



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO.26 OF 2016**

**DAVID MWAMBI MATAMBO.....CLAIMANT**

**VS**

**KENYA PORTS AUTHORITY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for reinstatement to employment by the claimant on ground that his summary dismissal by the respondent was unconstitutional, illegal and/or unfair. The suit also seeks for injunction to restrain the respondent and or her agents from interfering with the claimant's occupation of the staff house or from evicting him from the same. In the alternative, the suit seeks damages for wrongful and/or unfair termination and for all benefits as required by the law.

2. The respondent has denied liability for wrongful or unfair termination of the claimant's employment and avers that the summary dismissal of the claimant was fair both substantively and procedurally. She therefore prayed for the suit to be dismissed and brought a counter claim against the claimant to forthwith give vacant possession of Staff House NO. MLL-BLK 13-D6 which currently occupied by the claimant. The claimant never filed any defence to oppose the counter claim.

3. The suit was heard on 17.6.2016 when the claimant testified as Cw1 and the respondent called her Senior HR Officer Madam Irene Murunde Mbogo as Rw1. Thereafter both parties filed written submissions.

**Summary of Claimant's case**

4. Cw1 testified that he started working for the respondent as a Casual Docker in 2001 and the only document needed there was his National Identity Card. Subsequently he presented his academic certificates and he was appointed Sailor Grade HG4 in 2004 and later applied for and was promoted to a Coxswain Grade HG2 on 2007. In his application for the said promotion, he indicated his qualification as "O" Level and attached his National Identity Card, School Leaving Certificate from Dr. Aggrey High School, plus all other Certificates filed herein by the respondent except the KCSE Result slip which reflects a Mean grade of C-. Cw1 contended that the Job Advertisement never specified the KCSE Grade required.

5. Cw1 further stated that after making the application, he was shortlisted and attended interview where he presented his original KCSE Certificate showing a mean grade D+ which he filed herein and he was

promoted to the position of Coxswain HG2. He maintained that the Scheme of Service for Coxswain was an 'O' level Certificate plus a Coxswain Certificate. That the grade for the 'O' level certificate was not specified and as such there was no reason to forge his academic papers because he already had the necessary qualifications.

6. Cw1 explained that in August 2012 he was called by his Head of Department to present his Original Academic Certificates and complied; that later he was served with a Show Cause letter dated 5.11.2015 giving him 72 hours to explain why disciplinary action should not be taken against him for presenting fake academic certificates to the respondent. The claimant stated that he denied the offence and even attached the academic papers showing that he had a KCSE D+.

7. Cw1 was then invited to a disciplinary hearing where again he denied the offence of presenting a KCSE Result Slip for mean grade C-. He was however dismissed by the letter dated 12.1.2016 and he appealed. He however did not produce the appeal letter as exhibit. He never the less admitted knowledge of the KPA Disciplinary Handbook 2015 but stated that he has never read it.

8. As regards the right to occupy the Staff house, Cw1 contended that the house belonged to KPA Pension Scheme and not the respondent and maintained that he was paying rent to occupy the house. He however did not produce any evidence to prove that he was paying any rent for the house or that the respondent was not the owner of the house.

### **Defence case**

9. Rw1 is the Senior HR Officer in Charge of Administration and Discipline. She confirmed that Cw1 was employed as alleged in his testimony above, that on 1.4.2004 the claimant presented an Application for Employment Form for appointment as a Sailor Grade HG4, that he indicated in the Form that he attended Dr. Aggrey High School from 1993 to 1996 and attained Grade D+ in the 1996 KCSE Examination; that Cw1 was then appointed and continued working until 18.1.2007 when he presented an Application for Promotion Form seeking promotion to the position of Coxswain Grade HG2.

10. Rw1 contended that Cw1 annexed the following documents to the said application:

- (a) Copy of his National Identity Card.
- (b) Copy of Leaving Certificate from Dr. Aggrey High School.
- (c) Copy of 1996 KCSE Result Slip Mean Grade C-.
- (d) Copy of Basic Safety Training Certificate.
- (e) Copy of Certificate in Coxswain Course from Bandari College.
- (f) Copy of Diploma in Constitution.
- (g) Copy of Certificate in Architectural Draughtsman ship from Mombasa Technical Training Institute.
- (h) Copy of Certificate in AutoCAD 2000 Level 1 from Gath Management Limited.
- (i) Copy of Driving License.

11. According to Rw1, the respondent relied on the said documents as claimant's proof of Academic and Professional qualification and promoted him to the position of Coxswain/Mate Grade HG2 post number 411-7025 effective 21.11.2007 at a salary of kshs.20,570 per month.

12. Rw1 further testified that on 27.6.2012 the Public Service Commission wrote a Circular to Ministries

and State Corporations directing them to authenticate Academic and Professional Certificates of all their employees because there were employees in employment without valid certificates. As a result the respondent informed all her staff via letter dated 27.7.2012, to submit their Academic and Professional Certificates to their Departmental Administrators for authentication by an Ad Hoc Committee that was appointed for that purpose. She further explained that after the claimant presented his documents the respondent wrote a letter dated 21.8.2013 to the Kenya National Examination Council (KNEC) to verify the status of the claimant's KCSE Result Slip and Certificate allegedly by KNEC.

13. The KNEC respondent by letter dated 24.9.2015 confirming that indeed the claimant registered and sat for KCSE Examination in 1996 at Dr. Aggrey High School index but the number 101101043 in his Result slip had been altered to 101101011 and all the subject grades and the Mean Grade had been changed from D+ to C-. The KNEC further clarified that the bonafide candidate who registered and sat the exam under the index number 101101011 was one Kazungu W. Zebedayo and not the claimant.

14. Rw1 further explained that after the verification of the claimant's KCSE Certificate, he was served with Show Cause letter dated 5.11.2015 charging him with the offence of presenting fake or forged Academic Certificate/testimonial to secure employment or Career advancement. After his response he was invited to a disciplinary hearing vide the letter dated 24.11.2015 which gave him the right to bring along a union official or a fellow employee of his choice. The hearing was done on 25.11.2015 but the claimant chose nobody to accompany him to the hearing. Thereafter the committee recommended for dismissal of the claimant after convicting him for the offence of securing appointment and promotion on the basis of forged certificates. He was dismissed by letter dated 12.1.2016 and he never appealed against the dismissal.

15. Rw1 maintained that the dismissal of the claimant was fair because he was found to have committed gross misconduct against the employer after a fair hearing done under the provisions of the KPA Disciplinary Hand book and Section 41 of the Employment Act. She therefore prayed for the suit to be dismissed with costs.

### **Analysis and Determination**

16. There is no dispute from the pleadings, evidence and submissions presented to the court that the claimant was employed by the claimant from 2001 to 12.1.2016 when he was dismissed by the respondent. The issues for determination are:-

**(a) Whether the dismissal was unfair.**

**(b) Whether the claimant is entitled to the reliefs sought in his suit**

**(c) Whether the claimant should surrender vacant possession of the Staff House to the respondent as prayed in the counter claim.**

### **Unfair termination**

17. Under Section 45(2) of the Employment Act, termination of employment by the employer is unfair, if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A valid reason one which is true while a fair reasons is one which relates to the employee's conduct and the operational requirements by the employer. Fair procedure on the other hand, as per Section 41 and 45(5) includes:

(a) explaining the reason for dismissal to the employee in the presence of a fellow employee or shop floor union official of his choice, and in a language he understands

(b) according the employee and his chosen companion a chance to air their defence

(c) considering the defence offered, previous warnings and evaluating the case with the previous

practice of the employer in similar circumstances

(d) communicating the decision fairly and explaining the a right of appeal or review

(e) pay any dues available

(f) issue the employee with Certificate of Service

18. In this case the reason for the termination was presentation of fake or forged KCSE Result Slip by the claimant to the respondent to secure appointment/promotion. The claimant admitted that on 19.1.2017, he applied for promotion to the position of a Coxswain Grade HG2 after the vacancy was advertised internally. He has also admitted that the application was in the Standard form provided by the respondent and he annexed thereto his Academic and Professional Certificates. He further admitted that the application and the testimonials he annexed thereto are the ones contained in page 4-17 of the respondents defence save for the KCSE Result Slip.

19. Rw1 has however contended that the disputed KCSE Result Slip was one of the testimonials that were annexed in the application for promotion presented by the claimant on 19.1.2007. She further contended that the said document was one of the testimonials relied upon by the respondent before promoting the claimant to be a Coxswain. She further confirmed that after verification with the KNEC, the said KCSE Result Slip was found to be a forged document. That the index number was for another candidate, all the subjects grades were altered and the Mean Grade enhanced from his D+ to C-.

20. I have carefully considered the rival contentions and submissions and come to a considered view that the respondent has proved on a balance of probability, that there was a valid and fair reason to terminate the claimant's employment contract. I am satisfied from the evidence presented by the defence that the claimant indeed presented the forged KCSE Result Slip to secure promotion to the position of Coxswain Grade HG2. That the forgery was done fraudulently to mislead the respondent while making a choice as to who among the competing candidates was more qualified for the position of Coxswain. The claimant knew that the Scheme of Service for the position was above his Academic qualification because it required a minimum of KCSE C+ or KCE Division II and consequently he caused the forgery on the KCSE Result Slip and presented it to the respondent.

21. The claimant denied in evidence that he presented the document to the respondent and lied that Coxswain required only unspecified 'O' level education. He however did not name any other person who might have committed the offence and for what reason. Even if the court was to entertain the denial by the claimant, several questions would still arise including:

(a) Why would a stranger forge KCSE Result Slip to enhance grades and annex it to the claimant's application.

(b) Where is the KCSE Result Slip for mean Grade D+ that the claimant alleges that he annexed to said application.

22. The answer to the foregoing questions can only be answered against the claimant and in favour of the respondent. Firstly a stranger would have no interest in enhancing chances for the claimant's promotion. Secondly, the claimant has not proved that he presented any KCSE Result Slip for Mean Grade D+ during his application for the promotion. He has also not produced it anywhere during the verification exercise, disciplinary hearing and also in this suit.

23. The offence of forgery of Academic Result Slip is a Criminal offence under the Penal Code and the KNEC Act. In this case, the crime was committed or was reasonably suspected to have been committed by an employee against his employer. Under Section 44(4) (g) of the Employment Act, employer is entitled to summarily dismiss his employee if:

**“(g) an employee commits, or on reasonable and sufficient grounds is suspected of having**

**committed, a criminal offence against or to the detriment of his employer or his employer's property."**

24. In this case the respondent believes that the claimant committed the offence of presenting to her on 19.1.2007, a fake or forged KCSE Result Slip bearing his name to secure promotion. Section 43(2) of the Act defines reason(s) for termination of employment 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 employee..."**

25. The said KCSE Result Slip has been verified with the KNEC and found to be a forged document. Based on the information from KNEC, the respondent was entitled to believe that the claimant presented the forged Result Slip to secure promotion fraudulently. Why would a reasonable employer fail to take disciplinary action against such an employee who has acted dishonestly against his employer?

26. One of the principles of contract is that an innocent party has every right to terminate a contract as soon as he discovers that he was induced by the other party to enter into the same through fraudulent misrepresentation. In view of the foregoing, it is my opinion that the contract promoting or appointing the claimant to the position of Coxswain having been entered through fraudulent misrepresentation remained voidable at the will of the respondent as soon as he discovered the forgery. The respondent discovered the forgery on 2.10.2015 when she received the letter dated 24.9.2015 from the KNEC confirming that the KCSE Result Slip for the claimant indicating a mean Grade C- was indeed a forged document in all aspects, and proceeded to dismiss him from service on 12.1.2016.

27. As regards the issue of procedural fairness, I am also satisfied that the respondent followed a fair procedure before dismissing the claimant from employment. First, the claimant was served with Show Cause letter stating the offence in respect of which the respondent contemplated punishing him. Secondly, the claimant's response to the Show Cause letter was received and considered. Thirdly, the claimant was invited to a personal hearing and informed of his right of being accompanied to the hearing by a fellow employee or union official of his choice. Fourthly, the respondent considered his defence but dismissed him after it was found to be unsatisfactory. The claimant had a right of appeal under clause K16 but he never exercised that right. No evidence of such appeal was adduced by him showing that it was in deed received by the employer. Finally, I have noted from the dismissal letter that the claimant was guaranteed payment of his terminal dues less statutory deductions.

28. The only default I noted from the evidence is that a certificate of service was not issued to the claimant after the dismissal. However, that default alone cannot render unfair, an otherwise substantively and procedurally fair dismissal. In any event the claimant has not alleged that he was denied the Certificate by the respondent. The said default notwithstanding, I find and hold that the dismissal of the claimant from service by the respondent on 12.1.2016 was fair within the meaning of Section 45(2) of the Employment Act.

### **Reliefs.**

### **Reinstatement**

29. Under Section 12(3) (vii) of the Employment and Labour Relations Court Act this court has jurisdiction to reinstate any employee within three years of dismissal. However such jurisdiction can only be exercised under section 50 read with section 49(3) and (4) of the Employment Act. The gist of the said provisions is that the court may reinstate an employee if it is of the opinion that employee's summary dismissal was unfair. In the present case, however, I am of the opinion that the dismissal of the claimant was fair and in all fours with Section 45(2) of the Act and therefore I decline to reinstate him to his employment as prayed. For the same reason, I also decline to award him the alternative prayer of compensation for unfair termination.

### **Injunction.**

30. The claimant has prayed for injunction to restrain the respondent or her agent from interfering with his occupation or from evicting him. The grounds cited for the seeking the said injunction is that the house belongs to a Pension Scheme to which the claimant contributes. In addition, the claimant contended that he is not owned by the respondent otherwise, she would not be paying him house allowance. He further contended that he was paying rent to occupy the house but on cross examination he could not give any proof of payment of any rent.

31. On the other hand, the respondent contended that the termination letter gave the claimant notice to vacate the staff quarters but to date he has refused to surrender vacant possession of the same. RW1 admitted that there are some houses owned by the KPA Pension Scheme but not staff house number MLL-BLK-13-D6 which is occupied by the claimant. The claimant has not produced any title or lease document or any other form of evidence to prove that the house he is occupying belonged to the KPA Pension Scheme and that it is not the respondent's Staff House Number MLL-BLK-13-D6. Consequently I dismiss his prayer for injunction against the respondent.

### **Counter claim**

32. In view of my finding herein above that the claimant was fairly dismissed for his misconduct, I proceed to grant the respondent's counter claim for surrender of vacant possession of her Staff House Number MLL-BLK-13-D6. The only reason why the claimant occupied the staff house is because he was her employee. Staff Quarters by their very nature are subsidized and are strategically placed to benefit both the employee and the employer during their employment relationship.

33. Once the said employment relationship ends, the said convenience and benefit comes to an end and neither of the two parties to the terminated contract should insist in continuing to house or be housed at the staff quarters. Instead the employer should allocate the staff quarter to the new or old employees for the same reason why she had housed the former employee.

34. The claimant was given notice to vacate on 12.1.2016 but he moved to this court for interlocutory injunction. No such orders were granted and therefore the claimant has been staying there unlawfully. Although he alleged that he was paying rent to continue his occupation, no evidence of such payment was adduced. Consequently I allow the counter claim and direct the claimant to give vacant possession of the said Staff House Number MLL-BLK-13-D6 within 21 days from today. In default the respondent will be at liberty to forcefully remove him.

### **Disposition.**

35. From the reasons stated above, the suit is dismissed and judgment entered in favour of the respondent as prayed in her counter claim. Each party shall bear his or her own costs.

**Signed, dated and delivered at Mombasa this 20<sup>th</sup> day of January 2017.**

**O.N. MAKAU**

**JUDGE**