



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 283 OF 2013

BETWEEN

CLEMENT KARURI CLAIMANT

VERSUS

KENYA PORTS AUTHORITYRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Gikandi & Company Advocates for the Claimant

Addraya Dena Advocate for the Respondent

JUDGMENT

1. This Claim was originally Mombasa High Court Civil Suit Number 144 of 2010. It was initiated by was of a Plaintiff by the Claimant, dated 26th February 2010. The Respondent filed its Statement of Defence on 23rd July 2010 and Amended Statement of Defence on 5th April 2011.

2. The Claim was transferred to the present Court on jurisdictional ground, through an order of the High Court, made on 28th August 2013. It was received at the Industrial Court and registered as Industrial Court Cause 283 of 2013.

3. The Parties recorded an agreement in Court on 17th June 2016 to have their bundles of documents accepted as part of their evidence as filed; and the Witness Statements are adopted in evidence as filed. The Claimant gave evidence and rested his Case on the 17th June 2016. Respondent's Human Resource Officer, Marko Ngolia, gave evidence on 23rd September 2016, when hearing closed. Parties filed their Closing Submissions subsequently. Respective Counsel underscored these Submissions through brief presentations made before the Court on 13th October 2016, when Judgment was reserved for 24th March 2017.

The Claim

4. The Claimant states he was employed by the Respondent Corporation as a Casual Employee, in the

year 1998. He was granted a 2 year contract, working as a Security Private in May 2006. This was renewed in 2008, due to expire in May 2010.

5. He did not serve the full period. On 24th September 2008, he was alleged to have attempted to irregularly remove 10 cartons of assorted whiskies, from the Port. He was interdicted on 7th October 2008. He was taken through an initial hearing by the Committee of Inquiry. In its Report of 9th March 2009, the Committee of Inquiry found the Claimant guilty, and recommended he is summarily dismissed, in accordance with Respondent's Disciplinary Handbook 2008, Section K.8 (u).

6. The Personnel Manager Mrs. J.W. Kamau, concurred with this recommendation in her Report to the Managing Director dated 26th March 2009.

7. The Claimant appealed. An Appeals Committee was constituted. The Appeals Committee heard the Claimant. Its Report is dated 30th September 2009. It recommended the summary dismissal decision against the Claimant is upheld, but corrected the clause under which the decision was made, to be Section K.4 (a) (vi) of the Disciplinary Handbook 2008.

8. The Personnel Manager Mrs. J.W. Kamau was persuaded the Claimant's Appeal had merit, and recommended to the Managing Director, that the summary dismissal decision against the Claimant is quashed.

9. On 4th December 2009, Mrs. J.W. Kamau wrote to the Claimant's Trade Union, Dock Workers Union, advising that Management had carefully considered his Appeal. It was the view of the Management that the Appeal lacked merit. The decision to summarily dismiss the Claimant was sustained.

10. Summary dismissal was malicious and unjustified. The Claimant was never charged in Court with attempted theft of whiskies. Another Employee, named John Eboso, was charged in Court over the incident. The Claimant was not even called as a Witness in the criminal trial.

11. The Claimant blamed one Patrick Kioko, a Senior Officer of the Respondent, alleging there was a feud between the Claimant and Kioko. The Claimant alleged he had over the years, reported Kioko to Management over 'underhand dealings' at the Port. Kioko felt the Claimant was an impediment, and influenced the Disciplinary Committee, to ensure the Claimant was summarily dismissed.

12. A number of Disciplinary Committee Members, including the Officer in charge of Personnel and Human Resources, had stated the Claimant should not have been interdicted, let alone being summarily dismissed. Only a properly constituted Criminal Court could find the Claimant guilty. The entire Disciplinary Proceedings were a pure Kangaroo exercise, lacking in credibility, integrity and moral justification.

13. The Respondent touted to the entire world that the Claimant was a thief. His character and name were tarnished. He was highly traumatized. The Claimant seeks the following orders against the Respondent:-

- a) Loss of monthly salary and allowances at Kshs. 51,770 from October 2008 to-date, less Kshs. 147,713 paid by the Respondent.
- b) Increments of salary and allowances from October 2008 to-date.
- c) General Damages.
- d) Reinstatement.
- e) A declaration that the decision of the Disciplinary Committee is null and void, and of no legal consequence.

f) Costs and any other suitable relief.

