



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 957 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

COMMUNICATION WORKERS UNION (KENYA).....CLAIMANT

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT

JUDGMENT

The Claimant herein filed its Memorandum of Claim on 9th June 2014 on behalf of the grievant, Jonathan Omamo Omondi, alleging that his summary dismissal by the Respondent was in contravention of the rules of natural justice. It seeks the following reliefs:

- i. A declaration that the Respondent unfairly and wrongfully terminated the contract of employment of Mr. Jonathan Omondi Omamo.
- ii. An order directing the Respondent to reinstate Mr. Jonathan Omondi Omamo to his former position without any loss of benefits, earnings or seniority.
- iii. In alternative to prayer (ii) above, an order directing the Respondent to compute and pay Mr. Omamo 12 months' salary based on his gross monthly salary in addition to the terminal benefits that is already accrued to him as per his termination letter dated 16th October 2012.
- iv. General damages for wrongful and unlawful termination.
- v. Such other and further orders that this Court deems just and expedient to grant.

The Respondent filed its Memorandum of Defence on 17th May 2018 denying the Claimant's allegation. It averred that the grievant was lawfully dismissed from employment for vandalism or intentional damage to company property contrary to the Respondent's rules and regulations.

Claimant's case

The grievant testified that he worked at the Respondent from 24th September 1990 and he held the position of Team Leader. He testified that he earned Kshs.56,582 and that he left the Respondent on 16th October 2012 on allegations of unsubstantiated gross misconduct.

The grievant testified that he was called on the day of dismissal and there was a disciplinary hearing on that day. He testified that he appealed the decision through the Union which wrote to the Employer's Appeal Panel but the respondent upheld the dismissal. He further testified that the matter was reported to the labour officer but it was not resolved hence this case in which he seeks the prayers stated in his memorandum of claim.

In cross-examination the grievant admitted that the in his Summary dismissal letter raised the issue of vandalism on 13th October 2012. He stated that several employees were arrested and they were part of his team. He testified that he instructed his team to go and repair the vandalised cables and they were found there based on his instructions

He testified that he was invited to disciplinary weekly meeting with the CEO and it is in the same meeting he was dismissed.

In re-examination he testified he was not at the site where there were repairs as he was in the office. He further testified that he was not arrested and that the CEO was in the meeting which dismissed him.

Respondents' Case

Chief Inspector Reuben Onchoka testified as RW1 and stated that he was seconded to Telkom Kenya from the Directorate of Criminal Investigations to assist Telkom Kenya in investigations on vandalism of telephone cables. He testified that in 2010 his position was Chief Inspector and he had 2 officers working under him.

He testified that on 13th October 2012 at around 3.45 pm he received a call from Senda Okoyo who was the Unity Technical Officer informing him that some of the technical staff members who had gone to restore an alarm along Mombasa Road had moved away from where they were restoring the cable and started vandalising the unused cables around the same place. He testified that the action he took because he was far from the scene, was that he raised the issue from the OCS Industrial Area Police Station and requested for two officers to visit the scene before he arrived. He testified that when the officers arrived at the scene they called him and told him that the technical staff members had restored the cables in two points, they had moved away to another point and were in the process of vandalising the unused cable using a ratchet used for pulling.

He testified that when he was informed, he told them to go with the technical officers to Akila Police Post. He testified that there were six technical staff and Jonathan Omamo was not at the scene but was the team leader. He testified that the technical officers defied the orders of the officers and one of them called Potus Watanda drove towards South C Mosque and parked the vehicle there and ran away. He testified that on his arrival he found 2 officers guarding the vehicle as all the other staff had taken cover. In addition, they all appeared except Watanga who had fled. He testified that he asked Kessio a technical officer to tell him if they were on official duty and he confirmed that they were on official duty. He testified that he asked if they were authorised to vandalise and he said he did not have the authority. Further they were on site on instructions of their team leader, Jonathan Omondi.

He testified that when he called Omondi, the grievant, Omondi told him he had sent his technical team there but left the scene to do some tests in the office. He testified that when he asked the grievant if he had authorised the technical team to also vandalise the unused cable he, the grievant, answered in the affirmative. He testified that he called the Regional Manager, Mombo, to confirm if he had authorised the removal of the cables. Mombo stated he did not give such authority.

He testified that he took a further step and called the security Manager Mr. Charles Arogo who also said he had no information on removal of the cables. He testified he ordered his officers to accompany him together with the Technical officers to Telkom Milimani Yard and on arrival at the yard he called the grievant to come over with the Regional Manager, Mr. Mombo. He testified that they came and he inquired from both of them if there was authority to vandalise or remove the cable. He testified that that Mr. Mombo told him there was no authority and that if there was such authority he would have written an email.

He testified that the grievant told him there was no authority but he was convening his men and that this was the first time such an incident occurred with the technical staff. He testified that he told Mombo to instruct Omondi the team leader to go bring Watanga who had ran away and when Watanga was brought to him, he took all of them to Central Police Station and booked them with two charges of severing with intent to steal C/s 290 of PC and tampering with telecommunication Plant contrary to Section 32(c) of Kenya Communication Amendment Act 2012.

He testified that he did not arrest Omondi, the grievant, because he was not at the scene but was giving instructions. He testified that on 15th October 2012 while in the company of Omondi, Mombo, two arresting officers an officer from scene of crime and Mr. Kessio proceeded to the scene. He testified that on arrival at the scene they were shown the 2 points where the technical staff were to restore the alarm. He testified that the points where the technical staff were arrested was 75 meters away from where they were trying to remove the unused cables. He testified that the cables the staff wanted to remove were protruding covered with some soil and there were marks of the ratchet where they had tied the cable to the tree and that this was photographed.

He testified that he recorded statements from several people and recommended disciplinary measures be taken to deal with the grievant. He further testified that he prepared a report, making his findings and recommended that the grievant be dealt with departmentally.

In cross-examination he testified that he was attached to Telkom in 2010 and worked there for 5 years. He testified that he was not familiar with the disciplinary procedure at Telkom. That when he arrived at the scene the grievant was not there. Further, when he recorded the grievant's statement he realised that the grievant had changed his statement and that the grievant was aware of what was going on. He testified that the statement recorded from the grievant was what the grievant had told him and he could not record anything outside what the grievant told him. He testified that he also recorded statements from Mr. Mombo, the Regional Manager.

KENNEDY MOKUA testified as RW2 and stated that he works for the Respondent as a Senior Human Resource Officer. That he has worked for the Respondent for 20 years. He testified that he knows the grievant as he was a former employee of the Respondent as a Senior Technician since 1990.

He testified that the reason for the grievant's separation was vandalism of telephone cables and that the grievant was among the six people who were at the scene but he was not arrested.

He testified that the grievant was the team leader of the arrested colleagues and was part and parcel of that case. He testified that the grievant was given an opportunity to explain what happened. He testified that there was a meeting of senior management where the grievant was given an opportunity to defend himself. It was his testimony that this was the first time the grievant was involved in such a case.

He testified that the grievant's appeal was heard and there was a response to the appeal by the Appeals Committee which upheld the decision

to dismiss the grievant. He testified that the grievant was paid his terminal dues which included his leave days. He testified that the grievant gave instructions on how his terminal benefits should be expended and that the grievant cleared with the Respondent. He testified that the grievant's termination was proper and no payment is due to the grievant.

In cross-examination he testified that the grievant was neither at the site of vandalism nor was he arrested. He testified that the procedure of termination was not fully followed due to the nature of the offence being the rampant vandalism and the fact that the persons were caught in the act. He testified that the CEO was not part of the Disciplinary Committee, that he took part in the disciplinary committee because of the nature of the case. He testified that there was rampant vandalism and the Managing Director came in to understand what was happening.

He testified that the report of the investigations officer stated what should be done. He further testified that the report was not given to him directly but he knows it was given to the Company. He testified that all staff found vandalising cables were charged but the grievant was not charged. He testified that they relied on the investigations Report to discipline the grievant though he did not have the Investigations Report.

In re-examination he reiterated that the Management received an investigations Report and the grievant was given an opportunity to be heard before the senior management committed prior to his dismissal.

Claimant's Submissions

The Claimant submitted that the grievant was never given a show cause letter as required under section 41 of the Employment Act. He further submitted that the investigations report by the police officer was never taken into consideration.

It is further submitted that the Respondent did not follow the laid down disciplinary procedure as provided under the Human Resource Manual and Employment Act. In addition, the grievant's appeal was not given due consideration.

In respect of the amount dues, the Claimant submitted that the grievant was not paid all his dues as alleged by the Respondent and he was only paid his earned salary and outstanding leave days. In addition, the grievant was not paid his pension because he was yet to attain the mandatory age.

Respondent's Submissions

It is the Respondent's submission that the vandalism of copper cables by the grievant was a crime and was a breach of the Respondent's policies and Human Resource Manual. The Respondent argued that this amounted to gross misconduct deserving dismissal. The Respondent relied on the decision in *Industrial Alliance Life Insurance Company v Gilbert Cabiakman*.

The Respondent submitted that it took disciplinary action against the grievant and that he was afforded an opportunity to appeal the decision of the disciplinary committee and due to the gravity of the offence the grievant was lawfully dismissed from employment in accordance with section 44(4)(g) of the Employment Act.

The Respondent argued that the grievant was afforded a fair hearing in accordance with section 41 of the Employment Act to explain why he instructed his team to recover a copper cable. Further, that the grievant was implicated by his team even though he denied instructing his team to vandalise the cable, that he had already admitted the same to the police before changing his statement. The Respondent argued that contrary to the allegation that it did not consider the Police Report it had valid reasons to believe the team was acting on the instructions of the grievant. The Respondent relied on the decision in *Judicial Service Commission v Gladys Boss Shollei*.

