



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1739 OF 2015

JOSHUA RODNEY MARIMBA.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The claimant brought this suit on 29.9.2015 alleging that his contract of service was unfairly and unlawfully terminated by the respondent on 30.6.2015. He therefore prayed for the following reliefs:

- (a) A declaration that the suspension, disciplinary proceedings and ultimate dismissal of the Claimant were a sham, unfair, unprocedural, wrongful and unjust.
- (b) The immediate and unconditional reinstatement of the Claimant to his employment.
- (c) Payment of all outstanding salary and benefits from the date of suspension upto reinstatement.
- (d) Damages for loss of credit and integrity.
- (e) Interest on (b) and (c) hereinabove at Court rates.

2. The respondent's defence is contained in the Amended Statement of Response filed on 1.12.2015 whereby she admitted the employment relationship with the claimant but denied the alleged unfair termination thereof. She averred that the claimant was fairly terminated for gross misconduct and after following a fair procedure whereby he was afforded a chance to defend himself. She therefore prayed for the suit to be dismissed with costs.

3. The main issues for determination arising from the pleadings are whether the termination of the claimant's contract of service by the respondent was unfair and whether he is entitled to the reliefs sought.

4. The suit was heard on diverse dates when the claimant testified as Cw1 but the respondent called no witnesses. After the hearing both parties filed written submissions.

Evidence

5. Cw1 testified that he was employed by the respondent as a driver on 3.5.2007 and in September 2013 he was appointed Market Surveillance Officer.

6. He further testified that on 4.3.2014 he and 7 other officer were assigned duty to go to Gilgil to inspect taxable goods. That on arrival they divided into groups of two and three. Cw1 and Ouma visited the first shop and found it okay and proceeded to the second one which was a supermarket where they found goods manufactured by Kenya Breweries Limited bearing old stamps and told the proprietor that they were going to seize the goods. However, the proprietor called police thinking that they were impostors.

7. The police led them to the police station where he was told to remove all what was in his pocket and he produced Kshs.33,000 which the police alleged was bribe money solicited from the shop owners. He however called his Supervisor Mr. Macharia who came and identified

him as a genuine KRA Officer. That at the same time the OSC arrived and ordered for his release and refund of his money.

8. Cw1 further testified that he was suspended on 26.5.2014 on the alleged offence of soliciting Kshs.20,000 from Peter Muiruri and Kshs.9,000 from Samuel Ratanya. He denied the alleged offence and produced bank statement of his bank Account Number 0124 5014601600 for the month of March 2014. He further produced Affidavit sworn by Samuel Ratanya on 10.8.2015 whereby he denied allegation that the claimant solicited and received bribe from him. Claimant contended that the shop owners never had any fake stamps in their stocks and as such, there was no basis for demanding any bribe. He further contended that the supermarket had CCTV cameras but non was shown to him to prove the alleged bribery.

9. Cw1 further testified that after the response he wrote to the suspension letter dated 26.5.2014, nothing was done for a while and despite demand for his case to be finalized. The reason given was that the investigations report by a Mr. Mofat Muriithi had serious gaps and unreliable for disciplinary proceedings. That when he could not wait any longer, Cw1 filed Petition No. 45 of 2015 before this Court seeking orders to compel the respondent to make a decision on his case. That the respondent asked the Court for 30 days to conduct a disciplinary hearing and he was called for the hearing on 29.6.2016. That on 30.6.2016 he received a dismissal letter citing lack of confidence as the reason for the separation.

10. Cw1 contended that the hearing was not fair because the committee was not properly constituted. He contended that Disciplinary Committee Rules of business at paragraph 2.2 requires that all the KRA Commissioners must be in attendance at the hearing but in his case, only one commissioner Mr. Cheruyot attended as the chair of the Disciplinary Committee. He further referred to the letter dated 17.4.2008 by the Commissioner General Mr. Waweru whereby he told all the Commissioners to attend Disciplinary Committee and not to delegate.

