



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT MOMBASA
CAUSE NO. 789 OF 2015
THAMUDA H. MWARUWA.....CLAIMANT
VERSUS
KENYA PORTS AUTHORITY.....RESPONDENT
J U D G M E N T

INTRODUCTION

1. The claimant has brought this suit seeking the following reliefs.

- (a) Damages for unfair dismissal.
- (b) Reinstatement to her employment
- (c) Certificate of service.
- (d) Payment for years worked.
- (e) Payment of gratuity.
- (f) All allowances under the contracts of employment
- (g) Cost of the suit.

2. The respondent has denied the alleged unfair dismissal and avers that the claimant was fairly dismissed for grounds of misconduct and after following a fair procedure. It is the defence case that the claimant uttered false academic certificates/ testimonies/documents for purposes of securing employment or promotions at the respondent and she was accorded a fair hearing before dismissal as provided for under the law and the respondents' Disciplinary Handbook (2008) and (2015).

3. The suit was heard on 1/9/2016 when the claimant testified as CW1 and the respondent called Constance Rose Mcharo, Silvester Ndongoli and Irene Mbogo as RW1, Rw2, and RW3 respectively. Thereafter both parties filed written submissions which I have carefully considered herein.

CLAIMANT'S CASE

4. CW1 was employed by the respondent as messenger Grade PA12 in September 2000. In 2002 there

was restructuring and she was translated to Officer Messenger Grade HG4. In 2004, she was confirmed to permanent and pensionable terms effective 13/9/2000 the date she joined the respondent. On 12/4/2006, her manager wrote to the Personnel manager proposing that she be promoted to a Dispatch Clerk. The letter by her manager set out the documents she had presented to the employer for consideration during the promotion. She was promoted effective 12/4/2006 to the proposed position. Again by a letter dated 30/3/2007, the manager, Finance Accounting recommended for the promotion of the CW1 among other officers based on their work experience and productivity.

5. On 1/8/2011, CW1 was shocked to receive a show cause letter stating that she had presented forged certificates to the respondent for purposes of securing employment or promotional interviews. She wrote back on 3/8/2011 requesting for 14 days to respond to the show cause letter. She did so on 17/8/2011 denying the offence levelled against her and requested for a personal hearing to defend herself. The hearing was accorded on 25/11/2011 and thereafter she went on with her duties until 4/9/2015 when she received a letter summoning her to the Ethics and Anti-Corruption Commission (EACC) office, Mombasa on 18/9/2015. She was on a leave of absence to go for pilgrimage in Mecca on the scheduled date and as such she went to the EACC office on 14/10/2015. When she reported back to work on 15/10/2015, she was stopped at the gate and she was informed that she had been dismissed from employment. After the explanation she was let in to collect her dismissal letter dated 29/9/2015. According to her the dismissal was unfair because no reasons were given and the results of the committee of Inquiry of 25/11/2011 had not been disclosed to her. In addition she deemed the dismissal to be unfair because she was not served with a prior notice.

6. On cross examination by the defence counsel, CW1 admitted that she wrote and signed the application dated 10/2/2005 stating that she went upto Form 3 secondary education. She however confirmed that she reached Form 2. She further admitted that on 14/1/2010 she applied for appointment to the Position of Secretary Grade HG1 and annexed her testimonials but denied ever annexing any certificate from Matuga Development Centre, Tebotech Institute and Coast Institute of Business Studies. She further denied ever annexing any KCSE certificate from Baptist high School.

7. She however admitted that sometimes before January 2010 some people came to her office and asked for her testimonials for purposes of entering in respondent's computer system and she gave out the documents. She also admitted that shortly after presenting the application in January 2010, she received an email asking her to take all her original certificates to the Ethics and Integrity Department. Thereafter she received the show cause letter dated 1/8/2011 accusing her of forging KCSE certificate, and three other certificates from Matuga Development Centre. She concluded by admitting that she was accorded a hearing on the alleged offence before the dismissal.

DEFENCE CASE

8. RW1 is the Respondent's Senior HR Officer (Recruitment and Staff Appointments). She confirmed that the claimant was employed by the respondent as office messenger Grade PA12 on 14/9/2000 and later applied for Promotion to the Post of Clerk Grade HG3 on 10/2/2005. In the application, she indicated that she reached form three in Secondary education which was considered to get the promotion to Dispatch Clerk Grade HG3 on 17/7/2006. From 1/4/2007, CW1 was appointed in acting capacity to serve as Secretary HG1. On 31/12/2009, the respondent advertised position of secretaries Grade HG1 and the claimant applied on 14/1/2010 annexing her testimonials including KCSE certificate 2002 from Baptist High School and three certificates from Matuga Development Centre for Business English II, officer Practice II and Typing writing II (60 WPM).

9. In the course of January 2010, the respondents' MD received anonymous letters alleging that some of the applicants for the secretarial positions advertised had presented fake/forged testimonials as proof of their qualifications. As result, the MD appointed the Ethics and Integrity manger to investigate the alleged forgery and advise him. The manager did the investigations and prepared the repost dated 26/5/2011 which confirmed the alleged forgery of certificates by employees and recommended for disciplinary action against them.

10. The claimant was served with a show cause letter dated 1/8/2011 charging her with presenting the said forged/fake KCSE certificate and the other certificates from Matuga Development Centre. The claimant responded and requested for personal hearing which she was accorded on 23/11/2011 with the option of being accompanied by a fellow employee or union official of her choice. After the hearing she was found guilty as charged and she was dismissed on 29/9/2015. According to the RW1, the dismissal was fair because the claimant had presented to the respondent forged/fake certificates for purposes of appointment/promotion.

11. On cross examination, RW1 stated that employees' testimonials are submitted by the employees during recruitment and fed into the SAP system. Thereafter the certificates are updated when the employee presented new ones after completing any training after the recruitment. She clarified that after the updating, the employee goes back with his hard copy certificate. She further contended that a stranger cannot cause update of documents in the SAP system.

12. RW2 is the Respondents' Ethics and Integrity Manager. In January 2010, he was appointed by the respondent's MD to investigate alleged forged/fake testimonials which had been presented by 14 staff members seeking appointment in the position of Secretary. The tip off had been given to the respondent through anonymous letters. He did his investigations and verified with the Kenya Examination Council (KNEC) that the certificates presented by the claimant were forged/fake. He prepared his report dated 26/5/2011 and submitted to the respondent. Thereafter the claimant was taken through fair disciplinary process and finally she was dismissed for uttering false academic testimony which depicted her as untrustworthy employee.

13. RW3 is the respondent's Senior HR officer. She testified that after RW2 presented his investigations report, the claimant was served with a show cause letter on 1/8/2011 and she responded on 17/8/2011 denying the offence. Thereafter she was invited for hearing on 25/11/2011 and after considering the evidence, the committee returned a verdict of guilty as charged and recommended for her dismissal of the claimant. On 2/2/2015 respondent Board considered the decision by the committee of inquiry and approved it. Thereafter the claimant was served with a dismissal letter dated 29/9/2015. RW3 maintained that the dismissal was justified and fair considering the fact that the claimant had committed gross misconduct under section 44(g) of the employment Act and she was accorded a fair procedure before the dismissal.

ANALYSIS AND DETERMINATION

14. There is no dispute that the claimant was employed by the respondent from September 2000 until 29/9/2015 when she was dismissed. The issues for determination are:

- (a) Whether the dismissal was unfair.
- (b) Whether the claimant is entitled to the reliefs sought.

UNFAIR DISMISSAL

15. Under Section 45(2) of the Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. Valid reason is one which is true on a balance of preponderance. Reason is fair if it relates to the employee's conduct, capacity and compatibility, or the operational requirements of the employer. On the other hand, the procedure is fair if it avails to the employee an opportunity to understand the reason for, and defend herself before the termination.

16. The said burden of proof, however does not accrue until the employee discharges the burden of proving that indeed his dismissal fell short of valid and fair reason and/or that fair procedure was not followed. Section 47(5) of the Act provides that the burden of proving unfair termination of employment lies with the employee who alleges that he was unfairly terminated while the employer has the burden of justifying the termination. With the above background the questions that beg answers are therefore

whether there was a valid and/or fair reason for dismissing the claimant from employment, and whether the dismissal was done after following a fair procedure.

Reasons for the dismissal

17. The claimant denied in evidence that she never presented to the respondent the four fake certificate/testimonials, namely, KCSE 2002 from Mombasa Baptist High School, Business English II Result slip from Matuga Development Centre, Office Practice Result slip from Matuga Development Centre and Typewriting II (60 WPM) result slip from Matuga Development Centre. The respondent has however contended that the said testimonials were brought to her by the claimant during the census on 5/3/2009 and on 14/1/2010 when she applied for promotion to secretary Grade HG1.

18. I have carefully considered the evidence and the submissions presented to me by both parties. There is no dispute that the testimonials in question bear the claimants name and were availed to the respondent during a census in March 2009 and in January 2010 during recruitment of Secretaries in which the claimant was involved. The said documents were lawfully updated into the respondent's HR master Data system. Though the claimant has suspected witch hunting from envious colleagues, RW1 has denied any possibility of a stranger causing any update of certificates in the HR SAP system. On a balance of probability, I find that it is only the claimant who secured the fake documents and presented them to the respondent for purposes of employment and career progression.

19. The foregoing view is buttressed by the claimant's admission on oath that she wrote the applications for promotion dated 14/1/210 and attached testimonials. She also admitted on oath that, sometimes before making the said application some people asked for her testimonials for purposes of preparing Soft Data in the personnel office. The claimant having made false statement in her application for promotion in 2005 and escaped must have decided to take her dishonesty a notch higher. In her application dated 19/2/2005 she lied that she went upto form 3 at H. H. Agakhan Secondary School and got away with it. In the application dated 14/1/2010, she never stated the academic qualifications but she annexed the academic and professional certificates some of which turned out to be forged/fake.

20. The report by RW2 that verified that the KCSE 2002 certificate from Mombasa Baptist High School was fake has not been denied. Likewise the report by the KNEC confirming that the said KCSE certificate and the result slips from Matuga Development Centre were fake has not been denied. The claimant has admitted in evidence here and before the respondent's committee of inquiry that she never went beyond from 2 secondary education and that she never attended Mombasa Baptist School and Matuga Development Centre. During the disciplinary proceedings, she stated that she left Agakhan secondary school in 1977 at form 2 and from 1999 she never went to school or did any course in relation to secretarial profession.

21. Having found herein above that the claimant presented the said fake documents to the respondent to secure employment/promotion, it is my further finding that such action amounted to gross misconduct and brought her within the bounds of Section 44(4) (g) of the Act. Under the said provision, an employee who commits a crime against his employer or is reasonably suspected to have committed a crime against the employer, is guilty of misconduct which entitles the employer to summarily dismiss her. I agree with the defence that uttering a forged or false document is a criminal offence under the Penal Code. I also agree with the defence that employment contract is grounded on mutual trust and once that trust flies away, the employer has a right to dismiss the dishonesty employee. Consequently, I find and hold that there existed a valid and fair reason for the dismissal of the claimant namely presenting forged/fake testimonials to the respondent for purposes of securing employment/promotion. The discovery of the said offence rendered the claimant's contract with the respondent incompatible.

Fair procedure

22. The claimant admitted that she was served with a show cause letter and thereafter given a personal hearing. The letter dated 23/11/2011 which invited her to the hearing gave her the right to be accompanied by union official or her fellow employee. In my view the procedure followed was fair and

in accordance with Section 41 of the Act which requires that, before dismissing an employee on account of misconduct, poor performance or 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 afford the employee and his companion a chance to air their defence. Consequently I find and hold that the respondent followed fair procedure before dismissing the claimant.

RELIEFS

23. Under section 49(3) and (4) of the Employment Act, reinstatement can only be ordered if the dismissal is found to be unfair in addition to consideration whether it is practicable. In this case, I have already made a finding that the dismissal of the claimant was fair. In addition, there is no dispute that the claimant lacked the academic and professional qualifications for the job she wants to be reinstated to. Consequently, I decline to order for her reinstatement.

DAMAGES FOR UNFAIR DISMISSAL

24. Under Section 49(1) and (4) of the Act, damages can only be awarded if the dismissal is found to be unjustified and/or unfair. The damages include salary in lieu of notice plus compensation of upto 12 months gross salary. In this case the dismissal was justified and fair and therefore no damages are payable to her under Section 49(1) of the Act.

CERTIFICATE OF SERVICE

25. The claimant is entitled to a certificate of service under Section 51 of the Act and therefore the same shall issue as prayed.

SERVICE PAY/GRATUITY

26. The claim for years worked and gratuity lacks particulars and evidence to substantiate. It is therefore dismissed.

ALLOWANCE

27. The claimant prays for all allowances under the contract of employment. She also prays for all leave allowances for years worked. The said claim lacks material particulars and no evidence has been adduced to prove the same. I therefore dismiss the claim for the said allowances.

DISPOSITION

28. For the reason that the dismissal of the claimant was fair and justified and no damages have been proved against the respondent, I dismiss the suit with no order as to costs. The claimant will however be issued with a certificate of service.

Dated, signed and delivered this 28th April 2017

O N. Makau

Judge