



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 464 'B' OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BERNARD NDUNGU MBUGUA.....CLAIMANT

VERSUS

NAIROBI WATER AND SEWERAGE COMPANY LIMITED....RESPONDENT

JUDGMENT

The claimant filed this suit against the respondent alleging unfair termination of his employment. The claim was originally filed jointly with Philemon Atik in Cause No. 464 of 2014. On 6th February 2015, the claimant's suit was delinked from that of Philemon Atik and registered as **Cause 464 'B'**.

In the memorandum the claimant seeks the following orders –

- a. A declaration that the claimant's termination was unfair.
- b. Payment of Kshs.36,112,000/= being the aggregate of unpaid salary and severance pay.
- c. Reinstatement and payment of Kshs.390,947.39/=.
- d. Damages
- e. Costs and interest

It is the claimant's case that he was employed by Nairobi City Council as a senior driver on 15th March 1979. In 2004, he was transferred to the respondent Nairobi Water and Sewerage Company Limited in the same capacity.

The claimant states that his troubles started when he was elected as a representative of National Union of Water and Sewerage Employees (NUWASE). That the respondent became hostile to him and he was subjected to numerous transfers in order to intimidate and harass him with the intention to interfere with his union duties.

That this led to his dismissal by letter dated 15th August 2013. It is the claimant's case that the dismissal was unfair, unprocedural and unlawful as the respondent failed to summon the relevant witnesses as requested by himself. Vide his letter dated 15th July 2013 to give evidence at the disciplinary hearing in support of his case.

It is the claimant's case that despite being accorded a hearing by the respondent, it failed to consider his submissions thereby arriving at the wrong decision. That the appeals process was a sham as a decision had already been made to dismiss him.

It is further the claimant's averment that the respondent did not carry out investigations before dismissing him for gross misconduct in violation of the respondent's own Human Resource Manual.

The respondent's case is that the claimant had a long history of indiscipline as demonstrated by the record in his file and documents produced by the respondent at pages 25 to 28 of its list of documents as follows –

A warning was issued via a Memo dated 14th October 2009 by which the Claimant was cautioned against habitual lateness, absconding of duties, use of abusive language and threatening colleagues;

The Claimant was suspended via a letter dated 20th November 2012 for illegally inviting the members of staff to discuss management matters touching on their employment contrary to the laid procedures in Clause 8.2.4(m) of the Respondent's Human Resource Policy and Procedure manual;

Prior to the aforementioned letter, the Respondent had issued the Claimant with a show cause letter dated 12th November 2012 which the Claimant refused or neglected to respond to.

A warning was again issued via a letter dated 26th February 2013 against insubordination and engaging in actions that contravened the Respondent's Regulations;

A complaint was made against the Claimant via a Memo dated 3rd May 2013. The Claimant's supervisor alleged that he had once again absconded his assigned duties and disobeyed a lawful command. The Claimant as the designated driver, was assigned to transport members of staff to and from Kimakia Forest on 3rd May 2013. He deliberately abandoned his colleagues and supervisors at the said Kimakia Forest without any justifiable reason and disobedience of a lawful command.

It is further the respondent's case that the claimant was subjected to fair disciplinary process as follows –

The Claimant was served with a Show cause letter dated 3rd May, 2013 by which he was informed that the following complaints had been made against him;

1. Habitual lateness;
2. Early departure from the work place without approval; and
3. Refusal to obey lawful and proper commands issued by his supervisor, specifically abandoning his colleagues at Kimakia Forest where the Respondent was undertaking a tree planting ceremony.

The Show Cause letter was annexed at page 29 of the Respondent's list of documents;

The Claimant was also informed that he was required to give an explanation for his continued misconduct;

The Claimant thereafter wrote to the respondent and admitted that he abandoned his colleagues at the forest but stated that he did so because he did not have their contacts and more so he was sure they were safe.

The said response was not satisfactory to the Respondent as he was aware that he ought to have waited for them at the designated parking area as they were to depart upon completion of the tree planting exercise. The Respondent therefore suspended him on 16th May 2013.

The Claimant was thereafter summoned to a Disciplinary hearing on 19th July 2013.

The Claimant admitted that he attended the disciplinary hearing and that he was accompanied by two fellow employees.

During the hearing, the Claimant changed his earlier position in an attempt to mislead the Disciplinary committee and stated that he left his colleagues because they were drinking. He also stated that he was habitually late because he lived far from his work station.

