



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1211 OF 2013

SAMUEL MBOTE MWEYACLAIMANT

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION....RESPONDENT

J U D G E M E N T

1. The Claimant pleaded that at all material times he was employed by the respondent as a Senior accountant III on permanent and pensionable terms. He worked throughout for respondent and rose to the rank of Senior Accountant. He further stated that his employment was regulated by inter alia the respondent's code of conduct.

2. On 9th October, 2008 the respondent wrongfully and in breach of the contract terms suspended the Claimant from employment on the pretext that the plaintiff was under investigation. After five months in the month of February, 2009 the suspension was lifted and the Claimant was recalled to duty implying that he had been cleared of any wrong doing. He continued with his duties until he was sent on compulsory leave in November, 2009 on the same grounds previously stated by the respondent in the suspension letter. The suspension lasted up to the months of January, 2010 when the respondent summarily dismissed the Claimant from employment.

3. The respondent alleged the Claimant's employment was terminated on grounds inter alia of aiding and abetting fraudulent payments and wrong voting. He averred that the reasons for terminating his employment were not valid and did not give a basis for the respondent's action. He was further not given a chance to defend himself. As a result of the respondent's actions the Claimant lost his benefits, entitlements and has suffered loss and damages.

4. The respondent on its part pleaded that the Claimant's employment was terminated after investigations into the Claimant's area of operations revealed massive actions of fraud and gross misconduct by the plaintiff. The respondent further stated that the Claimant was called upon to defend himself before a disciplinary committee a chance that he took but had no valid defense for his actions. The respondent further stated that the Claimant was not entitled to any terminal benefits because he was summarily terminated.

5. At the oral hearing the Claimant stated in the main that he prepared a witness statement which he sought to adopt as his evidence in Chief. He further stated that he was on suspension for five months but was recalled back and when he got back he received a letter from the MD asking him to go and make a presentation to the EMU. He saw the MD and asked about the presentation but the MD insisted he should go. So, he went and made the presentation. On general issues. It was his evidence that there was fire at the respondent's premises around the same time. He stated that he received a letter inviting him to defend himself on allegations of financial impropriety. He attended the meeting and was asked general questions which he answered.

6. He further stated that he was asked if it was possible to pay a voucher twice and he answered that it was very complicated after that he was asked to go and pick a dismissal letter. According to him, he was accused of duplication of vouchers. The accusations were never brought to his attention earlier.

7. In cross-examination he stated that he was employed in 1996 and that he was inducted when he was employed. At each promotion he was explained to the nature of his duties.

8. It was his evidence that he collected his suspension letter from HR office and that he never asked questions when he was sent on compulsory leave and when he returned no one explained why he was sent on compulsory leave. He further stated that he never queried when he returned why his areas of operation was under investigation further he never claimed his benefits because he was contemplating legal action.

9. The respondent's witness Ms Nancy Murunju stated that she worked for the respondent as HR and Administration Officer. She relied on

her witness statement recorded on 29th November, 2018 as her evidence in Chief. She also adopted the bundle of documents filed with the claim.

10. In cross-examination she stated that she had worked for the respondent since 1994. It was her evidence that the Claimant was in the finance department when the debt in issue was accumulated and that there was no specific debt attributed to the Claimant.

11. According to her, the Claimant was sent on compulsory leave because of allegations of aiding fraudulent payments. He was sent on compulsory leave to pave way for investigations. The letter of compulsory leave did not make any allegations against the Claimant. It was her evidence that Emu released a report which triggered the second compulsory leave. The report was shared with the Claimant when he appeared before the disciplinary Committee. The Claimant was asked give a presentation before the EMU.

12. Under section 47(5) the burden of proof that an unfair termination has taken place rests on the employee while the burden of justification of reasons for dismissal or termination rests on the employer. The Claimant has averred that the termination of his employment was unfair because he was never given reasons for the termination. He further stated that on two occasions when he got suspended he was not told the reason for suspension.

13. The letter of compulsory leave dated 9th October,2008 attached to the Claimant's bundle of documents stated that the leave was to facilitate investigations in his area of operations. The Claimant further attached to his bundle of documents, a letter dated 15th October,2008 written by the Chairman of the Respondent's Board Professor S. M Shitote. The letter requested for special investigations into the financial matters of the respondent. In the second last paragraph of the letter the Chairman of the respondent's Board observes in part as follows:

a. "The government has tried to inject funds into the corporation but the situation seems to get worse by the day as the management keeps on producing inconsistent figures which cannot enable the Board to make any informed decision on financial status. However, the Board has terminated the service contract of the former Managing Director and Finance Manager and sent a number of officers on compulsory leave as an attempt to address the issue".

14. Further by a letter dated June, 16th 2009 the Claimant was invited by the respondent to give a presentation to the members of the EMU team. In his evidence in Court, the Claimant confirmed he appeared before the EMU and made the presentation. The Claimant further informed the Court that he was invited to appear before the respondent's disciplinary Committee and made his presentation over the allegations of fraudulent payments.

15. Finally, in the dismissal letter dated 26th February, 2010 the Claimant is informed that pursuant to letter dated 5th November,2009 in which he was sent a compulsory leave to facilitate investigation on account of aiding in fraudulent payments and malpractice in Finance Department through recycling of payment vouches and wrong voting, the board found his defence before it unsatisfactory hence unacceptable.

16. From the foregoing it cannot be gainsaid that the Claimant knew and interacted enough with the allegations against him hence his allegations that he was not aware and was never told the reason why he was suspended on two occasions is unbelievable. In any event the Claimant did not allege that he sought to know the reasons for his suspension and was denied. During the trial the Court noted that the Claimant was constantly evasive and argumentative with the Counsel for the respondent, a trait that he was uncomfortable answering certain questions.

17. Allegations of financial impropriety of the magnitude the respondent was dealing with was a serious enough a ground for dismissal for anyone implicated therein. The Claimant was accused of involvement and was called upon to explain both before EMU and the Respondent's Board.

18. In conclusion the Court finds that there existed valid grounds for terminating the Claimant's service and that the same was done in accordance with fair procedure as contemplated under Section 45 of the Act. The claim is therefore found without merit and is hereby dismissed with costs.

19. It is so ordered.

Dated at Nairobi this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

Delivered this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge