



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

CAUSE NO. 2164 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

NAIROBI COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

JUDGMENT

The Claimant, Kenya County Government Workers' Union filed a Memorandum of Claim dated 4th December, 2015 against the 1st Respondent, Nairobi County Public Service Board and the 2nd Respondent, Public Service Commission of Kenya for the unfair termination of services of Beatrice Ekesa Namulanda and Michael Onyango Ochoro, the grievants who are their members by Nairobi City County. The Claimant Union avers that this trade dispute came as a result of the unlawful/ unprocedural termination of services of the two employees after they were arraigned in Court on allegations of forgery of academic certificates.

The claimant avers that the Respondent failed to attend all conciliation meetings despite invitation from the conciliator at the pre-Employment & Labour Relations Court level as per **Article 159(2)(c) of the Constitution**. That the County Government violated the cardinal laws that govern their contracts of service and the registered CBA, which prompted the union to engage them for dialogue but that they refused to open doors to resolve the dispute in contravention of the spirit of the **Industrial Relations Charter of 1984**.

It is the claimant's case that Beatrice Namulanda was appointed on 9th April 1990 as a manual worker in the Public Health department while Michael Ochoro was appointed on 3rd August 1992 to the City Engineer's department. That Mr. Ochoro's show cause letter dated 2nd March 2011 which served also as a suspension letter referred to him as Labourer II, contradicting the letter dated 23rd March 2010 which had promoted him to a supervisor attached to the highway section while the show cause letter for Beatrice Namulanda dated 20th April 2012 gave her 14 days to explain the issue of forgery and why her services should not be dismissed. That Michael Ochoro's services were thereafter terminated on 20th September 2012 while Beatrice Namulanda had her services terminated on 21st May 2013 and that both terminations violated the **Collective Bargaining Agreement (CBA) Rule No. 30(b)** which states that:

“Where criminal proceedings which involve Councils interest have been instituted against an officer, the Head of Department may subject to the provisions of any Act or Rule for the time being in force suspend such officer from duty without pay until the criminal proceedings have been concluded.”

Further, that Mr. Ochoro appealed against the termination of his services through a letter dated 8th October 2012 and requested the employer to lift the termination as he was waiting for the determination of his **Criminal Case No. 248/2011**. That Beatrice Namulanda amongst four other employees was invited for a disciplinary committee on 6th September 2012 by the Director for Human Resource Management vide a Memo dated 30th August 2012 which was unlawful as the management was aware her **Criminal Case No. 411/2012** was still on going in court. That both Michael Ochoro and Beatrice Namulanda were acquitted by the court in March 2013 and July 2014 respectively and they both wrote to the Chief Officer, Public Service Management of Nairobi City County forwarding the court rulings made in their favour and also requested for reinstatement. That after receiving the court rulings, the management was duty bound by **Rule 30(d) of their registered CBA** to reinstate the two employees back to employment and further pay all their unpaid salaries from the dates of their suspension. That the Chief Officer, Public Service Management of Nairobi City County then wrote to Beatrice Namulanda through a letter dated 19/01/2015 informing her that her appeal to the Respondent board had been disallowed and that she could appeal to the 2nd Respondent within 90 days. That this decision by the Respondent was unfair and illegal as it contravened **Rule No. 30(c) of their registered CBA** but that Beatrice Namulanda still filed her second appeal with the 2nd Respondent on 18th March 2015.

The Claimant union then avers that it thereafter wrote to the Chief Officer, Public Service Management of Nairobi City County vide letters

dated 6th May 2015 and 11th May 2015 raising the violation of fundamental laws as far as the disciplinary procedure of the two employees was concerned and copied the said letters to the Secretary, Public Service Commission, Principal Secretary, Ministry of Devolution and the Secretary, County Public Service Board. That when the Chief officer failed to respond to their letters, it reported a trade dispute to the Cabinet Secretary, Ministry of Labour in a letter dated 29th May 2015 and requested for a conciliator and that the Chief Industrial Relations Officer, Ministry of Labour through a letter dated 23rd June 2015 then appointed Mr. R. Ngugi of Nyayo House as the conciliator. That after the Respondent refused to attend the two convened meetings the conciliator issued the Claimant union with the Certificate of Conciliation so as to refer this matter to court for further arbitration. The Claimant union thus prays that:

- 1) This Court finds that these two employees were discriminated against by being subjected to a court process while their fellow employees were taken for an internal disciplinary procedure.
- 2) This Court finds that these two employees were unlawfully terminated as their cases progressed in court which contravened our registered CBA Rule No. 30(b).
- 3) This Court finds that the Respondent's action of terminating their service even before the determination of their cases was illegal which made the termination letters as null and void.
- 4) This Court orders that these two employees be reinstated back to their employment and further be paid their outstanding salaries at the prevailing terms without loss of benefits, service, pension and seniority.
- 5) This Court awards these two employees, salaries of 12 months as compensation for loss of earnings during the period of unlawful termination which is within Section 15(c) of the Labour Institutions Act 2007.
- 6) Bearing in mind the period that this dispute has taken, this Court gives time limit for the Respondent to reinstate and pay them all their emoluments.

In two verifying affidavits dated 3rd December 2015 individually sworn by the two employees, Beatrice Namulanda avers that she was promoted to Inspector III and was transferred to the Environment Department. The two employees aver that they presented their certificates like all other employees during the forensic staff head count conducted by Price Waterhouse Coopers (PWC) between 22nd February 2010 and 12th March 2010. That two years later on 21st March 2012, they were called by the investigators at city hall and were arrested for allegedly presenting fake certificates during the head count and that Michael Ochoro was arraigned in court in 2011 while Beatrice Namulanda was arraigned in court on 22nd March 2012. Each of them was released on bail and went back to their work station to continue with their usual duties until they were each served with a show cause and suspension letter without a salary. Beatrice Namulanda avers that when she attended the disciplinary hearing, Mr. Tom Nyatike of HR Department in charge of discipline denied her entry saying that her case was still in court and could not be discussed at the disciplinary committee meeting while Michael Ochoro on the other hand avers that he never received any invitation for a disciplinary meeting to defend himself against the allegations levelled against him. That they both still received termination letters before their court cases had been concluded and contend that their rights as employees were violated including the right to reinstatement after they were both acquitted by the court as prescribed by their registered CBA.

Respondents' Case

The 1st Respondent filed a Memorandum of Response dated 5th January 2016 on 7th January 2016 denying the allegations set out in the Memorandum of Claim and avers that the two employees were lawfully and legally terminated from their services in accordance with the law and upon due process being followed. That they were subjected to a fair disciplinary process, given an opportunity to defend themselves and even filed appeal against their determinations of the disciplinary processes and that the reasons for terminating their services were justified and valid as per law. Further, being subjected to a disciplinary process or the State initiating prosecution against them does not amount to discrimination and that the CBA must be read in consonance with the Employment Act which authorizes the 1st Respondent to take appropriate actions against the two employees for the offences committed. It states that the acquittal of the two employees in a criminal case does not absolve them from gross misconduct since the standard of proof in a criminal case is not the same as that in a civil labour relations case. That the two employees are thus not entitled to any of the reliefs sought by the Claimant union and it prays that the Claim is dismissed with costs to the 1st Respondent.

When this matter came up for hearing on 25th July 2018, this Court ruled that the 2nd Respondent was discharged as it is not a necessary party.

Evidence

CW1, Beatrice Namulanda testified that while in employment with the Respondent, her salary was Kshs.27,775.00, House allowance was Kshs.12,000.00 and Commuter allowance was Kshs.2,000.00 and referred the court to payslips at Appendix B(i). She stated that the CBA provides that once she was acquitted, she should be reinstated and paid her salaries and prayed that the Court compels the Respondent to reinstate her back to employment and pay her salaries without any loss of benefits. In cross-examination, she stated that the response of the Public Service Commission on her appeal was that they based their decision on the NEC Report.

CW2, Michael Ochoro testified in court that his salary while in employment with the Respondent was Kshs.20,505.00, House allowance was Kshs. 9,000.00 and Commuter allowance was Kshs.2,000.00. He states that he has never received any response to his letter to the Respondent requesting for reinstatement and that he requests the court to help him get back his job and serve as he used to serve diligently. That he also prays to be paid all the money that they owe him without loss of service. In cross-examination, he stated that he appealed to the Public Service Commission but did not get any response and that is when he went to his union which took up the matter.

The Respondent's advocates closed their case by stating in court that they were not calling any witnesses and that they wished to rely on their pleadings in court.

Claimant's Submissions

It is submitted by the Claimant that the terms and conditions of the two employees are enshrined in their CBA which was inherited by the Respondent upon transiting to devolution and that the Respondent was therefore obligated to adhere to Rule No. 30(b) and (c) of their registered CBA. That this Court should also note the subsequent CBA registered under C.A. No. 14 of 2013 which was the last one in the advent of devolution that benefited all other employees from the defunct City Council of Nairobi apart from the two employees herein as their names had been removed from the payroll. That the current prevailing terms and conditions of service for the two employees are not the same as at the date of their unlawful termination and that the basic salary, house and commuter allowances were increased as follows:

Beatrice Ekesa Namulanda – Basic Salary increased by 60% to Kshs.44,540/=

House Allowance increased to Kshs. 17,000/=

Commuter Allowance increased to Kshs. 3,000/=

Michael Onyango Ochoro - Basic Salary increased by 60% to Kshs. 32,880/=

House Allowance increased to Kshs. 15,000/=

Commuter Allowance increased to Kshs. 3,000/=

The Claimant submits that directing the two employees to appeal to the Public Service Commission was meant to frustrate them and cause them more suffering and that this action was in breach of Article 236(b) of the Constitution which provides that a public officer shall not be dismissed or otherwise subjected to disciplinary action without due process of law. That the two employees became victims of ambush by the Respondent's action to terminate their services while the criminal proceedings were still going on in court.

The Claimant relied on Cause 435 of 2013 Mary Chemwono Kiptui –v- Kenya Pipeline Company Limited where Mbaru J. in entering judgment against the Respondent and awarding costs of the suit to the claimant, ordered that the claimant therein be reinstated to her position or an equally suitable position with the respondent, with all her back salary, allowances, benefits, and any other legal dues within 30 days from the date of the judgment and further ordered that there would be mention after 35 days to confirm compliance.

The Claimant prays that the Court grants the orders prayed for in its Memorandum of Claim and submits that the response by the Respondent to the Claim lacks merit and should not be entertained by this Court and it should hence be dismissed with costs to the Claimant.

Respondent's Submissions

The Respondent submits that it wholly relies on the case of *Kenya Plantation & Agricultural Workers Union –v- Sotik Highlands Tea Estate Limited [2016] eKLR* where the respondent therein relied on the case of *Benson Rollano Wemali v National Environment Management Authority (NEMA) [2015] eKLR*. In that case the court expounded that provisions of Section 47(5) of the Employment Act touching on the burden of proof of unfair termination rests upon the employee. It submits that it issued show cause letters to the two employees and later suspended them after the headcount by PWC reported that the two had presented KCSE and KCE Certificates that were suspected to be forgeries. That it inquired into the authenticity of the certificates with the Kenya National Examination Council (KNEC) which confirmed the said certificates were non-existent and were indeed a forgery.

It is submitted by the Respondents that it followed due procedure as per **Section 41(1) of the Employment Act** and that the two employees were further accorded an opportunity to appeal against the decisions to the Secretary, Public Service Commission within 42 days from the date they received their termination letters as per **Section 32(1) of the Public Service Commission (Local Authority Officers') Regulations 2007**. That the Claimant should not be granted the orders sought since the Respondent complied with the requirements of procedural fairness in terminating the two employees' services and that the disciplinary meetings also relied on the Reports from KNEC. That in *Kenya Plantation & Agricultural Workers Union –v- Sotik Highlands Tea Estate Limited [2016] eKLR*, Njagi Marete J. held as follows:

“The respondent's case outweighs that of the claimant on the veracity of the evidence adduced. The evidence and case of the respondent overwhelms the claimant's by far. The claimant does not largely answer the respondent's case but insists on his. In as much as this appears to be a case of your word against mine, it all tilts in favour of the respondent on a test of preponderance of evidence. I therefore find a case of lawful termination of the employment of the claimant and hold as such.”

Determination

I have considered the pleadings, the evidence adduced in court by the claimants and the submissions filed by both parties. The issues arising for determination are whether the termination of the employment of the grievants was fair and if they are entitled to the reliefs sought.

For termination to be fair there has to be proof of the reason for termination as provided under Section 43 of the Employment Act (the Act) and proof of valid procedure as provided in Section 41 of the Act.

In the present case both grievants were first issued with show cause notices which also suspend them from service. The charges in the show cause letters was that the two grievants had presented forged Kenya National Examination Council Certificates to Price Waterhouse Coopers (PWC) Consultants. The charges against Michael Onyango Ochoro were that –

“During the forensic staff head count conducted by Price Waterhouse Coopers (PWC) Consultants; you presented a Kenya Certificate of Education [KCEJ Certificate index Number 41079/019 which indicated that you sat for your KCE examination in 1981 at City High School. The certificate was suspected to be a forgery and upon confirmation of its authenticity by the Kenya National Examinations Council it was discovered that you were not a registered candidate at City High School and the centre code was 41034 and not 41079.

You were arraigned before the Chief Magistrate’s Court, Nairobi charged with the offence of forgery.

In view of the above, it is contemplated to dismiss you from Council service on account of the gross misconduct; but before this is done, you are hereby called upon to show cause why you should not be dismissed.

Your response, if any, should be received in this office within fourteen (14) days from the date of this letter failure to which the contemplated action will be taken against you without further reference to you.”

The charges against Beatrice Ekesa Namulanda were that –

“It has been reported to this office that ‘following the forensic verification of City Council Staff academic certificates, a copy of your Kenya Certificate of Secondary Education certificate No. 94012/020 was forwarded to the Kenya National Examinations Council for confirmation of its authenticity.

The Examinations Council has informed the City Council that you were neither registered nor sat the 1990 KCSE examination at the private centre code number 94012 shown on the photocopy of the certificate. As a result of this you were arraigned in court with the offence of forgery.

In view of the foregoing, it is contemplated to dismiss you from the Council service on account of gross misconduct, but before this is done, you are hereby called upon to show cause why you should not be dismissed.

Your representations, if any, should reach this office within fourteen (14) days from the date of this letter, failure to which die contemplated action will be taken without further reference to you.

In the meantime, it has been decided that you be and are hereby suspended from exercising the duties of your office from the date of this letter pending finalization of your case.”

The court notes that none of the grievants attached a copy of the response to the show cause letter although they confirm responding to the same.

The grievants were invited for disciplinary hearing as is evident from the letter dated 30th August 2012 addressed Beatrice Ekesa Namulanda among others. The disciplinary hearing was to take place on Thursday 6th September 2012 at the Committee Room starting from 9.00 am. Beatrice confirmed receiving the said letter. Michael Onyango Ochoro however denied receiving the letter inviting him for disciplinary hearing.

The employment of Beatrice Ekesa was terminated by letter dated 21st May 2013 while the termination letter of Michael Onyango is dated 20th September 2012.

In the termination letters both grievants were advised of their right of appeal to the Secretary, Public Service Commission within 42 days, a right that both of them exercised, although their appeals were not successful.

From the foregoing, it is evident that the respondent complied with the provisions of Section 41 of the Act.

On validity of reason for the termination, none of the grievants denied that they presented fake academic certificates to the council in either their pleadings or their evidence in court. They only dwelt on the procedure.

Having not denied the charges against them, the court can only conclude that they submitted fake certificates. This is confirmed by the evidence in the criminal proceedings submitted by both parties in which the witness from Kenya National Examination Council testified that the certificates were not from the Council. The evidence in the criminal cases however do not affect the outcome of this case as the judgments were delivered after the termination of the employment of the grievants and did not affect the decision to terminate their employment.

From the foregoing, I find that the claimant union has not proved that the termination of the employment of the grievants was unfair either substantively or procedurally.

There is another factor that was however not raised by either party. The termination of the employment of Beatrice was on 2nd July 2012, while Michael’s letter of termination is dated 20th September 2012. The claim herein was filed on 7th December 2015, outside the limitation

period of 3 years provided for in Section 90 of the Act. So even had the grievants proved that the termination of their employment was unfair, the case would have collapsed on the ground that they are statute barred.

For the foregoing reasons the claim herein is dismissed with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE