



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 464A OF 2014

(Before Hon. Lady Justice Maureen Onyango)

PHILEMON ATIK.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND SEWERAGE COMPANY.....RESPONDENT

JUDGMENT

The Claimant filed his Memorandum of Claim on 24th March 2014 alleging that he had been victimised by the Respondent for reasons that he transacted in trade union matters in his capacity as an official. He avers that the victimisation took different forms such as suspension, failure to remit his statutory deductions, harassment and finally his dismissal. He therefore seeks the following reliefs:

- a. A declaration the dismissals are unfair.
- b. Reinstatement and payment of Kshs.39,094,739.60 for the Claimant.
- c. Alternatively payment of Kshs.39,094,739.60 arrears and damages for 13 months' salary at the rate of Kshs. 148 per month for the Claimant.
- d. Damages for legitimate expectation of job placement.
- e. Cost and interest on the above.

The Respondent in its Response to the Claim filed on 16th May 2014 avers that the Claimant was dismissed on 26th February 2013 for misconduct after appearing before a disciplinary committee and was afforded a fair hearing.

After the hearing, the parties were directed to file written submissions but only the respondent filed submissions. The Claimant chose to rely on the submissions in his Memorandum of Claim.

Claimant's Case

The Claimant, who appeared in person, adopted his Witness Statement filed in court on 14th June 2016 and his documents filed on various dates. In the witness statement the Claimant states that he was at all material times an official of the union. that he was consistently a victim of trumped up charges of absenteeism which he constantly challenged. He avers that he was suspended to keep him away from a unionisable staff meeting over a CBA stand-off. He avers that after the Respondent took over operational staff from the defunct Nairobi City Council (now Nairobi County Government) he was downgraded from Grade 9 to Grade 7 and his job placement appeal was dismissed.

He avers that in April 2012 he reported a dispute to the Ministry of Labour on the issue of constant victimisation of union officials by the Respondent and the Ministry called a meeting.

That on 10th April 2012 he sought permission to hold a meeting following refusal of the Respondent to sign CBA but the meeting was rejected by the Respondent by letter dated 10th October 2012. That he was served with a warning letter on 2nd November 2012. That the Claimant and other union officials called for a meeting on 17th November 2012 to update members on the issue of refusal to negotiate CBA by the Respondent. The Claimant was served with a letter of suspension on 12th November 2012 while at work, alleging that he had

absconded duty. According to the Claimant the suspension was intended to keep him from the meeting of 17th November 2012. That the rest of the Union officials were suspended on 20th November 2012 allegedly for holding a meeting at City Hall to discuss management matters that touch on employment relationships. He avers that the termination of his employment was to punish and block him from performing union duties as an official of the union and was not valid, genuine or fair.

On non payment of salary the Claimant avers that –

(a) I was suspended from 16th June 2008 to 15th September 2008 with no payment at all, a period of 4 months. It is not denied.

(b) I was dismissed on 15th September 2008 and reinstated on 29th April 2009 but no payment was ever made to me for the unlawful period I was kept out. It is not denied.

(c) I was interdicted on 26th January 2012 and was only reinstated on merit on 15th June 2012 and was not paid for the 5 months out. This is not denied.

(d) From the date of reinstatement, being 15th June 2012 to October 2012, the I was not paid any sums at all despite working for a period of period of 4 months.

(e) I was suspended from employment on 12th November 2012 to 26th February 2013, a total of 4 months and was not paid at all.

Summary of unpaid sums on the disputed grade

Period	Sum claimed
16 th June 2008 to 15 th September 2008	Kshs.162,040
15 th September 2008 to 29 th April 2009	Kshs.364,590
26 th January 2012 to 15 th June 2012	Kshs.280,500
15 th June 2012 to October 2012	Kshs.224,400
12 th November 2012 to 26 th February 2013	Kshs.224,400
Total	Kshs.1,255,930

Under cross-examination the Claimant testified that he was a union official and was aware that there was a matter pending in Court on the correct union in Cause 823 of 2012, where the Court made a determination that the correct union was the Kenya Local Government Workers Union. That the decision has since been overturned. He testified that the Respondent refused to negotiate with the union.

He testified that after the takeover of the operations of the Nairobi City Council by the Respondent, there was a wage increase of 60% and 20% but his salary was never increased by the 20% increment. He testified that he was entitled to two increments and that he only received the 60% increment and not the 20% increment.

He testified that he had an issue with the Grading as he was at Grade 9 but he was placed at Grade 7, which was more junior.

Respondent's case

LUCAS GOR, RW1 stated that he worked at the Respondent as an Industrial Relations Co-ordinator from 2016. He testified that in accordance with the Claimant's terms of employment the grading system was to be subject to a job evaluation and grading system. He testified that the Claimant was transferred to Sasumua but he did not report. That in his letter dated 27th March 2008 the Claimant informed the Respondent that his life was in danger. He testified that despite being informed to report to the new station the Claimant did not report and stated that he had met hostility from staff and the community. He testified that the Respondent opted to suspend staff members and that the Claimant was informed to respond to the show cause letter which he did citing unfriendly environment and hostility. He testified that upon receipt of the Claimant's letter they decided to terminate the Claimant's services.

He testified that the Claimant did not respond to the issues set out in the Notice to Show Cause issued by the Head of Station. Consequently, the Claimant was suspended from duty by the letter dated 12th November 2012. He testified that after the Claimant's suspension letter a disciplinary committee was convened and the Claimant summoned for hearing, that by letter dated 26th February 2013 the Respondent informed the Claimant of his dismissal.

In cross-examination he testified that he was not aware of a dispute on victimisation. He testified that it is not true that the dues sought by the Claimant were not paid to him. He further testified that there is a recommendation that the claimant was not paid because he has not cleared.

