



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1836 OF 2015

BENSON MWANGI KAGUNDACLAIMANT

VERSUS

COUNTY COUNCIL OF NAIROBIRESPONDENT

JUDGEMENT

1. The Claimant pleaded that on or about September,1989 the respondent employed him as a watchman and subsequently promoted him to a city askari on 4th February,1991.
2. On or about June, 2013 the respondent interdicted the Claimant and put him on half salary on accusations of involvement in corruption and insubordination. According to him no investigations were conducted to confirm the allegations and that he was never invited to show cause before his interdictions.
3. The Claimant denied altering the charge sheet and receiving bribes from accused person on 14th June,2013. According to him the accused person was duly discharged under Section 87 of the Criminal Procedure Code.
4. The Claimant continued to work until 23rd January,2014 when the respondent without any colour of right unlawfully dismissed the Claimant. He appealed to the County Public Service Board but the appeal was disallowed. He filed a second appeal to PSC but the same was disallowed as well.
5. The respondent on its part pleaded that it was not true that the Claimant was condemned unheard yet as per the Claimants attachment II it was clear at the second last paragraph that the Claimant was granted an opportunity to be heard by being required to put in a response within seven days failure to which a disciplinary action would be taken against him.
6. Further, it was not the first time the Claimant was implicated in conduct unbecoming of an officer of his stature. On 7th September,2005 the Claimant was suspended upon arrest for soliciting and receiving a bribe. He was later arraigned in court and charged. On 17th March,2011 the Claimant was issued with a show cause letter for different cases of misconduct. On 13th April, 2011 the Claimant was once again issued with a show cause letter after he had absconded duty. The respondent was magnanimous enough to warn the Claimant despite the gravity carried in the offences.
7. The respondent further stated that based on these, it was quite clear that the Claimant had been subject on numerous occasions, to disciplinary issues.
8. In a bid to curb the rampant corruption within the County Officials, the City County integrity Testing Program team was framed. The team was tasked with among others weeding out corruption and enhancing integrity within the respondent's members of staff. On 4th June,2013 the said City County Integrity Testing Program team received a complaint that the Claimant had solicited for a bribe of Kshs. 3,000/=. The team then gave the complainant the said amount which was photocopied for purposes of comparison once the bribe was received by the Claimant.
9. Later on, when the Claimant returned to the office, the integrity team confronted him together with the complainant. He became violent when he was asked to submit to bodily search to recover the money received as a bribe. He opted to walk out to avoid recovery of the money.
10. The respondent therefore decided to interdict the Claimant. This was done via a letter dated 15th June, 2013 and in the letter the Claimant was informed of the various allegations against him.
11. The letter also called upon the Claimant to show cause why he should not be dismissed from employment.

12. The Claimant responded through a letter dated 23rd July, 2013. On 31st October, 2013 a disciplinary meeting to consider the allegations levelled against the Claimant as well as his response was constituted by the County Human Resource Management Advisory Committee (CHRMAC). The Claimant was given an opportunity to present his case. The committee noted his history of cases of gross misconduct among others and recommended that the Claimant be dismissed from service with effect from 18th June, 2013. The decision was communicated to the Claimant through a letter dated 23rd January, 2014. The Claimant was in the said letter informed of his right of appeal to the County Public Service Board which he did through a letter dated 15th February, 2014.

13. The County Public Service Board convened its sitting on 30th September, 2014 and upheld the decision of the CHRMAC. The Claimant further appealed to PSC who considered the appeal and dismissed the same. To this extent the respondent averred that the Claimant had duly exhausted the legal mechanism to seek redress under the structure and provisions of the County Government Act.

14. In his oral evidence during the trial, the Claimant repeated the averments in the statement of claim and further stated that his work as a City Askari was enforcement of City by Laws and that he left the respondent in 2013. By the time he left he was a city Court orderly. It was his evidence that he was accused of soliciting for a bribe, was charged in Court but was acquitted for lack of witnesses. He returned to work thereafter.

15. In 2013 he was interdicted for letting free an accused person. He denied altering the charge sheet it was his evidence that he never involved himself with charge sheets. He further denied receiving any bribes. He stated that he responded to the allegations against him on 23rd July, 2013.

