



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 153 OF 2016

FRANCIS WAWERU NJENGA

CLAIMANT

v

PUBLIC SERVICE COMMISSION

RESPONDENT

JUDGMENT

1. Francis Waweru Njenga (Claimant) sued the Public Service Commission (Respondent) on 4 May 2016 and he outlined the issues in dispute as

- (i) Unfair and unprocedural dismissal from employment.
- (ii) Wrongful withholding of salary/wages.
- (iii) Failure to accord the Claimant natural justice.

2. According an affidavit of service sworn by Edward Maina Wachira and filed in Court on 1 September 2016, the Respondent was served with Notice of Summons on 13 July 2016. A copy of the Summons attached to the affidavit show receipt and acknowledgment by stamping.

3. The Respondent despite the service did not file a Response and when the Cause was called out for directions on 18 October 2016, Mr. Nguyo, Senior Litigation Counsel on behalf of the Respondent sought for 21 days to file a Response and documents.

4. The Court granted the Respondent leave to file its Response and documents before 11 November 2016, and mention was scheduled for 2 December 2016 for further directions.

5. On 2 December 2016, the Claimant sought a hearing date which the Court fixed for 16 January 2017 (Respondent had not filed a Response and sought more time which application the Court declined because there was no explanation why the Response had not been filed as earlier ordered).

6. When the Cause was called out for hearing on 16 January 2017, the Respondent sought an adjournment which the Court declined and the Cause therefore proceeded for formal proof on 16 January 2017.

7. The Claimant and his witness testified and were cross-examined (despite not filing any process, Respondent's legal counsel was allowed to cross examine the witnesses).

8. The Claimant filed his submissions on 9 February 2017 while the Respondent's submissions which should have been on file by 21 February 2017 were not on file by this morning.

9. The Court has considered the pleadings, evidence and submissions.

10. The Claimant was appointed as a Forest Guard through a letter dated 23 September 1987 and served in various stations and was also promoted to a Corporal, which rank he was serving in at time of dismissal.

11. As regards the circumstances of dismissal, the Claimant was issued with a show cause notice dated 11 May 2011 alleging involvement in *cutting , felling and subsequent conversion to post of fifty (50) ...* cedar trees.

12. The Claimant responded to the show cause notice through a letter dated 23 May 2011 and a dismissal letter dated 24 January 2012 followed.

13. The Claimant appealed against the dismissal and on 5 November 2012, he was informed that the appeal had been disallowed. He thereafter sought for a review which was also declined through a letter dated 10 April 2015.

14. The Claimant impugned the dismissal both on procedural and substantive grounds.

Procedural fairness

15. On the procedural challenge he testified that there was no hearing, both before the dismissal and also after he lodged an appeal.

16. The primary statutory protection granted to employees against procedurally unfair termination of employment is found in section 41 of the Employment Act, 2007.

17. In so far as the Claimant was issued with a show cause setting out the allegations to confront and the timelines within which to respond, the Court is of the view that the Respondent was substantially in compliance with the requirements of procedural fairness.

18. It is now accepted jurisprudence that the process envisaged under section 41 of the Employment Act, 2007 can be conducted through correspondence, orally or a combination of both.

19. The Court must also observe that the Claimant did not set out a case for a right to a *face to face* hearing, either as a requirement of contract or other legal instrument.

Substantive fairness

20. It is incumbent upon an employer/Respondent to prove the reasons for terminating the services of an employee and that the reasons are valid and fair. Those are the burdens placed upon employers by sections 43 and 45 of the Employment Act, 2007.

21. The Respondent therefore had to prove that the Claimant was involved in the cutting and conversion of cedar trees into post and also that he set fire to Siron beat (part of the forest in contention).

22. In this case, the Respondent did not file a Response to set out its case or to meet the burden placed upon it by the aforesaid provisions of law and therefore by default, the Court can conclude that the dismissal of the Claimant was substantively unfair.

23. The Court has also considered the Claimant's uncontroverted testimony that he was not in charge of the part of the forest where there was a fire incident and that of his witness that there was another officer in charge of the material area.

Appropriate remedies

Lost income up to date

24. The Claimant did not lay any legal basis for grant of income he would have earned up time of judgment and this relief is therefore declined.

Reinstatement

25. The Claimant was due for retirement in 2027 according to a copy of payslip he produced in Court.

26. Considering the circumstances of dismissal, the nature of the work the Claimant was involved in and the size of the employer, the Court is of the view that reinstatement without loss of benefits would be an appropriate remedy.

Costs

27. The Claimant did not file submissions within the agreed timelines and on this account the Court denies him costs.

Conclusion and Orders

28. The Court finds and holds that the dismissal of the Claimant was substantively unfair and orders the Respondent to reinstate him without loss of any benefits with effect from 11 May 2011.

29. The reinstatement should be effected within 45 days from today.

Delivered, dated and signed in Nakuru on this 17th day of March 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Chege instructed by Gakuhi Chege & Co. Advocates

For Respondent Mr. Kirui, Litigation Counsel, Office of the Attorney General

Court Assistants Nixon/Daisy