11. Cw1 further testified that paragraph 4 of the Disciplinary Committee Rules bars the Commissioner in charge of a Department where the matter arose from sitting in the Disciplinary proceedings. He contended that Mr. Cheruyot being in charge of the claimant's department, he should not have sat over the case for the claimant.

12. Cw1 further testified that Rule 9 requires that the minutes of the disciplinary proceeding shall be summarized and given to the Commissioner General before termination to enable him make a decision. However Cw1 contended that the minutes were give to the Commissioner General after one month.

13. Cw1 testified that he exercised his right of appeal but the appeal was dismissed. He however maintained that he was dismissed for no valid reason and prayed for declaration that he was unfairly dismissed. He further prayed for reinstatement contending that there is nowhere else the skills he has can get him another job.

Claimant's Submission

14. The claimant submitted that his termination was unfair, unjust and unlawful. He contended that there was no valid reason to warrant his termination under section 44(4) of the Employment Act and argued that the onus of proof of the alleged misconduct lies with the employer by dint of section 43 and 45 of the Act. He urged the court to find that the said burden has not been discharged. He relied on Gibson D. Mwanjala Vs Kenya Revenue Authority to fortify the foregoing submission.

15. The claimant further submitted that due process was not followed before dismissing him. He contended that his case was delayed forcing him to seek court orders to compel the employer to make a decision. That after the court ordered a hearing be done within 30 days, the employer hurriedly constituted a Disciplinary Committee to hear his case in total violation of the Respondent's Code of Conduct.

16. He further submitted that the committee was not properly constituted. First, he contended that the chairperson was the Commissioner in charge of the claimant's department of Investigations and Enforcement where the matter under inquiry arose. According to the claimant the said composition violated paragraph 2 of the Disciplinary Committee Rules of Business. He therefore contended that the presence of the Commissioner Investigations and Enforcement as chair of the Claimant's Disciplinary Committee amounted to conflict of interest. He contended that under part 4 of the regulations, the said Commissioner should have declared conflict of interest since the matter was reported by his office and stepped aside to allow a partial chairperson to preside over the proceedings.

17. The claimant further submitted that the composition of the Disciplinary Committee was in violation of the direction by the Commissioner General vide Internal Memo dated 17.4.2008 which appointed all Commissioners of the respondent to sit in the Disciplinary Committee and advising them that the functions of the Commissioners in the Committee cannot be delegated. He contended that in his case only one Commissioner sat, being the Commissioner from his department.

18. The claimant further contended that the decision to dismiss was communicated prematurely on 30.6.2015 before the proceedings of the hearing were summarized and sent to the Commissioner General for his decision as required by paragraph 9 of the said Rules and Regulations.

19. Finally the claimant submitted that the disciplinary hearing was a mere sham and biased against him because his termination had been decided way back on 7.5.2015 when the Commissioner stated that the claimant ought to have been terminated by then. He contended that, the Commissioner General being the final authority in the respondent, the Disciplinary Committee could not contradict his view that the claimant should have been dismissed long ago.

20. In view of the foregoing matters, the claimant concluded that the procedure followed before terminating his services was unprofessional, unfair and wrongful and prayed for the reliefs sought in his suit including reinstatement.

Respondent's Submission

21. The respondent submitted that the claimant was dismissed in accordance with the KRA Code of Conduct. That investigations were done by her Ethics and Integrity Team and filed a Report dated 24.4.2014 after which the claimant was served with a suspension letter dated 26.5.2014 for his transgressions on 4.3.2014. That the claimant submitted his defence to the said transactions on 3.6.2014 and 17.7.2014 denying the transgression.

