



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.53 of 2018

PAUL KIPKEMOI KIPTOO.....CLAIMANT

VERSUS

BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND (NSSF).....RESPONDENT

JUDGEMENT

The claimant, an adult male was employed by the respondent, in June, 1994 as a driver and assigned staff number 1771. He served the respondent in various regions including Nairobi, Eldoret and Nakuru all being 24 years until 23rd October, 2017 when his employment was summarily terminated. At the time he was earning ksh.150, 996.00 gross.

The claim is that at the time of his summary dismissal he was driving the regional manager, Nakuru. He would undertake such duties to various destinations as and when authorised to do so.

For his role the claimant was required to maintain a motor vehicle daily work ticket for the motor vehicle he was assigned and authorised to drive. The motor vehicle work ticket was to be filled by the regional manager indicating the date of travel, time of departure, route taken, time of arrival and distance covered to the various destinations and the claimant drove to. The claimant signed alongside the details filled in once he reached his destination.

Under this system, the respondent's motor vehicle whereabouts was accounted for at all time and he could not make any unauthorised movements. Any time the claimant had to spend a night away on duty, he was entitled to a night out allowance and such night out allowance was paid based on the information in the work ticket.

On 2nd June, 2017 the claimant received letter dated 26th May, 2017 from the respondent in which he was accused of imprecise accounting malpractice. He was accused of falsifying work tickets on different dates being;

15th March, 2016;

26th July, 2016;

29th August, 2016;

5th September, 2016; and

21st September, 2016.

The claimant was accused of manipulating the motor vehicle work ticket or motor vehicle KBT 635N which he was assigned to drive to conceal malpractices and claimed an extra night out allowance for 5 trips for the sum of Ksh.30, 000.00.

The claimant was also accused of requesting for an imprecise travel with the regional manager to official functions on the 5 occasions only to report a day earlier and park the vehicle at the basement of Polo Centre Building.

On the allegations made, the claimant was required to show cause within 7 days to which he replied on 5th June, 2017 and explained he was a stranger to all the allegations made as all trips taken were accounted for and the motor vehicle work ticket was the evidence and there was no unauthorised trip. The assigned vehicle was never parked at Polo Centre Building as alleged since the practice was to park it at AFC building

which was the authorised parking place.

The claimant inspected the register of vehicles at the Polo Centre and noted that while the registration number of his assigned vehicle KBT 635N was indicated as having been parked three the time for checking in was not indicated and which meant the claimant was being framed.

In his reply to the show cause notice, the claimant explained each trip and produced the work ticket for the assigned vehicle;

15th to 19th March, 2016 the claimant was authorised to drive KBT 635N to Kitale;

26th to 30th July, 2016 the claimant was authorised to drive to Eldama Ravine;

29th August to 3rd September, 2016 the claimant was authorised to drive to Kericho;

6th to 23rd September, 2016 the claimant was authorised to drive to various branches of the respondent being Kabarnet, Eldoret, Kapsowar, Kapsabet, Sotik, Kericho, Nandi Hiss, Kitale and West Pokot; and

21st September to 1st October, 2016 the claimant was authorised to drive to kapsabet.

These travels are backed up by motor vehicle work tickets and letters of authority and the allegations that the vehicle was parked at Polo Centre on the same dates is false. The allegations that there was falsification of work tickets for financial gain is not true as the work tickets and letters of authority prove that he was on authorised trips on the stated dates. The claimant was not authorised to fill in the work tickets as this was the preserve of the authorising officer, the regional manager noting the dates the trip was taken, the time of departure and arrival and distance covered. The claimant could not falsify what he had no authority to record.

The claim is also that the claimant attended the disciplinary committee alone where he made oral submissions and explained his defence and produced his work tickets and letters of authority. despite giving satisfactory explanation, on 23rd October, 2017 the respondent issued letter of summary dismissal under section 44(4)(g) of the Employment Act, which reiterated the allegations stated in the notice to show cause and which the claimant had given a defence.

The cited law in the letter of summary dismissal related to criminal suspicion but police report was ever made. The claimant made an appeal challenging the summary dismissal on 31st October, 2017 and which was rejected vide letter dated 5th December, 2017.

The claim is that the summary dismissal was not supported by any evidence. On the allegations made the claimant had given evidence to exonerate himself which was not taken into account. This resulted in unfair summary dismissal.

The claimant is seeking for a declaration that his employment was terminated unfairly and unlawfully; an order setting aside the summary dismissal and a reinstatement; and in the alternative a declaration that the termination of employment was unfair and unlawful; compensation for unfair and unlawful termination and payment of salary for the remainder of terms at 14 years all at Ksh.25, 376,328.00; pension, interests and costs.

The claimant testified in support of his case.

Defence

The defence is that the claimant is a former employee of the respondent and who was employed in the year 1994 as security guard and left his employment as a driver in grade 8 and last working at Nakuru office situate at AFC building in Nakuru town and operations are carried out at NSSF offices at Polo centre and each office has its own parking of its vehicles.

The defence is also that early in the year 2017 the acting CEO of the respondent received an anonymous letter dated 17th April, 2017 pointing to some malpractices in Nakuru regional office whereby the claimant was purporting to have travelled out of station on official duty only to be discovered that he had not. The CEO commissioned an investigation and internal audit and risk department to carry out investigation on the claims and the report revealed on 5 occasions the claimant requested for imprest to drive the regional manager who is housed at AFC building to official functions only to return a day earlier and park the vehicle No.KBT 635N at the basement of Polo centre building.

Investigations also revealed that the claimant used to manipulate the motor vehicle work ticket to conceal the malpractices of leaving the vehicle parked at Polo centre while claiming to be out of station and later claim for an extra night out allowance for each journey and this led to the respondent losing ksh.30, 000.00.

The claimant was issued with a show cause notice to show why disciplinary action should not be taken against him for his misconduct by receiving money from the respondent through dubious means the claimant responded alluding that he was guided by the work ticket which show the correct position and that he had never parked the vehicle at Polo centre but at AFC building and whenever he travelled and arrived late he would call the guards at AFC building to access parking.

On 21st July, 2017 the claimant was invited to appear before the fraud and disciplinary committee to make further clarifications to the allegations on the show cause notice, he was advised to bring a representative of his choice and he attended accompanied by the chief shop steward Bernard Munywoki on 2nd August, 2017 and in defence he reiterated his written responses.

Upon hearing the claimant the committee arrived at a decision to dismiss him from his employment noting he had falsified work tickets and claimed night out allowances on 5 occasions which led to financial loss to the respondent. The claimant was found not honest and lacking in accountability and that he had acted fraudulently which amounted to gross misconduct subject to summary dismissal.

The claimant lodged an appeal against the decision to dismiss him from employment which was considered and found without good basis and dismissed. There were no good grounds to justify a review of the summary dismissal.

The defence is also that the claimant had an employment contract requiring him to be diligent and honest in his duties which he failed to abide and by his conduct, the summary dismissal was justified. The claims made should be dismissed with costs.

In evidence the respondent called Carolyn Okul the human resource manager.

At the close of the hearing both parties filed written submissions.

The claimant submitted that until his summary dismissal by the respondent on 23rd October, 2017 he had served for 24 years with a score of exceptional performance. His last duty was to drive the regional manager for Rift Valley and assigned motor vehicle KBT 635N.

The claimant also submitted that he was accused on imprest accounting malpractices and issued with a show cause notice alleging there was an investigation reported conducted by internal audit and risk department and that the investigations revealed 5 occasions of imprest request but return a day early and where the assigned vehicle was parked at Polo centre instead of AFC building. The claimant replied to the specific allegations made and relied on work tickets for each travel. Such work tickets show the movements made with a start and end all authorised by the regional manager. Despite the explanation made the respondent's committee failed to take the same into account before the decision to dismiss the claimant. The records produced from Polo Centre are incomplete and nobody was called to speak to the same. The alleged anonymous report of malpractices were not submitted or called in evidence.

The claimant also submitted threat section 43(1) of the Employment Act, 2007 (the Act) places the burden on the employer to prove the reason for termination of employment which must be valid and genuine as held in **Rebecca Ann Maina & 2**

others versus Jomo Kenyatta University of Agriculture and Technology [2014] eKLR.

The claimant also submitted that his primary remedy is that of reinstatement as his employment was unfairly terminated at his prime and had no chance to retire honourably and had served the respondent sorely for over 24 years.

The respondent submitted that the claimant was employed as a driver by the respondent and with duty to drive the regional manager who authorised work tickets which resulted in his dismissal. The regional manager has since been dismissed and has filed **ELRC Cause No.439 of 2017 (Nakuru)**.

The claimant relied on letters of authority which letters were contrary to the work tickets. While the letters of authority permitted the trip for a specified period, the work tickets indicated that the claimant returned the vehicle a day after the approved period. The work tickets were manipulated either by the regional manager or by the claimant. In this case the work tickets submitted did not match the authorised trips as per the letter of authority. These matters were brought to the attention of the claimant in a notice to show cause why disciplinary action should not be taken over his misconduct but he could not explain his whereabouts on the nights the assigned vehicle was found parked at Polo centre instead of being in the field. Dismissal of employment followed what the employer genuinely believed to exist justified reasons as held in **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wsike [2017] eKLR.**

The reliefs sought by the claimant cannot issue as reinstatement back to his position is not justified in a case where there existed good reasons for summary dismissal as held in **Cooperative Bank of Kenya Limited versus BIFU [2017] eKLR.** The alternative remedies should also not issue as summary dismissal of the claimant was arrived after due process and reasons given for the same.

The court has considered the pleadings, the evidence of the parties, the written submissions and the issues which emerge for determination can be summarised as follows;

Whether the sanction of summary dismissal was unfair and or justified;

Whether the remedy of reinstatement should issue;

Whether the alternative remedies should issue; and Who should bear costs.

The summary dismissal of an employee is addressed under section 44 of the Act where an employee is found to be in fundamental breach of his employment contract and or has grossly misconducted himself. The only procedural requirement the employer is required to abide is under section 41(2) of the Act and which requires that;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

That procedure has been interpreted by the court in the case of **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Ltd, [2013] eKLR**, as a mandatory process and the holding was approved by the Court of Appeal in the case of

CMC Aviation Limited versus Mohammed Noor [2015] eKLR.

Additionally, the Act provides for the burden of proof where the issue of wrongful dismissal arises as held in **Standard Group Limited versus Jenny Luesby [2018] eKLR**. Section 47 (5) provides as follows;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.” [Emphasis added].

The core of the claim herein is that the claimant was dismissed from his employment by the respondent unfairly. The defence is that the claimant was dismissed following malpractices which were found unacceptable for the reasons that he falsified work tickets of vehicle registration No.KBT 635N and also fraudulently claimed extra night out allowances for each journey covered on 5 different occasions and causing loss of Ksh.30,000.00 to the respondent.

The show cause notice dated 31st May, 2017 was to the effect that;

The investigations established that on five (5) different occasions you requested for an imprest to travel with the Regional Manager to official functions only to report a day earlier and park the vehicle Ford Ranger Registration Number KBT 635N at the basement of Polo Centre Building. The investigations report also revealed that you manipulated the Motor vehicle work ticket to conceal the malpractices and claimed an extra night out allowance for each journey. This practice led to the loss of funds worth Ksh.30,000.00 ...

The basis of his claims were that the claimant would drive the regional manager to various work duties, fill the work ticket to cover such trips and dates but return a day earlier and park the assigned vehicle at Polo centre instead of AFC building where it had a designated parking. Such trips and work tickets related to;

15th March, 2016 imprest for a trip to Trans Nzoia on 16th to 18th March, 2016 but the vehicle was parked at Polo Centre on 18th March, 2017;

On 26th July, 2016 imprest for a trip to Eldama Ravine on 27th to 29th July, 2016 but the vehicle was parked at polo centre on 29th July, 2016;

29th August, 2016 imprest for a trip to Kericho on 29th August to 2nd September, 201 but the vehicle was parked at polo centre on 2nd September, 2016;

On 8th September, 2016 imprest for a trip to several braches for 13th to 17th September, 2016 but the vehicle was parked at polo centre on 16th September, 2016; and

21st September, 2016 imprest for a trip to Nakuru environs for 27th to 30th September, 2016 but the vehicle was parked at polo centre on 30th September, 2016.

