



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 330 OF 2017**

**KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS...CLAIMANT**

**VERSUS**

**KITUI WATER & SANITATION CO. LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent on behalf of the Grievant Mr. Emmanuel Kyambi Munguti who claims to have been unlawfully terminated, discriminated against and his salary unfairly reduced by the Respondent. The Claimant averred that the Grievant was a permanent and pensionable employee of the Respondent earning a basic salary of Kshs. 19,440/-, house allowance of Kshs. 5,000/-, transport allowance of Kshs. 3,000/- and medical allowance of Kshs. 2,500/-. The Grievant asserts that he was deployed by the Respondent in 2005 and served until 19th January 2016 when his services were terminated. The Respondent averred that the Grievant was transferred to Voo Station on 18<sup>th</sup> August 2015 and that upon receipt of the letter he requested for 5 days off duty since he was not feeling well. The off was granted on 31<sup>st</sup> August 2015 and on 28<sup>th</sup> August 2015, he wrote a letter to the County Deputy Director of Water against Mr. Martin Wambua the operation's manager and Mr. Urbanus Mutisya the HR officer. He averred that instead of the Respondent addressing his issues, he was issued with a show cause letter on 15<sup>th</sup> September 2015 and in the same letter the Respondent agreed to look into his issues. The Grievant averred that he was issued with an invitation to appear before the staff advisory committee on 21<sup>st</sup> October 2015. It was averred that on 27<sup>th</sup> October 2015, the Grievant made a response to the show cause letter. He further received several other invitation letters to appear before the staff advisory committee and the Human resource committee on 17<sup>th</sup> November 2015 and 3<sup>rd</sup> December 2015 respectively. The Claimant averred that the Grievant was then issued with a termination letter on 19<sup>th</sup> January 2016 before being afforded a hearing. It was averred asserted that despite all the invitations the hearings did not take place as scheduled. The Grievant appealed against the termination but he was not afforded a hearing on appeal. He termed this unprocedural and unfair. The Claimant reported a dispute to the Cabinet Secretary who appointed a conciliator and the matter went through conciliation wherein the Respondent agreed to reinstate the three employees whose disputes had been reported. The Grievant further contended that the Respondent's action to terminate the Grievant before first considering his defence and dislodging his contentions against senior officers was bad in law. The Claimant averred that the Respondent's action to reduce his salary confirmed ulterior motive against him. The Claimant therefore sought a declaration that the Respondent's actions were unjustified, unfair and unlawful, an order to reinstate the Grievant unconditionally, the Respondent be directed to pay all benefits the Grievant was entitled to, claim for using personal motor bike from 14<sup>th</sup> August 2014 to August 2015 Kshs. 144,000/-, payment of balance of his salary due to the unfair unlawful reduction Kshs. 515,820/- and costs of the suit.

2. The Respondent in its response denied having reduced the Grievant's salary and termed the claim as false. It stated that the terms of employment referred to by the Grievant were those of his former employer. It stated that upon going through a rigorous process including interview, the Grievant was employed by the Respondent with new terms as demonstrated in the contract of employment dated 4<sup>th</sup> December 2012. The Respondent averred that the Grievant's performance was generally poor and he had been reprimanded severally. It was averred that he also engaged in a myriad of malpractices including carrying on business of selling fittings and imposing them on customers claiming that they had been recommended by the Respondent, selling the Respondent's property, selling substandard materials for water connection passing them off as those of the Respondent, failing to attend to Agape Community Water Project reconnection on 21<sup>st</sup> August 2013 and lying to his supervisor that he had. The Respondent averred that the Claimant was issued with a notice to show cause in 2013 in relation to the above stated malpractices and in his response admitted to carrying out the business of selling fittings and opening a shop without the authority of the Respondent. The Respondent averred that there was conflict of interest and on 7<sup>th</sup> July 2015 the Grievant was issued with a warning letter for failure to adhere to instructions and was required to refrain from engaging in malpractices which had been reported by many customers. The Respondent averred that due to those various complaints the Grievant was transferred from Katheka to Ikanga station on 9<sup>th</sup> July 2015 and was required to report on or before 18<sup>th</sup> August 2015. He failed to report and instead he wrote to the Respondent on 24<sup>th</sup> August 2015 requesting for off days with effect from 24<sup>th</sup> August 2015 to 28<sup>th</sup> August 2015 which was not approved. The Respondent averred that on 28<sup>th</sup> August 2015 the Grievant wrote and requested to delay his handover without stating reasons and this request was also not approved. The Respondent asserts that throughout the months of August, September and October 2015 complaints against the Grievant continued trickling in from customers and on 15<sup>th</sup> September 2015 he was issued with a notice to show cause why disciplinary action should not be taken against him for failure to report to his new station and the illegal connections as raised by complaining clients. After failing to respond, the Grievant was invited to appear before the staff advisory committee on 13<sup>th</sup> October 2015. The Respondent averred that the Grievant failed to appear without apology and he was again invited to appear on 21<sup>st</sup> October 2015. When he appeared he stated that he did not know why he had been summoned. He was given the notice to show cause again and he responded to it on 22<sup>nd</sup> October 2015 and denied all the allegations. The Respondent averred that on 5<sup>th</sup> November 2015 he was invited to the committee meeting on 12<sup>th</sup> November 2015 and yet again he failed to attend without apology. The Respondent averred that the Grievant was invited again on 17<sup>th</sup> November 2015 but he failed to attend yet again. It was averred that the Grievant was again summoned to the HR Board Committee on 3<sup>rd</sup> December 2015 and the Board listened to the Grievant's complaints against the two employees and directed that the Grievant be terminated. The Respondent averred that the two employees were surcharged and the Grievant was terminated for gross-misconduct. The Respondent averred that it followed the proper procedure before arriving at the decision to terminate the services of the Grievant. It also stated that the Grievant was not authorized to use his personal motorcycle for work and claim for mileage.

