



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 471 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 13th February 2018)

REUBEN MAINA MUTUA.....CLAIMANT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Claimant herein filed his Memorandum of Claim on 5th April 2013 through the firm of Katunga Mbuvi and Company Advocates claiming wrongful termination by the Respondent.
2. The Claimant's case is that he was employed by Respondent as a Boiler Attendant Grade 1 on 28th January 1992 and later on permanent basis on 11th September 1995. He was further upgraded from Grade 1/11 to 111/IV on 17th August 1999.
3. He avers that he worked devotedly with a clean record until 8th December 2010 when he was dismissed ostensibly with a reason that he had stolen and/or being in possession of 10 jerricans containing 20 litres of diesel each belonging to Kenyatta University without permission.
4. Prior to the dismissal, the Claimant was suspended vide a letter dated 5th March 2010. He was subsequently invited to appeal before the Junior Board of Discipline and later dismissed on 3rd December 2010.
5. The Grievant appealed the dismissal but withdrew it by letter dated 16th May 2012 which was acknowledged by the University by a letter dated 23rd May 2012.
6. The Grievant avers that the act of dismissing him from employment was without any reasonable cause whatsoever and was not justified, too harsh and tainted with malice.
7. He avers that the dismissal was also unprocedural and contrary to law. He contends that he was just a victim of circumstances by virtue of his position of running the University's generators.
8. He prays that this Court finds for him and reinstate him to work or in the alternative finds that he was wrongfully terminated and therefore order compensation for him plus costs of this case.

9. The Respondents filed their Memorandum of Response on 22nd October 2013 through the firm of Mohammed Muigai Advocates. They deny that the Claimant had a clean record until 8th December 2010.
10. They admit employing the Claimant as stated but state that the Claimant was suspended on 5th March 2010 pending his appearance before the Junior Board of discipline on account of being in possession of 10 jerricans each containing 20 litres of diesel belonging to the Respondent.
11. The Respondents further aver that the Claimant was given an opportunity to state his case before the Junior Board of Discipline before this decision to dismiss him was made.
12. On the assertion that the Respondents withdrew the charge before the Chief Magistrate's Court, the Respondents submit that this was informed by the Magistrate's advice to the parties to consider an out of Court settlement and by then, they had completed their disciplinary action against the Claimant.
13. The Respondents therefore deny that the dismissal was unlawful and unprocedural and contrary to the law.
14. The Respondents aver that they conducted investigations in the matter and aver that on 2nd/3rd March 2010 night 10 jericans full of 20 litres of diesel were intercepted in a lorry as it made its way out of the University. The driver was one Mr. Andrew Amutalla. He was questioned and in a written statement said that the Claimant is one who requested him to ferry out the diesel from the generator room to an undisclosed destination.
15. That the Claimant called him and directed him on where to pick the diesel. When Amutalla was found with the diesel, he was arrested and taken to Kawaha Sukari Police Station. The Claimant was also arrested and both were charged in the Chief Magistrate's Court Makadara.
16. The Claimant was suspended on 5th March 2010 pending investigations. He was later invited for a disciplinary hearing before the Junior Board of Discipline. He appeared before the Board where he defended himself and presented his evidence. After the hearing, he was found guilty of the charges and dismissed. He was informed of his right to appeal (KU 6).
17. Indeed, he appealed but later withdrew the appeal. The Respondents therefore aver that the dismissal was proper and urge the Court to dismiss the Claimant's case accordingly.
18. The Respondents attached Amtalla's statement as their evidence and proceedings of the Disciplinary Board Hearing.
19. The Claimant filed his submissions on 24th June 2015 and they submit that the Respondent's action of dismissing the Claimant because he was facing criminal proceedings amounts to unfair labour practices. They also aver that the disciplinary hearing was unfair as the reasons given for dismissal were not valid as the Claimant was not convicted in any Court of law.
20. The Claimants want this Court to find for the Claimant and award him as prayed in the claim.
21. The Respondents also filed their submissions on 6th November 2017 where they reiterated that the Claimant's dismissal was justified as he was given a fair hearing and seek that the claim be dismissed.
22. I have considered the evidence and submissions of both parties. I set the following as the issues for determination:

1. Whether there were valid reasons to warrant dismissal of the Claimant

2. Whether due process was followed before the Claimant was dismissed.

23. On the 1st issue, the Claimant was dismissed vide a letter dated 3rd December 2010 which stated that the reasons for dismissal were that he colluded with one Mr. Amutalla to steal from the University contrary to Section 44(4) (g) of Employment Act and Article 5.3 of the Respondent's terms of service.

24. The question then this Court needs to interrogate is whether the above reasons were valid and did indeed exist. Section 43 of Employment Act envisages that an employer must prove the reason or reasons for termination and these reasons are matters that the employer at the time of termination of the contract genuinely believed to exist and which reasons caused the employer to terminate the services of the employee. These reasons must in my view be real and tangible and not merely speculative.

25. In the case of the Claimant, it is in evidence that the Claimant was a boiler attendant and he was in charge of the boiler room where diesel was stored. It appears that diesel was either stolen or removed from the boiler which diesel was found in possession of the driver Amtalla. The driver then implicated the Claimant as the person who gave him the diesel to transport to an unknown place.

26. The Claimant indeed denied this fact stating that the boiler-room must have been opened in by some unknown people and that he never gave the diesel to the said driver. The Junior Disciplinary Committee heard and considered this issue and from the proceedings observed that the key to the boiler room could have been duplicated. They also noted that the right guard who arrested the driver did not record any statement. The security report was not availed to them.

27. In my view, the Junior Board left many questions unanswered and the only evidence at their disposal was that of the driver which the Claimant contested. The entire disciplinary proceedings were not placed before this Court.

28. That being the case, it is apparent that the Board never made conclusive findings that indeed the Claimant colluded with the driver. The Claimant was also charged before a criminal Court with an offence of stealing but the Respondent went ahead and withdrew the charges.

29. That being the case, this Court finds that there was no conclusive and valid reason, which led to the dismissal of the Claimant. What was left and is left before Court is evidence, which is merely speculative, and suspicion however strong cannot be a valid reason to dismiss an employee. I therefore find that there were no valid reasons to dismiss the Claimant.

30. On the 2nd issue, I find that the Claimant was taken through a valid and proper hearing process. This, the Claimant admits and the minutes of the disciplinary hearing have been attached. The minutes are however incomplete and thus it is not easy to discern what really transpired in those proceedings.

31. That being the Court's finding, I conclude that the dismissal of the Claimant was unfair and unjustified for lack of valid reasons. Section 45 of Employment Act 2007 on other hand states as follows:-

1. "No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove:-

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

4. A termination of employment shall be unfair for the purposes of this Part where:

a. the termination is for one of the reasons specified in section 46; or

b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider:

a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

b. the conduct and capability of the employee up to the date of termination;

c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

e. the existence of any previous warning letters issued to the employee.

32. I therefore find for the Claimant and I award him as follows:-

1. 1 months salary in lieu of notice = 29,200/=.

2. 12 months salary for unlawful termination= 12 x 29,200 = 350,400/=

Total = 379,600/=

3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 13th day of February, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Onyonyi holding brief for the Claimant – Present

Muigai for Respondent – Present