14. The Claimant told the Court at the time of dismissal, he earned, Kshs. 25,270 monthly basic salary; Kshs. 11,500 as house allowance; Kshs. 15,000 as mileage allowance; and annual leave pay of Kshs. 18,000.

15. The Respondent represented to the Claimant that it would employ him on permanent and pensionable terms. He expected therefore, he would be absorbed on permanent and pensionable terms, and work for the Respondent until mandatory retirement age. At the very least, the Claimant expected to complete his contractual period in May 2010.

16. Like all other Employees, the Claimant expected he would have his salary and allowances reviewed upwards, before retirement.

17. On cross-examination, the Claimant told the Court he expected he would be employed on permanent and pensionable terms. He conceded he was employed on a 2 year contract. His contract stated employment on permanent and pensionable terms depended on interview and medical examination of the Claimant. Renewal was at the discretion of the Respondent. Clause 19 allowed for dismissal on the grounds shown thereunder. Clause 3 incorporated the Staff Regulations as part of the contract.

18. Interdiction was unjustified. The Claimant asked for a personal hearing. It was availed to him. He was notified of the hearing. Hearing was under Respondent's Disciplinary Handbook. He was aware of the charges. He was accompanied by a Trade Union Representative throughout the hearings.

19. In the proceedings, Eboso stated the Claimant called him several times on the date of the attempted removal from the Port, of the whiskies. The Claimant did not send a message to Eboso telling Eboso, "*kuja, mambo yako poa*" [Kiswahili for "*come, things are in order*"]. The Claimant did not send Eboso any text messages.

20. Page 37 of proceedings of the Committee of Inquiry indicates the Claimant agreed, the short text message to Eboso was from the Claimant. The Claimant testified he could not recall what he told the Committee of Inquiry with regard to the text messages. Eboso's own evidence at page 24 of the proceedings, indicating he acted in concert with the Claimant, in attempted removal of the whiskies was untrue. It is true the Claimant met Eboso on the material day. Nothing however, transpired between Eboso and the Claimant.

21. The Claimant conceded he was in communication with Eboso on the material day. Eboso was arrested, and the Claimant went at the gate where arrest took place, to assist Eboso.

22. The Respondent found the Claimant guilty, and summarily dismissed him. He appealed twice. He participated fully in the Appeal processes, with the assistance of his Trade Union. The Witnesses who testified in the first hearing were called again on Appeal. The Claimant was allowed to question them. He did concede on Appeal, that he assisted Eboso. The Personnel Manager had allowed the Appeal, recommending the Claimant returns to work. Management disagreed, upholding the recommendations of the Disciplinary and Appeal Committee that the Claimant is summarily dismissed. The Claimant conceded he was accorded fair procedure, but maintained termination was unfair.

23. Redirected, the Claimant told the Court he was employed in 1998. He was promoted once. Eboso conceded he was arrested and charged. The Claimant was not charged. The Claimant did not recall what he discussed with Eboso on the phone. Eboso worked in the Claimant's department. The Personnel Manager wrote to the Managing Director saying there was no evidence against the Claimant.

Claimant's Submissions

24. The Claimant submits criminal charges were preferred by the Police, for the attempted removal of the whiskies, against Eboso. The Claimant was neither an Accused Person, nor a Witness in the criminal trial.

The disciplinary proceedings and action against the Claimant were influenced by Patrick Kioko. The Respondent should not have instituted disciplinary proceedings against the Claimant, over allegations whose truthfulness was not shown in the investigations carried out by the Police. Citing the High Court decision, in **Silas Otuke v. Attorney- General & 3 Others [2014] e-KLR [Governor Ali Joho Degree Case]**, the Claimant submits it was only after Police had investigated, and established Respondent's allegations against the Claimant, that the Respondent could have acted against the Claimant. It was not open to the Respondent to try the Claimant, and find him guilty, over allegations which had not been established through the criminal process.

25. A Body which purports to convict someone without due process is a Kangaroo Court as held in **Petition 23 of 2015, Margaret Miano v. Kenya National High Ways Authority**. The Disciplinary Committee should have warned itself it was required to adopt the evidential standard of beyond reasonable doubt, applicable in criminal trials, the Claimant submits, relying on **Woolmington v. D.P.P** [no citation give.] At the very least, the Disciplinary Committee should have adopted a standard falling between beyond reasonable doubt, and balance of probability, as applicable to fraud in civil litigation, under the Authority of **Urmila w/o Mahendra Shah v. Barclays Bank Limited & Another [1979] e-KLR**. The quality of evidence should have been above average, as ruled in **J.W.N v. Teachers Service Commission [2014] e-KLR**, as the allegations were serious in nature, and likely to deprive the Claimant of his livelihood.

26. The Respondent acted as a Judge of its own cause, a Complainant and a Prosecutor. It was the duty of the Respondent to call Kioko as a Witness if it doubted the Claimant.

27. The Claimant clarifies in his Closing Submissions that his prayers include the following:-

- a) The gross salary for October and November 2008 at Kshs. 69,770.
- b) Reinstatement or, 17 months' salary for the remaining period of his contract, at Kshs. 880,080.
- c) Leave allowed for 2009 and 2010 at Kshs. 36,000.
- d) Kshs. 100,000 as gratuity.
- e) Salary up to mandatory retirement age at Kshs. 26,093,080.
- f) In event the Court does not allow salary to the date of retirement, the Claimant be granted salary for a period of 10 years, being the period he reasonably expected the contracts would have continued to be renewed up to. This item is claimed at Kshs. 6,212,400.
- g) Damages for unfair termination the equivalent of 12 months' salary at Kshs. 621,240.
- h) General damages for defamation at Kshs. 10 million.

The Claimant submits he is entitled to damages in defamation, relying on the case of **Dr. Ezekiel Nyangoma Okemwa v. Kenya Marine & Fisheries Institute [2016] e-KLR**. He prays the Court to allow the Claim with costs.

Response

28. The Respondent's position is that it summarily dismissed the Claimant, following the recommendation of a duly constituted Disciplinary Committee. He was found to have been involved in the irregular removal of 10 cartons of assorted whiskies, using Staff Vehicle registration number KAR 326 L. He was granted fair hearing, in accordance with Respondent's Disciplinary Handbook. He was not defamed. The Respondent did not make any statements aimed at tarnishing the Claimant's character or reputation; the Respondent acted on honest belief that the Claimant was involved in the irregular removal

of whiskies from the Port. Following a credible internal process, he was summarily dismissed. The Respondent lost confidence in the Claimant, and cannot accept him back.

29. Marco Ngolia told the Court he is Respondent's Human Resource Officer. He confirmed the Claimant was employed by the Respondent, in the position, and on a gross salary, stated in the Claimant's Pleadings.

30. The Claimant was on a 2 year contract, beginning May 2008. The Respondent represented to the Claimant it would absorb the Claimant on permanent and pensionable terms, subject to availability of a vacancy.

31. He was arrested on 24th September 2008 at around 1645 hours, at gate 10B, ferrying 10 cartons of whiskies in a Staff Vehicle. He was interdicted in accordance with Respondent's Disciplinary Handbook. He requested a personal hearing. He was heard in the presence of his Trade Union Representative by a Committee of Inquiry. He was found guilty, and recommendation made to have him summarily dismissed. He appealed, was heard, with the same outcome. The Managing Director was eventually informed of the recommendations and the Claimant was summarily dismissed.

32. On cross-examination, Ngolia testified Eboso and the Claimant were involved in attempted theft of the whiskies. Only the Police could say why the Claimant was not criminally charged. The Respondent handled the matter administratively. The Respondent did not complain why the Claimant was not charged.

33. There is no Judgment of the Court finding the Claimant guilty. He stated Senior Security Officer Kioko was against him, because the Claimant had been close to the Managing Director, and the Claimant had been reporting Kioko to the Managing Director over theft of containers.

34. The Personnel Officer Mrs. J.W. Kamau recommended summary dismissal decision against the Claimant, is rescinded. Salim Chingabwi who was senior to Kamau concurred. The Managing Director did not agree and endorsed the decision summarily dismissing the Claimant. The Claimant's Trade Union similarly lodged a separate Appeal on behalf of the Claimant. The Claimant's contract would eventually have been converted, were it not for the incident. Ngolia has sat in many disciplinary proceedings, and testified grave matters are escalated to the Police.

35. Ngolia closed his evidence, on redirection, with the evidence that the Respondent does not have control over Police Investigations. The Respondent can undertake parallel process. Police Officers do not prosecute crime in accordance with the recommendations of the Respondent. The Claimant was heard fairly. The Managing Director is not bound by the recommendations of the Human Resource Office.

Respondent's Submissions

36. The Respondent submits Claimant's contract, under clause 19, provided he was liable to be summarily dismissed, if found guilty of gross misconduct. Change of terms to permanent and pensionable terms would, under the contract depend on availability of a vacant position, and the Claimant passing an interview and medical tests.

37. Dismissal followed the provisions of the Disciplinary Handbook 2008.

38. Disciplinary processes follow Codes of Conduct and Staff Regulations, and must not be compared to trials before Courts of Law, as held in *R v. Egerton University ex-parte Robert Kipkemoi Koskey [2006] e-KLR*; *Kenya Revenue Authority v. Menginya Salim Murgani [2010] e-KLR*; and *Constantine Simati v. Teachers Service Commission & Another [2011] e-KLR*. The standard of proof in employment offences is not to be equated to that obtaining in criminal offences.

39. Even if the Personnel Manager gave a recommendation in favour of the Claimant, the Managing Director was not bound by the recommendation of the Personnel Manager, under the Disciplinary

Handbook.

40. Termination was fair and strictly carried out in accordance with Section 41 of the Employment Act and Article 47 of the Constitution.

41. The dismissal letter indicated the Claimant would be paid the salary held back during interdiction. He cannot claim what was offered.

42. Reinstatement is only granted under very exceptional circumstances under the Employment Act. In event the Court finds the Claimant's contract was unfairly terminated, he would only be entitled to notice pay and compensation under Section 49 of the Employment Act.

43. Lastly, the Respondent submits no actual defamatory words complained of, are set out in the Claimant's pleadings. No Witness was brought before the Court to support the claim that the Claimant's reputation was injured. The Respondent prays for dismissal of the Claim with costs to the Respondent.

Issues:-

- a) Was the Claimant's contract terminated following a fair procedure under Section 41 and 45 of the Employment Act?
- b) Was there valid ground for termination?
- c) Does the Claimant merit the prayers sought in his Complaint and Closing Submissions?

The Court Finds:-

44. The Claimant was employed by the Respondent Corporation on casual terms, in 1998. He was placed under a 2 year contract, in 2006. He was designated as a Security Private. His contract was renewed in May 2008 for another 2 years, expected to end in May 2010. It is agreed the Claimant did not serve out his last contract. He was alleged to have, in concert with a fellow Employee John Eboso, attempted to remove from the Port, 10 cartons of different whiskies, without clearance documents. He was interdicted, taken through Disciplinary Hearing, Appeal Hearing, and eventually dismissed by the Respondent on 4th December 2008. His rate of monthly gross salary on exit is not contested.

45. On cross-examination, the Claimant testified "*I agree Respondent availed to me fair procedure.*" He was taken through all the procedures prescribed under the Disciplinary Handbook 2008.

46. The Court has carefully examined the proceedings of the Committee of Inquiry, and of the Appeal Committee. There is nothing to suggest procedure was anything but fair as conceded by the Claimant in his evidence. The Claimant appeared in Person and was allowed to ask questions to Witnesses, at the Committee of Inquiry, and the Appeals Committee. Among the Witnesses he questioned was Eboso, who gave very clear and damaging evidence against the Claimant. The Chair of the Appeals Committee took time to ask the Claimant's Trade Union Representative if hearing had been conducted fairly. There was nothing to suggest the hearing was conducted without regard to the standards of procedural fairness laid down in Section 41 and 45 of the Employment Act, and in the Respondent's Disciplinary Handbook. It is not fair for the Claimant to make an about turn in Court, and allege he was taken before a Kangaroo Court. He concedes he was heard fairly, and is way out of line, to at the same time, condemn the organs that heard him, as being Kangaroo Courts.

