –Versus- Lydia Kaguna Japheth & 2 Others [2014] eKLR**, thus,

“Forgery is a very serious allegation to make and more so, if it involves one's signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1st respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all.”

The Court finds that in the present case there was no report or formal inquiry into the alleged forgery of the register and the respondent had no basis at all, as at the time of the termination, to dismiss the claimant on account of forgery of the register as was alleged. The dismissal, on merits of the allegations, amounted to unfair termination of the contract of service between the parties.

The 2nd issue for determination is whether the procedure leading to the claimant's dismissal was unfair because the initial disciplinary committee and the appeals committee were biased since the chairman and the secretary had a long standing grudge against the claimant for having investigated them resulting into their being transferred.

The claimant's unchallenged evidence in that regard was as follows, "13) I attended the meeting where I found the chairman and the secretary were people who I had investigated in the year 2012. 14) The said chairman and the secretary were moved to the head office after my investigation report. 15) I protested but nobody bothered about my protest and hearing proceeded after which I went back to my work station." Thereafter, on 30.07.2014 the claimant received a dismissal letter dated 21.07.2014 and dismissing him from office effective 01.08.2014.

The respondent denied the alleged bias at paragraph 7 of the memorandum of response. At paragraph 7 of the memorandum of claim the claimant had pleaded the particulars of bias including the appointment of a chairman and a secretary who the claimant had investigated in July 2012 after a demonstration by the local community in seven forks; that the claimant had implicated the chairman and secretary for being in the wrong and the findings were that the two officers had to be moved to the head office; and the appeal committee demonstrated bias by being chaired by someone related to the claimant's accuser. The evidence on record is that the claimant had made some adverse reports against one Joel Ngugi (then the Generation Manager -Eastern Hydros) and one John Macharia Mwangi (then Principal Human Resources Officer) in circumstances whereby the community, being Kivaa residents of Masinga District, had levelled certain allegations against the two officers.

The Court returns that taking the evidence into account, on a balance of probability, the claimant has established that the two officers were likely biased against him when they sat as part of the disciplinary committee.

In the recent judgment in **Dr. Solomon Mummah –Versus- Kenyatta University [2019]eKLR**, this Court's opinion was as follows, "Thirdly it was urged that the claimant's supervisor the Chairperson of the Department of Psychology being the complainant and the Deputy Vice-Chancellor (Administration) having signed the suspension letter had thereby been directly or indirectly been involved in the case against the claimant so that they ought not to have sat at the Senior Board of Discipline that deliberated the case. The Court returns that there was no established contractual or statutory provision that the persons previously directly or indirectly involved should not participate and that ground will fail. The Court considers that a disciplinary case is between the employer and employee and there cannot be strict independence of the employer except where the statute or contractual provision specifically prescribes that those handling the disciplinary case should not have been directly or indirectly been involved in the case before, the Court will not impose such levels of independence in handling of disciplinary cases by the employers. All that is imposed by section 41 as read with section 45 (2) (c) of the Employment Act, 2007 is the employer giving the employee due chance to explain himself before the employer imposes punishment such as dismissal. The employer is not expected to be a neutral arbiter in that process of notice and hearing. An employee will have to show clear aspects of manifest procedural injustice such as shortness or unreasonableness of notice or inadequacy of particulars of allegations or such other sufficient lamentation to succeed for unfair procedure under the sections and in absence of statutory or contractual provision, mere demand and anticipation of neutrality of the employer or employer's representatives or authorised persons in handling the disciplinary proceedings will not alone, in the opinion of the Court, render the procedure unfair."

In the instant case under clause 2.3.4.1 of the respondent's policy on employee discipline, the respondent's CEO was vested with the authority to appoint the disciplinary and appeals committees. He was also responsible for approval of the disciplinary procedure. The claimant has established that he had reservations against the chairman and the secretary of the disciplinary committee, and, the chairman of the appeals committee. There is no reason to doubt that the claimant protested against the involvement of the chairperson and the secretary. The Court finds that the committees being ad hoc as appointed by the CEO, the parties had by implication agreed on possible neutral composition of the committees and to the extent that nothing was done about the claimant's protestation at the disciplinary hearing, the composition having been validly challenged meant that the proceedings were thereby not fair. The Court returns that in that view, the procedure leading to the dismissal fell short of the fair procedure as envisaged in section 45 (2) (c) of the Employment Act, 2007. However, it is also noted that the claimant did not raise the fact of his protestation about the composition of the disciplinary committee in his appeal letter dated 05.08.2014 and did not also draw the CEO's attention to his grievances in that regard in any other manner so that in its final determination the Court will not place emphasis on the identified procedural insufficiency – the claimant having failed to move the CEO to consider reconstituting the committees in view of the claimant's grievances.

The 3rd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court returns as follows:

a) The claimant was dismissed effective 01.08.2014. Three years of limitation for grant of reinstatement under section 12 of the Employment and Labour Relations Court Act lapsed on or about 01.08.2017. Time has run and it is belated to grant reinstatement as it is statute barred. The prayer will fail.

b) The claimant prays for 12 months compensation under section 49 of the Employment Act, 2007 for the unfair dismissal. The Court considers that he had served for over 18 years with a clean record and he desired to continue in employment. He was 48 years old and had 12 years to serve prior to retiring at the age of 60 years. It is an aggravating factor that the termination might have been actuated with malice and bias because there was no evidence to rebut the claimant's evidence that the secretary and chairman at the disciplinary hearing were persons he had investigated before. The claimant's exhibit ZKM – 6 on the response to the memorandum of response shows that in a disciplinary case involving loss of Kshs. 357, 250.00 against Francis O. Omondi the respondent had imposed a 1st warning whereas in the claimant's case involving alleged loss of Kshs. 6, 000.00, the respondent had imposed the disproportionate punishment of abrupt dismissal. The Court considers that the respondent's action in that regard amounted to gross unfairness. In the circumstances the Court returns that the claimant is awarded 12 months' salaries in compensation at last monthly gross pay (per the claimant's gross pay for July, 2014) to be computed and included in the final decree.

c) The claimant prayed for one month pay in lieu of the termination notice. The prayer was introduced at the hearing by consent of the parties and the payment was offered in the dismissal letter of 21.07.2014. The Court returns that the prayer has been established and the termination having been abrupt, the same is due per section 35 of the Employment Act, 2007 or as promised in the termination letter as is awarded accordingly to be computed and included in the final decree.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

a) The declaration that the claimant was wrongfully, unfairly and unlawfully terminated.

b) Payment of 12 months' salaries in compensation at last monthly gross pay (Per July 2014 payslip) plus one month pay in lieu of the termination notice to be computed by the parties and included in the final decree (and failing agreement the quantum be settled by the Deputy Registrar).

c) The amount in (b) above to be paid by 01.06.2019 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nairobi this Wednesday 10th April, 2019.

BYRAM ONGAYA

JUDGE