For each trip the claimant was guided by letter of authority and work ticket. Each work ticket has a schedule giving details of the journey, a signature by the person authorising the journey, time in and out and total kilometres covered in each authorised journey. This document is not signed by the claimant but the authorising person. An example is the work ticket for 26th to 29th July, 2016;

- authorised for travel to NSSF – Nakuru – Eveready – ravine on 26th July, 2016 and departure was at 4.30pm and arrival at 6pm after covering 67 kilometres;

- On 27th July, 2016 journey authorised for Eldama Ravine and environs and back from 11.40 to 2.30pm which is authorised and covered 78 kilometres;

- On equal date 27th July, 2016 journey authorised for Eldama Ravine – NSSF Nakuru at 4pm to 5.30pm covering 77 kilometres;

- On the same date 27th July, 2016 journey authorised from NSSF Nakuru – Eldama Ravie – Chambai hotel at 6pm to 7.30pm covering 81 kilometres;

- On 28th July, 2016 journey authorised for Ravine Molo NSSF – Ravine Chambai hotel from 11pm to 4pm covering 93 kilometres;

- On 29th July, 2016 journey for Ravine – Nakuru NSSF – Ravine Chambai from 8.30am to 5.40pm covering 121 kilometres; and

- 30th July, 2016 Ravine to NSSF Nakuru from 7am to 9am covering 71 kilometres.

The challenge is that the trip ended on 29th July, 2016 as the vehicle was parked at Polo centre on 30th July, 2016 and not in the field as set out in the work ticket.

Of interest to the court are the work ticket records for 27th July, 2016. The journeys started at Eldama Ravine and back to the same point from 11.40am to 2.30pm covering 78 kilometres. At 4pm the vehicle was authorised to depart from Eldama Ravine to Nakuru NSSF at 4pm to 5.30pm covering 77 kilometres. On the same date the vehicle left Nakuru NSSF to Eldama Ravine at 6pm to 7.30pm.

All these trips are authorised for the claimant to undertake.

To counter the work tickets for the use and journeys by the claimant, the respondent submitted vehicle records allegedly taken at Polo Centre and kept by *Glosec Services Limited* and relating to overnight parking. On the records for the impugned dates of 18th March, 2016 ;

29th July, 2016 motor vehicle KBT 635N is the 3rd on the register but there is no record for time in and time out whereas the record is signed out by John Waweru at 8pm on this date;

2nd September, 2016 vehicle KBT 635N is the 5th on the register without a time in or out signed off at 8pm;

16th September, 2016 vehicle KBT 635N is 2nd on the register with no time in or out and signed off at 6am;

30th September, 2016

This record allegedly taken from Polo Centre is vague and inconclusive. There is no material evidence that the record taken allegedly by *Glosec Services Limited* related to parking of motor vehicles at Polo Centre and that the claimant parked his assigned vehicle at such a place and where the parking record was kept by a third party and *Glosec Services Limited*. Where this was the case, noting the omission of key records from such register particularly the time in and time out, the claimant having challenged the taking of such a record contradistinguished with his work tickets, nothing stopped the respondent from calling the makers of this record or management of Polo Centre to speak to the same. The court is left with a record with a register of vehicles, signed off by different persons and without credible details to assign blame on the claimant using the same.

Where the record of *Glosec Services Limited* was the only material and record used to find the claimant was culpable, and without it being conclusive as to assign blame, in the notice to show cause the respondent was relying on an investigation report. Such report done internally from the Internal Audit & Risk Department, the respondent was at liberty to call the maker and investigator to speak to the findings.

Moved by a whistle-blower, the respondent ought to have done more before the summary dismissal of the claimant. A serious audit of the work tickets and a synchronisation of the time covered in the authorised journeys and the exact locations from one end to the next and the purpose of taking round journeys as set out above for the 27th July, 2016 would have yielded more. To rely on an anonymous letter dated 17th April, 2017 pointing to some malpractices in Nakuru regional office and without interrogation of journeys taken and the rationale supporting the same, the work tickets well presented, the alleged record from *Glosec Services Limited* does not create the picture the defence intended. That there was parking at Polo Centre on the 5 listed occasions and dates and thus the claimant claimed night out allowance fraudulently and such was a malpractice amounting to gross misconduct.

Had the respondent put the responses to the show cause notice made by the claimant into proper perspective, it would have been apparent that the record upon which the respondent was relying upon could not be applied to find fault or substantiate the allegations made. With the work tickets filed and authorised by the officer responsible to authorise each journey, the records from *Glosec Services Limited* being inconclusive, the claimant ought to have been given the benefit of doubt. Due process called for the respondent to ensure there was a valid and genuine reason(s) before termination of employment. The attendant procedures are set out under section 41, 43 and 45 of the Act.

In **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR**, the Court of Appeal summarized those procedures as follows;

Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer.

In **Bamburi Cement Ltd Versus Willima Kilonzi CA No. 62 of 2015; International Planned Parenthood Federation versus Pamela Ebot Arrey Effiom Civil Appeal No. 132 of 2011; Kenfreight EA Ltd Versus Benson K. Nguti CA No. 31 of 2015** all for propositions

that obligation lies on the employer to demonstrate justification for termination of an employee from employment; and secondly that unfair termination of an employee arises where no valid reason is given by the employer for such termination.

Accordingly the court finds the reasons given for summary dismissal of the claimant lacked validity, were not weighed against the defence made and this led to unfair termination of employment.

On the remedies sought, the primary remedy the claimant is seeking is that of reinstatement and in the alternative compensation and payment of salary for 14 years being the remainder of his term until retirement.

In this regard, the primary remedy sought being that of reinstatement, the claimant testified that he had worked for the respondent for over 24 years until his employment was unfairly terminated. He had a good work record and no case of indiscipline over the years. His last performance appraisal was excellent and was driver grade 8.

In consideration the remedy of reinstatement, section 49 of the Act provides the parameters within which such remedy can issue. Section 49 must be read together with section 12 of the Employment and Labour Relations Court Act, 2011. Reinstatement back to employment as pleaded can only issue within three (3) since employment terminated. The claimant was dismissed on 31st October, 2017. He is within the time limit for the remedy of reinstatement.

Further, the Court of Appeal in addressing the remedy of reinstatement in the case of **National Bank of Kenya versus Anthony Njue John Civil Appeal 117 of 2017**;

The mode of assessment of those remedies was set out by the Court, in Co-operative Bank of Kenya Ltd V. Banking Insurance & Finance Union CA No. 188 of 2014 as follows:

“Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports

a discretionary rather than a mandatory meaning. That the remedies....are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee’s length of service with the employer, the employee’s reasonable expectation of the length of time the employment was to last but for the termination, the employee’s opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations.

The claimant submitted that he is seeking reinstatement as his employment was cut short unfairly and relied on the case of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited and BIFU versus Co-operative Bank of Kenya Limited [2015] eKLR** and which decision resulted in the above cited case by the Court of Appeal in **Co-operative Bank of Kenya Limited versus BIFU**, quoted above.

The Court of Appeal in the case of **George Kingi Bamba versus National Police Service Commission [2019] eKLR Civil Appeal 149 of 2017** in allowing an appeal from the court, reinstated the appellant back to his employment after 3 years on the basis that while serving the employer he was of excellent work performance and had *achievements against the unproven accusations of impropriety*. Similarly, the claimant herein served the respondent diligently and without a disciplinary records for over 24 years.

As the respondent has many branches as evidenced by the various regions and the claimant was required to visit, upon reinstatement, he can be deployed in any of such branches and without returning him to the branch subject herein, Nakuru. This will be the most practical and efficacious remedy in a case of unlawful and wrongful termination of employment. The Court of Appeal in the case **Telkom Kenya Ltd versus Paul Ngotwa Civil Appeal No. 52 of 2011** held as follows;

... where the employer, like in this case is a large organisation. In large organisations where the sacked employee is not the immediate junior and/or does not, on a day to day basis, deal with the officer he has clashed with, or where he can be redeployed to another department, and especially so in a country like ours where employment opportunities are very hard to come by, reinstatement is the most efficacious remedy. Before ordering it however the court must consider the employee’s antecedents and age. [underline added].

It is trite that where there is an efficacious remedy provided by law, the same ought to be resorted to first. As was held by this Court in **Republic versus Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013**.

On the alternative remedies sought, the claimant seeking compensation for 14 years being the balance of the years expected in the service of the respondent until retirement, with the primary remedy thus address as above, such is dealt. See **Olive Mwhaki Mugenda & Another versus Okiya Omtata Okoiti & 4 others [2016] eKLR**;

... where relief is prayed for in the alternative, a court of law has to choose whether to grant the main or alternative reliefs and

state the reasons for doing so. Both cannot be granted in blanket form. ...

Accordingly, the letter dated 31st October, 2017 dismissing the claimant from his employment with the respondent is hereby set aside; the claimant is hereby reinstated back to his position with the respondent as Driver Grade 8; the claimant shall report back to his former office at Nakuru regional office for deployment by the person of Regional manager as appropriate on 1st October, 2019 at 8.30 hours.

For clarity, no back wages were claimed and such are not due.

The claimant is awarded his costs.

Delivered at Nakuru this 26th day of September, 2019.

M. MBARU JUDGE

In the presence of: