



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 372 OF 2013

[FORMERLY MOMBASA H.C.C.C NO. 276 OF 2005]

BETWEEN

ONGORO OYUGA WEDACLAIMANT

VERSUS

1. KENYA PORTS AUTHORITY

2. MURIITHI MUGAMBIRESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Nyadwat Odundo & Company Advocates for the Claimant

Legal Department KPA for the Respondents

JUDGMENT

Pleadings and File history

1. This Claim was originally filed at the High Court in Mombasa, in the year 2005. It was transferred to the Industrial Court [presently Employment and Labour Relations Court], through an order of the High Court on 4th November 2013. Through the Amended Statement of Claim filed on 11th July 2014, the Claimant states he was employed by the 1st Respondent on 24th May 1980, until 17th August 2005. His contract was terminated by the 1st Respondent on the former date, on the allegation that the Claimant was involved, in falsification of Purchase Requisition Form for Safety Performance Boards. He held the position of Senior Clerical Officer Grade HG [PA6], earning a basic monthly salary of Kshs. 27,750, and standard house allowance of Kshs. 9,320.

2. He avers the allegations against him were investigated by the Police. He was investigated internally by the Committee of Inquiry. In either case, he was absolved. Inexplicably the 2nd Respondent, who served as the 1st Respondent's Human Resource & Administration Manager did not implement the recommendation of the Committee of Inquiry. The 1st Respondent unfairly and unlawfully sent the Claimant on retirement in Public Interest. He avers allegations against him, leading to this decision, were instigated by the 2nd Respondent. The 2nd Respondent acted maliciously, causing the Claimant's loss of reputation in the estimation of Colleagues and right thinking Members of the Public. The Claimant states he was defamed. He was 48 years old at the time of retirement, and had worked for 25 years. He was 60 years at the time of filing the Amended Claim. He prays for Judgment against the Respondents for:-

- a. A declaration that retirement of the Claimant in Public Interest was unfair and unlawful, and the same is reduced to normal retirement with all benefits paid to the Claimant, or retirement in Public Interest is set aside in its entirety.
- b. The Claimant is reinstated forthwith, and treated as if his employment had not been terminated.
- c. Damages for breach of contract of employment and for wrongful and unfair dismissal, and equivalent of 12 months' salary in compensation at the current gross salary rate of Kshs. 106,650.

d. Aggravated general damages for defamation against the 2nd Respondent.

e. Costs and interest from the date of filing Claim.

3. The 1st Respondent filed Re-Amended Statement of Response on 23rd July 2014. It concedes the Claimant was employed by the 1st Respondent on the dates stated in the Claim. He was retired in Public Interest as stated in his Statement of Claim. He was lawfully and properly charged under Kenya Ports Authority Staff Regulations for fraudulently altering Purchase Requisition Form Serial Number 011103. He appeared before a Committee of Inquiry to answer the charges. The Reports that followed this process, absolving the Claimant were not binding on the 1st Respondent. These were forms of persuasive information in the hand of the Decision-Maker. They did not constitute conclusive information warranting reinstatement of the Claimant. The Claimant was subsequently found guilty upon hearing of the relevant Witnesses and for this reason he was retired in Public Interest. The 1st Respondent states that the Claimant was paid full terminal dues at Kshs. 994,997.20, and is being paid monthly pension of Kshs. 12,437. 47.

4. The 2nd Respondent filed a Statement of Defence on 15th February 2006 at the High Court. He denies that he in any way defamed the Claimant. Any actions taken by the 2nd Respondent in the matter were justified, made in the ordinary course of employment, and without malice at all. Lastly, the 2nd Respondent holds he did not employ the Claimant, and is not liable to the Claimant on any employment issue. He prays the Claim against him, is dismissed with costs.

5. All documents filed by the Parties were consensually admitted as their respective exhibits, and hearing commenced on 4th March 2015. The Claimant gave evidence on this date and on 29th September 2016 when he closed his case. 2nd Respondent gave evidence on 8th February 2017 and on 6th November 2017. The 1st Respondent called its retired Human Resource Officer Marco Ngolia, who gave evidence on 8th February 2018, bringing hearing to a close. The matter was last mentioned on 8th June 2018, when Parties confirmed the filing of their Submissions.

Claimant's Case

6. The Claimant testified he was initially employed by the 1st Respondent in 1980 as a General Labourer. He rose to become Expenditure Clerk. His last basic salary was Kshs. 27,850 and house allowance of Kshs. 9,380 monthly. He had worked for 25 years on termination. He was 50 years as of the date of termination. He expected to continue working for 10 years.

7. His duties entailed placing orders for materials. His Head of Department was the 2nd Respondent. The 2nd Respondent asked the Claimant to place an order for Safety Performance Board. It was to be fixed at the 1st Respondent [KPA]. The Board was meant to show how operations at the Port went on. The 2nd Respondent gave the Claimant verbal instructions. He told the Claimant to get details from the Head of Department Safety, R.H. Jin. The Safety Department gave the Claimant details of the Safety Performance Board. The price was Kshs. 350,000. The Claimant could not recall the exact size of the Board. The Requisition Number was 10010992. The system was self-updating.

8. The 2nd Respondent returned from a journey, and subsequently advised the Claimant to change the requisition to have a quantity of 3 Boards. The Claimant deleted quantity and re-keyed in the system to show 3 Boards. The total value changed to Kshs. 1,050,000. He sent the amended Requisition to the 2nd Respondent. It was the 2nd Respondent who would access the amended document from his e-mail, open it and release to the Clerk. The Claimant could only have access again, after the Senior Clerk sent the amended Form to the Claimant.

9. The amended Form was approved by the Claimant's Manager. The Manager would then forward the Form to the Procurement Manager. The workflow record is captured at page 104 of the Claimant's bundle of documents.

10. The 2nd Respondent later called the Claimant, asking the Claimant how the order for Safety Board went. The Claimant told the 2nd Respondent the Claimant did not know how it went. The Claimant later received a letter of interdiction dated 2nd July 2004 from the 1st Respondent, alleging the Claimant falsified the Requisition. The Claimant testified he did not falsify the Requisition.

11. The amount stated in the amended Requisition was Kshs. 1,050,000, not Kshs. 3,081,655.50 as given in the letter of interdiction. The Claimant responded to the letter as shown at page 89 of his documents. He reiterated he had the instructions of the 2nd Respondent in amending Requisition.

12. The Claimant appeared before a Committee of Inquiry. He was heard in the presence of his departmental Shop Steward. The 2nd Respondent refused to attend hearing. The Claimant restated his position. The 2nd Respondent presented himself later. The 2nd Respondent explained that Jin could have caused further change to the order. Jin confirmed this was done, to cover Kisumu, Nairobi and Mombasa. The Committee recommended interdiction is lifted, and the Claimant transferred to another department. The Personnel Manager made the same recommendation to the Human Resources Manager. Human Resources Manager insisted it was a fraud case, and should be left to the Police. Police exonerated the Claimant.

13. The Respondents alleged the Claimant failed to give a hardcopy of the Requisition document to his Manager. The 1st Respondent operates a paperless system, where hardcopies are outmoded. The Claimant prepared Requisition Form on 5th March 2004, which the 2nd Respondent signed. This was merely a departmental record, which was not physically forwarded to the Procurement department. The Claimant was retired in Public Interest. He was paid terminal benefits. He has approached the Court because of wrongful termination. He adopts his Witness Statement on record. He testified that he wished to be reinstated, as he had 8 months left before retirement [as of the date of testifying]. Alternatively he seeks compensation based on the current monthly salary applicable to his grade, at Kshs. 106,650. He prays for costs and interest.

14. Cross-examined, the Claimant told the Court he filled the Requisition Form at page 101 of his bundle of documents. It was filled if an order was required. It was filled by the Expenditure Clerk. The Claimant held this position. Quantity required was 1 Board, at Kshs. 350,000. The Claimant took the Form to the 2nd Respondent, who signed the Form.

