



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 7 OF 2017

(Before D. K. N. Marete)

FRANCIS NYONGESA KWEYU.....CLAIMANT

VERSUS

ELDORET WATER AND SANITATION COMPANY LIMITEDRESPONDENT

JUDGEMENT

This matter was originated by way of a statement of claim dated 30th January, 2017. The issue in dispute is therein cited as;

“Unfair and unlawful termination of employment.”

The Respondent in a statement of defence dated 15th May, 2017 denies the claim and prays that the same be disallowed and dismiss with costs.

The claimant’s case is that he is a trained Building and Construction Technician and holds qualifications from the Rift Valley Institute of Technology at Nakuru.

The claimant’s further case is that he was employed by the respondent on a casual basis in the year 2003 to carry out duties relating to water meter installation and water pipe repairs.

The claimant’s other case is that he served the respondent diligently and dutifully and as at March, 2016 held the position of Artisan II with a monthly salary of Kshs.41,110.00. He reported to the Water Treatment Distribution Officer III as supervisor.

The claimant’s further case is that on 10th February, 2016, he received a letter of show cause signed by the respondent’s Head of Commercial Services inviting him to show cause why disciplinary action, including summary dismissal, should not be taken against him for negligence of duty. He answered the letter.

On 3rd March, 2016, the claimant received a letter from the Managing Director of the respondent placing him on suspension. It his case that this suspension was unfair for the following reasons;

- a) *The disciplinary inquiry was commenced by a person who was duly not authorized under his employment contract being the Acting Head of Commercial Services as opposed to the Water Treatment Distribution Officer III who was the official to which the claimant reported to.*

b) *The claimant was suspended without being invited to show cause why suspension should not be meted out.*

c) *The claimant despite being a member of a trade union, a representative from the union was not involved in the decision to exclude him from the work place.*

d) *No prima facie evidence of neglect of duty had been established to warrant the claimant to be placed on suspension as provided for in clause 12 of the employment contract.*

e) *Neglect of duty would not be grounds to justify an employee to be placed on suspension pending investigations.*

f) *No evidence existed to justify the suspension was no iota of justification was established that the claimant would interfere or affect the integrity of any pending investigations on alleged neglect of duty.*

g) *He suspension letter addressed matters that the claimant had not been invited to show cause as the notice to show cause letter as authored; unequivocally limited the scope of the disciplinary inquiry to negligence of duty and did not include non remittance of money or fraud.*

h) *The suspension was carried out in contravention of clause 30(a) of the Collective Bargaining Agreement registered in the Employment and Labour Relations Court on 7th February, 2013 as it was carried out by person who was not the claimant's Head of Department.*

i) *The suspension exceeded the 3 months period contained in the letter and in the Collective Bargaining Agreement.*

j) *The claimant was subjected to unfair labour practices and unfair administrative action contrary to articles 41 and 47 of the **Constitution of Kenya**, 2010 by the suspension in issue.*

The claimant further claims unfair and unlawful termination of employment for the following reasons;

a) *The Claimant was terminated on the basis of section 44(4) (g) of the Employment Act, 2007 for which he had not been invited to show cause against.*

b) *No evidence of neglect of duty existed as provided for in the employment contract between the parties.*

c) *The claimant was never invited to appear for a hearing before the employer with a fellow employee of his choice or a union representative as provided for in section 41 of the **Employment Act**, 2007.*

d) *The claimant was not accorded an opportunity to cross-examine any witnesses during a disciplinary hearing.*

e) *The disciplinary process took an unduly lengthy period rendering its credibility to be doubtful and it amounted to a breach of the rights to fair administrative action and fair labour practices.*

f) *The respondents despite having more than 50 employees if failed to maintain a statement of disciplinary practice and policy guidelines as required by the **Employment Act, 2007** and which ought to have been brought to the attention of the claimant.*

g) *The termination was not notified to the Director of Employment and the Labour Officer of the County as required by section 78 of the **Employment Act, 2007**.*

h) *The appeal process took an unduly lengthy period of time thus it breached the requirements of*

fair labour practices and fair administration action.

*i) The respondent in communication its decision decision on appeal failed to give reasons for seeking to continue to exclude the claimant from employment which was a breach of the requirements of natural Justice and fair administrative action as contained in the **Fair Administrative Action Act, 2015.***

*j) The nature of termination was not specified in the appeal/review decision letter thus rendering it vague and further evidence of unfair and unlawful termination of employment as the **Employment Act, 2007** has several modes of termination such as by notice, by redundancy by summary dismissal, by resignation, by insolvency of the employer.*

He prays as follows;

a) A declaration that the suspension from employment was unfair, unlawful, breached the employment contract and violated his constitutional rights coupled with the payment of the balance of the ½ salary from 3/3/2016 to 14th July, 2016 @ Kshs.20,555 for 4 months and 11 days being:-

4 months @ Kshs.20,555 being ½ salary – Kshs.82,220.00

11 days @ Kshs.1,644.40 daily - Kshs.18,088.410

Kshs.100,308.40

b) Damages for breach of the constitutional rights to fair labour practices and fair administrative action under articles 41 and 47 of the Constitution of Kenya, 2010 respectively over the suspension from employment.

*c) A declaration that he was unfairly and unlawfully terminated from employment and the respondent breached his rights under articles 41 and 47 of the **Constitution of Kenya, 2010** to fair labour practices and fair administrative action respectively.*

d) Reinstatement to employment without loss of salary, benefit, seniority and payment of his full salary from 14th July, 2016 to the date of reinstatement @ Kshs.41,110 monthly.

e) As an alternative but without prejudice to reinstatement prays for:

i. 3 months notice pay @ Kshs.41,110 Kshs.123,330

ii. 12 months salary as damages @ Kshs. Kshs.493,320

f) Damages for breach of his rights to fair labour practices and fair administrative action by the process undertaken in the termination and review of the summary dismissal decision.

g) Damages for the breach of the right to fair labour practices as provided for in article 41 of the Constitution of Kenya, 2010 by the engagement of the claimant on probation while he was already a term employment.

h) Costs and interests.

The respondent's case is that the claimant is her former employee from about the 15th April, 2014 whereby he was engaged as Artisan II at a salary of Kshs.26,445.00 and a house allowance of Kshs.12,000.00. His duties included providing timely and reliable maintenance services, identification of maintenance requirements, planning and effecting the maintenance schedule, identification of necessary tools and equipments, assistance in the maintenance of schedule of schedule reports, maintenance of records of spares used and *inter alia* promotion of safety practices at the work place.

The respondent's further case is that in December, 2015, she received a complaint of an irregular payment to the claimant by one of her clients, Tecla Chesang of Plot No. 15/1845. She had paid the claimant a total of Kshs.5,000.00 on a promise of delivery of water meters and receipts by 29th September, 2015 but this was never met. A refund was only made after much pressure from the client.

On receipt of the complaint from Tecla above, the respondent issued a show cause letter requesting that he shows cause as to why disciplinary action should not be taken against him for receiving money from a customer when this was not his responsibility/duty and also refusal to remit the amount received to the cash office.

The claimant on 16th March, 2016 responded to the show cause and admitted receipt of the monies but added that he had kept the money in his personal account to avoid the temptation of converting it to his personal use. Again, he would not remit the money to the cash office as the forms had not been approved also due to the raised tariffs which required the client to up the amount required.

The respondent's other case is that on 10th May, 2016 the claimant was invited to appear before a disciplinary committee which he did appear on 26th May, 2016 and disciplinary proceedings partaken. As a result of this, he was dismissed from employment vide a comprehensive letter dated 14th July, 2016.

The respondent's final case is that the claimant's case does not display or disclose any cause of action against the respondent for unfair termination. This is because the claimant admitted taking money from a customer while he was tasked to ensure that he carried out his duties with utmost integrity.

The issues for determination are;

1. Was the termination of the employment of the claimant by the respondent wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant's written submissions dated 17th May, 2017 reiterates his case of unlawful termination and seeks to rely on the authority of **Bernard Ngugi v G4s Security Services Kenya Limited [2013] eKLR** in which it was observed as follows;

“Accordingly, it is the opinion of the court that the Employment Act, 2007 envisages serious due process of justice on the part of the employer in event of alleged misconduct, poor performance or even physical incapacity of an employee. It is not a casual undertaking that can lead to termination of employment without adequate explanation of the circumstances and the reasons taken into account before making the termination decision. To put emphasis on the seriousness of the decision to terminate, section 78 of Act provides that an employer shall notify the termination of every employment and of each lay-off of a person in writing to the nearest employment service office within two weeks of the termination or lay-off”.

Again, in the authority of **Nicholus Muasya Kyula v FarmChem Limited, Industrial Cause No.1992 of 2011; (2012)LLR 235 (ICK)** where the court held that;

“It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.”

The respondent in rebuttal to a case of unlawful termination of employment sought to rely on the authority of **Thewaterskloof Municipality and South African Local Government Bargaining**

Council (Western Cape Division Vs Arbitrator Adv C De Kock N.O while quoting from **Council for Scientific and Industrial Research v Fijen (1996) 17 ILJ 18 (AD) at 26E-G** observed thus at page 13;

“it is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the ‘innocent party’ to cancel the agreement On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgements in the LAC to this effect ... It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow naturalia contractus.”

The respondent further relies on the authority of **Judicial Service Commission vs Gladys Boss Shollei & Another, Civil Appeal No. 50 of 2014** where the judges of the Court of Appeal borrowing from **Michael Dowling – vs Work Place Safety and Insurance Board [2004]CAN LII 43692 at page 74**, observed as follows;

“...It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the circumstances of the misconduct

Again, the test applicable is to consider whether the respondent was fair in dismissing the claimant would be. This is expressed at page 74 as follows;

“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee’s dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee’s obligations to his or her employer.”

The termination of the employment of the claimant on grounds of misconduct overwhelms this cause. The open and clear display of a dishonesty and deficiency in the integrity of the claimant in the course of duty in every way eroded all element of trust *inter partes*. It also destroyed the core of the service contracts to the extent that it was no longer sustainable. This embeds the respondent’s action of termination of employment.

The claimant astoundingly sets out the principles of unfair termination of employment and applies these to his case. He however is not able to discount the respondent’s case of dishonest conduct on his part. Again, this is not denied by the claimant. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination, he becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own cost of the claim. And this answers all the issues for determination.

Delivered, dated and signed this 23rd day of May, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mogambi instructed by Wambua Kigamwa & Company Advocates for the Claimant.
2. Mr. Masese instructed by the Federation of Kenya Employers for the Respondent.