3. The Grievant testified that he had requested a transfer and he was transferred to Kitui by Athi Water Services Board in September 2012. He testified that the Respondent stated that it employed him afresh and that is why they reduced his salary. He also stated that after conciliation, the three staff were to be reinstated but only the two employees were reinstated excluding him. He stated that he never worked from August 2015, and when Mr. Boit the in-charge called him, Boit told him to wait for a letter but the HR did not respond. He stated that he was then issued with a termination letter without being called for a disciplinary hearing. In cross-examination he confirmed that the Respondent had produced letters inviting him for a disciplinary meeting. He confirmed that he did not appear but he stated that he would receive them after the date had passed and other meetings would be postponed. He asserted that his transfer was not on discipline issues and denied having seen the Respondent's letters to him prior to filing. He stated that he never made any errors. He further averred that he did not attend the board meeting even though his name is there as one of the attendees. He stated that he was interviewed and signed a letter upon employment. He confirmed that the interview was so he could go join the Respondent and that he was given a fresh contract. He confirmed he previously did not have a contract. He testified that the notice to show cause could be given after dates had passed and he never responded after receiving them late. He stated that they had agreed with the MD that he would be paid for the use of his motorbike; however, he confirmed that they did not have a written agreement to that effect. He testified that he never faced any issues from the customers and he was never informed of the complaints at the office. He also stated that his off was approved and that it was wrong for the Respondent to allow him off duty and later state that he was not authorized. He denied knowing of any illegal installations and owning a shop selling fittings.

4. The Respondent called Mr. Urbanus Wambua Mutisya the HR administration manager who stated that he was in the recruitment panel when they interviewed the Grievant in 2012 and that the Grievant was issued with an employment contract. He stated that the Grievant's services were terminated on grounds of misconduct. He testified that the Grievant breached his contract of employment and was in conflict with employee by opening a shop selling fittings that were being sold by the employer. He stated that he learnt of the business from the Grievant's supervisor in Kithyoko region. He testified that the Grievant was issued with a notice to show cause and he responded and purported to have been given permission by the MD. He was then transferred. He stated that before termination the Respondent carried out investigations and confirmed the various illegal acts that led to breach of his contract. He stated that the Grievant was taken through the due process before his termination in line with the HR manual and Public Service Code. In cross-examination the witness confirmed that the Grievant had been transferred from Kikuyu Water and Sanitation to Tanathi Water Services Board and not to Kitui Water Services Board. He further testified that the Grievant was transferred to various stations due to gross misconduct. He stated that the Grievant and the two employees appeared before the Board individually and that the case was past the shopsteward stage. He stated that the other two employees were reinstated because they took responsibility but they were surcharged. He testified that they did not agree to reinstate the 3 employees and that they reinstated the 2 employees because they took responsibility of what they had done. He stated that the termination notice was issued to the Grievant and the reasons stated therein. He confirmed there was a letter stating the reasons why the Grievant was not reinstated. He denied sending the Grievant home and promising to call him back and stated that the Grievant was served with notices, received them and signed the delivery book. He however did not avail the book in court. He testified that the Grievant solicited money from clients and that the clients appeared before the board and recorded statements accusing the Grievant of misconduct. Regarding the illegal connections, he stated that there were about 15 and the Respondent communicated to the Grievant about them when he appeared before the board together with his witness one Martin Wambua.

5. The parties filed written submissions and the Claimant submitted that the Grievant was transferred from Kikuyu Water Company to the Respondent and that it was improper for the Respondent to reduce his salary and force him to sign a new contract of employment. He therefore requested the court to order payment of the difference of Kshs. 8,204 per month. He relied the case between **David Wanjau Muhoro v OI Pejeta Ranching Limited [2014] eKLR** and submitted that the Respondent did not follow the due process of law when disciplining the Grievant. It submitted that the Grievant was sent on suspension without pay and without any formal communication contrary to the Public Service Code of Regulation. The Claimant submitted that failure to disclose to the Grievant and the court the contents of the investigation report was bad in law. The Claimant submitted that the Respondent's failure to pay salary to the Grievant for the period he was out of employment prior to termination was bad in law. It was also contended that the Respondent violated Section 41 of the Employment Act and that the Respondent's assertion that the Grievant appeared before the court was misleading since the Grievant testified that he did not appear before the Board and the Respondent failed to present evidence to confirm that the Grievant attended the meeting as alleged. The Claimant submitted that the Respondent acted in bad faith by failing to reinstate the Grievant as had been promised during the conciliation meeting. The Claimant submitted that there was no valid reason to constitute the Grievant's termination as no proper inquiry took place at all. The Claimant submitted that the Respondent did not state the period, days and dates and efforts made to trace the Grievant if indeed he was absent from work without permission or absconded duty as alleged and thus the Respondent's case must fail. Reliance was placed on the case of **Joseph Korir v Race Guards Limited [2018] eKLR**. It was submitted that the Respondent's failure to disclose to the Grievant all facts leading to his termination and failure to afford him a fair hearing and a representation violated the Grievant's constitutional rights as envisaged under article 50 of the Constitution.

6. The Respondent submitted that it issued the Grievant with sufficient notice and explained the allegations against him, and even though the Grievant ignored summons to attend before the Respondent's disciplinary committee several times he eventually presented himself, was heard and his explanations were found unsatisfactory and thereafter the Grievant's services were terminated. The Respondent submitted that the Grievant cannot turn around and assert that he was never accorded fair hearing. The Respondent relied on the case of **Mathew Lucy Cherusa v Poverelle Sisters of Belgano T/A Blessed Louis Palazzalo Health Centre [2013] eKLR**. The Respondent further submitted that it has always been lenient to the Grievant whose misconduct dates back to the year 2013. The Respondent submitted that it had given the Grievant several chances by transferring him from one station to another with the expectation that the Grievant would change his ways when taken to new work environments. However, the Respondent avers that its lenience was met with utter disobedience ranging from ignoring of summons, unexplained absenteeism from duty, misappropriation of the Respondent's funds and illegal receipt of funds, illegal connection of water and defiance of lawful commands from the superiors. The Respondent submitted that there were valid reasons to warrant the dismissal of the Grievant from employment as per the termination notice dated 19<sup>th</sup> January 2016 and that the action of the Respondent was within the purview of Section 45 of the Employment Act. It relied on a case of **Duke Onchiri Mose v Rosoga Investments Limited [2017] eKLR** where the Court considered theft of tools from the employer as valid grounds for termination of employee. The Respondent submitted that the Grievant was taken through a rigorous procedure before getting employed by the Respondent. He submitted his curriculum vitae and other academic credentials before he was interviewed by the Respondent before being issued with a new contract of employment. The Respondent contends that it was not a transfer but a new job altogether and that the Grievant signed the new contract and accepted the new terms that came with the new contract, including the duties and obligations he cannot again turn around and say that he was to continue working with the Respondent under the old terms. The Respondent submitted that it was a breach of the Grievant's contract to receive payments from clients yet he knew very well that role was a preserve of the employer's finance department. It submitted that the Grievant was not reinstated because after the Board reviewed his records, his conduct weighed heavily against him and the allegations against him

were so gross not warranting reinstatement. It urged the court not to reinstate the Grievant as that will only serve as an extension of the Grievant's malpractices to the detriment of the Respondent. The Respondent submitted that the purported travelling expenses of Kshs. 144,000/- was not substantiated as the Grievant failed to provide any documentary evidence. It submitted that he who alleges must prove and relied on the case of **David Getare Nyang'au v Houseman General Contractors Ltd [2013] eKLR**. The Respondent asserts that the Grievant had been involved in various malpractices from the year 2013 barely one year after signing his employment contract. The Grievant was also issued with notice to show cause outlining the malpractices he had been accused of being involved in and in response to the notice to show cause that was issued in 2013, the Grievant confessed to having opened a shop selling fittings to clients. This is a clear indication of a conflict of interest. It is clear that the contract of employment the Grievant signed precluded him from receiving money on behalf of the Respondent. The Respondent also asserted that the Grievant absented himself from work without authority and proof of this was the letter that written by the Grievant seeking permission not to attend work. The letter was not approved by the Respondent and the letter seeking for more time before handing over written by the Grievant was also not approved by the Respondent. The Grievant also from his statement of claim confirmed that he received a show cause letter and letters inviting him to appear before the advisory committee but he snubbed all those meeting without giving reasons. Having regard to the pleadings and the evidence adduced in court, it is crystal clear that the Respondent had valid reasons to warrant the termination of the Grievant. The authority of **Mathew Lucy Cherusa v Poverelle Sisters of Belgano T/A Blessed Louis Palazzalo Health Centre** (*supra*) applies to the circumstances of this case. The Grievant is not entitled to the remedies sought and his claim is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 15<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**