



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 780 OF 2017

EDDIE MAGIRI

CLAIMANT

V

KENYA MEAT COMMISSION

RESPONDENT

JUDGMENT

1. Eddie Magiri (Claimant) was offered a 1 year fixed term contract by Kenya Meat Commission (Respondent) with effect from 1 February 2007.
2. The contract was renewed severally until the Respondent appointed the Claimant as an ICT Administrator on 18 April 2012, still on renewable fixed term contract.
3. On 22 April 2013, the Claimant's contract was renewed for a term of 3 years, to lapse on 31 January 2016.
4. The relationship hit turbulence, for on 16 July 2015, the Respondent interdicted the Claimant on grounds of gross misconduct. The particular(s) were Unauthorised deletion of invoices from quick book some of this invoices were deleted in June and July 2015.
5. The interdiction letter called upon the Claimant to show cause within 2 weeks why he should not be dismissed from employment.
6. Upon receipt of the interdiction letter, the Claimant made an oral request to the Respondent on 20 July 2015 seeking to be furnished with certain documents to enable him respond.
7. The Claimant eventually responded on 28 July 2015 denying the truth of the allegations set out in the interdiction letter, and on 16 September 2015, the Respondent wrote to the Claimant inviting him to attend a disciplinary hearing on 22 September 2015.
8. The Claimant attended the hearing, and on 23 September 2015 he wrote to the Respondent expressing displeasure over how the hearing was conducted.
9. The Claimant also lamented about being ambushed with a *Forensic Audit Report*, and requested to be supplied with a copy of the report to enable him be given another opportunity to give further clarifications.
10. On 25 September 2015, the Respondent wrote to the Claimant, informing him of his summary dismissal.
11. The letter of dismissal was delivered to the Claimant on 11 January 2016, and he appealed on 5 February 2016.
12. When there was no response forthcoming on the appeal, the Claimant sought legal advice, and hence these proceedings, alleging *unlawful interdiction and dismissal*.
13. The Claimant filed a Supplementary List of Documents on 31 May 2018 and the Cause was heard on 20 February 2019.
14. Although the Respondent caused a *Memorandum of Appearance* to be filed on 13 June 2017, it never filed a Response.
15. On 2 May 2018, during pre-trial directions, the Respondent sought leave to file a *Response* out of time, and the Court granted leave and directed that the *Response*, witness statements and documents if any, be filed before 18 May 2018. The order was not complied with.

16. The Respondent again sought leave on 31 October 2018 to file a *Response*, and the Court directed it to file the same before 17 November 2018. The order was not complied with, yet again.

17. The Court declined a third attempt to secure leave to file a *Response* on the morning of the hearing. The Court however allowed the Respondent to cross examine the Claimant.

18. The Claimant filed his submissions on 15 March 2019 while the Respondent's submissions were not on file by this morning.

19. The Court has considered the pleadings, evidence on record and the submissions.

Unfair termination of employment

Procedural fairness

20. The Claimant was informed of the charges to confront after which he made a request for certain documents which were supplied to him on 21 July 2015. He then made a written response.

21. The Claimant was then invited for an oral hearing.

22. The Claimant testified that during the oral hearing, a *Forensic Audit Report* which had not been brought to his attention before the disciplinary hearing was introduced.

23. According to the Claimant, he was ambushed with the *Forensic Audit Report*, and therefore he wrote to the Respondent a few days later asking to be furnished with a copy of the *Forensic Audit Report*, and indicating that he would be available to make clarifications.

24. The Respondent did not respond.

25. Clause 14.5.2.2 (ii) of the Respondent's *Human Resource Policy, Regulations and Procedures Manual* filed in Court required the Respondent to *give an employee maximum opportunity to defend him/herself both orally and in writing*.

26. Despite putting in a request in writing to be furnished with a copy of the *Forensic Audit Report* which was only introduced during the oral hearing and asking for an opportunity to give further clarifications, the Respondent did not respond to the Claimant's request.

27. Further, Clause 14.6 of the *Human Resource Policy, Regulations and Procedures Manual* on its part provided for appeals to the Board within 6 weeks.

28. The Claimant appealed but the appeal was not processed.

29. In so far as the Respondent introduced *new evidence* during the oral hearing, and declined to respond to the Claimant's entreaties to be furnished with a copy and be granted an opportunity to make further representations, and failed to process the appeal within a reasonable time, the Court is of the view that the process undertaken by the Respondent failed both contractual and statutory procedural fairness test.

30. The Court finds that the process leading to the summary dismissal of the Claimant was not fair.

Substantive fairness

31. In terms of sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden to prove that the Claimant *deleted invoices from quick books*, and that the reason was a valid and fair reason.

32. The Respondent did not file a *Response*, and therefore could not lead evidence through witnesses.

33. The Claimant's testimony that he only *read access rights* to the system and that the system was controlled by the Finance/Accounts department and that others in the department could have done the *deletions* was not rebutted or shown not to be credible.

34. The legal and logical inference of the Respondent failing to discharge the statutory burden of demonstrating the *validity and fairness* of the reasons leading to the summary dismissal of the Claimant is that the Respondent did not have valid and fair reasons, and the Court so holds.

Salary arrears

35. The Claimant contended that he was paid half salary only for July and August 2015, and not for September 2015 to date of communication of dismissal on 11 January 2016.

36. The Claimant computed the arrears as Kshs 516,000/- being the equivalent of 6 months' salary.

37. The computation cannot be correct. The Claimant was out for 6 months and 11 days. Out the 6 months, he was paid half salary for 2

months, and therefore he is only entitled to salary for 5 full months and 11 days.

38. Computing the salary for the 5 months is straightforward, but the parties did not address the Court on the formula to use to arrive at 11 days salary (monthly salary was Kshs 86,000/-).

39. The Court will therefore only allow this heads of claim for 5 months.

Surcharge

40. The Claimant testified that the Respondent unlawfully surcharged him Kshs 228,570/-.

41. The Respondent did not lead any evidence to show what the surcharge was in respect of, and the Court will find that the surcharge was unlawful.

Reinstatement

42. For the Court to order reinstatement, evidence must be led by both parties as to the practicalities of an order of reinstatement.

43. No such evidence was led and therefore the Court is unable to consider the appropriateness of reinstatement as a remedy.

Compensation

44. The Claimant served the Respondent for about 8 years, and in consideration of the length of service, the Court is of the view that the equivalent of 8 months' gross salary would be appropriate (gross salary was Kshs 86,000/- per month).

Conclusion and Orders

45. The Court finds and declares that the dismissal of the Claimant was unfair and awards him

(a) Compensation Kshs 688,000/-

(b) Salary arrears Kshs 430,000/-

TOTAL Kshs 1,118,000/-

46. For clarity, the Court finds that the awards herein are in addition to the terminal benefits indicated in the terminal benefits schedule attached to the *Discharge Certificate* without deduction of the surcharge.

47. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 9th day of April 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. instructed by Mugambi & Co. Advocates

For Respondent Macharia Ngar'ru & Wetangula Advocates

Court Assistant Lindsey