The Committee therefore considered the reasons given for the habitual lateness and for the disobedience of lawful command and found that the same was insufficient because;

(i.) The Claimant was not only given a house allowance to enable him to secure accommodation near his work station but he was also given a commuter allowance to facilitate his movement and so the explanation furnished by the Claimant for the habitual lateness was not satisfactory and the lateness could therefore not be condoned;

(ii.) The Committee also noted that the Claimant's reason for disobeying the lawful command issued on 3rd May 2013 was inconsistent with his earlier reason. Other employees including his Supervisor, Mr. Mogire who was the Respondent's second witness who was present at the forest confirmed that none of the employees were drinking at the forest and that there was in fact no alcohol available in the said forest where tree planting was carried out; and

(iii.) From the above, it was clear to the Disciplinary Committee that the Claimant intended to rely on falsehoods to justify his habitual misconduct and the same was in further contravention of the Respondent's policy that bound all other employees.

The Disciplinary Committee concluded that the Claimant was guilty of habitual misconduct and insubordination and he was summarily dismissed on 15th August 2013.

On 5th September 2013, the Claimant filed an appeal against the summary dismissal and the Respondent Summoned him to appear before the Company's Corporate Appeal Committee on 13th November 2013.

Subsequently, the Claimant filed this suit together with Cause No. 1526 of 2013 and the Respondent therefore advised the Claimant that it needed to involve its advocates on record in the matter to forestall any adversities. The Claimant was also advised that the dismissal would stand.

Evidence

At the hearing of this case, the claimant testified on his behalf. The respondent called two witnesses.

The claimant reiterated his averments in the claim. Under cross-examination, he admitted to his habitual lateness attributing the same to living far from the workstation. He also admitted that he left his colleagues at Kimakia Forest. He further admitted that he was paid house allowance and commuter allowance to enable him secure housing and transportation to work.

For the respondent RW1 LUCAS GOR testified that he was the Industrial Relations Coordinator for the respondent. He confirmed that the claimant was employed by the respondent in 2005 following secondment from Nairobi City Council. He confirmed the history of the claimant with the respondent including the disciplinary hearing process.

RW2 SOLOMON MOGIRE confirmed that he was a Supervisor and was one of the staff abandoned by the clamant at Kimakia Forest.

The parties thereafter filed and exchanged written submissions.

Determination

I have considered the pleadings and evidence. I have further considered the submissions by the parties. The issues for determination are whether the dismissal of the claimant was unfair and if he is entitled to the remedies that he has prayed for.

The claimant was dismissed by letter dated 15th August 2013. Before the dismissal he was issued with a show cause letter dated 3rd May 2013 where he was asked to show cause why disciplinary action should not be taken against him for reporting to work at 9.30 am instead of 8 am on 3rd May 2013 then ferrying staff to Kimakia Forest for tree planting exercise and abandoning them in the forest. That he had parked the vehicle KBG 949C at Ndakaini Shopping Centre instead of the designated parking area inside the Power House Premises. The show cause letter stated that he had been severally warned for reporting to work late but had not changed. He was thus accused of habitual lateness and early departure from the place of work without approval of his superior as the first charge, and, refusal to obey lawful and proper commands issued by a superior as the second charge.

The claimant in his response dated 9th May 2013, admitted abandoning the staff in the forest arguing that did not have the contacts of the staff and was sure they were safe because they with the forest officer.

The claimant was suspended by letter dated 16th May 2013 for habitual lateness and early departure from the place of work, without approval of his supervisor, refusal to obey lawful and proper commands issued by his superior and failure to abide or observe the company's code of conduct.

He was thereafter invited for a disciplinary hearing on 19th July 2013 which he attended accompanied by two colleagues. The disciplinary committee considered his case and recommended his dismissal. His appeal against dismissal was dismissed.

At the hearing the claimant admitted abandoning his colleagues in the forest. He also admitted reporting to work late.

From the foregoing, there was valid reason for the dismissal of the claimant and he was subjected to a fair procedure. I therefore find that the termination was valid. I find that the dismissal had nothing to do with claimant's union activities as alleged by him. I also find that the conciliator's recommendations for reinstatement was based on a different dispute on victimization and wrongful termination of employment on account of union activities by the respondent of 85 employees. The said dispute was reported on 26th November 2012, before the dismissal of the claimant although the report is dated 21st May 2013.

I have however considered that the claimant was about 58 years old at the time of dismissal and had served the respondent and its predecessor, the Nairobi City Council, for a cumulative duration of about 24 years. For this reason, I reduce the summary dismissal to normal termination of employment and order that the respondent pays his terminal dues in accordance with his terms of service.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE