



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 458 OF 2016

JANET MELLY OTIENOCLAIMANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for reinstate to employment by the Claimant following an alleged unfair and unlawful termination of his employment by the respondent on 29.9.2015. In the alternative, the claimant prays for compensation for the alleged unfair termination, salary in lieu of notice, pension loss of future earnings, costs and interest.

2. The Respondent has admitted that she had employed the claimant until 29.9.2015 but denies that she unfairly terminated her services. It is the defence case that she dismissed the claimant for the offence of presenting to her, forged certificates for purposes of securing employment and/or promotion. It is further defence case that she accorded the claimant a fair hearing before the dismissal.

3. The suit was heard on 15.6.2017 and 19.6.2017 when the claimant testified as Cw1 and the respondent called her HR officer, discipline Mr. Marco Ngolia as Rw1. All the documents filled as exhibits by both parties were admitted in evidence by consent without calling the makers. After the close of the hearing, both parties filed written submissions.

Summary of claimant's case

4. Cw1 stated that he was employed by the respondent in May 2007 as casual labourer Marine Engineering and the only document used to secure the job was her National Identity card. On 14.4.2008 she was employed on seasonal contract basis which was renewed severally. In the meanwhile, she pursued training and courses to enhance her capacity as a result of which she earned promotions and later appointment on permanent and pensionable terms in 2014.

5. On 29.9.2015, she was dismissed on allegation that she presented a fake form four KCE certificate for 1987 for purposes of securing employment and promotion from the respondent. She denied the alleged offence and contended that the copy of the KCE certificate Division II used by the respondent was not presented by her. She maintained that she did her KCE examinations in 1987 and achieved Division III and not Division II. She therefore denied that she fraudulently and unlawfully secured employed and promotion from the respondent using forged KCE certificate and contended that the respondent had no

capacity to determine that she had forged the alleged certificate.

6. On cross examination, Cw1 admitted that she filled Employee Details Form indicating that she achieved KCE certificate Division II in 1987. She further admitted writing the letter dated 29.6.2009 requesting for appointment on a training Grade and stating that she held KCSE Division II for 1987. She also confirmed that she was served with a Show Cause letter dated 18.2.2015 alleging that she had presented to her forged KCE Certificate for purposes of securing employment and/or promotion and she responded denying the alleged offence and requested for a personal hearing to defend herself. Finally she confirmed that she was accorded the hearing through an Inquiry Committee on 29.7.2015 where he denied the offence and produced her original KCE certificate but she was dismissed by the letter dated 29.9.2015.

7. However, on further cross examination, she confirmed that during the disciplinary hearing she admitted that she filled and signed the Employee Details form indicating that she achieved KCE Division II in 1987 by her own hand. She also admitted that during the said hearing she admitted that she wrote the letter requesting for grading indicating his qualification as KCE Division II but explained that the same was a typographical error. She further admitted that when the committee of inquiry asked her how the forged KCE certificate got to her personnel file, she responded that a mistake had happened. She however maintained that the decision to promote her was the sole prerogative of the managers of the scheme of service.

Defence case

8. Rw1 confirmed that Cw1 was employed by the respondent as a casual Cleaner on 19.2.2007 up to 28.3.2008 when she was offered seasonal contract upon being found qualified as holder of KCE Division II. As per the respondent's policy, the claimant accepted the offer by the letter dated 8.4.2008 and filled Employee Details Form dated 8.4.2008 indicating that she was holder of KCE Division II. By letter dated 29.6.2009 she applied for promotion to training grade on the basis that she had enrolled to a Diploma course in HR at the University of Nairobi. She repeated her qualification of KCE Division II and attached copy of the KCE Division II certificate to the application among other testimonials.

9. On 27.7.2009, the claimant's request was approved and she was appointed to a Trainee Grade but still on periodic contract. Thereafter she was confirmed to working grade by the managing Director (MD) vide an Internal Memo dated 25.2.2010. The claimant's contract at the Marine Engineering continued being extended until 2.11.2012 when she was offered a chance to convert to permanent and pensionable employee and she accepted by her letter dated 15.11.2012. The said conversion was confirmed by letter dated 19.3.2014.