15. After this, the Claimant keyed the Requisition in the computer. If another item was to be procured, it would follow the same procedure. The Claimant altered the Form from 1 Board to 3 Boards. He did not get the authorization of his Manager to do this. He was familiar with the procurement system- System Application Product [SAP]. The system is shown at page 103 of the Claimant's documents. The Claimant was instructed by his Head of Department to alter quantities to show 3 Boards. The Claimant conceded there was no provision for verbal authorization to change Requisitions. He was interdicted for the alteration. He asked for personal hearing. Hearing was granted. He was represented by his Union's Chief Shop Steward. He was retired in Public Interest. The 1st Respondent found him guilty. Reason given for retirement in Public Interest was valid.

2nd Respondent's Case

16. The 2nd Respondent gave evidence before the 1st Respondent. He adopted his Witness Statement filed on 28th October 2014. There were goods to be procured by User department through its clerk. The 2nd Respondent headed Safety and Health department. Expenditure Clerk was the Claimant.

17. Quantity initially was 1, not 3 Boards. At page 103 of Claimant's bundle of documents this was altered to show 3 Boards. The 2nd Respondent did not authorize procurement of 3 Boards. He realized there was change to 3 Boards later. He wrote to the Procurement Manager on 25th June 2004 pointing out there was alteration, and that alteration was highly irregular. The 2nd Respondent recommended the matter is investigated. The letter was copied to the Managing Director and Human Resources Manager. It was not personal or defamatory, but made in the course of 2nd Respondent's regular work. The 2nd Respondent did not oversee the process leading to retirement of the Claimant.

18. On cross-examination, the 2nd Respondent stated he has worked for the 1st Respondent for about 30 years. Requisition was for 1 Board. 2nd Respondent approved the Form. The Form would be sent to Procurement department through the computer system. If it had errors, it was supposed to revert to the 2nd Respondent. Delivery dates in the Form are shown as 5th March 2004 and 9th March 2004. First date was shown as cancelled, with a litter bin against the entry. The 2nd Respondent approved the transaction. He did not know if somebody else had his password. The 2nd Respondent saw 3 quantities and approved.

19. The 2nd Respondent wrote to the Procurement Manager raising issue of the Claimant having made fraudulent procurement. To the 2nd Respondent's knowledge, procurement was for 1 quantity. The 2nd Respondent denied he wrote the Memorandum Number 119 of 2004 at page 113 of Claimant's documents, addressed to the Chairman Corporation Tender Committee, asking for quotations for 3 Boards.

20. The 2nd Respondent alleged the Claimant increased the price from Kshs. 350,000 to Kshs. 3.5 million. The 2nd Respondent could not recall how the Claimant is supposed to have inflated the price. He was not aware his allegations led to retirement of the Claimant. His juniors proposed requisition of 3 Boards. The Chairman of the Committee of Inquiry said when the 2nd Respondent appeared before the Committee, he confirmed 3 quantities. The 2nd Respondent could give instructions to the Claimant verbally. He did not have personal differences with the Claimant. He wrote the letter raising the matter against the Claimant, because quantities were altered.

21. Redirected, the 2nd Respondent testified that the Claimant should not have gone against the Managing Director's approval for procurement of 1 Safety Board. The Claimant conceded he was aware of his department's budgetary constraints. There was no money to buy 3 Boards. 1 Board was valued at Kshs. 350,000. 3 Boards would not amount to Kshs. 3 million. There was inflation. The 2nd Respondent did not intend to malign the Claimant by writing the letter. It was internal document, made in the course of duty.

1st Respondent's Case

22. Marco Ngolia adopted his Witness Statement on record as his evidence in chief. The Statement is basically a rehash of the Statement of Response, whose contents are summarized by the Court at paragraph 2 of this Judgment.

23. Cross-examined, Ngolia told the Court any Person placed in authority could issue interdiction letter, subject to approval of the Managing Director. Charge sheet is then drawn, and presented to the Employee. The interdiction letter itself contains particulars of the offence.

24. Recommendation of the Committee of Inquiry is not binding. It can be reviewed by the Managing Director or other authorized Persons. The Committee absolved the Claimant. The Human Resources Manager recommended the matter is investigated by the Police. The DCIO in a letter dated 24th February 2005 found there was no prima facie case against the Claimant and referred the matter back to the 1st Respondent. The Human Resources Manager recommended retirement of the Claimant in Public Interest to the Managing Director. The Managing Director approved this recommendation. The 2nd Respondent was found to have been negligent. Ngolia did not know if the Claimant benefitted from the alleged falsification of Requisition Form.

25. Redirected, Marco Ngolia told the Court interdiction of an Employee of the 1st Respondent, comes after approval of the decision by the Managing Director. The Managing Director relied on information from the Claimant's department in approving decision against the Claimant. The procurement transaction was documented, and the action against the Claimant based on these documents. Details of the offence were given before the Committee of Inquiry. The Committee of Inquiry and the Personnel Manager recommended the Claimant is assigned to another department. The Human Resources and Administration Manager did not agree, and recommended the matter is

investigated by the Police. The Police in turn, referred the matter back to Human Resources Manager who recommended to the Managing Director that the Claimant is retired in Public Interest. The Managing Director approved retirement. The Claimant was not involved before change in the recommendation. Ngolia did not know if action was taken against the 2nd Respondent. It is possible the Claimant should have been promoted by 3 grades if not retired prematurely. Ngolia conceded at some point, the matter was not handled properly. Management should have gone by the recommendation of the Police.

26. The issues as understood by the Court are:-

- Did the action taken by the 2nd Respondent against the Claimant amount to defamation of the Claimant, and is the 2nd Respondent liable to the Claimant, in tort or contract?
- Was retirement of the Claimant by the 1st Respondent in Public Interest fair and lawful?
- Is the Claimant entitled to the remedies sought?

The Court Finds:

27. Details of the Claimant's employment history with the 1st Respondent, the terms and conditions of employment, and the fact that he was retired by the 1st Respondent in Public Interest, are not contested.

28. With regard to issue number 1, it is important to observe that the 2nd Respondent, Muriithi Mugambi, was at the material time, Manager, Health, Safety and Environment. The Claimant served under the 2nd Respondent, as Senior Clerical Assistant [Stores], also referred to in the proceedings in Court, as Expenditure Clerk.

29. The letter alleged to have been defamatory of the Claimant, was written by the 2nd Respondent on 25th June 2004, to the Procurement Supplies Manager, and copied to the Managing Director, Human Resources and Administration Manager, and Personnel Manager.

30. The letter states that the 2nd Respondent had realized the number of Safety Performance Boards had been altered from 1 to 3, contrary to the Managing Director's approval. He alleged that the Claimant fraudulently altered the Requisition Form. Alteration justified dismissal of the Claimant from service. The alteration had the effect of changing the cost from Kshs. 350,000 for 1 Board, to Kshs. 3,081,655.

31. The Court does not think this letter was defamatory to the Claimant. It was not sent to all and sundry at the 1st Respondent. It was confined to Superiors. There was no malice shown by the 2nd Respondent in writing this letter. It is addressed to Superior Officers of the 1st Respondent, who had legitimate interest and obligation, to know about, and pursue the matter under communication. There are some elements of truth, in the letter communicated to Superiors: It was the Claimant who made the change in the Requisition Form, from 1 to 3 Boards; approval by the Managing Director was for 1 Board; the change brought the cost up from Kshs. 350,000; and, if shown to have amounted to an employment offence, alteration would justify dismissal of the Claimant from service. These are some elements of truth, contained in the 2nd Respondent's letter. The Claimant has not established defamation, to warrant general damages from the 2nd Respondent. The 2nd Respondent acted under qualified privilege, and was largely truthful in his letter. Defamation law does not allow truth, to give rise to liability.

32. The 2nd Respondent acted as an Employee of the 1st Respondent, in taking action against the Claimant. He cannot be held liable for any damages arising out breach of the employment contract, or be called upon to compensate the Claimant for unfair termination of employment under statute. He did not employ the Claimant. Although employment law recognizes that a Manager can be an Employer, there is no evidence that the 2nd Respondent ever employed the Claimant, or could be deemed to have employed the Claimant, to justify imposition of Employer's liability on the 2nd Respondent.

33. The Court finds the Claimant has no cause of action against the 2nd Respondent. **The Claim against the 2nd Respondent is dismissed with no order on the costs.**

34. On issue number 2, the Court observes that the 1st Respondent's Management decided as far back as the year 2000, to procure Safety Performance Boards. In 2001, the Manager Safety Health and Environment, sought approval from the Managing Director for procurement of 7 Safety Boards. The Managing Director approved procurement of 1 Safety Board. A supplier was sourced to provide 1 Board, but supply was discontinued due to poor workmanship.