22. The respondent further submitted that a disciplinary hearing for the claimant was done on 26.6.2015 where witnesses tendered evidence against him and he was given a chance to tender his defence as per the minutes filed. She contended that the Disciplinary Committee was properly constituted as per part 13 of KRA Code of Conduct and argued that the claimant never raised any objection to the inclusion of the Commissioner Investigations and Enforcement in the Committee. She contended that the said Commissioner played the role of a Committee member and also a technical officer of the Investigations and Enforcement by dint of Paragraph 7.9 of the Code of Conduct which provides that the department from where the matter arose shall avail an officer with adequate technical knowledge and understanding of the operational guidelines to guide the committee.

23. Finally the respondent contended that after the hearing the case, the Committee made a decision to terminate him on the basis of the evidence availed to it which showed that the claimant had breached the code of conduct. She therefore urged the Court to find that the claimant has not proved his case on the balance of probability and dismiss the suit with costs. She cited Judicial Service Commission Vs Gladys Boss Shollei & Another [2014]eKLR where the Court of Appeal held that internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability

Analysis and Determination

24. There is no dispute that the claimant was employed by the respondent until 30.6.2015 when he was dismissed. The issues for determination herein are:

(a) Whether the termination was unfair and unjustified

(b) Whether reliefs sought should be granted.

Unfair and unjustified termination

25. Under section 45 of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that it was ground on valid and fair reasons and that a fair procedure was followed. Valid and fair procedure is one, which relates to the employee's conduct, capacity and compatibility, or based on the employer's operation requirements. Fair procedure on the other hand refers to, but not limited to, according the employee an opportunity to know the reason for the termination and air his/her representations before the termination is decided.

Reason for the termination

26. In this case, the reason for termination was gross misconduct by the claimant which led to the respondent's loss of confidence in him. The respondent never gave any evidence in this case, as her witnesses never attended the hearing. However in her written submissions, she relied on the documents filed by the claimant to urge that the termination of the claimant's contract was justified by a valid reasons being his misconduct at Gilgil Town on 4.3.2014 including soliciting and obtaining bribes from two traders.

27. The claimant has denied the alleged misconduct and contended that it was false. He produced an affidavit sworn by one of the traders, Mr. Ratanya denying the allegation that the claimant solicited from him Kshs.9,000. As regards the second trader, Peter Muriuki Igogo, the claimant relied on the statement by his colleague Mr. Ouma which stated that when they raised the issue of old stamps on the spirits at the supermarket, the Manager called KBL Officer who came quickly and after confirmation that the supply was genuine and from KBL, they stopped the intended seizure and left the shop to answer a call from their colleague Joan who had alleged that police were harassing her.

28. The claimant denied the alleged soliciting of bribes of Kshs.29,000 from the said traders and contended that all the money found in his pocket belonged to him and relied on bank statement to prove that he had withdrawn the money from his account. He further contended that there was no complaint filed at the police station and statement recorded against him and that is why he was released the same day and the money refunded to him. He also contended that if as alleged by the manager and cashier of the supermarket that he was given the money near the point of sale, CCTV footages could have been provided to prove that she was indeed given the said Ksh.20,000 at the Supermarket. He therefore submitted that the reasons for the termination was invalid and that the employer was aware that there was no evidence to sustain a disciplinary case against him and consequently delayed the case for over one year.

29. After careful consideration, of the evidence and submissions presented to the court, I find that the claimant was at the place of the alleged offence on the alleged date and time. The evidence is however not sufficient to prove that the claimant indeed solicited and obtained Kshs.9,000 from Mr. Samuel Ratanya of Vitalas Wine and Spirits. First, Mr. Ouma who was in the company of the claimant stated in his statement that they found the stamps on the stock okay and left to go together. Second, Mr. Samuel Ratanya himself swore an affidavit denying that the claimant solicited and obtained Kshs.9,000 bribe from him. Finally, the respondent has not rebutted the claimant's evidence that no complaint was lodged at the police station for the alleged offence or statement recorded against him. Consequently I return that the alleged offence of soliciting and obtaining a bribe of Kshs.9,000 from Mr. Samuel Ratanya was not valid

30. As regards the offence of soliciting a bribe of Kshs.20,000 from Peter Muiruri, Manager Gilmart Supermarket, Mr. Ouma stated that they found offending stock with old stamps but the Kenya Breweries Limited staff was called to explain the delay in using new stamps and the matter ended. He further stated that when he walked out with the KBL Officer, the claimant was left in the Supermarket talking to the Manager and when he called the claimant to alert him about a distress call from Joan, he never picked. He therefore left the claimant at the Supermarket and the claimant followed him later in the company of the Manager to where Joan was. He denied witnessing the claimant

soliciting and receiving the alleged bribe from the Manager but he learnt later that he was arrested on the said offence.

31. The claimant did not state any reason why his colleague at the operation would lie that he left him at the supermarket. The time the claimant was left behind by Ouma and the KBL Officer provided a good opportunity for him to solicit for the bribe or to be falsely accused of the offence by the Supermarket Manager. The burden of proving the alleged misconduct of soliciting for the bribe lies with the respondent. No evidence was adduced herein to prove that indeed the claimant solicited and received the bribe of Kshs.20,000 from Peter Muiruri. No CCTV footages were produced to prove the alleged offence by the claimant or some other documentary evidence to support that allegation.

32. Although it was alleged by statements collected by KRA investigator that the claimant was arrested in connection with the offence, the claimant's evidence that no formal report or statement was recorded against him at the police and that indeed all the money taken from him by the police was returned to him has not been rebutted by the respondent. I therefore find on a preponderance of evidence that the alleged offence of soliciting an receiving Kshs.20,000 bribe by the claimant from Peter Muiruri of Gilmart Supermarket has not been proved.

33. The foregoing Lacuna notwithstanding, it is without peradventure that the conduct of the claimant during the visit to the Wines and Spirits shop and the Supermarket on 4.3.2014 at Gilgil entitled the employer to reasonably suspect him for being dishonest and likely to bring her into disrepute contrary to rule 6.2.5.4 and 6.2.6.9 of her code of conduct. Whereas the KRA Surveillance team were divided into groups of at least 2 persons, the claimant was either returning to the premises or being left there talking to the Managers while his colleague, Mr. Ouma walked away. Although Mr. Ouma never witnessed any bribes being given, the said conduct by the claimant breached work procedures and opened opportunity for him to demand bribes from the traders or to be falsely accused of the offence and thereby bring disrepute to respondent.

34. The respondent conducted private investigation and made a report which found the claimant culpable of contravening the said sections of the code of conduct. The said report and the statements collected from the various witnesses including his companion Mr. Ouma were considered against the defence offered by the claimant both in writing and before the Disciplinary Committee, and a decision was reached that the claimant had misconducted himself contrary to the Code of Conduct.

35. Under section 43 of the Employment Act, the reason for terminating the employee's contract are those things which the employer honestly believed to exist at the time when the termination was done and which made him to decide to terminate the contract. In this case, the respondent considered the said evidence collected by her investigator and made opinion that the claimant could not be trusted any more with the tasks he was employed to undertake for her. The termination letter dated 30.6.2015 cited the reason for the termination as loss of confidence. The letter stated thus:-

“your conduct at Gilmart Supermarket in Gilgil town was found to be in gross violation of the laid down work procedures, and consequently the Authority has lost confidence in you.

.....it has been decided that your services with KRA be terminated with immediate effect on grounds of gross misconduct.”

36. Despite the failure by the respondent to call any witnesses herein, I am satisfied by the documentary evidence adduced by the claimant himself that the respondent had a valid and fair reason for terminating the claimant's contract of service. His conduct of breaching work procedures was no longer compatible with the respondent and had the potential of bringing the respondent and her other staff into disrepute and frustrate her public duty. I therefore return that the termination was justified.

Procedure followed

37. The respondent submitted that a fair procedure was followed because the claimant was served with a suspension letter which invited him to make a written defence; that he was later invited to a disciplinary hearing and thereafter given right of appeal. However, the claimant contended that the procedure followed was unfair because the Disciplinary Committee was improperly constituted and the hearing was a mere sham because the employer had determined his exist even before the hearing; further because he was denied the opportunity to meet his accusers at the disciplinary hearing and the panel was hostile to him.

38. The procedure of disciplinary hearing at work place is governed by the employment contract and the Law. The Contract of Employment may be contained in several documents including Appointment Letter, Collective Agreement, Internal Memos, Code of Conduct and/or HR policies and manuals published by the employer. In this case, the parties have cited the Code of Conduct, the Disciplinary Committee Rules of Business, the Internal Memo by the Commissioner General dated 17.4.2008, letter by Head of Public Service dated 24.5.2010 and the Rules and Regulations Governing Discipline and Grievances. It is the said documents, which dictates the composition of the Disciplinary committee and the procedure to be followed.

39. Under Section 2 of the Respondent's Disciplinary Committee Rules of Business the Disciplinary Committee comprises:-

“2.1 the Chairman who shall be a Commissioner appointed by the Commissioner General.

2.2 All Commissioners.

2.3 The Heads of Human Resources, Finance, Board Secretary and ICT Departments.

2.4 Where the Chairman is not available for the meeting, or should he for any reason disqualify himself, the members shall appoint one of them, who is not from the department from which the matter under consideration arose, to act as the Chair for purposes of that meeting.”

40. From the foregoing express provision of the Committee rules, it is clear that the chairman of the Disciplinary Committee cannot be from the department where the matter under review arose. In this case, the claimant contended, and it was not rebutted, that the chairman of the Disciplinary Committee which heard his case was from the department of Investigations and Enforcement from where the claimant's case rose. That was a clear breach of the said Rules of Procedure and the Chairman was therefore conflicted.

41. In addition to the foregoing breach, Rule 3.2 of the said Rules provided that the quorum of the Committee shall be 5 but the minutes of the hearing dated 26.6.2015 shows that only 4 members including only one Commissioner sat in the Committee. That was also in breach of the Internal Memo by the Commissioner General dated 17.4.2008 whereby all the Commissioners were required to attend Disciplinary Committee Meetings without failure. To that extent I find that the claimant has proved that the composition of his Disciplinary Committee was not proper and its chairperson was conflicted. The respondent submitted that the Commissioner in charge of the claimant's department was there to provide technical assistance but that is not true. The proceedings produced indicate that he was the chairman which was wrong and not in accordance with section 7 of the Code of Conduct.

Procedure at the hearing

42. Section 7 of the Respondent's Code of Conduct and Rule 6 of the Disciplinary Committee Rules of Business expressly provide for the procedure to be followed at a disciplinary hearing. The two documents require that the employee should be served with the charges and thereafter attend the hearing personally. That on the day of the hearing the committee receives the investigations report and hears evidence from the staff and other witnesses in support of the charges. Thereafter the accused employee is allowed to tender his evidence and even call his witnesses to support his defence. Finally, the Committee deliberates on the evidence adduced by both sides and proceeds to make recommendation to the Commissioner General. The department

where the matter arose from is required to provide an Officer with adequate technical knowledge and understanding of processes, procedures and operations guidelines/statutes to guide the Committee. The Committee is also entitled to call any person or visit any place which in its opinion would assist the committee in its work.

43. The claimant contention that he was not allowed to meet his accusers during the disciplinary hearing has not been rebutted. The Disciplinary hearing was a quasi-judicial process in which the claimant's conduct was being adjudicated upon. He was therefore entitled to face his accusers and test their evidence through cross examination. The said right was denied and I therefore return that the process followed was not consistent with fair hearing. The foregoing view is fortified by *Menginya Salimi Murgani Vs Kenya Revenue Authority [2006]eKLR* where Ojwang J (as he then was) held as follows:-

“It is clear too that the suspicions which led to the suspensions and to termination of employment, were not set out in a document availed to the plaintiff, so he could respond. For the most part, the plaintiff did not share a forum with his accusers, so that the differing views could be resolved through an informed process.

I have considered the foregoing facts, and come to the conclusion that they were not consistent with the requirements of a fair hearing.”

44. In the end, I find on a preponderance of evidence that the claimant has proved that a fair procedure was not followed before his dismissal and that rendered the separation herein unfair within the meaning of section 45 of the Employment Act. There cannot be a fair hearing where the Committee sitting to hear the case is improperly constituted and it acts with bias, hostility to the accused employee and denies him the right to face his accusers as provided under the contract of service. The basic tenets of the rules of national justice are that the person who sits to decide a case must be impartial and must accord the accused party a fair opportunity to present his defence for consideration before his fate is determined. I therefore dismiss the submissions by the defence that a fair procedure was followed before dismissing the claimant.

45. In addition to the improper composition of the Disciplinary Committee and failure to follow proper procedure at the hearing, the delay in finalizing the disciplinary process also rendered the procedure followed from the suspension to the dismissal unfair. Section 8.4.7 of the Respondent's Rules and Regulation Governing Discipline and Grievances provide that suspension shall as much as possible last for 6 months. In addition, a circular by the Head of Public Service dated 24.5.2010 directed Permanent Secretaries or Authorized Officer and all the Chief Executives of State Corporations, like the Respondent herein, to ensure that administrative action of public officers suspected of corruption were dealt without delay and in accordance with the relevant Laws and Regulations. That was not the case herein because after the suspension of the claimant on 26.5.2014 the respondent took no steps to call him to disciplinary hearing despite demands by the claimant until a Constitutional Petition No. 45 of 2015 was filed to compel her to determine the delayed case. Such delay of over one year was not only unfair but also very costly to the tax payers because the claimant ended up receiving a salary for no work done for all that period.

Reliefs

46. In view of the failure to follow a fair procedure before dismissing the claimant, I make a declaration that the suspension, disciplinary proceedings and the ultimate dismissal of the claimant was unfair. I however decline to grant the order for immediate and unconditional reinstatement to his employment because section 12(3) (vii) of the ELRC Act bars the Court from granting that relief where 3 years have lapsed from the date of separation. In this case, the termination occurred on 30.6.2015 and the 3 years limitation period lapsed on 30.6.2018. The claimant did not pray for alternative prayer for compensation for unfair termination under section 49(1) of the Employment Act. He is bound by his pleadings and the court will not award compensation.

47. The claim for salary from the time of suspension to the date of reinstatement is dismissed because, first and foremost there is no reinstatement ordered. Secondly, the claimant has not denied the allegation by the defence that he was paid his salary from the date of suspension to the date of termination. He is therefore not entitled to any further salary from the date of the separation.

48. The claim for damages for loss of credit and integrity is also dismissed because as already held herein above, there is sufficient evidence

to prove that the claimant misconducted himself by breaching the work procedures which required him to always visit target premises with another employee. As already observed, it was wrong for the claimant to return to the inspected premises alone or to remain behind talking to the Managers while his colleague walked away after the inspection. Such conduct opened opportunity for him to demand bribes or to be falsely accused by the traders with such offence.

49. In addition to the foregoing, I am satisfied by the evidence on record that the allegation that the claimant solicited and received bribes did not emanate from the respondent but members of the public and the police. The respondent and the claimant's supervisor were only informed of the allegation by the claimant and/or the police and the persons who recorded statements with the internal investigator when he went to Gilgil Town to investigate the allegation.

Conclusion and Disposition

50. I have found that there was a valid and fair reason that justified the dismissal of the claimant from service, namely, his dishonesty conduct that rendered him incompatible with the Respondent. However, I have further found that the termination was rendered unfair by the failure by the respondent to follow a fair procedure as provided under the contract of service. Finally I have declined to grant the reliefs sought either due to limitation period provided by the law or because of lack of merits altogether. Consequently, I dismiss the suit but with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 24th day of May 2019

ONESMUS N. MAKAU

JUDGE