



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. 5 OF 2012
JOSHUA OCHIENG OCHIEL.....PETITIONER
VERSUS
KENYA REVENUE AUTHORITY.....RESPONDENT

Mr. Omino for the petitioner

Mr. Ontweka for respondent

JUDGMENT

1. Suit is based on an amended petition dated 5th November 2012 seeking reliefs set out 18, 18A, 18B, 19 and 19A of the petition.
2. In the final analysis, the petitioner seeks the following orders;
 1. A declaration under Article 23 (3) (a) of the Constitution that the petitioner has right under Chapter Four of the Bill of Rights as a citizen.
 2. A declaration under Article 23 (3) (a) of the Constitution of Kenya 2010 that the rights of the petitioner are not those limited by virtue of Article 24 of the constitution.
 3. A declaration that the respondents action of termination of the petitioner's services and employment with the respondent was in gross violation of the petitioner's right under Articles 3, 19,20,21,22,23,225, 35,41, 47 and 50 of the constitution of the Sovereign Republic of Kenya 2010 and is therefore invalid and void.
 4. An order of judicial review by way of *certiorari* to remove and bring to this court for purposes of quashing the decision of the respondent's disciplinary committee terminating the petitioner's employment with all the consequential orders and action.
 5. An order of mandatory injunction directed at the respondent to reinstate the petitioner to his employment position with full salary emoluments and benefits in the usual manner.
 6. In the alternative to (e) above a conservatory order retaining the petitioner in the respondent's employment.

7. An order for compensation for the lost earnings of Kshs.31,430,826/=.
8. Terminal dues earned but not paid Kshs.1,322,500/=.
9. General damages for unfair termination.
10. An order for conservatory order as the court may deem fit.
11. Cost of the petition.
12. Any such other order(s) as this Honourable Court shall deem fit.

Facts of the Case

3. The petitioner is a former employee of the respondent who was retired in the respondent's interest for loss of confidence in his service in accordance with the respondent's code of conduct.
4. The petitioner was in the rank of revenue officer (II), the last grade in the cadre of technical officers. The appointment was under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the laws of Kenya.
5. The code of conduct was made pursuant to Section 21 (c) of the Act.
6. The petitioner served in the Domestic Taxes Department that administers income tax, value added tax among other tax heads.
7. The petitioner's testimony was that he was unfairly terminated after serving the respondent for a long time without any disciplinary record. He was stationed at Forodha House, working in West of Nairobi, and in Section domestic taxes department.
8. The petitioner received a letter of termination on 23rd November 2011 following a notice to show cause and a disciplinary hearing in which he denied that he had facilitated the alleged fraud that led to loss of confidence by the respondent in his service. The petitioner states that a person unknown to him impersonated him in the alleged fraudulent activities.
9. The petitioner confirmed that one of the persons involved in the fraud was his friend upon production of Safaricom record showing that the two had communicated.
10. The fraud involved refunds made and he testified that he was not based in the fraud unit and in any event there was an elaborate procedure of authenticating tax refunds.
11. The petitioner concludes that he was victimised and discriminated against by the respondent and therefor his fundamental rights were violated and the termination be declared unlawful unconstitutional and that he be reinstated to his employment without loss of any benefits and in the alternative he be compensated for the loss of his employment.

Respondent's Case

12. The respondent relies on the testimony of RW1 Cuspin Agata, RW2 Julius Chege Macharia and RW3 Susan Wanjiku Njeru.
13. RW1 testified that she was in charge of employee relations in the respondent's human resource department which is responsible for discipline of staff.
14. That following investigations carried out by the internal department, the petitioner was charged under the code of conduct.

15. Following the disciplinary process, the petitioner was retired in the interest of the respondent upon being found guilty of gross misconduct by the disciplinary committee. In terms of Section 3.15; 3.16; 3.12, 4.1.1.4.1.4 and 4.12; of the code of conduct and Section 44 of the Employment Act, 2007.
16. The disciplinary committee made a decision on 2nd September 2011 and the petitioner testified before the committee on 27th July 2011.
17. The petitioner was found guilty of having facilitated the processing of a fraudulent value added tax (VAT) refund claim of Kshs.3,571,702/= in favour of Tear Fund Limited.
18. That Tear Fund Limited was deceptively incorporated on 16th February 2009 by two shareholders by the names Paul Otieno Onger and Tom Philip Ochieng Mboya with the sole purpose of siphoning the funds from the respondent with the aid of the petitioner.
19. That on 23rd February 2009, the company opened a bank account number 0900482 with Diamond Trust Bank Ltd, Industrial Area Branch, Nairobi.
20. That Paul Otieno Onger was a former employee of the respondent dismissed from service in 2004 after stealing Kshs.14 million together with two other.
21. That Philip Ochieng Mboya was a former procurement officer of Tear Fund which was registered as a non-governmental organisation (NGO). He was sacked from the NGO in May 2009 for misconduct.
22. RW1 denied that the petitioner was wrongly targeted or discriminated against because evidence available pointed to his fraudulent involvement in the scheme. That the petitioner was accorded a fair hearing and opportunity to present his case.
23. That the petitioner was informed of charges facing him in good time by a letter dated 22nd June 2011. The petitioner made oral presentation before the disciplinary committee on 27th July 2011 and he had appeared before the committee earlier in April and May 2011.
24. That the petitioner was informed of all the procedures to be followed at each stage of the disciplinary proceedings and the charges he faced.
25. The committee found the petitioner guilty and retired him in respondent's interest for gross misconduct, for dishonestly, lack of accountability, failure to take due care; leading to loss of revenue of Kshs.3,571,702/= fraudulently to Tear Fund Limited and causing the respondent to be sued by Diamond Trust Bank Limited at Milimani High Court in 2012 for refund of the amount retained as lieu for the amount of Kshs.3,571,702/= illegally transferred to the bank through the petitioner's design.
26. That the petitioner was paid his terminal dues upon clearance and the suit be dismissed with costs.
27. RW2, Mr. Julius Chege Macharia was an investigator assigned to investigate the fraudulent electronic transmission of VAT refund of Kshs.3,571,702/= in favour of Tear Fund Limited. The alarm was raised by Diamond Trust Bank in respect of account no. 09000482482 held at Industrial Area Branch.
28. RW1 testified that he established this deception by the Tear Fund Ltd, an NGO in fraudulently lodging a claim for refund of VAT. The claim documents were stolen.
29. RW2 established the identity of the shareholders of Tear Fund Ltd as Paul Otieno Onger and Tom Philip Ochieng Mboya.
30. RW2, established the link between the fraudsters and the petitioner in that some of the stolen documents in support of the fraudulent claim for refund of VAT that is copies of PAYE bank slips and PAYE – Employer Certificate (P10) for the months of January to May 2009 had been requested by the

petitioner stationed at KRA Forodha House in early June 2009. RW1 was at a loss how the said documents found their way to the Times Tower and formed the basis of the fraudulent claim.

31. RW2 recorded statements from all the persons involved including the petitioner and was able to establish that the petitioner called through the respondent switch board severally asking for the said documents to be delivered to his office at Forodha House, 4th Floor. Mr. Macharia later instructed finance assistant Mr. Japheth Ouma Yoyo to deliver the documents to the petitioner in his office.

32. One Ms Elizabeth Kariuki confirmed having received calls from the petitioner on the subject matter. Mr. Ouma Yoyo, was able to identify the petitioner as the officer to who he delivered the said documents.

33. RW2 concluded that the petitioner used the documents sent to him to facilitate the fraud in question.

34. RW2 Susan Wanjiku Njeru, stated that she was an officer at the refund unit and had reviewed the claim in line with the required procedures and verified its authenticity based on the documents submitted. She recalled that a man by the name Mboya, presented himself as the logistics manager of Tear Fund and was following up on the claim. She could not tell that the supporting documents were stolen and that Mr. Mboya was not the logistics manager of Tear Fund.

35. The respondent submits that it had watertight evidence against the petitioner and its decision to retire him on public interest was based on a valid reason and was therefore justified.

36. That the respondent followed a fair procedure in arriving at the decision to terminate the employment of the petitioner. That it made the decision to retire the petitioner in respondent's interest to allow the petitioner to get terminal benefits he would otherwise not have received had he been summarily dismissed. Respondent prays that the petition be dismissed with costs.

Determination

37. The issues for determination are as follows;

1. Has the petitioner established violation of the listed constitutional rights?
2. Was the retirement on respondent's interest justified?
3. Is the petitioner entitled to the reliefs sought?

Issue I

38. The case presented by the claimant is a typical claim for wrongful termination of employment disguised as a constitutional petition. The Employment Act, provides for the manner of dealing with claims for wrongful termination and dismissal and it is wrong for the petitioner to elevate his claim to a constitutional petition based on the facts now before court.

39. It is clear that the petitioner, being an employee of the respondent was faced with disciplinary charges of gross misconduct, particulars of which have been canvassed in the judgment already.

40. The petitioner was accused of having used his position to facilitate fraudsters to steal from the respondent a sum of Kshs.3,571,702/=.

41. The evidence presented to court by RW1, RW2 and RW3 is in the court's view overwhelming.

42. The respondent has established on a balance of probability that documents proved to have been provided internally to the petitioner, following his persistent request for the same, were subsequently used by persons who were not employees of the respondent to lodge a fraudulent claim in the name of TEAR FUND LIMITED, a lawfully registered NGO in USA and Kenya using documents stolen from the TEAR

FUND LIMITED and from the respondent.

43. The link between the petitioner and the fraudsters was carefully established by RW1 and the conduct by the petitioner explained by RW2 and RW3 well corroborated the role the petitioner played in enabling the success of the fraudulent claim of VAT refund.

44. The court will not regurgitate the evidence herein before summarised but makes a finding that the petitioner was neither falsely targeted nor discriminated. The petitioner was properly charged and accorded opportunity to defend himself in terms of the relevant code of conduct of the respondent.

45. The petitioner has failed to prove on a balance of probability that any of the alleged violation of his constitutional rights took place and the court finds that none of his constitutional rights as alleged or at all were violated.

Issue II

46. Following the finding in (i) above, the court finds that the respondent had a valid reason to terminate the employment of the petitioner and therefore giving him a more lenient option of retiring him in respondent's interest.

47. Equally, the respondent has proved on a balance of probability that it followed a fair procedure in disciplining and eventual termination of the petitioner from the employment of the respondent.

48. The respondent did not therefore violate Sections, 41, 43 and 45 of the Employment Act and the termination was justified and fair.

Issue III

49. As to whether the petitioner is entitled to any of the reliefs sought, it is not in dispute that the petitioner was paid his terminal benefits upon retirement in respondent's interest.

50. The petitioner is not entitled to any of the reliefs sought.

51. The petition is therefore dismissed in its entirety with costs to the respondent.

Dated and Delivered at Nairobi this 26th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE