



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 324 OF 2014

BETWEEN

HAFIDH MWINYI MWATSAHU CLAIMANT

VERSUS

KENYA WILDLIFE SERVICE RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

A.O. Hamza & Company Advocates for the Claimant

Musinga & Company Advocates for the Respondent

JUDGMENT

Overview

1. The Claimant filed Civil Suit Number 146 of 2010 at the High Court in Malindi on 20th December 2010. He sought the following orders against the Respondent:-

- a) The Respondent is compelled to compensate the Claimant for wrongful dismissal from service by paying the Claimant his full salary up to retirement age, taking into account any increments of salary place [sic].
- b) Direct the Respondent to release the Employer contribution/ retirement benefits under Retirement Benefits Act Registration as per the Rules [?]
- c) Costs of the Case.

2. The Respondent filed a Statement of Defence on 14th April 2011. It concedes the Claimant was its Employee. He was dismissed from service on valid grounds. He was heard before dismissal. The Respondent does not administer Pension Scheme and cannot be held liable in a pension claim. The Claimant filed a Reply to this Defence on 5th July 2011. He states the Defence is a sham and ought to be rejected.

3. The Suit was transferred from the High Court Malindi, to the Industrial Court Mombasa on jurisdictional ground, on the 10th June 2014. It was registered as Cause Number 324 of 2014 at the recipient Court.

4. The Claimant gave evidence, and closed his case, on the 14th July 2015. Wilson Kamengo Mulwa, Human Capital Officer of the Respondent, gave evidence on 14th July 2015 and 17th February 2016. Celina Musyawa Mwangangi, Respondent's Senior Investigations Officer –Ticketing, gave evidence on the 17th February 2016. Assistant Warden 1 Elija Chege, and Senior Officer Warden 2 Francis Kirimi Mbaka, both gave evidence for the Respondent on the 16th June 2016 when hearing closed.

Claimant's Case

5. He told the Court he was employed by the Respondent [KWS] as a Ranger Grade 4, as per the letter of appointment dated 5th May 1994. He was dismissed from service on 20th July 2008. He earned a monthly salary of Kshs. 17,700 as at the time of dismissal. He was dismissed on the allegation of recycling 6 gate entry tickets at Watamu Marine Park, in Malindi. He testified a fellow Officer, one Rashid, and not he recycled the tickets. Rashid was not called to the disciplinary hearing because he was likely to give evidence favourable to the Claimant's cause.

6. The Claimant's role was to count the receipts and reconcile the amounts received. He had not experienced any problems on ticketing with the particular Client, Aqua Venture Driving School. Peter Nzai from Aqua Venture was a Witness in the disciplinary proceedings. He was not able to recall most of the issues he was questioned about by the Claimant. The Panel concluded the Claimant was guilty of recycling tickets. Other peripheral charges against the Claimant were thrown out. It was decided the Claimant is dismissed from service effective 30th June 2008 as per dismissal letter dated 30th July 2008.

7. He appealed against the decision on 10th August 2008. He was not invited to a hearing. His Appeal was dismissed. He had 20 years left in service.

8. On cross-examination, the Claimant stated he was forced to sign his Statement dated 11th November 2007, by an Officer he identified as Warden 1. He was not given the opportunity to call a Witness at the disciplinary hearing. Rashid issued the receipts. The Claimant did not erase the receipts. Claimant's Appeal took 1 year to be determined. He was paid terminal benefits amounting to Kshs. 110,453. He was paid 1 month salary in lieu of notice; 17 days' salary for days worked; and house supplementation- net Kshs. 31,223. This was paid on 11th November 2011. He was called to Nairobi Head Office for the hearing of the Appeal. He was heard.

9. Redirected, the Claimant testified he did not self-record the Statement of 11th November 2007. His self-recorded version was rejected. He was not allowed to call Witnesses. He would have called Richard and Mwachanze, fellow Officers on duty at the time. Richard issued the disputed tickets. The Claimant prays the Court to grant his prayers.

Respondent's Case

10. Wilson Kamengo Mulwa confirmed the Claimant was employed on 6th May 1994, after attending a recruitment exercise at Manyani. He was enrolled as a Ranger. KWS has uniformed and non-uniformed staff. The Claimant was uniformed.

11. He committed the offences stated in his evidence above. He was subjected to Respondent's Human Resources Regulations. His case was handled under the Armed Wing Regulations Code. He was heard and found guilty. Mulwa deleted Claimant's name from the payroll after dismissal.

12. There is provision for appeal. There is an Appeals Board, in which Mulwa serves as the Secretary. The Board advises the KWS Director on removal of staff. The Claimant was dismissed on 30th June

2008. He appealed on 10th August 2008. The Director called on the Appeal to be coached. Coaching of the Appeal is a process provided for under Regulation 17 [3] of the Armed Wing Regulations Code. It required the Claimant be explained to by the relevant Warden, how the proceedings went. The Appeal was listed for hearing on the 7th November 2008. Mulwa personally called the Claimant to attend the appeal hearing. He was eventually heard on 3rd December 2008 by the KWS Disciplinary Advisory Board.

13. This Board is an independent organ. It reviewed all the proceedings on record. It upheld the decision to dismiss the Claimant. The proceedings were forwarded to the Director for approval on 6th March 2009. The Director approved the Board's decision. The decision was communicated to the Claimant on 31st July 2009.

14. KWS has a Superannuation Scheme. He was paid withdrawal benefit comprising his contribution and interest, amounting to Kshs. 110, 453. Employer's contribution was deferred and would be accessible to the Claimant on attaining the age of 50 years and above. If the Claimant secured alternative employment, he was free to have deferred benefit transferred in any scheme established by such other Employer.

15. Due process was followed. Mulwa told the Court he could vouch for this statement as he served as the Secretary to the Appeals Board. There was no wrongful termination. There were no anomalies in the procedure. The Appeals Board would have noted any anomalies.

16. He testified under interrogation by Counsel for the Claimant, that the Claimant had a clean record before the ticketing incident. He handled revenue. He had a Supervisor. He did not account for revenue collected. The Supervisor was not implicated. Revenue inquiry was carried out through revenue audit. If an Officer does not have power to make a decision, he would pass on the file to an empowered Officer. The Code was followed. Sentencing was carried out by an empowered Officer.

17. Celina Musyawa Mwangangi told the Court she accompanied her Colleague Chege on a routine revenue inspection at Watamu, Malindi on 11th November 2007. They inspected revenue records at the Marine Park gate. These comprised Sales Reconciliation Register, Visitors' Register and the Ticketing Books.

18. There were cancellations in the Visitors' Register for 9th November 2007. The Claimant who was on duty on the material date was asked for explanation. He did not have an explanation. Originally, the entry indicated there were 4 Adult Residents and 1 Child Resident. It was altered to show 2 Adult Residents and 1 Child Resident.

19. The 2 Investigation Officers visited the Client Aqua Venture. The business owner informed them he had given money for 6 Adult Non- Resident, 2 Adult Resident and 1 Child Resident. He showed tickets which had been issued by the Claimant. They had 2 different dates of issue- 6th November 2007 and 9th November 2007. The tickets of 6th November 2007 were recycled and sold as new tickets on 9th November 2007. The Claimant defrauded the Respondent of Kshs. 4,080 by manipulating ticketing. Cross- examined, Mwangangi told the Court the Claimant received records on shift, from another Officer one Omar. He took shift on 5th November 2007. The offence was committed on 6th November 2007 and 9th November 2007. It was unnecessary to question Omar.

20. Elijah Chege confirmed he visited Watamu, accompanied by Mwangangi, for routine inspection. They found Ranger Hafidh Mwinyi Mwatsahu at the Blue Bay Gate, Watamu. They detected the anomalies given by Mwangangi in her evidence before the Court. They asked the Claimant to explain. He started shaking and asked the Officers to be allowed a moment to relieve himself. He did not give any explanation on return. They visited the beneficiary of the tickets Aqua Venture and met the business owner one Steve Curtis. He informed the Officers he sent his Employee Nzai on 9th November 2007 to purchase 6 Adult Non-Resident, 2 Adult Resident, and 1 Child Resident Tickets. Non Resident Tickets were serial Numbers 0015683, 0015686, 0015688 and 0015689. Resident Adult Tickets were 0012428

and 0012429. The last, Child Resident Ticket was 0004517.

21. Serial Numbers sold to 1 individual normally follow sequentially. They did not in this case. The Officers took the suspect tickets for investigation. Some tickets had been re-stamped, concealing the date of the issue. The reconciliation record at the gate indicated Adult Non- Resident tickets were sold on 6th November 2007. They were recycled and sold 9th November 2007. By doing this, the Claimant defrauded the Respondent of Kshs. 4,080. Chege was a Witness in the disciplinary hearing. He told the Court on cross-examination that he did not uncover other members of the ticketing syndicate. Mwachanze was the Supervisor. It was not recommended that Mwachanze be prosecuted. The Claimant was charged for the offence.

22. The last Witness Francis Kirimi Mbaka presided over the Claimant's case. He was asked by the Area Assistant Director Coast Region to undertake the role. He went to Watamu Marine National Reserve. He was handed over the Investigation file, details of the accused person, and the statement of offences against the accused person.

23. Mbaka applied the KWS Disciplinary Code of 1990. The Claimant was brought before Mbaka under escort. It was confirmed the Claimant was the accused Ranger. Charges were read to the Claimant. He pleaded not guilty. Hearing was adjourned to allow preparation of Witnesses. It was reconvened and evidence taken from KWS and Aqua Venture Witnesses. The Claimant was allowed the chance to cross-examine Witnesses. The Claimant was advised he could give evidence orally, give a written statement and call his own Witnesses. He opted to give an oral statement. The charges against him were established. He repossessed tickets sold on 6th November 2007 and resold them on 9th November 2007. Mbaka sentenced the Claimant to pay the equivalent of his 15 days' salary on the first count. On 2nd count, Mbaka did not have the power to sentence. He made recommendation and forwarded the file to the Head Office for further action. The Claimant subsequently was dismissed from service. He appealed. His Appeal was declined. Cross-examined, Mbaka told the Court there were no Visitors to the Park who were called to confirm ticketing fraud. The Supervisor was not called as a Witness. Mbaka drafted the charges and presided over the case. This was in accordance with the Disciplinary Code. The Claimant was given the chance to call his Witnesses. The Respondent prays for dismissal of the Claim.

Issues

24. The issues arising from the evidence above are these:-

- a) Whether the Claimant's contract was terminated on valid ground/s?
- b) Whether termination was fairly carried out?
- c) Whether the Claimant merits the 3 prayers contained in his Complaint dated 3rd December 2010.

The Court Finds: -

Uncontested evidence

25. It is common evidence that the Claimant was employed by the Respondent State Corporation as a Ranger Grade 14, through a letter of appointment dated 5th May 1994. Date of appointment was 6th May 1994. He was charged with the offence of recycling and reselling KWS entry tickets at Watamu Marine Park, on 9th November 2007. He recorded a statement on the allegation. He was heard and decision to summarily dismiss him made by the Respondent. He appealed against the decision to the Respondent's Disciplinary Appeals Board. The Appeal was rejected, and the decision of the Appeals Board endorsed by the KWS Director. The decision was communicated to the Claimant. He earned a monthly salary of Kshs. 17,700, as of the date of summary dismissal. He was subject to the Kenya Wildlife Service [Armed Wing] Disciplinary Code, 1990.

Substantive Justification [Sections 43 and 45 of the Employment Act 2007]

26. The Claimant recorded a statement dated 11th November 2007. His position was that he did not self-record the statement. He did not deny the correctness of the statement, even assuming he did not self-record.

27. The statement in general is inculpatory. The Claimant concedes he was on duty at the Blue Bay Gate on 9th November 2007. He sold 2 Adult Resident Tickets and 1 Child Resident Ticket to Aqua Ventures. He sold them to one Peter who had been sent by Steve Curtis of Aqua Venture. The Claimant states he had initially indicated entry for 4 Adult Residents and 1 Child Resident. He states he cancelled the tickets to read 2 Adult Residents and 1 Child Resident. He explained he did the alterations after he had done the daily reconciliation. He confirmed tickets sold on 6th November 2007, were re-stamped and re-sold on 9th November 2007. They were used for Park entry on 2 different dates. The Claimant gave the cost of the recycled tickets at Kshs. 4,080. He states he was the only Officer on duty on 9th November 2007.

28. This recollection from the Claimant, in his own words, is supported by the statement of Peter Nzai from Aqua Ventures, dated 17th November 2007. Nzai confirms he was sent to purchase tickets by Curtis on 9th November 2007. He was sold the tickets by the Claimant. These tickets turned out to have been recycled and resold.

29. Celina Musyawa Mwangangi and Elijah Chege, the Officers who investigated the offence, similarly corroborated in great detail, these statements of the Claimant and Peter Nzai. They asked the Claimant to explain the anomalies in the Gate Entry Book. The Claimant started shaking, requested to go out and relieve himself, but came back with no plausible explanation.

30. In his evidence before the Court, the Claimant weakly attempted to shift blame to his fellow Officers at Blue Bay, who included his Supervisor. He alleged he was ordered to sign his statement, but gave no details of coercion. His statement, that of Peter and the evidence of the Investigation Officers all placed the offence squarely in the hands of the Claimant.

31. The Court is satisfied the Claimant was dismissed from KWS for valid reasons. He was at the heart of recycling and reselling of entry tickets. He defrauded the Public. He was summarily dismissed on valid grounds. The Respondent cannot be faulted for not justifying its summary dismissal decision.

Procedural Fairness [Section 41 and 45 of the Employment Act 2007]

32. The Claimant as stated above was subject to the KWS [Armed Wing] Regulations 1990. He was supplied with a Notification of Disciplinary Inquiry on 28th January 2008. He was supplied with a clearly worded Charge Sheet. He signed both documents. The record indicates he was taken through Orderly Room Proceedings running from 29th January 2008 to 30th June 2008. It is recorded the charges were explained to him in a language understood by him, to which he responded 'nakataa' [not guilty].

33. Witnesses were called by the Respondent. They included Peter Nzai, Elijah Chege, Celina Mwangangi, and Steve Curtis. The Claimant was advised of his right to cross-examine each Witness and exercised that right. At the end of Respondent's case, the Claimant was advised:-

- a) He could call his own Witnesses.
- b) He could defend himself orally.
- c) He could hand in a written statement.
- d) He could remain silent.

The Claimant opted to give an oral statement. In the end presiding Officer Francis Kirimi Mbaka read a

Judgment finding the Claimant guilty. The Claimant was advised on his right of mitigation and appeal. He exercised these rights. He was heard on Appeal. The hearing was carried out fairly, and in accordance with the applicable Disciplinary Code.

34. The sentencing of the Claimant on one of the counts, by an Officer rather than the one who heard the Claimant, appears not procedurally sound. Ideally, the Officer presiding over the Disciplinary Proceedings should have been empowered to sentence on all counts. The Respondent should have assigned an Officer fully empowered rather than one with limited powers. The Claimant was nonetheless not prejudiced by having one count moved to another Officer sufficiently empowered, to sentence based on the recorded proceedings. The Claimant did not raise this issue with Mbaka, and did not show the Court that the handing over the file to another Officer for sentencing was against the KWS [Armed Wing] Disciplinary Code 1990.

35. The Claimant lodged an Appeal on 10th August 2008. He gave 4 grounds:-

- a) He did not recycle and resell the tickets.
- b) He always served with dignity and professionalism.
- c) He did not see the Guest purported to have been issued with recycled tickets.
- d) He had a clean record.

36. He did not complain about being denied his right to call Witnesses at the disciplinary hearing, in this Appeal. He did not complain about sentencing by the wrong Officer. He did not complain that Rashid, and not him, issued the tickets. He did not complain about the participation of his fellow Officers in the crime, and the lack of action against those Officers by the Respondent. He raised grounds which could not be sustained, in light of the evidence given by the Claimant himself, the evidence of Peter, Celina and Elijah. His Appeal was dismissed.

37. In the view of the Court procedure was fair, and in conformity with the Disciplinary Code to which the Claimant was subject. Termination was fair both in justification and fairness of procedure.

Remedies

38. Consequently the Claimant does not merit any of the prayers. Termination was fair on all counts. The Respondent administered disciplinary sanction against the Claimant validly and fairly.

IT IS ORDERED:-

a) The Claim is dismissed with no order on the costs.

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

James Rika

Judge