

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 522 OF 2017

PETER MURIGI MBURU.....CLAIMANT

VERSUS

KENYA FOREST SERVICES.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent alleging unfair termination from employment and withholding of terminal benefits. The Claimant averred that he was a bona fide employee of the Respondent having been engaged as a Store Man II on KFS Grade 13 and stationed at the Respondent's Central Highlands Conservancy in Murang'a South District. He averred that he was employed on a permanent and pensionable basis having executed a letter of appointment with the Respondent on 26th October 2012 and was earning a gross salary of Kshs. 24,800/- up until his unfair dismissal on 14th December 2015. The Claimant averred that the Respondent during the notice to show cause proceedings falsely accused him of forgery of his previous supervisor's signature, which formed the basis for his termination but the said supervisor never made such allegation and neither was he charged and found guilty by any court of law. The Claimant prays for judgment against the Respondent for a declaration that his termination was unfair, 12 months' compensation for unfair termination – Kshs. 297,600/-, one-month salary in lieu of notice – Kshs. 24,800/-, terminal benefits/entitlements to be computed/declared and filed in court by the Respondent within such period as may be ordered by this Honourable court, certificate of service, costs of the suit plus interest.

2. The Respondent's defence was that the Claimant was its employee albeit illegally. It averred that he was dismissed from employment after having been found to have breached the Respondent's regulations and secured his employment through forgery of records and therefore his termination was fair. The Respondent averred that the Claimant was not eligible for employment in the service due to his various disciplinary cases and for having been blacklisted. The Respondent averred that the Claimant has a pending court case at Makadara Law Courts being CF 3606/07 for issuing a fake movement permit to Ms. Rachael Muthoni to transport forest products/materials. The Respondent averred that the Claimant is still being pursued by the OCS Muthaiga Police Station to answer to charges of forgery after forging a letter in the name of Police Department under Ref. C/ORG/2/9/2/VOL.II/163 dated 23rd January 2009 addressed to the Respondent purporting the case had been withdrawn. The Respondent averred that the Claimant has on diverse dates made forgeries of letters of Police and that the Claimant is a fugitive of justice. The Respondent averred that the Claimant was accorded a proper and fair hearing before the disciplinary committee which found him guilty of forging the Zonal Manager's signature and recommending himself for appointment. The Respondent denied that there were any terminal benefits payable to the Claimant that were withheld and the Respondent denied the allegations that the Claimant is entitled to any benefits as alleged or at all.

3. The Claimant testified as did the Respondent's witness Juliana Ochieng the HR Manager. The Claimant relied on his statement and testified that he was employed by the Respondent from 1984 and his dismissal was without basis. He stated that he did not forge any document and admitted to knowing Mr. Owate as his boss in 2012. He testified that he was previously working with the Ministry of Natural Resources till 2012 October when he joined the Respondent. He stated that there was no complaint against him as he stayed there for 3 years. He testified that there is no forgery case pending as the case at Makadara was terminated on 23rd August 2007 and that it was withdrawn before he joined the Respondent. He stated that he was invited to a meeting at Water Buck Hotel Nakuru but the people who are claimed to have complained did not attend. He denied having forged any signature and asserted that his terminal dues were not paid. He testified that there was a notice to show cause which he responded to, he was invited to a hearing on 31st March, the decision was communicated and he appealed to the Board and was heard on 17th October 2017 and the Board gave its determination and he was issued with a dismissal letter. He stated that he does not have a pending case before OCS Muthaiga and that if he had committed a crime he could have been arrested.

4. The Respondent's witness Juliana Ochieng adopted her statement and testified that the Claimant was an employee of the Ministry and in 2007 he was found culpable of signing a movement permit under Ministry of Forestry and he was interdicted for forgery. She stated that the vigilance team upon intercepting a lorry that was transporting logs demanded for a movement permit after which they established that the permit had been signed by Mburu who was on leave. She stated that KFS was a parastatal that was formed from the Ministry and after the creation of KFS the Board decided to take only staff without discipline cases from the Ministry to the new parastatal. She stated that Mburu was not taken over due to his indiscipline issues. She testified that in 2012 when KFS was taking the fourth lot it was decided all staff to be taken in on recommendation from their supervisors. She testified that they did not understand how Mburu was recommended as he had serious indiscipline issues and after being absorbed he wrote a letter requesting for early retirement and it was then that the Board then began to investigate. She testified that in 2009 Mburu had written a letter indicating that the cases in Makadara and Muthaiga had been withdrawn. They then went to the Ministry to establish the veracity of the letter and upon writing a letter to Muthaiga it was indicated he was a fugitive. She stated that he was heard and he appealed against the Committee's decision. In cross-examination she confirmed that the Claimant had forged Mr. Owate's signature as Owate confirmed that through a letter that was shown to the Claimant and that the Claimant was not prosecuted because it was not KFS to investigate forgery. She stated that the Police were still handling the issue. She testified that the case at Makadara is still pending and upon writing to the Police they confirmed that the Claimant had absconded court. She stated that according to the Employment Act if one is charged he is not supposed to be at work. She stated that the Claimant was paid his benefits but since he was to be paid pension from the pension fund who is another party he should have brought that to the attention of the Respondent had he not been paid within 15 days. That marked the end of oral testimony.

