

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 160 OF 2015

SOLOMON KARITHI WACHIRA.....CLAIMANT

VERSUS

MATHIRA WATER & SANITATION

COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the alleged wrongful and unprocedural dismissal from employment and failure to pay his terminal benefits. The Claimant averred that he was employed by the Respondent as an artisan on 1st July 2009 and that he was earning a monthly salary of Kshs. 18,530/-. The Claimant averred that he worked diligently for a period of 4 years until 30th July 2013 when he received a letter of interdiction from the Respondent accusing him of collecting money from customers. The Claimant averred that he wrote a letter and denied ever being involved in collecting money from customers as alleged in the interdiction letter as all customers were well connected and were paying for services without any hitch. The Claimant averred that he received a termination letter on 18th September 2013 and appealed against the termination to the managing director on 27th September 2013. He averred that he was advised by the managing director to appeal to the Staff and Finance Committee and he did so but the Staff and Finance Committee upheld the decision of the disciplinary committee. He averred that he filed a second appeal to Tana Water Board on 17th February 2014 but never received any response. The Claimant averred that he reported the matter to the Union who subsequently reported the dispute to the Labour Officer in Nyeri and parties summoned to resolve the issues. He averred that the Respondent failed to attend he was given a referral certificate and he thus filed this claim in court. The Claimant averred that the Respondent's actions were malicious, vexatious, dictatorial and a violation of his constitutional right to fair labour practices and was a breach of the rules of natural justice since he was condemned unheard as he never attended the disciplinary committee meeting which allegedly took place on 6th September 2013. The Claimant averred that although he appeared before the disciplinary committee, he was never asked to defend himself or to call witnesses and no representative of the union was present therefore no hearing took place contrary to section 43 of the Employment Act. The Claimant prayed for judgment against the Respondent for a declaration that the termination was unfair, unlawful, null and void. He sought reinstatement without any loss of salary, allowances and other benefits as well as a certificate of service, costs and interests of the suit. In the alternative, he prayed for an order compelling the Respondent to pay him salary, allowances and other benefits until his retirement age of 60 years, salary in lieu of notice and full compensation for loss of employment.

2. In the defence filed, the Respondent averred that the Claimant's termination was pursuant to clause 8 of the letter of appointment dated 1st July 2009 and Section 44(4) the Employment Act 2007. It averred that his termination was due to gross misconduct for being suspected of having committed a criminal offence to the detriment of his employer. The Respondent denied that the Claimant worked diligently as his activities bordered on theft of customer's money and failing to remit the same to the Respondent. The Respondent averred that it received letters from its customers Florence Njeri and Jennifer claiming that the Claimant had received Kshs 7,000/- and Kshs. 3,500/- as meter deposit and for meter installation which was not his duty to receive and he failed to remit the same to the Respondent. The Respondent averred that the Claimant was given a chance to respond in writing, was heard by a disciplinary committee where he was represented by Daniel Muriithi Kinyua the Union Chairman and was found culpable of taking the clients' money and intimidating them. The Respondent averred that his appeal was heard and found to lack merit. The Respondent averred the Claimant through his union reported the dispute to the Ministry and the Conciliator was required to resolve the dispute within 30 days from the date of referral and the dismissal having taken place on 18th September 2013, this suit is statutory barred under Section 67 of the Labour Relations Act. The Respondent denied victimizing the Claimant and averred that the dismissal was not unfair hence he is not entitled to the prayers sought.

3. The Claimant filed a reply to the Respondent's response to the claim and denied receiving money from the two customers and engaging in activities bordering on theft. The Claimant admitted he was heard by the disciplinary committee but he averred that the proceedings were improperly conducted as the committee introduced a member of management instead of a member of the union as required by law hence the recommendations of the committee were a nullity as they were illegally conducted. The Claimant averred that his appeal was not heard by the board of directors and the dismissal was an illegal unilateral decision of the managing director who lacked jurisdiction and that his action amounted to victimization. The Claimant averred that his claim is well within time as he filed it two years after the cause of action arose. He averred that the two customers Teresia Mugure and Jeniffer Gathigia were both well connected with water supply via connection numbers U3412 and U3413 respectively and as at 31st March 2013 were already paying the water bill more than 4 months before the date of interdiction on 30th July 2013. He further averred that the third customer Florence Njeri was outsourced after interdiction to lodge false claims to give ground for the Claimant's unfair termination. He averred that his termination was unfair as he was denied a hearing both by the disciplinary committee and at the appeal proceedings as he was neither allowed to call any witness nor his accusers called to testify against him.

4. At the hearing, the Claimant testified as did the Respondent's witness David Gathogo Kamau the managing director of the Respondent. The Claimant testified that as an artisan his work was to connect water, and that he never used to receive money as it was paid to the Respondent. He said that he received a letter from Jeniffer to connect water for her and not money and that he could only connect after

payments were made and a form from commercial had been submitted. He confirmed that he was not supposed to receive money from customers. He testified that he did not get any money from Florence Njeri since he was not even working. He said he had been interdicted already at the time of the complaint on 7th August 2013. He testified that he appeared before a disciplinary committee but there were no complainants, no witnesses were called and there was no union representative present. He stated that Muriithi was a fellow employee and he did not call him to come to the meeting. He testified that he received a letter of termination but it did not specify the persons that he had allegedly received money from. He stated that he never appeared in the appeals and that he could not remember the date of the disciplinary hearing and he could not recall a report from the auditor. He stated that he did not know the customers named. He testified that he used to get authorization from the Respondent and he had connected all the customers and gave them connection numbers and denied having committed any error. He stated that after being interdicted he went to the disciplinary committee without a union representative despite the minutes showing as such.

5. The Respondent's witness was David Gathogo Kamau the managing director of the Respondent. He testified that the Claimant received money from the customers and failed to remit the same to the Respondent. He stated that the Claimant was interdicted as a result and informed that he would appear before a disciplinary committee on a date to be communicated. He produced a letter from one of the customers which stated that the Claimant had called and told her not to reveal his name. He stated that if the Claimant was not guilty then he would not have called the customer. He testified that the Claimant was summoned to appear before the disciplinary committee on 29th August 2013 but the committee was not able to hear him and the matter was deferred to 2nd September 2013 when the Claimant was heard in the presence of Daniel Muriithi the union representative. He stated that the committee recommended summary dismissal due to gravity of the offence of obtaining money customers and intimidating them by asking them not to mention his name. He stated that the Claimant appealed the decision and his appeal considered and the decision of the disciplinary committee upheld. He testified that the Claimant was dismissed lawfully for gross misconduct as he was not authorised to receive money from customers. He testified that the claims by the customers were verified by the internal auditor and added that Jennifer was intimidated in the presence of the auditor where she was writing the complaint. He testified that he appeared before the Labour Officer but summonses to appear in court were issued to the Respondent before the matter was concluded. In cross-examination he confirmed that the conciliator mentioned that the Respondent had appeared. He stated that the union representative attended the hearing both as an official of the Union and a representative of the Claimant as a colleague. He stated that all customers were connected with water but the internal auditor confirmed that the right procedure was not followed and the customers confessed that they had given money to the Claimant hence the connections were illegal. He stated that a notice to appear before the disciplinary committee on 2nd September 2013 was not issued but stated that the notice was issued on 26th August 2013 requiring the Claimant to appear on 29th August 2013 but the meeting was postponed to 2nd September 2013. He testified that the Claimant was lawfully dismissed for gross misconduct and should not be entitled to re-instatement and/or any allowances. He urged the suit be dismissed with costs. That marked the end of oral testimony.

6. The Claimant submitted that he was not given sufficient time to prepare as he received the hearing notice on 26th August 2013 for a hearing on 29th August 2013 and that the notice infringed on his constitutional rights under Article (50)(2)(c) which requires one to be given sufficient time to prepare their defence. The Claimant submitted that the Respondent violated Section 41 of the Employment Act, as he was not allowed to bring along a colleague of his choice and that instead, the Respondent invited a person who purported to be an official of a non-existent Mathira Branch of NUWASE who did not even make any representation on his behalf. The Claimant submitted that the proceedings were therefore illegal and contrary to the provisions of Article 47 of the Constitution. The Claimant submitted that the Respondent also never called the so called customer to testify nor did it call the auditor. The Claimant submitted that the disciplinary hearing was therefore unconstitutional as he was condemned on the basis of hearsay evidence. The Claimant contended that if their evidence was challenged on cross-examination he could have shown that he never received any money from the customers. The Claimant submitted that the Respondent equally violated Article 50 of the Constitution as the notice it issued was too short and that did not give him time to prepare his defence. He submitted that Article 47 was also violated as his right to administration action which is expeditious, efficient, lawful, reasonable and procedurally fair was overlooked. The Claimant submitted that he was never subjected to any criminal proceedings to confirm the allegations in the customer's letter and as such they still remain allegations as they were not tested and or proved in a court of law. He relied on the case of **Simon Kiprotich Chepchowoi v Nandi Tea Estate Ltd [2014] eKLR**. The Claimant submitted that the Respondent had failed to prove the reasons for termination thus the termination violated Sections 43 and 45 of the Employment Act. He relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Ltd [2014] eKLR** and **Gilbert Mariera Makori v Equity Bank Ltd [2016] eKLR**. He submitted that the alleged receipt of money and illegal connection was not proved as it was confirmed that the money was actually paid to the account of the Respondent which issued a payment receipt in the name of the customer. He submitted that it was also confirmed that the customer was connected with water in the normal way after making payment to the Respondent and maintained that the dismissal was unfair and that he is entitled to the reliefs sought.

7. The Respondent submitted that the Claimant's allegations that he was not summoned to a hearing and that he had no representative cannot hold water as he confirmed in his testimony that he knew Daniel Muriithi as his colleague and the Union representative. The Respondent submitted that it had produced a letter dated 26th August 2013 summoning the Claimant to appear before the disciplinary committee on 29th August 2013 which hearing actually took place on 2nd September 2013 as borne out in the minutes of the Disciplinary Committee. The Respondent submitted that the Claimant conceded that he was served with the interdiction letter dated 30th July 2013 through which he was required to show cause. The Respondent submitted that he responded to the notice to show cause vide his letter dated 19th August 2013. The Respondent submitted that the minutes of the disciplinary indicated that the internal auditor was a witness as the auditor is the one who received complaint letters while Jennifer Gathigia Njoki stated that the Claimant also threatened her over the phone as she was writing the complaint letter in the office of the internal auditor. The Respondent submitted that the minutes show that the Claimant denied all charges but he was nevertheless found culpable and was dismissed for gross misconduct. The Respondent submitted that fair procedure was followed as demonstrated by the notice to show cause and the hearing and that there was a valid reason for the termination. It relied on the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Ltd [2018] eKLR** and urged the court to make a similar finding as the one that was made in the case that the claimant failed to discharge the burden of proof placed on him under Sections 107 and 108 of the Evidence Act and that the respondent gave valid reasons for the suspension and eventual termination of employment. The Respondent submitted that it discharged its burden by demonstrating that the procedure applied in the termination was fair and lawful. The Respondent submitted that the Claimant had failed to support his claim by evidence and hence his claim should be dismissed with costs.

8. The Claimant was dismissed for good cause, to wit, his gross misconduct which was proved after a disciplinary hearing. He was heard by a panel duly constituted for this and his suit was therefore a total waste of judicial resources and time. He ought not have filed the suit as

there was basis for his dismissal, his employer took procedural steps to terminate the contract and achieved it without breaching the law. The Claimant failed to prove his suit on a balance of probabilities and the suit is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 10th day of December 2019

Nzioki wa Makau

JUDGE