



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NO 1682 OF 2012

STEVE N MUINDE.....CLAIMANT

VERSUS

THE KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

JUDGMENT

1. The claimant brought this suit on 19/9/2012 contending that he was unfairly dismissed from his employment by the respondent on 30/5/2012. He therefore prayed for the following reliefs:

- a) a declaration that the claimant's dismissal from employment was wrongful
- b) an order that the respondent does reinstate the claimant to his position
- c) an order that upon reinstatement the respondent pays the claimant unpaid salary arrears based on his last payslip for the period commencing May, 2012 till reinstatement.
- d) In the alternative, payment of damages under section 49 of the Employment Act as follows:
 - (i) one (1) month's salary in lieu of notice Kshs.71,900.00.
 - (ii) compensation equivalent to 12 months gross salary Kshs.862,800.00.
 - (iii) severance pay for 19 years Kshs.788,134.00.Total Ksh.1,722,834.00.
- e) costs of the suit
- f) interest on prayers (d) hereinabove at court rates from date of filing suit till payment in full.

2. The respondent filed her defence on 24/12/2012 denying the alleged unfair dismissal and contending that the dismissal was for a just cause and in accordance with the law and regulations. She averred that the claimant negligently performed his work that he facilitated theft of result slips for Obera Boys Secondary School.

3. The suit was heard on 19/9/2018 when the claimant testified as CW1 and Mr. Timothy Mutiso Ngui testified on behalf of the respondent as RW1. Thereafter only the respondent filed written submissions which I have carefully considered together with the evidence tendered.

Claimant's case

4. CW1 testified that he served the respondent on 1/3/93 as a clerk on casual basis KCPE section. He worked as such until March 2000 when her permanent pensionable employee.

5. CW1 further testified that in the month April 2012, most members of staff in the KCSE section went on leave following instructions from the respondent's secretary and he was left with a lot of work to do.

On 16/4/2017, he discovered that Mr Dancun Osodo had collected results slips for Obera Boys Secondary School and wrote down all his particulars on the dispatch register and went away unnoticed. CW1 further stated that when he signed the dispatch book he presumed that the results were released by Mr Peter Ng'etich of KCPE section who he had asked for his assistance with permission from Miss Kashu. That he signed to avoid Audit query.

6. He contended that he didn't know whether the results for Obera Boys Secondary School had cheating problems until he saw investigator Mr Matenzawa bring in Mr Dancun Osodo to the office. He further contended that results could not be printed out without the authority from the respondent's secretary and his deputies including the deputy secretary computer department who was the custodian of all computers and the passwords for printing result slips.

7. CW1 further testified that on 31/5/2012, he received a dismissal letter and went to see the respondent's secretary but he got no help. Consequently he wrote an appeal letter but before delivering it to the chairman of the respondent's board, Mrs Edna Muiruri, senior deputy secretary examination administration instructed him to delete some paragraphs of his appeal letter and directed him on what to write so that she could assist him in succeeding in his appeal.

8. CW1 on concluded by contending that, Mrs Muiruri never helped him in the appeal and it was dismissed by the board after hearing him. He however maintained that his dismissal was unfair because he was not accorded any hearing except on the appeal.

9. On cross examination CW1 contended that his work did not include packing and dispatching results slips. He admitted that on 12/4/2012 he went out of the office and left it unlocked because there were ECDE personnel working inside there. He further admitted that before dismissal, he was asked to write 3 statements about the release of results slips to Obera Boys Secondary School during the investigation. He further admitted that other officers from computer department were dismissed but stated that he was the only one dismissed from the examination department.

10. CW1 further admitted that on 12/4/2012 he went out of the office for about 30 minutes and when he returned he never noticed that a person had written his name and all his details indicating that he had picked results slips for Obera Boys secondary School. That he only noticed the same on 16/4/2012 morning then appended his signature against it to confirm that he had released the result slips to the person. He admitted that what he did was not in accordance with the set procedure.

11. CW1 contended that when Mr osodo, the principal Obera Boys School was brought to the office he confirmed that he is the one who took the result slips and recorded his details in the dispatch register. CW1 admitted that he only learned during the investigations that the results for the said school had been nullified.

12. CW1 further stated that after filing his appeal he was invited to a hearing by the board on 20/6/2012 where he was asked some questions and he answered. He however contended that he was stopped from addressing the board on his appeal and told to go away and wait for further communications. That thereafter the board notified him that his appeal had failed and his dismissal confirmed.

He however admitted that after dismissal he was paid some money. He also admitted that he was being deducted NSSF dues.

13. In conclusion, he blamed his bosses for the release of the material results slips. He contended Miss Kashu told him that the exams had been vetted and he could release them. He further stated that the responsibility of closing the office was on Mr Ngui who was the custodian of the key.

Defence case

14. RW1 was the claimant's supervisor at the respondent's examination department. He testified that in April 2012 the respondent's Deputy Secretary Planning came to the department to enquire about issuance of results to the principal Obera Boys Secondary School and asked all the officers in the department including the claimant to write a statement to explain the said results were released.

15. RW1 further testified that he wrote his statement explaining the procedure for releasing examination results as follows:-

- a) Examination management division releases formal request from the school.
- b) The said division requests from the result slips from the research department.
- c) Research department prints the results slips and writes a memo calling for collection.
- d) Examination administration goes for the results or they are brought straight to the department.
- e) The department verifies whether there is any query raised and whether the results are ready for release.
- f) Releasing is done by recording details in the register book after verifying the identity of the claimant who must be the school principal that requests for the results.

16. RW1 further testified that there was no evidence of request for results by Obera Boys Secondary School, there were no results slips or any communication from research department to his department, and the results were recorded on the register book as having been released and signed against by the claimant while he (RW1) was away on official duties. He further contended that when Mr Matenzawa brought the principal of Obera boys to the office, the principal identified the claimant as the person who issued him with the results.

17. RW1 further testified that by end of May 2012, he and the staff at examinations department were interdicted but the claimant and 2 officials from ICT department were dismissed. He further stated that in August he appeared before the staff affairs committee and defended himself against allegations of negligence in supervising the release of results which led to stealing of result slips by an outsider. However, he was found innocent and restated.

18. RW1 denied that the claimant was dismissed discriminatively and contended that Mr Samuel Maloba was also dismissed with him after admitting that he authorized Berlyl Ojwang to print the results. He further stated that the claimant was dismissed for signing against entries he had not recorded and failing to report the error to his supervisor.

19. On cross examination RQ1 admitted that he was working in the same room with the claimant and that there was only one key to the office. He further admitted that he was the custodian of the key but he used to leave in the office during the day. He further admitted that on 12/4/2012 he was in the office and there were other people including officers dealing with ECED exams because the office is used by other people. He described the office as one large open space with one entrance and inside there are two other small rooms without a door. He contended that there was a policy that before leaving the office one was to tell the people to go out and lock.

20. RW1 maintained that in April 2013 it was discovered that results for Obera Boys Secondary School were released by the claimant to the principal of the school. He contended that the signature by the claimant on the dispatch register was the evidence that he is the one who released the results. He concluded by stating that the claimant was the only one dismissed from his department because he is the one who released the results and also left the office open.

Analysis and determination

21. There is no dispute that the claimant was employed by the respondent until his dismissal on 30/5/2012.

The issues for determination are:

- a) Whether the dismissal was unfair.
- b) Whether he is entitled to the reliefs sought

Unfair dismissal

22. Under section 45 of the Employment Act, termination of an employee's contract of employment is unfair if the employer fails to prove that it was grounded on a valid and that a fair procedure was followed. A valid and fair reason is one that relates to employees conduct, capacity and compatibility and based on the employer's operational requirement. Fair procedure relates to according the employee a hearing before the termination, appeal, payment of any accrued dues and issuance of certificate of service under section 41 and 51 of the Act.

Reason for dismissal

23. The reason cited for dismissing the claimant was negligent performance of duty and dishonest that facilitated theft of result slip for Obera Boys Secondary School which had been nullified. That the theft occurred on 12/4/2012 when the claimant was on duty dispatching results. The respondent contended that the procedure for releasing results was not followed in this case as there was no request from the school or any correspondence from the Research Department releasing the results to the claimants department for dispatch.

That the results were collected by the principal Mr Osodo who also recorded the details in the dispatch register without knowledge of the claimant.

24. The claimant admitted that he never noticed the entry of release of results for Obera Boys Secondary School on 12/4/2012 when he returned to the office after break. That he noticed it on 16/4/2012 and suspected that the entry was made by Mr Peter Ng'etich who had been asked to assist him in the dispatch office. He further admitted that in order to avoid ISO audit query, he signed against the entry by Mr. Osodo. He however contended that he had no prior notice that the results for Obera Boys School had been nullified.

25. After careful consideration of the evidence tendered, there is no dispute that the principal of Obera Boys School collected results from the respondent and some how recorded the details on the dispatch register on 12/4/2012. The said register was in the custody of the claimant who was on duty on that day. There is also no dispute that on that day there were many people working in the same office and also clients coming for their results. There is further no dispute that at one point the claimant walked out of the office for 30 minutes and when he returned he never noticed the entry for Obera Boys on the dispatch register and that continued until 16/4/2012 when he noticed the illegal entry and without paying much heed to it, he signed against it to avoid ISO audit query.

26. The foregoing conduct, in my view is not consistent with diligent and honest performance of duty. On the contrary it is indeed consistent with dishonest and negligence and I agree with the respondent that such conduct constituted valid and fair reason for dismissing the claimant from service under clause 13.21.9(d) of the HR Manual. I agree with the respondent that after noticing the strange entry on the dispatch register, claimant should not have just signed against it. He should have enquired from Mr Ng'etich whether he is the one who made the entry before signing against it. In addition he should have verified with the concerned officers especially RW1 whether the results had been released through correct procedure. The claimant admitted under oath that he never notified his senior. He further admitted that he signed for the results against the set procedure.

Fair procedure

27. CW1 testified that he was never accorded any hearing before the dismissal but was made to record 3 statements during the investigations by Mr Matenzawa. He, however, admitted that after dismissal he appealed and he was invited to appear before the respondent's board where he was not allowed to prosecute his appeal but only allowed to answer the questions that were made to him.

28. The respondent has not disputed the fact that she never accorded the claimant hearing before the dismissal. The dismissal letter clearly indicated that the dismissal was based on the review of the investigations report and his written response. According to the respondent a proper procedure was followed as provided by section 13.9 of her terms and conditions of service. The relevant provision of the respondent's terms and conditions of service was not produced in court. Consequently, the court resorts to the minimum procedure provided by the Employment Act.

29. Under section 41 of the Employment Act, before dismissing an employee for misconduct, poor performance or physical incapacity, the employer is enjoined in mandatory terms to explain the reason for which he considers to dismiss the employee. The explanation must be in a language of the employee's understanding and in the presence of another employee or shop floor union representative of the employees' choice and the employee and his chosen companion must be accorded a chance to air their representations for consideration before the termination is decided.

30. In this case, the foregoing procedure was not followed. His right to fair procedure before dismissal was therefore violated. Although he was accorded a hearing at the appeal level, that did not cure the pre- dismissal unfairness. I would also not hesitate to hold that the claimant was treated differently and in discriminatory manner from the other staff in his department by being denied a prior hearing and being dismissed summarily.

31. The reason for the foregoing is that RW1 testified that staff in his department were served with interdiction letters except the claimant and 2 officers from ICT department who are summarily dismissed. That in August RW1 was summoned for hearing by the Staff Affairs Committee in August 2012 and he successfully defended himself and got reinstated. The said staff committee which heard the officers from the claimant's department should not have denied the claimant the right to appear before it to defend himself. Consequently, I return that the summary dismissal of the claimant was done without following a fair procedure and as such the dismissal was unfair and wrongful within the meaning of section 45 of the Employment Act.

Relief

32. For the foregoing reason that the claimant's summary dismissal was done without following a fair procedure.

I make declaration that summary dismissal was wrongful and unfair. I however decline to grant the prayer for reinstatement with payment of salary arrears from May 2012 because under section 12(3) of the ELRC Act the Court is barred from ordering reinstatement after the lapse of 3 years from the date of the impugned separation. I will therefore award him compensatory damages.

33. Under section 49(1) of the Employment Act the claimant is awarded one month salary in lieu of notice, plus 12 months salary as compensation for the wrongful dismissal. In awarding the maximum compensation, I have considered the length of the period served from 1993 to 2012 which is 19 years. I have also considered that the claimant has not secured any alternative job since 2012 when he was dismissed. Finally I have considered that no gratuity was paid to the claimant after the dismissal.

34. The claim for severance pay is dismissed because the termination was not on account of redundancy but misconduct. He is however free to pursue any claim for social security benefits under his contract of service, HR Policy or the law including pension and / or gratuity because his termination was wrongfully done.

Conclusion and disposition

35. I have found that there was a valid and fair reason warranting dismissal of the claimant. I have however found that the procedure followed before the summary dismissal of the claimant was not fair under section 41 of the Employment Act and that rendered the summary dismissal, unfair and wrongful. I have further found that due to limitation period under section 12(3) of the ELRC Act, reinstatement is not possible. Consequently, I enter judgment for the claimant in the following terms:-

Notice	71,900
Compensation	<u>862,800</u>
Total	<u>934,700</u>

The claimant will get costs and interest from the date hereof. The decreed sum will be paid less statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of December, 2018

ONESMUS N. MAKAU

JUDGE