The Respondent submitted that the grievant was paid all his dues. It submitted that the grievant is not entitled to reinstatement as it is not tenable under Section 12(3)(vii) of the Employment and Labour Relations Court Act. In addition, the Claimant did not lay any basis for the claim of general damages and further argued that the grievant was lawfully terminated. The Respondent relied on the decision in *Mbaka Nguru & Another v James George Rakwar [1998] eKLR*. It further submitted that the claim for general damages is not contemplated under section 49 of the Employment Act. In conclusion it urged that the Court does dismiss the matter.

Issues for determination

The issues for consideration are:

- a) Whether the grievant's summary dismissal was wrongful.
- b) Whether the grievant is entitled to the reliefs sought.

a) Whether the grievant's summary dismissal was wrongful.

The parties confirmed that there was vandalism of cables along Mombasa Road by 6 staff who were arrested and charged with the offence of severing with intent to steal contrary to section 290 of the Penal Code.

The Claimant's case is that the grievant had instructed his team members to repair vandalised cables but he did not instruct them to vandalise the cables. RW1 testified that the grievant was not among the staff who were arrested and arraigned in Court. He testified that though the grievant was not at the scene he was aware of the vandalism. RW1 testified that in his investigations report he recommended that the grievant be dealt with departmentally. RW1 further testified that there had been no instructions from Mr. Mombo, the grievant's Supervisor for the removal of the cables. RW2 testified that the grievant was taken through a disciplinary hearing on 16th October 2012.

The grievant's Summary dismissal letter dated 16th October 2012 states thus:

"...As you are well aware, six (6) of your team members were arrested on Saturday 13th October 2012 on account of vandalism of a junction copper wire along Mombasa Road. Following their arrest, the staff informed the arresting police that you had sent them to repair the cable. When contacted by police to verify the information, you admitted that you had sent the team to recover the cable in order to restore service to ward off the policemen. Upon realising that the policemen were not convinced and that your fellow employees had been arrested, you changed your story and insisted that you sent them to repair a cable cut 100 meters away.

Due to the gravity of the offence with which your fellow employees have been charged with and the economic loss that would have been suffered by the Company as a result of their intended actions, you were accordingly informed through your Line Manager that the company was considering termination of your employment on account of gross misconduct..."

The grievant in his Statement recorded on 15th October 2012 stated that he had not instructed his team to recover the cables and this position was maintained by the grievant in this case. The Respondent in its dismissal letter stated that the grievant changed his statement when contacted by the police and this was reiterated by RW1 in his testimony.

The disciplinary process according to appendix 7 of the claimant's bundle of documents is as follows –

11.14 Discipline Process

Disciplinary action should be preceded by an investigation and the offender given a chance to defend himself before any disciplinary action is taken.

Steps

- 1. Take employee statement immediately after the offence*
- 2. Charge employee within 2 days of noting offence. The charge should call upon the offender to state his or her case (or defence) against specific allegations.*
- 3. Employee responds within 48 hours in writing and submits a signed hard copy.*
- 4. Evaluate defence letter in liaison with HR within 1 day*
- 5. Take Disciplinary action within 2 days*
- 6. Forward noted copy to HR for records in the employees file.*

The process is explained in details in the discipline matrix attached.

Employees may appeal to the CEO or Chief Human Resources Officer on any decision made in the course of the disciplinary procedure.

An employee with a warning letter will not be entitled to salary increment for that year unless with special approval of the CEO

The turnaround time for execution of disciplinary action will not be more than 7 working days.

From the facts on record, the respondent substantially complied with the disciplinary procedure. They however did not prove that the grievant was aware of the vandalism by his team. In his statement of 15th October 2012, the grievant was emphatic that he did not send the team to recover any cables. There was no statement before the disciplinary committee implicating the claimant. It was only RW1 who implicated the grievant but even RW1 said that the grievant told him so verbally but recorded a different position in his statement. There was no basis for the disciplinary committee to trust RW1 and to disbelieve the grievant. It is my opinion that RW1 being a policeman, would have charged the grievant with conspiracy to vandalise the cables if his statement is true that the grievant was aware about his team vandalising the telephone cables.

I therefore find that there was no proof of valid reason to dismiss the grievant. The dismissal was to that extent unfair.

Remedies

The claimant prayed for reinstatement of the grievant or in the alternative payment of terminal dues. Reinstatement is now not available to the grievant due to the time lapse of more than the three years permitted for reinstatement under Section 12 of the Employment and Labour Relations Court Act.

Having found that the summary dismissal of the grievant was unfair, I order that the same be reduced to a normal termination with normal terminal benefits as provided for under his terms of service.

In addition, I award the grievant 12 months' salary as compensation. In awarding the same, I have taken into account the fact that there was no proof of valid reason for his dismissal and thus he lost his job prematurely. I have further taken into account the length of his service which was more than 20 years and the fact that he had a clean record as was attested to by RW2. Further as stated by RW2, the grievant was punished because vandalism of cables was rampant causing the Managing Director to participate in the disciplinary hearing of the grievant when he was not supposed to as he was to handle appeals. This means that the respondent was intolerant with any person connected with vandalism of telephone cables at that time.

I therefore award the grievant **Kshs.678,984/=** as compensation. The same will attract interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE