



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 7 OF 2016
ECKLA JESANG KIROP.....CLAIMANT
VS
KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The claimant has brought his suit alleging that she was unfairly dismissed from her employment by the respondent by the letter dated 12.1.2016. It is the claimant's case that she was dismissed for no good cause and without following the fair procedure in the Disciplinary Handbook 2015. She therefore prays for declaration that the dismissal of the claimant was unfair and that she should be reinstated to her employment without loss of benefits.

2. The respondent has admitted that she had employed the claimant from 2004 or there about until the said date of dismissal. It is however the defence case that the dismissal was fair because the claimant had presented forged academic certificate to her for purposes of securing appointment or promotion. It is further defence case that the dismissal was done after following a fair procedure because the claimant was given a chance to defend herself before the dismissal.

3. The issues for determination herein are:

- a. **Whether the reason for the dismissal was valid and fair.**
- b. **Whether the procedure followed before the dismissal was fair.**
- c. **Whether the reliefs sought should be granted.**

4. To answer the said issues the claimant testified as Cw1 while the respondent called Mr. Marco Ngolia as Rw1. All the documents evidence filed was admitted by consent during the hearing and thereafter both parties filed written submissions.

ANALYSIS AND DETERMINATION

Reason for the dismissal

5. The reason for dismissing the claimant was that she presented to the respondent for purposes of

employment or career advancement a forged academic certificate. The certificate presented was KCSE 1995 from Cheptulon Secondary School Exam code 58038. On 9.7.2012, the Ministry of Public Transport wrote to the respondent directing her to authenticate the academic certificates of all her staff in line with the advice given by the Public Service Commission. The respondent then submitted the claimant's 1995 KCSE Certificate to the Kenya National Examination Council (KNEC) for authentication. The KNEC responded by the letter dated 22.7.2013 confirming that the said KCSE certificate was a forged document. That the school code was not tallying with the Examination Code for Cheptulon Secondary School for 1995 which was 520108 and not 58038. Rw1 admitted that he visited the school during his investigations and confirmed that the claimant attended Cheptulon Secondary School and sat for her KCSE in 1993 as index number 004. He contended that during the disciplinary hearing, the claimant brought the correct KCSE Certificate for 1993 which was different from the one she presented, when she was employed.

6. The claimant denied the offence of presenting forged KCSE Certificate. She maintained that she sat for her KCSE in 1993 at Cheptulon Secondary School under School Code 58038 and index number 004 and score D+. She stated however that she lost her said certificate and applied for replacement which she presented to the committee of inquiry when she was called for disciplinary hearing. On cross examination she however admitted that she filled Employee Detail Form indicating that she did her Primary school from 1984-1991 and Secondary from 1992 to 1995, the same periods stated in the CV which she presented to the respondent for purposes of appointment. She further admitted that during the disciplinary hearings she told the committee that the certificates she presented to the respondent had been tampered with by a navy officer who had offered to look for a job for her.

7. I have carefully considered the evidence adduced herein and in the proceedings before the committee of inquiry. It is clear that on 11.9.2008 the claimant filled her Employee Details Form indicating that she sat for her KCSE in 1995 at Cheptulon Secondary School and scored D+. She annexed thereto a CV indicating the same academic qualifications, a copy of the 1995 KCSE Certificate and School Leaving Certificate for the same year.

8. There is no dispute that during the disciplinary hearing, the claimant admitted that her academic documents had been tampered with a Navy officer who was looking for a job for her. That when the respondent offered a contract for 2 years to her, she rushed to the Navy Officer and retrieved copies of her academic certificates which had already been tampered with and presented them to the respondent. She further stated that from the date of her appointment, she never received any complaint from the respondent until 2015 when she was served with a show cause letter.

9. I do not hesitate to find that, the claimant presented to the respondent a forged KCSE Certificate for 1995 for purpose of employment or career advancement. The said action was gross misconduct under section 44(4) (g) of the Employment Act because it amounted to crime against the respondent. The claimant admitted the offence during the disciplinary hearing and as such the respondent was entitled to dismiss her as she did. The issue herein is not whether or not the claimant did her KCSE in 1993 but whether she presented to the respondent a forged KCSE Certificate for 1995. Consequently I find and hold that the respondent has proved and justified the reason for dismissing the claimant as required under section 43, 45 and 47(5) of the Act.

Procedure followed

10. The claimant had admitted in evidence that he was accorded a disciplinary hearing on 25.11.2015 in the presence of his union representative Mr. William Onsando. The claimant has however contended that the committee of inquiry was not properly constituted because it was chaired by unqualified person. She cited section K10 (f) of the Disciplinary Handbook 2015 which barred the Head of Department, Division or Section of the accused employee from presiding over his disciplinary hearing. In this case Mr. Yobes Oyaro who chaired the claimant's hearing was the Head of Procurement Department where the claimant was attached and it is therefore the claimant's case that the committee constituted to hear his case was not in accordance with section K10(f) of the Disciplinary Handbook.

11. The respondent has however contended that the committee was constituted before the passing of the

said Disciplinary Handbook and as such it was not subject to the new Handbook. According to Rw1, the new Handbook could not be applied respectively to a special committee that had been constituted to deal with the issue of fake certificates.

12. After considering the rival contentions, I find that there is no dispute that the claimant was accorded a hearing where she was informed her charges in the presence of her union official and thereafter she and her union official were given a chance to air their defence. That process was on all fours with section 41 of the Employment Act which provides for procedure that was herein followed by the committee of inquiry. That however was not all what the claimant was entitled to.

13. Section 26 of the Act provides that the rights given under the Act are mere minimum which may be improved by the contracts negotiated by the employer and the employee. In this case the employer has bound herself under section K10 (f) of the Disciplinary Handbook not to let an accused employee to be tried in disciplinary proceedings by her Head of Department, Division or Section. Going against that contractual term is a breach of contract and section 12 of Employment Act which require the employers must provide rules of procedure for disciplinary cases of his employees. Consequently I agree with the claimant that her disciplinary proceedings were done by an incompetent committee because its chairperson was disqualified from chairing the proceedings by section K10 (f) of the Disciplinary Handbook 2015. The section provided that:

“...The chairman of the disciplinary committee for cases of accused employees at grades HM4-HG4 will be officers at grades HM3 and above. Members of the committee will be adopted with due regard to the standing grade of the accused with atleast one member from the accused employee’s Department. Neither the Head of the accused employee’s Division/Department/Section will be a member of the committee...” (Emphasis added).

14. The foregoing provision is not different from section K8 (K) Disciplinary Handbook 2008 which was in force before the passing of the 2015 Handbook. It is trite law that a hearing by an improper constituted tribunal cannot pass the test of a fair hearing. It is not by accident that the drafters of the respondent’s Handbook have from 2008 allowed the ban of Head of a Department from chairing proceedings of their juniors. One cannot rule out bias from the said Heads who may either victimize their juniors to settle old scores when they get the choice to chair their disciplinary cases.

15. In view of the foregoing I find and hold that the respondent has failed to prove that she followed a fair procedure before dismissing the claimant from her employment on 12.1.2016.

RELIEFS

Declarations

16. In view of the foregoing finding that the claimant was not accorded a fair hearing before a properly constituted disciplinary committee, I make declaration that her dismissal from employment was unfair. It cannot however be declared null and void because it is fact that the termination was done and the claimant is no longer in respondent’s establishment.

Reinstatement

17. There is no dispute that the court has jurisdiction to order reinstatement within 3 years after dismissal once it makes a finding that the dismissal was done unfairly. The said jurisdiction under section 49(3) of the Act is only to be exercised in very exceptional cases. In *Fadhil Juma Kisua vs Kenya Ports Authority*[2016]eKLR and *Walter Nyamweya Nyairo vs Narok University College* [2013]eKLR the court considered presentation of forged certificate to secure employment, as constituting a serious dishonesty which irreparably strained the trust and confidence between the parties to the employment relationship and consequently dismissed the prayer for reinstatement. I do not see any reason why I should abandon that view in this case. I therefore dismiss the prayer for reinstatement.

General Damages

18. The claimant has prayed for general damages for abuse of office and irregular disciplinary action. There is however no precedent or legal provision cited by the claimant as the basis for the claim for general damages. Consequently I dismiss the prayer for general damages because it is not provided for in section 49 of the Employment Act which outlines the reliefs available for remedying unfair termination of employment contract. I will not make any other orders because parties are bound by their own pleadings.

Disposition

19. The suit is dismissed with no order as to costs.

Signed, dated and delivered at Mombasa this 3rd day of February 2017.

O.N. MAKAU

JUDGE