5. The Claimant submitted that the allegation of forgery is a serious one and he ought to have been presented with the evidence of forgery. He submitted that his supervisor Mr. Owate did not present himself during the disciplinary hearing to confirm that his signature was forged and neither was the Claimant shown any letter from Mr. Owate to confirm that he had made such an allegation. He submitted that it is worth noting that no conclusive evidence such as a professional document examiner was produced before the disciplinary committee and/or even before this court and therefore the allegation of forgery remains a mere allegation. On the issue of the Makadara case, the Claimant submitted that he was categorical that the case was withdrawn and thus there was no pending warrant of arrest. He submitted that the allegation that he forged the OCS Muthaiga letter dated 20th February 2009 does not hold any water there being no such allegations from the OCS. The Claimant submitted that had he jumped bail and forged the OCS letter as alleged he would have been arrested the moment he went to the station to enquire about the criminal case and/or to deliver the Respondent's letter. The Claimant submitted that the foregoing evidence clearly demonstrates that the allegations of jumping bail and forgery which formed the basis of the dismissal were not proved by the Respondent and urged the court to disregard the same and find in favour of the Claimant as sought in the Memorandum of claim. The Claimant submitted that the Respondent did not offer any tangible proof for the termination thus violating Section 43 of the Employment Act. The Claimant relied on the case of **Wyllis Collins Akeyo Muganda v Geothermal Development Company [2016] eKLR** where the court in dealing with similar facts underscored the statutory duty of an employer in proving the reasons for termination. The Claimant cited the case of **Mary W. Ndirangu v Board of Trustees National Social Security Fund [2013] eKLR** where the Court considered what constitutes a fair hearing with regard to Article 50 of the Constitution wherein the claimant was terminated from employment when the criminal case was pending before court. The Claimant submitted that his termination was unfair the same having been carried out when there was no proof of the alleged forgeries and he had not been found guilty by a court of a law since the criminal case against him was not concluded. The Claimant therefore prayed that judgment be entered in his favour.

6. The Respondent submitted that it followed due process in terminating the Claimant's employment in accordance to Section 41 of the Employment Act as the Claimant was issued with a notice to show cause, he gave his response, was invited to a disciplinary hearing whose decision was communicated to him after which he preferred an appeal which was heard and its decision communicated to the Claimant. The Respondent submitted that the Claimant attended both hearings, however he did not bring any representative despite being advised to and the Claimant remained silent for the most of the time during the two disciplinary hearings. The Respondent submitted that the reason for terminating the Claimant's employment was among other things forgery of his supervisor's signature and recommending himself for employment. The Respondent submitted that such an issue warrants summary dismissal under Section 44(4)(g) of the Employment Act. The Respondent submitted that the Claimant was however, accorded an opportunity to defend himself and the Claimant had not disputed the procedure adopted by the Respondent in dismissing him. The Respondent submitted that there was substantive fairness in the dismissal of the Claimant as they have proved the reasons for termination of the claimant as provided by Section 43(2) of the Employment Act. The Respondent submitted that in inviting the Court to consider whether a question of forgery of signatures was a valid reason for the Respondent to terminate the Claimant's employment, the Respondent relied on the case of **Andrew Wafula Amutalla v Kenyatta University [2019] eKLR** where Abuodha J. held that the test for reason which can cause a dismissal is usually premised on a reasonable employer. If a reasonable employer confronted with the same reason for which an employee was dismissed would uphold the dismissal then the court would not interfere. The Respondent humbly submitted that there existed a *prima facie* case and a genuine reason to terminate the Claimant's employment having illegally secured employment as a Store Man II Grade 13 by forgery of the Zonal Manager's signature and by recommending himself for appointment. It submitted that further, the Claimant was also accused of other forgeries in which he recommended himself for leave by forging one Mr. Mwirigi's signature as well as forging a letter in the name of the Police department and the Claimant also has an ongoing criminal case at Makadara Law Courts for issuing a fake movement permit. Reliance was placed on the case of **William Kiaritha Gacheru v East African Packaging Industries Ltd [2016] eKLR** and the Respondent submitted that it had a valid reason for terminating the Claimant's employment. The Respondent submitted that during the hearing the Claimant testified that the criminal case had been withdrawn but failed to produce any documentary evidence in support. The Respondent submitted that to this end, it is not in dispute that the Claimant had committed a criminal offence to the substantial detriment of his employer or his employer's property which warranted dismissal. The Respondent submitted that the reasons for terminating the Claimant's service were justified and the Claimant had a burden to prove that the allegations levelled against him were false, a burden which he did not discharge. For the foregoing reasons, the Respondent submitted that the procedure it employed in terminating the Claimant's employment was both procedurally and substantively fair and he is therefore not entitled to any reliefs sought and his claim should be dismissed with costs to the Respondent.

7. The Claimant asserts unlawful dismissal. Under Section 43 of the Employment Act, the Claimant has a burden to prove the dismissal was unfair and unlawful while the Respondent has the burden of proving there were reasons for termination. The Claimant denied being involved in forgery. Despite this denial, there was a criminal case before the Makadara Law Courts which related to the Claimant's conduct. As far as the employer was concerned there was basis for the dismissal. Prior to dismissal, an employer has to give an employee the safeguards of Section 41 of the Employment Act. Section 41 provides as follows:-

41. (1) an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

From the testimony and evidence before me, there was a hearing at which the Claimant was heard, his defence was considered and termination recommended. As he was accorded a proper and fair hearing before the disciplinary committee which found him guilty of forging the Zonal Manager's signature, the claim was unmerited and without any basis. The claim is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 27th day of November 2019

Nzioki wa Makau

JUDGE