



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 82 OF 2014

(Before Hon. Justice Mathews N. Nduma)

HASTINGS MASIKO SAWENJA.....CLAIMANT

VERSUS

NZOIA WATER SERVICES.....RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent on 7th December 2005 in the operations and maintenance department and was confirmed as clerk II by a letter dated 23rd August 2006. The letter set out his duties and responsibilities whose purpose was to maintain water lines and customer meters according to set standards. He reported to a meter Reader Supervisor.

2. The claimant testified under oath that he received a letter dated 21st February 2011 suspending him without pay. The claimant was accused of being involved in illegal water connection and reconnection in Kitale which was not his designated area of operation at the time. From the records the claimant was stationed at Webuye.

3. The claimant denied the charges. The suspension was without pay.

4. The claimant received a further letter dated 26th May 2011 in which the letter of suspension dated 21st February 2011 was referred to.

5. The claimant was asked to provide his defence in writing on specific allegations resulting from investigations as follows:

(i) Carrying out duties in Kitale on 19th February 2011 without authority while officially stationed at Webuye.

(ii) Explain connection of Leonard Barasa at Lesos- Kitale.

(iii) Account for Kshs 2,000 billing the claimant received from Anne Wangui Chege. Comm. 21112682082 at Lenos.

The claimant was to explain within 7 days.

6. The claimant testified that on 19th February 2011 he had visited his mother at Kitale and it was a Saturday. While there he met a customer whose contract forms had been filled but had not been supplied with water. The customer asked the claimant to assist him get connected. The claimant went to the office and met technical officer Mr. Kimungui and explained to him about the customer. Mr. Kimungui requisitioned connection materials from the store and gave to the claimant. Those materials included, hacksaw, one inch pipe and others. The claimant connected the water on 19th and 20th February 2011. The claimant then plugged the water and asked the customer to go to the office on Monday 21st February 2011 so that the water could be officially connected. The customer did that and the Kitale office connected the water on 21st February 2011.

7. The claimant reported back to work at Webuye on 21st February 2011 and he received the letter of suspension from the Managing Director.

8. The claimant was kept under suspension for over three (3) months without any pay or any communication until charges were preferred against him by letter dated 26th May 2011.

9. The claimant responded to the charges in writing by a letter dated 17th August 2011. He denied that he was illegally connecting water in

Kitale. He explained the circumstance that led to his assisting a customer on 19th and 20th February 2011.

10. The claimant denied any knowledge of one Anne Wangui Chege and/or receipt of Kshs. 2,000 from her.

11. The claimant was called to a disciplinary hearing on 26th June 2011. He was given an opportunity to defend himself. He was not asked about Anne Wangui at all. He was only asked to explain the connection at Kitale on 19th February 2011. The Manager Kitale and Webuye attended the hearing.

12. The claimant then received a letter of termination. The claimant appealed the decision to terminate his employment. After the Appeal hearing the claimant was reinstated back to work on condition that he generates a list of all the people he had illegally made water connections for.

13. The claimant denied having a list of such people and so did not generate one. The claimant came to court and explained his case as set out above.

Defence

14. The respondent filed a statement of defence on 4th July 2014 and list of documents attached thereto. The respondent filed further list of documents on 21st July 2016. These documents included the letter of suspension, the notice to show cause, the letter of response by the claimant, the minutes of the disciplinary hearing, the Appeal letter, inter alia.

15. The respondent however failed to call any witness to testify in its defence and therefore the claimant's case remains undefended and the testimony by the claimant was not controverted.

Determination

16. In terms of *Section 107 and 108 of the Evidence Act, Cap 80 laws of Kenya* the claimant has the burden of proving his case on a balance of probabilities even where no defence has been advanced as in the present case.

17. The claimant by his oral testimony demonstrated that he had assisted a customer in good faith while visiting his sick mother at Kitale.

18. That he presented the customer's case at the Kitale office and the office assisted the claimant with water connection tools. That the claimant laid the pipes and plugged the water with instructions that the customer visits the Kitale office on 21st February 2011 to get the meter connected officially. There is no testimony by the respondent to indicate any wrong doing by the claimant in this respect.

19. The claimant has in the circumstances demonstrated in terms of *Section 47(5) of the Employment Act*, that the termination of his employment was wrongful and unfair.

20. The claimant further demonstrated that the respondent had upon his appeal reinstated him back to work but had imposed unlawful conditions to the said reinstatement. The court finds that the reinstatement was not done in good faith and the claimant's employment remained terminated wrongfully and unfairly in contravention of Sections 43 and 45 of the Employment Act.

21. The claimant is entitled to compensation in terms of *Sections 49(1) (c) and (4) of the Act*.

22. In this regard, the claimant had served the respondent for a period of over six (6) years. He had no adverse record until he was set up for unlawful termination by his counterparts in Kitale office.

23. The claimant sought reinstatement but this suit was filed in 2014, and a lot of water has passed under the bridge. This would have been the appropriate remedy in this matter barring the limitation under *Section 12 of the Employment and Labour Court Act, 2011 (as amended)* which restricts reinstatement up to a period of three (3) years from the date of termination.

24. The court has taken into account that the claimant did not contribute to his termination. The claimant suffered loss and damage as a result of the unlawful dismissal. The claimant did not get alternative employment as at the time of the hearing of the suit and continued to suffer loss and damage.

25. The court has considered similar cases including *Nairobi Industrial Cause No. 2525 of 2012. Absalom Ajusa Magomere vs Kenya Nut Company Limited and Nairobi Industrial court Cause No. 435 of 2013, Mary Chemweno Kiptui vs Kenya Pipeline Company Limited.*

26. The court finds this a suitable case to award the claimant the equivalent of ten (10) months salary in compensation for the unlawful and unfair termination of employment.

27. The claimant did not provide the gross salary he earned as at the time of termination. The court enters judgement in favour of claimant as against the respondent as follows:

- (a) Equivalent of ten (10) months gross salary in compensation for the unlawful and unfair termination of employment. The amount to be computed and filed in court within 30 days.

(b) Interest at court rates from date of judgment till payment in full.

(c) Costs of the suit.

Judgment Dated, Signed and delivered this 2nd day of May, 2019

Mathews N. Nduma

Judge

Appearances

Kiarie and Company Advocates for the claimant

Federation of Kenya Employers – Mr. Ouma for the Respondent.

Chrispo – Court Clerk