10. Rw1 stated that by letter dated 27.6.2012, the Public Service Commission (PSC) issued a circular to all State Corporations to undertake the authentication of academic and professional certificates for all their officers. On 9.7.2012, the Permanent Secretary Ministry of Transport wrote to the respondent to authenticate all her employees' certificate as per the PSC directive. As a result, the respondent submitted all the certificates presented by the claimant among other employees to the Kenya National Examination Council (KNEC) for authentication. On 23.8.2013, the KNEC wrote a report highlighting several irregularities in the claimant's KCE certificate and concluding that it was a forgery.

11. On 16.4.2015, the claimant was served with a Show Cause letter accusing her of the said offence of forging the KCE certificate and she responded denying the offence and requesting for a personal hearing. She was invited to the hearing by the letter dated 28.7.2015 which gave him the option of being accompanied by a coworker of his choice. The personal hearing was done on 29.7.2015 before a committee of Inquiry where she appeared alone and denied the offence. However, after considering the claimant's defence, the committee found her guilty of the offence charged and recommended for her summary dismissal. Thereafter the respondent's Board of Directors approved the recommendation by the committee and the claimant was dismissed by letter dated 29.9.2015.

12. On cross examination, Rw admitted that promotion and change of terms of service was the

responsibility if the respondent. He further admitted that the claimant was employed on the basis of experience and competence. He explained that the scheme of service for the claimant's position was KCSE certificate or one or more years' experience. He confirmed that KCE certificate was equal to KCSE certificate. He clarified that initially that the claimant presented KCE certificate Division II but when she applied for a departmental transfer on 6.12.2012, she attached KCE certificate Division III.

Analysis and Determination

13. The parties framed the following issues for determination:

- (a) Whether the respondent had the mandate to deal with and determine whether the offence of forgery had been committed.*
- (b) Whether the reason for dismissal cited in the letter dated 29.9.2015 was valid and just.*
- (c) Whether the procedure followed in terminating the claimant's employment was fair.*
- (d) What orders should the court make.*

Mandate to deal with and determine forgery

14. It is trite law that the employer has every right to discipline her employees. Section 44 of the Employment Act entitles the employer to summarily dismiss his employees for gross misconduct subject to the mandatory statutory procedural safeguards being observed before the dismissal is sealed. As regards the capacity to determine whether or not the offence of forgery has been committed, it is my opinion that she does not have that capacity. However in this case she has explained that she forwarded the KCE certificate Division II allegedly presented to her by claimant to KNEC for authentication and the KNEC reported back that the certificate was forged. It is that verification report by the examining body and the admission by the claimant that, from the start of her formal employment by the respondent she indicated that she held KCE certificate Division II contrary that led to respondent to believe that the material certificate was forged.

Reason for termination

15. In this case there is no dispute that the contract of service was terminated by the respondent through summary dismissal on 29.9.2015. Under section 45(2) (a) and (b) of the Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was founded on valid and fair reason(s). A valid reason is one which is true in the subjective construction of the employer and which justifies termination of the employee's contract. Section 43 (2) of the Act defines reason(s) for termination of employment contract as:

“the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employer.”

16. On the other hand, under section 45(2) (b) of the Act, a reason for dismissal is fair or just if: it relates to the employees conduct, capacity and compatibility; or it is related to the operational requirements of the employer. In this case the reason for the dismissal of the claimant from service are cited in the Show Cause letter dated 18.2.2015 according to the dismissal letter dated 29.9.2015 which stated thus:

“You will recall that you were issued with a letter inviting you to show cause why you should not be dismissed from service of the Authority, for reasons contained in the said letter.”

17. The Show Cause letter dated 18.2.2015 outlined the reason as follows:

“You altered subject grades in the following subjects; English language (115), Literature in English (205), Christian religious education (228) and Biology(544). The overall result was also

altered from Division III (three) to Division II (two).

You were employed and/or promoted on the basis of forged documents and for that reason you are earning salary illegally. The offence you are accused of if proved, would amount to gross misconduct justifying summary dismissal.”

18. As stated herein above, the respondent relied on the verification report given by the KNEC, to prove that the claimant was employed and/or promoted on the basis of forged academic certificate which she presented to her. The report was conveyed by the letter dated 23.8.2013 by Nabiki Kashu, who is the Head of section KNEC Archives & Records. The letter stated as follows:

“CONFIRMATION OF ACADEMIC CERTIFICATES We are in receipt of your request on the verification and confirmation of the authenticity of academic certificates for your employees. Photocopies of the results slips/ certificates were also submitted for the purpose. Upon verification, twelve (12) copies were of certificates/ result slips were found to have been obtained from forged documents as follows:-

1.

2. Janet Meely Otienoh 1987 KCE examination, index number 74032075, Mawego Girl's Secondary School Records indicate that Janet Meely Otienoh was a bona-fide candidate who registered and sat for the 1987 KCE examination at Mawego girl's Secondary under index number 74032075. However , she altered subject grades in in the following subjects; English language (115), Literature in English (205), Christian religious education (228) and Biology(544). The overall result was also altered from Division III (three) to Division II (two).”

19. In addition the respondent relied on the Employee Details Form made by the claimant when she was formally employed by the respondent on 8.4.2008 and her application for appointment and/or promotion to training Grade dated 29.6.2009 to prove the offence by the claimant. By the two documents, the claimant indicated that she was a holder of KCE Certificate Division II attained 1987 and attached the said certificate as a testimonial. The claimant admitted filling the said Employee details Form and also writing the said application for training grade during his disciplinary hearing.

20. After considering the said verification report obtained from the examining body, and upon comparing the same with the Employee details Form filed by the claimant during her employment on 8.4.2008 that led to appointment on 14.4.2008 and her application for appointment into a training grade dated 29.6.2009 which led to appointment to the said position and later confirmed to permanent and pensionable employment, I find that the respondent has proved on a balance of probability that there existed reasonable and sufficient grounds for suspecting that the claimant had forged the KCE certificate in order to secure employment and/ or promotion from her.

21. The said conduct was dishonest and it was done to mislead the respondent into believing that the claimant had met the requisite qualifications for appoint to the training grade. According to the internal Memo dated 10.3.2010 by the Personnel Manager produced by the defence, the scheme of service for appointment to Grade HG3/HG2 was KCSE (B) or KCE Division II as the minimum academic qualification plus a diploma in HR management or Business Administration or Commerce, computer literacy and 3 years' experience. On a balance of probability, therefore I find that the claimant fraudulently misrepresented his KCE grade which induced the respondent to employ her. The said misrepresentation being an act of dishonest amounted to a valid and fair reason that justified summary dismissal of the claimant from service.

Fair procedure

22. The claimant has admitted that she was served with a letter to Show Cause why she should not be dismissed for the misconduct herein and that she indeed responded denying the offence and also requesting for a personal hearing so as to defend himself. The claimant has also admitted that she was

accorded the personal hearing by an Inquiry Committee set up by the respondent and she defended herself. The said hearing was in compliance with section 41 and 45 (2) (b) and (5) (c) of the Employment Act and the respondents HR Manual and Disciplinary Hand book.

Reliefs

23. In view of the finding herein above that the respondent has proved that the dismissal of the claimant was founded on a valid and just reason and that a fair procedure was followed before dismissing herein, I decline to make declaration that the termination of her employment was unfair and unjust as prayed. I also decline to order reinstatement to her employment or to award her any compensation. I will also not award her any damages for loss of future earnings because there is no legal or contractual basis for such remedy. The claim for pension is also declined and instead the claimant referred to the pension scheme to lodge her claim in accordance with rules of the scheme.

Disposition

24. For the reasons that summary dismissal of the claimant was justified and that it was done after following a fair procedure, the suit is **dismissed**. Each party to bear his or her own costs.

Signed and dated and at Nairobi this 15th day of March, 2018.

ONESMUS N. MAKAU

JUDGE

Delivered at Mombasa this 26th day of April, 2018.

LINNET N. NDOLO

JUDGE