47. Procedure as conceded by the Claimant, and confirmed in the proceedings of the Disciplinary and the Appellate Committees was fair. Termination cannot be faulted on fairness of procedure.

48. The Committee of Inquiry concluded the Claimant was involved in the attempted removal of cartons of whiskies, and recommended he is summarily dismissed. The Appeal Committee arrived at the same recommendation. Notably, Appeal took the form of a full rehearing of Witnesses, with the Claimant

allowed to ask the Witnesses questions once more. It was not the conventional Appeal, where the Appellate Organ examines the record of the first hearing, and calls upon the Appellant to submit; it was a complete re-run of the proceedings, a full *de-novo* hearing, where the Claimant had the chance to examine Witnesses afresh.

49. In her Report to the Managing Director with regard to the Report of the Committee of Inquiry, Personnel Manager Mrs. J.W. Kamau agreed with the recommendation that the Claimant is summarily dismissed. She did so upon reading the proceedings of the Committee of Inquiry. She concurred with the findings of this first Committee, after reading its evaluation of evidence.

50. The same, or similar, Witnesses were called in the Appeal Committee. Similar evidence was given. The Appeal Committee reached the same recommendation as the Committee of Inquiry, while careful in correcting the provision of the Disciplinary Handbook, under which the Claimant was recommended for summary dismissal.

51. Nevertheless the same Personnel Manager, Mrs. Kamau, this time was of the view that there was not a shred of evidence linking the Claimant with Eboso; the Claimant was not a passenger in the Staff Vehicle driven by Eboso at the time of the arrest at the gate; and that the Claimant was neither arrested nor arraigned in Court like Eboso was.

52. Mrs. Kamau did not explain what changed in the evidence collected during the Committee of Inquiry and that of the Appeal Committee, to absolve the Claimant. It would have been prudent for the Personnel Manager to justify her changed position, clearly based on the grounds of appeal, and the evidence recorded by either Committee. The proceedings in either case show the Claimant met, and was in communication with Eboso. There were text messages, from the Claimant to Eboso, advising Eboso "to come, the coast is clear." Even if the evidence of Eboso could be faulted in that Eboso was an accomplice, there were other Witnesses, such as Hassan and Okello, who gave evidence on the Claimant's involvement in the crime. The Court does not mean to say here, that principles governing criminal trials, such as on the evidence of accomplices, apply to disciplinary hearings at the workplace. The point is made by way of analogy, particularly because the Respondent seems to equate disciplinary hearing to a criminal trial.

53. The Managing Director properly exercised his discretion, in rejecting the strange recommendation made by Mrs. Kamau. The evidence against the Claimant was consistently given at both the Committee of Inquiry, and the Appeal Committee. Nothing changed on Appeal, as would have reasonably led to change of the recommendation by the Personnel Officer.

54. The Claimant was not truthful in his evidence before this Court. He denied texting Eboso, and telling Eboso "*mambo yako poa.*" He stated he did not send any text messages. Questioned about page 37 of the Disciplinary Proceedings where he admitted to texting, the Claimant told the Court he could not recall what he said to Eboso. He met Eboso, but nothing transpired on the material day.

55. At the disciplinary hearing, he explained that he texted Eboso, asking him to come and pick a friendly loan of Kshs, 3,000, Eboso had requested for. Why was not the Claimant able to recall this reason for his texting Eboso, while he gave evidence in Court? Why did he go to the gate to assist Eboso, when Eboso was arrested? Why would a Security Officer with no interest in the subject, assist a suspect arrested attempting to remove unaccustomed goods from the Port?

56. The Claimant blamed Senior Officer Kioko, alleging Kioko influenced the Disciplinary Committee. On Appeal, he was asked to provide proof for this, and was not able to give coherent proof, at times shifting blame to another Officer named Ngugi. Pressed at page 17 by the Appeal Committee to explain if Kioko influenced the Chairman of the previous Committee, the Claimant stated " *I did not say that.*" He did not object to the composition of any of the Committees. He blamed Ngugi for the contents of a statement the Claimant recorded after the incident. He was ambiguous when pressed to state if he was forced to sign the statement. The Claimant was an inconsistent Witness, in Court and before the Disciplinary and Appeal Committees. There was nothing to show Kioko, or any other Person, exerted

undue influence on either Committee to have the Claimant summarily dismissed.

57. Employment law does not require disciplinary proceedings at the workplace, to await the outcome of criminal investigations, where an Employee is alleged to have simultaneously committed a criminal offence and an employment offence. Unless the Employer has informed the Employee at the time of suspension that the Employee's fate depends on the outcome of the criminal process, such a criminal process cannot have effect of the disciplinary process. There must be some communication, or clause in the Human Resource Manual or Disciplinary Code, creating a link between the criminal and the disciplinary process. The Employment and Labour Relations Court has held in a catena of decisions that the two processes are different. The standards of proof as submitted by the Respondent are different. The objectives are different. [see ***Banking, Insurance, and Finance Union v. Consolidated Bank [2014] e-KLR***; ***James Mugeru Igati v. the Public Service Commission of Kenya [2014] e-KLR***] and ***Nairobi IC Cause Number 875 of 2010 between Peter Omachi Nyakoi v. Nairobi Java House Limited***]. Section 44 [4] allows an Employer to summarily dismiss an Employee, if an Employee is on reasonable and sufficient grounds, suspected of having committed a criminal offence against, or to the substantial detriment of his Employer, or Employer's property. This does not require the Employee to be investigated by the Police, little less tried and convicted by a Court of Law. The Employer is only required to have reasonable and sufficient grounds. The Respondent in this dispute had reasonable and sufficient grounds against the Claimant. That was enough to sustain the disciplinary sanction.

58. The Court is satisfied there was a valid ground justifying termination, as required under Section 43 and 45 of the Employment Act. The Claimant was a Security Officer. He knew it was illegal to remove unaccustomed goods from the Port without proper documentation. He attempted to remove whiskies from the duty free facility within the Port, without proper documentation.

59. That he was not charged by the Police with any offence did not bar the Respondent as an Employer, to try the Claimant and summarily dismiss him under the Employment Act 2007, and the Disciplinary Code. It was suggested by some Witnesses in the Disciplinary Proceedings that the Claimant was in communication with the OCS and the OCPD after the crime took place. It is only the Police and the Claimant who would know why the Claimant was not taken to Court. The failure to pursue criminal proceedings certainly did not absolve him of an employment offence. Termination was fair. The Claimant's employability was not affected by any wrongful act that would be attributed to the Respondent. Damages for employment-related defamation, such as granted Claimants in this Court's decisions, ***Dr. Ezekiel Nyangoma Okemwa v. Kenya Marine & Fisheries Research Institute [2016] e-KLR***; and ***Naqvi Syed Omar v. Paramount Bank Limited & Another [2015] e-KLR***, were granted as a result of loss of employability occasioned to the Employee, as a result of the wrongful acts of the Employer. There was no wrongful act done to the Claimant by the Respondent, resulting in his diminished or lost employability.

60. The Court finds no merit in the Claim. It is noted the Claimant expanded his prayers in the Closing Submissions, going beyond what he had pleaded. The Court has stated in the past that Parties should not introduce fresh evidence, or prayers, through their Closing Submissions. Whereas the Court may, in appropriate circumstances, and in the interest of justice grant orders which have not been specifically sought, Parties do not have a freehand in providing additional material, and seeking fresh remedies through Closing Submissions. Such introduction compromises the other Party's right to a fair hearing. **IN SUM, IT IS ORDERED:-**

a) The Claim has no merit and is hereby dismissed with no order on the costs.

Dated and delivered at Mombasa this 17th day of February, 2017.

James Rika

Judge