The Respondent submitted that section 44 of the Employment Act provides the instances that amount to gross misconduct. It relied on the

decision in *Kenya Union of Commercial Food and allies Workers versus Meru North Farmers Sacco Limited* where the Court held that whatever reason or reasons that arise to cause an employer to terminate an employee, the employee must be taken through the mandatory process as outlined under section 41 of the Employment Act.

It submitted that the law relating to suspension is provided for in the employment Act indirectly under section 12 of the Employment Act which required the employer with 50 or more employees to have disciplinary procedure. It relied on the decision in *Grace Gacheru Muriithi v Kenya Literature Bureau [2012] eKLR* and submitted that the employee was not entitled to any salary while on suspension.

It further submitted that the Claimant is not entitled to allowances as indicated in his witness statement and that the Claimant was provided with a house while working for the Respondent. In conclusion the respondent urged the Court to dismiss the claim.

Issues for Determination

The main issues for determination are:

- a. Whether the Claimant's summary dismissal was wrongful and unfair.
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's summary dismissal was wrongful and unfair.

Reason for termination

The Claimant's case is that he was summarily dismissed by the Respondent due to his Union activities. The Respondent on the other hand alleges that the Claimant was terminated due to indiscipline, in particular that he was fond of absconding duty. The Claimant in his witness statement stated that he was a victim of trumped-up charges of absenteeism from work. Further, that his suspension from work was to keep him away from the pending meeting of unionisable staff over the standoff on the CBA.

From the evidence on record the Claimant's dismissal was primarily based on the reason that he had been constantly absconding from duty. The Respondent's concerns on the claimant absconding duty were addressed in various letters including; the Show Cause Letter dated 27th May 2011, which he responded to by his letter dated 23rd June 2011, the Internal Memo dated 30th October 2012 from the Co-ordinator-DESTW and the letter dated 2nd November 2012. Further, the Respondent through its various officers in Internal Memos further discussed the Claimant's constant absence from duty without permission. This absconding of duty led to the Claimant's suspension and eventual dismissal by the Respondent. The Claimant alleges that he was suspended due to a staff meeting scheduled for 17th November 2012 where the Respondent informed its staff that the meeting was not authorised. However, the result of this meeting was that the Ministry of Labour informed the Respondent in its letter dated 21st May 2013 to reinstate the Claimant. The issue of the right union was addressed in the letter from the Ministry of Labour and was the subject of Cause No. 823 of 2012. In its Internal Memo dated 2nd August 2011 the Respondent stated that the Claimant's allegation of insecurity in Sasumua Dam in his letter dated 23rd June 2011 was unfounded and the Claimant only wanted to work in Nairobi to continue with union activities. There is no evidence that the security threats were reported to the police. Remarkably, the Respondent in recommendation to this allegation was to redeploy him to Nairobi. There was to be a greater reason for the Claimant's dismissal for reason of absconding duty as the Respondent had taken all measures to accommodate the Claimant further even by reinstating him, but he still continued with his ways after being posted to Ruai.

Section 44(4) of the Employment Act provides:

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

The Claimant was at the very least required to inform his employer of his whereabouts but he never bothered to and instead even alleged that the Human Resource knew the reason for his absenteeism. In *Joseph Njoroge Kiama v Summer Ltd [2014] eKLR* Abuodha, J held:

“Although the law does not prescribe a specific period an employer must wait to deem the employee to have absconded, the employee ought to have left the place of work and does not appear to have any intention to returning to the workplace. Generally the employee has an obligation to inform the employer of any reason why he or she is unable to be at work. For instance illness or having to attend to a family crisis. Where the employee does not contact the employer, the employer has an obligation to try to contact the employee. The purpose is to warn the employee of the possible consequences of not being at work without permission. This obligation on the part of the employer is however not a rule of law but is out of best practice and the broader principle of fair labour practice. Since an employee may not be able to contact a employer as soon as practicable under certain circumstances such as where such employee may be sick or injured and is unconscious in hospital.”

The Court finds that the Claimant has not proved that the reasons for his dismissal was on account of his union leadership or activities. The Court takes into consideration that the claimant was severally issued with warning letters in respect of his perennial conduct of absconding

duty. The Court therefore finds that the Respondent had discharged its burden and proved that there were reasons for the Claimant's dismissal for absconding duty.

Procedure

In respect of procedure prior to dismissal, the Claimant was issued with a

Notice to Show Cause vide the Memo addressed to him dated 30th October 2012 and was summoned to attend disciplinary hearing on 22nd January 2013. He was accorded an opportunity to defend himself and was represented by two(2) union officials. The Claimant appealed the Summary Dismal vide his letter dated 3rd April 2013 to which the Respondent responded that the appeal was not successful. The Court therefore finds that fair procedure was followed as required under Section 41 of the Employment Act which provides:

(1.) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2.) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

Whether the Claimant is entitled to the reliefs sought.

In respect of the reliefs sought the Court finds that the Claimant cannot be reinstated pursuant to Section 12(3)(vii) of the Employment and Labour Relations Court as the 3-year limit provided for in the Act has lapsed.

The claimant's prayers for payment for the periods he was on suspension during the course of his employment also fails for reason that Clause 17 of the Memorandum of Agreement between the Union and the Respondent provides that payment to the employee for the period he or she was on suspension will be dependent on the verdict reached. In this instance the suspension did not result in a verdict of innocence but rather a dismissal.

The claimant sought damages for legitimate expectation of job placement however, such a prayer is not contemplated under the Act. Further the court finds that he has not proved that he was either downgraded or underpaid. The prayer therefore fails and is dismissed.

Conclusion

Having found that the dismissal of the claimant was for valid reason and that the Respondent complied with fair procedure and further having found non of his prayers successful, the entire claim fails and is accordingly dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE