



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 919 OF 2015

MOHAMED NASSIR ABDALLA.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent from the 25.7.2001. He started as a Casual employee Grade PA12 working as a Welder and General fitter. According to him the document needed was National Identity card. On 22.12.2008 he was given two years fixed term contract as Assistant Artisan job Grade HG4 although he lacked 'O' level certificate. On 21.7.2011 he was appointed a Trainee Assistant Operations Officer Grade HG1/HM4 for one year term. On 10.7.2012, he was confirmed to the position of Assistant Operations Officer on permanent basis and on 29.8.2013 he was given a letter of commendation by the management for excellent operation of Gantry Crane.

2. On 20.7.2015, he was served with a show cause letter dated 27.5.2015 accusing him of presenting to her a forged/fake Academic Certificate to secure appointment or career advancement contrary to section K4(C) (XVI) of the Disciplinary Handbook 2015. He responded by requesting for a personal hearing to defend himself. On 23.7.2015 he was invited to the hearing where he defended himself unsuccessfully and he was dismissed for the said offence by the letter dated 29.9.2015. He has now brought this suit alleging that the dismissal was unfair, unlawful and wrongful and praying to be reinstated to his employment without loss of benefits. He also prays for any other relief as the court may deem fit to order. It is the claimant's case that he did not commit the alleged offence and that the committee of inquiry which heard his case was not properly constitute as required by section K10 of the Disciplinary Handbook 2015.

3. The respondent has admitted that she employed the claimant from 22.12.2008 as Assistant Artisan Grade HG4 for two years contract which was renewed for a similar term on 30.12.2010. She further admitted that the claimant was appointed as Trainee Assistant Operations Officer (Gantries) Division 1A Grade HG.1/HM4 by letter dated 21.7.2011. According to the respondent qualification for the position of Assistant Operations Officer was KCSE Grade C which the claimant lacked but he never the less was employed because he had an Advanced Certificate in Mechanical Engineering from Mombasa Polytechnic as he indicated in his Employment Details Form dated 29.12.2008 and his Curriculum Vitae (CV). It is the respondent's case that she renewed the contract in favour of the claimant on 11.1.2012 also on the basis of the said certificate from Mombasa Polytechnic.

4. The respondent further avers that on 8.7.2012 the Ministry of Public Transport wrote to her directing her to verify the academic qualifications and records of all staff in line with the Public Service Commission advice. As a result the respondent wrote to the Technical University of Mombasa (formerly Mombasa Polytechnic) to verify the claimant's Advanced Certificate in Mechanical Engineering. In response, the University wrote letter dated 25.7.2013 indicating that the Certificate presented by the claimant was indeed a forgery.

5. The respondent then served the claimant with a show cause letter dated 27.5.2015 on the basis of the information given by the University. In response the claimant requested for a personal hearing which was accorded on 23.7.2015. According to the respondent the claimant admitted the offence of presenting the forged certificate during the hearing and apologized. The apology was however not accepted and the claimant was dismissed on 29.9.2015. The respondent contended that the dismissal was fair and lawful because the claimant was given a fair hearing and found guilty of an offence that warranted summary dismissal. She further contended that the committee of inquiry was properly constituted before coming into force of the Disciplinary Handbook 2015 and as such section K10 of the said Handbook does not apply in this case.

6. The issues for determination are:

- a. Whether there was a valid and fair reason for dismissing the claimant from service.**
- b. Whether the procedure followed before the dismissal was fair.**
- c. Whether the relief sought should be granted.**

7. To answer the said questions, the claimant testified as Cw1 and the respondent called Mr. Marco Ngolia as Rw1. All the documentary evidence filed was produced by consent and thereafter both parties filed written submissions all of which I have carefully considered.

ANALYSIS AND DETERMINATION

The reason for Termination

8. The reason for the dismissal cited in the letter dated 29.9.2015 was presenting a forged Academic/Professional certificate to the respondent contrary to section K4 (XVI) of the Disciplinary Handbook 2015. The letter further states that the claimant had accepted the offence during the disciplinary hearing. The claimant admitted that he attended the disciplinary hearing but denied the offence during his testimony herein.

9. I have carefully considered the evidence adduced herein including the proceedings of the committee of inquiry that heard the claimant before his dismissal. It is clear from the committee proceedings that the claimant admitted that he presented the CV produced by the respondent. The CV indicated that he held an Advanced Certificate in Mechanical Engineering from Mombasa Polytechnic having done the course from May 2002-May 2003. He also confirmed that he made the CV at a Cyber Café.

10. On a balance of probability, I opine that, it is at the same Cyber Café where the claimant made the fake Certificate in Mechanical Engineering and presented the same to the respondent together with the Employee Details Form dated 29.12.2008 for purposes of seeking appointment to the position of Assistant Artisan Grade HG4. The CV, the Employee Details Form and the Advanced Certificate in Mechanical Engineering are consistent in their details. They were presented the same time by the claimant for the purpose of securing appointment or promotion in the respondent's establishment.

11. Had the respondent been keen, she would have noted that the certificate was not in tandem with the period of the training stated in the CV. Whereas the CV stated that the course period ran from May 2002-May 2003, the certificate indicated that the exam was done in November 2002 and the certificate was awarded on 18.3.2003. There is no dispute that the said certificate was sent to the Polytechnic (now

Technical University of Mombasa) and was found to be a forgery.

12. The claimant's response to the said forgery before the committee of inquiry was that

“Makosa yashatokea (an offence has been done) and a parent must forgive a child so I ask for forgiveness before God.”

13. In my view, the claimant admitted the offence of presenting to the respondent, a forged or fake certificate in Mechanical Engineering allegedly from Mombasa Polytechnic to secure appointment or promotion. Consequently I find and hold that the respondent has discharged the burden proving the reason for terminating the claimant's contract of service as required under section 43(1) of the Employment Act. The said section provides that:

“In any claim arising out of termination of contract, the employer shall be required to prove reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed unfair within the meaning of section 45.”

14. The said offence was a fair reason for termination because it is related to the claimant's conduct and the operational requirement of the respondent. The misconduct was also a crime against the respondent and the respondent was entitled to dismiss the claimant under section 44(4) (g) of the Act. In addition the claimant lacked the minimum academic and professional qualifications needed by the respondent for her operations in the department where the claimant was assigned.

Procedure followed

15. The claimant has admitted that he was served with a show cause letter and in response he requested for a personal hearing. He further admitted that he was invited to the hearing on 23.7.2015 by letter dated 20.7.2015. He however contended that the hearing was not fair because the committee of inquiry was not properly constituted due to lack of an officer from his department. In addition he contends that the claimant was not HM3.

16. The respondent has however contended that the committee was set up before the Disciplinary Handbook 2015 came into force in February 2015. In addition, she contended that the committee was a special committee specifically set up to investigate the fake academic and professional certificates. In addition the respondent contends that the chairman was qualified because the rules required an officer of HM3 and above.

17. I have carefully considered the rival contentions and the provisions of section K10 of the Disciplinary Handbook 2015. Section K10 (e) states:

“The chairman of the disciplinary committee of case of accused employees at grades HM4-HG4 will be officers at HM3 and above. Members of the committee will be appointed with due regard to the standing grade of the accused with at least 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.”

18. Considering the foregoing provision, I agreed with the respondent that the chairman of the committee of inquiry was qualified to chair the claimant's disciplinary hearing. I however disagree with the defence that there was no legal requirement to have an officer from the claimant's department in the committee of inquiry. The respondent was bound to comply with the provisions of section K10 (f) because the Disciplinary Handbook was fully operational and it was indeed under its section K4 that the claimant was charged. I however see no merit in the contention by the claimant that there was no representative from his department in the committee because during cross examination, the claimant stated that:

“I found an officer from my department already in the committee.”

19. After considering the fact that the claimant was accorded a personal hearing by a properly constituted committee, I find and hold that the procedure followed before terminating the claimant's contract was fair and in all fours with section 41 of the Employment Act. The said section provides that before terminating the contracts of service of an employee, on ground of misconduct, poor performance and physical incapacity, the employer shall first explain the reason to the employee, in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice and thereafter invite the employee and his chosen companion to air their representations for consideration before the dismissal is decided.

20. In this case the claimant was invited to hearing by letter dated 20.7.2015 which explained to him that he had a right of choosing another employee to accompany him to the hearing in line with section 41 aforesaid. He however did not bring along any companion to the hearing. He was however reminded of his charges that had earlier been served on him vide the show cause letter and he was accorded a chance to respond in his defence. Thereafter the committee made its decision recommending for the claimant's dismissal. The recommendation was approved and the claimant was served with the dismissal letter dated 29.9.2015. No appeal was preferred.

RELIEFS

Declarations

21. In view of my findings above that the respondent has on a balance of probability proved that the dismissal of the claimant was grounded on a valid and fair reason and that it was done after following a fair procedure, I decline to make the declaration that the dismissal by the respondent was unfair, unlawful and wrongful as prayed.

Reinstatement

22. In view of the foregoing reason, I decline to reinstate the claimant to his employment without loss of benefits. Under section 49(3) reinstatement can only be ordered if the court finds that the termination of the employee's contract was unfair. In this case, I am satisfied that the dismissal of the claimant was substantively and procedurally fair.

Disposition

23. For the reason that the dismissal of the claimant was fair, I dismiss his suit with no order as to costs.

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

O.N. MAKAU

JUDGE