35. The issue was resurrected in the year 2004, when the Manager Health, Safety and Environment, 2nd Respondent herein, gave verbal instructions to the Claimant to requisition for 1 Board. The Claimant states he filled Requisition Form for 1 Board, but was later instructed by the 2nd Respondent to adjust this to read 3 Boards. The 2nd Respondent's position is that the Claimant acted unilaterally and did not bring the altered Form to the 2nd Respondent. In effect the cost of procurement was raised from Kshs. 350,000 to over Kshs. 3 million.

36. The Claimant was subsequently interdicted, and taken through a Committee of Inquiry. The Committee found that procurement transaction in the Claimant's department should be reviewed. Documents should not flow directly from the Clerk to his Manager. In the particular case, the Principal Safety Officer should have examined the Requisition Forms, before they were submitted to the 2nd Respondent for endorsement and forwarding to Procurement department.

37. It also found that the transaction went before the Tender Subcommittee. The 2nd Respondent and his 2 Officers were in this Subcommittee. 3 Safety Boards were discussed by the Subcommittee. The 2nd Respondent did not raise objection on the quantity. The

Corporation Tender Committee was informed about 3 Boards, with priority for procurement of the 1st Board for Mombasa Port. The Committee of Inquiry found that the Claimant did not destroy the altered Requisition Form, suggesting he would have done so, if he had anything to hide. It was not possible to say that the Claimant intended to defraud the 1st Respondent. Subsequently, it was recommended by the Committee of Inquiry that the Claimant's interdiction is lifted, and he is transferred to another department.

38. In his Report to the Human Resources and Administration Manager dated 22nd September 2004, Personnel Manager Chingabwi endorsed the recommendations of the Committee of Inquiry. The Human Resources and Administration Manager reviewed the Reports submitted to him by Personnel Manager. He was not satisfied with their evaluation of evidence, and poked holes at certain findings. He recommended the matter goes to the Police. The Police found nothing to warrant criminal proceedings and referred the matter back to the Human Resources Department. It was in the end recommended by HRAM to the Managing Director, that the Claimant is retired in Public Interest.

39. The Court is satisfied that the Managing Director was not bound by the findings and recommendations of the Committee of Inquiry. At the bottom of the matter, is that the Managing Director had approved procurement of 1 Board. This was based on what the department of Health, Safety and Environment budgetary allocation could afford. It was about the financial management of the 1st Respondent. This was known to all involved Offices, including the Claimant's and the 2nd Respondent's. The Claimant went along with the wishes of other Officers such as Mohammed Jin and J.H.Ogoll, and altered procurement to 3 Boards. The line taken by these Officers at the Inquiry was that the Corporation Tender Committee had already sent out quotation for 3 Safety Boards, and that Requisition for 1 Board would therefore not be accepted. Why would there be quotations sent out, even before proper requisitioning had been completed? The 2nd Respondent, appears to have been complicit, otherwise he would not have turned a blind eye, when 3 Safety Boards, rather 1 approved by the Managing Director, were discussed by the Tender Subcommittee. He was prepared to let the Claimant make amendments to the original Requisition Form, in March 2004. It is also highly likely that the 2nd Respondent wrote the Memo to the Chairman of the Corporation Tender Committee dated 5th May 2004 recommending Coast Industrial and Safety Suppliers Limited, for supply of 3 Boards offered at Kshs. 3,081,665. The amount given by the Claimant after he altered the Form, for 3 Boards was Kshs. 1,050,000. The 2nd Respondent denied writing this Memo, but the Court does not buy his evidence on this. The amount of Kshs. 3,081,665 was the amount quoted by the Supplier who the 2nd Respondent endorsed. The 2nd Respondent only wrote the letter dated 25th June 2004 complaining against the Claimant to the Managing Director among others, more than 3 months after the 2nd Respondent commenced the dubious Requisition, probably upon recollection that the Managing Director had approved only procurement of 1 Board. In other words, the Claimant, the 2nd Respondent, Officers in the Tender Subcommittee, and the Corporation Tender Committee, from the trail of papers on record, seem to have been complicit in procurement of 3 Safety Boards, rather than 1 Safety Board approved by the Managing Director. The 2nd Respondent, in fact, gave the price of 1 Board, in his letter of 20th February 2004 addressed to the Procurement and Supplies Manager, as approximately Kshs. 150,000. A Month later, this approximation went up more than twice at Kshs. 350,000. Subsequently, the whole procurement was distorted quantitatively to 3 Boards, valued at Kshs. 3,081,665. How would the 2nd Respondent justify his position? The 2nd Respondent was not just an innocent Manager, who placed too much trust on his Clerk, as the Committee of Inquiry Report appears to suggest; he was in the thick of things.

40. The Court does not think however that involvement of other Officers in disregarding the approval of the Managing Director can have any effect on the culpability of the Claimant. He was not bound to take instructions from other Officers, contrary to what the Managing Director had approved. He was conversant with requisition procedure. He was an Officer of longstanding and was there when procurement of Safety Boards was first floated. He knew if 2 more Boards were needed, he would have to fill in fresh Forms, and go through another process of requisitioning. There was no room for cut and paste, delete and insert, quantities and costs of requisitioned items, in one Form. It is not relevant that the Claimant did not know who suppliers of the Boards would be, and that it was not shown in what way, he stood to benefit by altering Requisition Form. The Court does not think the fact that he altered the total value to Kshs. 1,050,000 for 3 Boards, and not Kshs. 3,081,665, absolved the Claimant. Of relevance is that he altered the Form contrary to the accepted standard of requisitioning, and aided in trashing approval for 1 Board, made by the Managing Director. He aided, what to the Court looks like a corrupt procurement transaction-in-the-making. Whether he stood to pocket something at the conclusion of the deal, is not an exculpatory consideration, in determining if the Claimant was engaged in an employment offence. If instructions came from the 2nd Respondent to engage in this irregularity, the Claimant was not bound to obey such instructions. Employees are only bound to obey lawful and proper instructions, which are within the scope of their duty to obey, issued by their Employers, or Persons placed in authority over them by their Employers. He ignored the procedure and was at the root of irregular alteration of Requisition Form. On cross-examination, before the Claimant engaged Counsel on the advice of the Court, the Claimant admitted he was heard before retirement, in the company of his Union Chief Shop Steward. Tellingly, he admitted that the 1st Respondent gave him valid reason for its decision to retire him. He left no room for any other finding by the Court.

41. Whereas other Officers were complicit, and can be faulted for going against the approval of the Managing Director, the lack of disciplinary measures taken against those Officers, does not exculpate the Claimant from personal responsibility. He committed an employment offence, justifying the decision to retire him in Public Interest, under the 1st Respondent's Staff Regulations. The action taken by Police did not bind the 1st Respondent. It must be clear that employment offences are not necessarily criminal offences, and the standards of proof, the nature of the offences, and trial objectives, are different. What the 1st Respondent opted to do with the other Officers, its perception of their roles in this questionable transaction, is entirely at the discretion of the 1st Respondent. The complicity of the 2nd Respondent, in the view of the Court, would not make his letter of June 2004 to the Managing Director, defamatory of the Claimant. The 2nd Respondent was perhaps cunning, shifty and careful to cover his tracks, but was not in law, libelous.

Remedies:-

42. The decision against the Claimant, in the end, seems to have been commuted to normal retirement. This is one of the alternative prayers in his Amended Claim, so that even assuming the Court has got it all wrong, in finding retirement in Public Interest justified, the Claimant still has in his hands one of his alternative remedies. The 1st Respondent exercised its discretion in imposition of penalty, in favour of the Claimant, by commuting Retirement in Public Interest to regular retirement. He was paid lump sum terminal benefits of Kshs. 994,997.20, and continues to earn monthly pension of Kshs. 12, 437. He ought to be contented with that.

43. His Claim against both Respondents has no merit and is dismissed with no order on the costs.

IN SUM, IT IS ORDERED:-

[a] The Claim is hereby dismissed in its entirety.

[b] No order on the costs.

Dated and delivered at Mombasa this 27th day of September, 2018.

James Rika

Judge