

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 152 OF 2015

ANTHONY N. KANG'ANG'A.....CLAIMANT

VERSUS

MATHIRA WATER AND SANITATION COMPANY.....RESPONDENT

JUDGMENT

1. The Claimant has sued the Respondent for his alleged unlawful termination. The Claimant averred that he was employed by the Respondent as a Subordinate Staff II in the year 1981. He averred that on 22nd December 1989 he was seconded to National Water Conservation and Pipeline in the same position. He averred that on 3rd September 2013 he was appointed by the Respondent as a metering officer at a starting salary of Kshs. 35,086/-. He averred that prior to his appointment he had received a letter of interdiction from the Respondent on allegations that he had purportedly taken money from a customer on unknown date in May 2013 promising to connect him with water. The Claimant attended a disciplinary committee on 29th August 2013 even though he had not been summoned. He averred that no accusation was raised against him, he was never asked to defend himself nor did he call any witness and or have union officials present. He averred that on 1st September 2013 he was served with a 10 month retirement notice indicating that he was to retire at the age of 60 years on 1st July 2014. He averred that later on 18th September 2013 he also received a letter of termination of employment from the director of the Respondent allegedly on admission of having taken money from a customer. The Claimant averred that he appealed against that decision on 3rd October 2013 but the managing director wrote and advised him to appeal to the Staff and Finance Committee of the Board. He averred that he appealed to the Staff and Finance Committee as advised but the Respondent dismissed his appeal and upheld its decision to terminate him. The Claimant averred that he reported the matter to the Union who subsequently reported the dispute to the Labour Officer in Nyeri and parties were summoned to resolve the issues but the Respondent failed to attend. He averred that he was given a certificate of reference to file this claim in court. He prayed for one month's salary in lieu of notice – Kshs. 35,086/-, salary and allowances from 23rd July 2013 to date – Kshs. 842,064/-, accrued leave arrears – Kshs. 19,980/-, leave travelling allowance – Kshs. 7,992/-, service pay – Kshs. 16,660/-, detergent allowance Kshs. 1,400/-, farewell allowance – Kshs. 50,000/-, full compensation for wrongful loss of employment – Kshs. 421,000/-, baggage allowance – Kshs. 40,000/- all making a grand total of Kshs. 1,434,182/-. He also sought a certificate of service, a declaration that his termination was unfair and unlawful as well as costs and interests of the suit. The Claimant averred that the Respondent's actions were malicious, vexatious, dictatorial and a violation of the Claimant's constitutional right to fair labour practices and a breach of natural justice as he was condemned unheard since he never attended the disciplinary committee meeting which allegedly took place on 6th September 2013.

2. In the defence filed, the Respondent averred that the Claimant's termination was pursuant to clause 8 of the letter of appointment dated 3rd September 2013 and Section 44(4) the Employment Act 2007. It averred that his termination was due to gross misconduct on suspicion 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 without remitting the same to the Respondent. The Respondent averred that it received a letter from a client Peter Mwangi Gaita claiming that the Claimant had received Kshs 3,500/- from him as water deposit and labor charges and yet that was not his duty. 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 client's money and intimidating them. The Respondent averred that the Claimant's appeal was also heard and found to be unmerited. The Respondent averred that the Claimant through his union having reported the dispute to the Ministry, 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 he is not entitled to the prayers sought.

3. The Claimant filed a reply to the respondent's response to the claim and denied engaging in activities bordering on theft from customers. He averred that the money he received from Peter Mwangi Gaita was a loan privately advanced to him and the customer came to complain when the Claimant took long to repay. The Claimant averred that he was heard by the disciplinary committee but denied he was found culpable as the committee found him not guilty and recommended that he be reinstated. He averred that the termination was unfair as it went against the recommendations of the disciplinary committee. The Claimant averred that his appeal was not heard by the board of directors and the dismissal was on the illegal and unilateral decision of the managing director who lacked jurisdiction which 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.

4. The Claimant testified as did the Respondent's witness David Gathogo Kamau the managing director of the Respondent. The Claimant testified that after being interdicted he went to the disciplinary committee without a union representative despite the minutes showing as such and that the complainant did not appear either. He denied having stolen money from the company and stated that he took a loan from the customer since he had a patient and had planned to refund. He testified that the committee had recommended that he be reinstated but he instead received a letter of termination. He stated that he reported the same to the Union and later went to the Labour Officer but the defendant failed to attend. He stated that he was given the reasons for the dismissal and stated that interdiction was to pave way for investigations. In cross-examination he testified that he was given a letter of retirement but the Respondent never allowed him to retire instead it proceeded with the dismissal process including appeals. He stated that he only appeared before the disciplinary committee on 29th

August 2013 but he did not receive a letter inviting him to appear on 2nd September 2013. He denied having issued the receipts for water deposit and he indicated that they were from the Respondent. He stated that he did not appear before the Finance Committee on appeal hence the disciplinary process was not lawful and that is why he had sued.

5. The Respondent's witness David Gathogo Kamau testified that the Claimant was interdicted to pave way for investigations after the Respondent got information that the Claimant had obtained money from a customer. He stated the Claimant was called for a disciplinary hearing on 2nd September 2013 as it was postponed from 29th August 2013 and the Union representative was present as captured in the minutes. He testified that the finding was that the Claimant admitted the mistake, apologized and refunded the sum in full and the customer was issued with official receipts. He testified that the gravity of the offence led to the recommendation that the Claimant be reinstated and a strong reprimand be issued. However, when the recommendation went to the managing director and the Board the decision was that the Claimant be terminated as the act of taking money illegally was a gross misconduct. He stated that the Claimant did not have the authority to receive the money and he had not declared it to the Respondent. He testified that the Claimant had also made illegal connections and was dismissed after the disciplinary committee met. Regarding the issue of salary in lieu of notice he stated that the Claimant was interdicted on 23rd July 2013 and he was not working in the period prior to his termination and he thus is not entitled to the payment and that the Claimant used to proceed on leave and was therefore not entitled to payment in lieu of leave. He confirmed that the hearing was internal and it was not mandatory that they invite the customer to attend the hearing. He also confirmed that the Claimant was given sufficient notice of the hearing and had time to prepare. He testified that the Claimant's appeal was heard and the Claimant was not required to appear before the appeal committee and the Board meeting. He testified that the Claimant and other 6 employees were given a fair hearing and the Claimant is thus not entitled to the prayers sought.

6. The Claimant submitted that the hearing notice was not sufficient as the disciplinary hearing took place on 29th August 2013 after he received a notice on 26th August 2013 and not 1st September 2013. The Claimant submitted that his dismissal was wrongful, unlawful and unfair. He submitted that he was issued with a letter of interdiction by the respondent on 23rd July 2013 at a time when he was not an employee of the Respondent. The Claimant submitted that the Respondent's witness in his testimony confirmed that by the time the letter of interdiction was issued to the Claimant he was an employee of Kenya Pipeline Corporation on secondment to the Respondent. The Claimant submitted that the Respondent failed to inform him or seek for consent from the employer to institute disciplinary proceedings against the Claimant. The Claimant submitted therefore that the letter of interdiction and the subsequent disciplinary proceedings were premature, incompetent, null and void as they were commenced, undertaken and concluded by the Respondent company that had not employed the Claimant at the time of such commencement. 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 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 a representation on his behalf. The Claimant submitted that the Respondent failed to call the so called customer to testify and that the letter produced by the Respondent remained anonymous and hearsay evidence which could not form the basis for dismissal from employment. The Claimant submitted that the Respondent violated Article 50 of the Constitution as the notice it issued was short and that did not give the Claimant time to prepare his defence. The Claimant 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 or proved in a court of law. He relied on the authority of **Simion Kiprotich Chepchowoi v Nandi Tea Estate Ltd [2014] eKLR**. The Claimant submitted that the Respondent failed to prove the reasons for termination and the termination was in violation of 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 the case of **Gilbert Mariera Makori v Equity Bank Ltd [2016] eKLR**. He submitted that the alleged receipt of money and illegal connection were 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 had failed to prove his case on a balance of probabilities. It submitted that though he alleges he was interdicted before he was appointed, his appointment reads "*with continuous service with effect from 2005.*" The Respondent submitted that his allegation 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 also produced a letter dated 26th August 2013 summoning the Claimant to appear before the disciplinary committee on 29th August 2013 which hearing eventually took place on 2nd September 2013 as borne out in the minutes of the Disciplinary Committee. The Respondent submitted that the findings of the Committee were that the Claimant indeed took money from the customer which action amounted to gross misconduct entitling the Respondent to terminate. The Respondent cited the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Ltd [2018] eKLR** relied on by the Claimant 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 S. 107 and 108 of the Evidence Act and the respondent gave valid reasons for the suspension and eventual termination of employment*. The Respondent submitted that fair procedure was followed as the Claimant was issued with an interdiction letter which stated the charges and notified him that he would be summoned for a hearing. The Respondent submitted that the Claimant was indeed summoned and he had a representative, admitted the charges against him and prayed for forgiveness. The Respondent submitted that Sections 41 and 43 of the Employment Act were therefore satisfied. The Respondent submitted that there was no evidence proving the claims amounting to Kshs. 1,434,182/- and they should therefore fail and the entire claim should therefore be dismissed with costs.

8. The Claimant was dismissed for his gross misconduct which was proved after a disciplinary hearing. There is even proof of admission of guilt 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

I certify that this is a true copy of the Original

Deputy

Registrar