16. The Claimant stated that he was never called for any disciplinary hearing before dismissal and that no one complained he received bribes from them. He appealed against the dismissal but the appeals were disallowed. He sought to be compensated as he was never paid his terminal dues upon dismissal.

17. In cross-examination he stated that he had worked for the respondent for more than 20 years. The Claimant admitted being issued with a show cause letter in 2011 but said that there was an officer who had a personal vendetta against him. He stated that he complained against the officer although he did not have a letter of complaint against the officer.

18. It was further his evidence that he responded to the show cause letter and addressed all the accusations against him. He however stated that he was never given a chance to defend himself before the dismissal.

19. The respondent's witness Mr. Daniel Kibet informed the Court that he worked for the respondent as Deputy Director Human Resource Management and that he had worked for fourteen years.

20. It was his evidence that the Claimant was a civil servant working for the respondent and was governed by the PSC-COR. He further stated that the respondent issued staff with guidelines on how to perform work.

21. On integrity testing he stated that this was done in conjunction with EACC where an allegation is made against an employee, such employee is notified and asked to respond. There were several complaints against the Claimant.

22. In cross-examination he stated that he was head of payroll when the Claimant was dismissed from service. He further stated that the Claimant is an askari did not prepare charge sheet and that it would be curious if he was accused of making a false charge sheet. It was his evidence that there was a complaint of bribery against the Claimant. The complaint was brought to the Claimant's attention and he was asked to respond.

23. This Court has held previously that the reason for which an employer terminates the services of an employee must be reasons which the employer at the time of termination of the Contract genuinely believed to exist and which cause the termination. The Claimant herein was accused of soliciting and receiving a bribe from a member of the public on 14th June, 2012 by integrity testing Program Officers. He was further accused of treating members of the public and fellow officers of without courtesy among others.

24. The Claimant was further accused of altering charge sheets, releasing suspects from custody and receiving bribes. On the issue of altering charge sheets, the respondent's witness Mr. Kibet stated that the Claimant as an askari did not prepare charge sheet and that it would be curious if he was accused of making a false charge sheet. This testimony coupled with the Claimant's explanation that he never altered the charge sheet in issue and that the accused in his particular case was dismissed by the Court due to the defect in the charge sheet and not alteration thereof makes this allegation against bribe without foundation hence not proved.

25. On the issue of soliciting and receiving bribe, the respondent's witness Mr. Kibet stated that it constituted an Integrity Testing Team who gave a member of the public from whom the Claimant had solicited Kshs. 3,000/= . The respondent's Integrity team alleged that they retained copies of the money they gave the member of the public and when the Claimant returned to the office they attempted a body search to recover the money the Claimant allegedly received from the member of the public but he became violent and threatened the integrity team. The respondent neither recorded a statement nor called this member of the public who received the alleged bribe from the Claimant to give evidence.

26. Further none of the integrity team members were called to give evidence neither is there anything on record to show that they spotted the Claimant receiving the alleged bribe. Worse still the respondent never exhibited copies of the notes the respondent claimed to have copied and gone to the said member of the public to given to the Claimant as a bribe.

27. The Court may consider that there were previous serious accusations against the Claimant but the respondent cannot be allowed to use these old previous facts to file gaps in the flared reasons for dismissal which the Claimant faced in this particular case. A dismissal or termination must be for accusations contained in the charge sheet or letter of interdiction once which an employee has been called upon to

respond.

28. In the circumstances the Court is of the view that the respondent has failed to prove to the required standards the reason for terminating the Claimant's service as required of it under section 43(1) of the Employment Act. The Court thus find the termination unfair and awards the Claimant as follows: -

- (a) One month's salary in lieu of notice
- (b) Half salary retained for the period of Interdictions.
- (c) Eight month's salary as compensation for Unfair termination.
- (d) Costs of the suit.

29. The parties never disclosed the Claimant's exit salary let the same be ascertained by the parties and be filed in Court to enable the Court record a final judgement in the matter. The matter is set for mention on the 8th day of January, 2020 before any Judge in Nairobi for recording of final orders.

30. Items (a) and (b) and (c shall attract interest at Court rates from date of judgement until payment in full but subject to taxes and statutory deductions.

31. It is so ordered.

Dated at Nairobi this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

Delivered this 18th day of October, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge