



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1614 OF 2015

PETER MBUTHIA GITAU.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 16th September 2015 and amended on 13th November 2017, the Claimant has sued the Respondent for unlawful termination of employment. The Respondent's defence is contained in an amended Memorandum of Response filed in court on 26th June 2018.

2. At the trial, the Claimant testified on his own behalf and the Respondent called its Assistant Manager, Human Resources Division, Frankline Kiogora Gitonga.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent in 1996, as a Higher Clerical Officer. Upon successful completion of a conversion course in 2005, he was promoted to the position of Assistant Revenue Officer.

4. In 2009, the Claimant was deployed as Assistant Revenue Officer in Registration and Logbook Section. He earned a monthly basic salary of Kshs. 90,000, housing allowance of Kshs. 18,000 and transport allowance of Kshs. 10,000.

5. In June 2012, the Claimant was transferred to the Motor Vehicle Registry. He states that he organised all logbooks and receiving register that were in his possession, which he duly handed over to another officer. After conducting due diligence and confirming that all logbooks and receiving register were proper, accounted for and in order and further that there was no audit query, the Claimant and the officer he was handing over to signed office handing over notes dated 22nd June 2012. The Claimant then proceeded and reported to his new station in Motor Vehicle Registry.

6. On 12th February 2013, the Claimant was suspended without salary, on allegations of manipulation of logbook register leading to loss of logbooks. The suspension letter required the Claimant to file an explanation on the allegations within 14 days, which he did on 21st February 2013.

7. The Claimant subsequently wrote to the Senior Deputy Commissioner inquiring about his case but he was told to wait. He states that he was not invited to appear before any Disciplinary Committee to respond to any charges.

8. Following a court order issued by **Abuodha J** on 9th October 2015, the Claimant was invited to appear before the Respondent's Disciplinary Committee, which he did on 23rd October 2015. The Claimant however states that the decision of the Disciplinary Committee was not communicated to him. He adds that he only became aware of the outcome when the Respondent filed a replying affidavit dated 29th February 2016, attaching a dismissal letter dated 26th February 2016.

9. The Claimant further states that in the replying affidavit dated 29th February 2016, the Respondent disclosed that the Claimant had been found innocent by the Disciplinary Committee. Nevertheless, the Respondent's Commissioner General did not concur with the recommendation of the Disciplinary Committee and instead asked for a review.

10. The Review Panel sat, in the Claimant's absence, on 16th February 2016 and recommended that the Claimant be dismissed. The Claimant states that he had no notice of the proceedings before the Review Panel. Further, his appeal against the decision to dismiss him was not heard.

11. The Claimant's case is that his prolonged suspension and subsequent dismissal amount to disciplinary action without due process. He now seeks the following:

- a. A declaration that his prolonged suspension and dismissal was unlawful and unfair;
- b. An order directing the Respondent to pay him 12 months' salary in compensation;
- c. An order directing the Respondent to pay him withheld salary and transport allowance from May 2013 until final determination of the claim;
- d. Service pay and terminal benefits;
- e. Costs plus interest.

The Respondent's Case

12. In its Statement of Response as amended on 18th June 2018, the Respondent states that at the material time, the Claimant was a Logbook Issuing Officer attached to the Road Transport Department.

13. The Respondent avers that on 15th June 2011, the Claimant issued 1500 Logbooks serial numbers S172000-S173500 to Ms Lucy Wahito Wachira.

14. The logbook issuing register however showed that although the figure of 1500 is what was received by Ms Wachira, the Claimant allegedly superimposed the figure '5' on figure '0' in the register, to give the impression that the serialised numbers had totalled the number of logbooks received which was in fact not the actual position. Consequently 500 logbooks from serial numbers S172501 to S 173000 could not be accounted for.

15. The Respondent accuses the Claimant of replicating the forgery with regard to logbooks serial numbers S362501 to S364000 on 6th January 2012.

16. The Respondent states that the Claimant's failure to account for 1000 logbooks resulted to a security lapse and loss of revenue.

17. It is the Respondent's case that the Claimant was guilty of gross misconduct as defined in the Code of Conduct.

18. The Respondent concedes that Section 8.4.7 of its Code of Conduct, 2012 provides that suspension cases would be determined within six months. The Respondent however explains the failure to invite the Claimant to appear before the Disciplinary Committee by citing delay in concluding investigations on the alleged misconduct owing to the complexity and nature of the offence.

19. With regard to the decision by the Commissioner General, which was at variance with the recommendation of the Disciplinary Committee, the Respondent states that recommendations by the Disciplinary Committee are confidential and not final. The Respondent maintains that the final decision on employee disciplinary cases lies with the Commissioner General.

20. The Respondent avers that the Claimant was paid all his outstanding dues from the date of suspension to the date of dismissal, totalling Kshs. 2,538,820.40. In addition, he was paid all his pension dues.

Findings and Determination

21. There are two (2) issues for determination in this case:

- a. Whether the Claimant's dismissal was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

22. The Claimant's dismissal was communicated by letter dated 26th February 2016, stating as follows:

"Dear Sir,

RE: DISMISSAL

Reference is made to our letter dated **12th February, 2013**, your response dated **21st February, 2013** and oral representations before the Disciplinary Panel meeting on **23rd October, 2015**.

We wish to inform you that your oral and written representations were not found acceptable. It was noted that you were responsible for the loss of 1000 logbooks out of which 88 logbooks were irregularly registered in KOVIS occasioning a loss of **Kshs. 50,794,951**. This is contrary to the Code of Conduct **Section 4.1.27** which refers to “theft, forgery, fraud, embezzlement or misappropriation of Authority’s funds” and constitutes gross misconduct.

In view of the foregoing and pursuant to the KRA Code of Conduct **Section 9.11** which states: “An employee found guilty of gross misconduct may be dismissed without notice or pay in lieu of notice”, it has been decided that you be dismissed with immediate effect.

You shall be paid your terminal dues as per the KRA Pension Rules upon production of Pension Commutation Form (PCF) and Clearance Certificate. Further and pursuant to **Section 27(5) & (6)** of the **Public Officer Ethics Act 2003**, you will be required to complete and submit a final Declaration of Income, Assets and Liabilities for the period from 1st November, 2015 to 26th February 2016 for onward transmission to Public Service Commission of Kenya (declaration form attached).

Please note that in accordance with **Part 11** of the KRA Code of Conduct you have a right of appeal against this decision within **thirty (30)** days from the date of this letter. Such an appeal should be addressed to the Commissioner General and should be forwarded through the Deputy Commissioner-Human Resources, Kenya Revenue Authority.

Yours faithfully,

(Signed)

P.N. Munihe

For: Deputy Commissioner-Human Resources

23. Prior to the dismissal, the Claimant had been put on suspension from duty effective 12th February 2013. During the suspension period, the Claimant was to earn full house allowance but no salary and would not earn any leave.

24. The suspension letter required the Claimant to make written representations within 14 days. In his response dated 21st February 2013, the Claimant denied tampering with the logbook register and accused Lucy Wahito Wachira of requisitioning for an unusually high number of logbooks whose safety she could not guarantee. The Claimant asked for thorough investigations in order to nail the real culprits in the scam.

25. After the Claimant made his written representation, there seems to have been no further action on his case. This was despite the Claimant’s written requests for a personal hearing. It took the intervention of the Court by an order issued by my brother **Abuodha J** on 9th October 2015 for the Respondent to invite the Claimant to appear before the Disciplinary Committee.

26. During the trial, the Court sought to know from the Respondent’s Assistant Manager, Human Resources Division, Frankline Kiogora Gitonga, the reason for the delay in dealing with the Claimant’s case and the simple answer was that the case was complex. The Respondent did not bother to give further explanation on the delay, which was in clear violation of its own Code of Conduct, whose Section 8.4.7 set 6 months as the upper time limit for determination of cases of suspension.

27. This Court (variously constituted) has pronounced itself on the issue of prolonged suspension. In **Gregory Owuoth v Mumias Sugar Company [2016] eKLR Onyango J** sated the following:

“The Respondent cannot put an employee on indefinite suspension against the provisions of its very own regulations.

If the Respondent was not ready to conclude the process within the prescribed period of 21 days it should have carried out its investigations and finalised them before sending the Claimant on suspension. Although it is not formal punishment, an employee on suspension is saddled with the uncertainty of not knowing his fate. His self esteem is punctured and his right to work is interfered with. Any disciplinary action must take the shortest time possible, otherwise it turns into a punishment.”

28. In **Teresia N. Peter v Kitui Teachers Savings & Credit Co-operative Society [2014] eKLR** the Court held:

“An employee on suspension remains innocent until proved otherwise. In addition, such an employee has a legitimate expectation that they will be given an opportunity to respond to any adverse findings arising out of investigations conducted by the employer. Suspension by its nature creates a fair amount of suspense for both the employee and the employer and should not therefore be unduly prolonged.”

29. The Respondent had 6 months to conclude the Claimant’s case but what did it do? it suspended the Claimant and stopped there as if the suspension was the final action. In fact, the Respondent had to be compelled by the Court to avail the Claimant personal hearing. By its conduct, the Respondent converted the suspension into a disciplinary action, devoid of due process. With such a finding, the only conclusion

to reach is that the said suspension was unlawful and unfair.

30. The next issue for consideration by the Court has to do with the lack of concurrence by the Commissioner General with the recommendations of the Disciplinary Committee. The proceedings of the Disciplinary Committee were not availed to the Court and there was no telling what the actual recommendations were. The clearest indication of an internal divergence within the Respondent is contained in a replying affidavit sworn by the Respondent's Chief Manager, Human Resources Division, Patrick Munuhe, by which he depones:

“the Commissioner General did not concur with the Recommendation of the Disciplinary Committee and instead recommended for a review in accordance with paragraph 10.3 of the Code of Conduct.”

31. Whatever the recommendation of the Disciplinary Committee was, the question remains whether the Commissioner General was empowered to call for a review. It was submitted on behalf of the Respondent that according to Section 13.3 of the Code of Conduct, the Commissioner General was not bound by the recommendations of the Disciplinary Committee.

32. Section 13.3 reads:

The Commissioner General will not be bound by any recommendation by the Disciplinary Committee but shall have the liberty to accept the recommendation or impose a different penalty. The different penalty imposed shall be within the provisions in the Code.

33. My reading of this provision is that the Commissioner General may either accept the recommendation of the Disciplinary Committee or impose an alternative penalty. Nothing in this provision gives the Commissioner General power to constitute a Review Panel. By attempting to do so, he overreached his mandate and the resultant Review Panel, being an illegal outfit, could not lawfully re-open the Claimant's case.

34. There is more that was wrong with the review ordered by the Commissioner General and it is this; the Claimant was not given an opportunity to appear in his defence. In fact, it seems that the Review Panel had only one mission, to get the Claimant out of the Kenya Revenue Authority. Such manoeuvres have no place in modern employment law and cannot survive scrutiny in the context of the constitutional dispensation of our time.

35. For the foregoing reasons, the Court finds and holds that the Claimant's suspension and subsequent dismissal were unlawful and unfair and he is entitled to compensation.

Remedies

36. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's long service with the Respondent and the Respondent's callous and irresponsible conduct in handling his case.

37. From the evidence on record, the Claimant was paid his withheld salary up to the date of dismissal. The claim thereon is therefore without basis. The claims for service pay and terminal benefits were not proved.

38. Finally, I enter judgment for Respondent in the sum of dismissal. in favour of the Claimant and against the **Kshs.1,416,000** in compensation for wrongful

39. This amount will attract interest at court rates from the date of delivery of this judgment until payment in full.

40. The Claimant will have the costs of the case.

41. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF JULY 2019

LINNET NDOLO

JUDGE

DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE

Appearance:

Mr. Juma for the Claimant

Ms. Wambui for the Respondent