



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 407 OF 2015

BETWEEN

FRANCIS AGUNGA KIMACLAIMANT

VERSUS

KENYA PORTS AUTHORITY..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Anyanzwa & Company Advocates for the Claimant

Addraya Dena Advocate for the Respondent

JUDGMENT

1. This Claim was initially filed at the Chief Magistrate's Court Mombasa, as Civil Case Number 669 of 2007. It was filed on 13th March 2007. The Claimant states in his Complaint, that he was employed at all material times by the Respondent. He does not state in what capacity. He was employed on 15th December 1976, and was set to retire on 24th September 2009. He was summarily dismissed by the Respondent on 20th January 2004. This was after he was arrested and arraigned in Court on 14th August 2003. He does not state in his Complaint the offence over which he was arrested. He was acquitted on 18th January 2005. He prays for Judgment against the Respondent for:-

- a) Salary and house allowance for lost years 2004- 2009.
- b) Terminal leave allowance.
- c) Goods allowance.
- d) Underpayment of salary.
- e) Legal representation.

Total..... Kshs. 2,304,414

f) A declaration that termination was unlawful and the Claimant should be placed on the pension scheme.

g) General Damages.

h) Costs and Interest.

i) Any other suitable reliefs.

2. The Respondent filed a Statement of Defence on 1st April 2007. It is conceded the Claimant was an Employee of the Respondent. It is not stated in what capacity. The Respondent states it was the Police, not the Respondent, who arrested and prosecuted the Claimant. He was lawfully dismissed by the Respondent. Having been dismissed, he could only receive pension, not other items claimed. The Respondent states the Claim is bad in law, as it contravenes the Kenya Ports Authority Act Cap 391 the Laws of Kenya with regard to notice of intention to sue and limitation of time.

3. Objection under KPA Act was heard and dismissed by the Trial Magistrate. The decision was appealed against at the High Court. It appears the Appeal was transferred to the Employment and Labour Relations Court [E&LRC]. On 15th June 2015, Parties appeared before Hon. Judge O. Makau of the E&LRC, and registered the following consent order:-

i. The Appeal is marked as withdrawn with no order on the costs.

ii. Mombasa Chief Magistrate's Civil Case Number 669 of 2007 is transferred to the E&LRC for hearing and determination.

4. The Claimant gave evidence on 20th July 2016 and 8th November 2016 when he rested his case. Respondent's Human Resource Officer and Disciplinarian, Marco Mulwa Ngolia, gave evidence for the Respondent on the latter date, when hearing closed. The matter was last mentioned on 13th December 2016, when Parties confirmed the filing of their Closing Submissions and Judgment was scheduled for delivery.

Claimant's Evidence:-

5. He testified he was employed by the Respondent as a Labourer at the dockyard, in 1977. He was trained as a Marine Fitter and later appointed Engine Room Assistant. He assisted Marine Engineer to maintain vessels.

6. On 30th July 2003, he was assigned Pilot Boat Baharia. He reported at 6.35 a.m. He worked under Senior Marine Engineer. The Senior Marine Engineer requested the Claimant to work overtime. This was approved by the Chief Marine Engineer C. Okwi.

7. The Claimant and his Supervisor needed spare parts. There was a procedure in supply of spares. There were documents used in requisition and supply of spares. The allegation against the Claimant, which led to summary dismissal, and criminal trial, was that he stole spare parts from the Respondent.

8. Head of Section asked the Claimant to raise requisition to get the spare parts. The Claimant prepared a material release note. The items were to be taken from the store. There was one particular item called Turbo Charger. It was to be fitted on Pilot Boat Baharia. The Claimant received the Turbo Charger. He complied with the requisition and supply regulations. The store transaction form was raised and approved by Okwi. The Claimant received the spares after these procedures. Claimant's Head of Section Patrick Osiyo confirmed the items taken were the items requested for.

9. On 30th July 2003, the Claimant was to start working on Pilot Boat Baharia. He was told by Osiyo to hold as there was an emergency on Tug Boat 2. Instructions issued upon the Claimant at 3.40 p.m. The Claimant proceeded to Tug Boat 2, and was to attend to the emergency up to 6.00 p.m. He had been authorized to work overtime by the Osiyo and Okwi. He worked up to 5.40 p.m. It was confirmed he completed the emergency work.

10. He went back to the Pilot Boat Baharia, showered and went to the Jetty where he stored the spares in an authorized container.

11. He was not aware Port Security Officers were monitoring him while he was at the Jetty. They called him and asked him what he was carrying. They were suspicious. They questioned the Claimant. They asked for his Port Pass. He gave it to them. They took him to their Office and alleged he was caught with a stolen item. They called Okwi who came and confirmed he had signed for the spare. The Security Officers still arrested the Claimant and locked him up at Port Police Station. He explained the spare part was obtained regularly. Police would hear none of it, and charged the Claimant in Court with the offence of stealing. While the criminal trial was ongoing, the Respondent summarily dismissed the Claimant.

12. Before dismissal, he appeared before a Committee of Inquiry and gave evidence. The Security Officers who gave evidence against the Claimant were inconsistent. Shallo stated he arrested the Claimant at 4.45 p.m. He did not release the Claimant to go and clock out. The closing card showed the Claimant checked out at 6.00 p.m. Claimant's Colleague Mwakoma stated he left the Claimant working at 5.45 p.m. Okwi stated he noticed the incident at around 6.30 p.m. He told the Committee he was surprised because he authorized the removal of spares. To-date, the Claimant has not been availed proceedings and findings of the Committee.

13. The Respondent alleged the spare part was removed from one of the lockers at marine afloat workshop. This was not the case. The letter suspending the Claimant alleged he admitted guilt. He did not do so. There were no findings and outcome. What the Claimant received was a letter lifting suspension and dismissing him.

14. The Criminal Court found the Claimant not guilty. Osiyo testified and stated he had never known the Claimant to steal anything for all his 20 years of service. He testified it was not possible to steal spares which the Claimant had regularly been supplied with to fit in Respondent's Boat. The Court found that the Claimant had all the requisite documents, showing he did not steal the spare parts.

15. The Claimant appealed against the decision to dismiss him, after he was acquitted. He did not receive any reply. Termination was unfair. He was to retire in 2009. He prays for the assistance of the Court in terms set out his Plaint.

16. He testified under cross-examination that he was subject to KPA Human Resources Manual. The reason for suspension was stated in the letter. He was asked to show cause, why he should not be dismissed within 48 hours. He replied and requested a personal hearing. He was asked at the hearing if he had a colleague accompanying him. He told the Committee he did not, because the colleague he intended would accompany, him had domestic commitments. He was allowed to call Witnesses and question all Witnesses. The Committee followed its Regulations. He was not present when the Committee visited the dockyard. He was not aware there was a lot of theft at the Port at the time and Security Personnel on high alert. KPA Organized for the Claimant to be paid his benefits. Redirected, the Claimant stressed he did not admit at any time, that he stole from the Respondent. The spares could only be fitted on the Pilot Boat, nowhere else. The Claimant would gain nothing by stealing the spares.

Respondent's Evidence:-

17. Marco Mulwa Ngolia testified the Claimant was suspended under Respondent's revised regulations of 2002. Once arrested, an Employee would be suspended awaiting outcome of investigations. The administrative process would run parallel to the legal process. KPA carried out its own process, and acted on the findings of that process.

18. There was a series of thefts at the dockyard. The Human Resources Department was under duty to take action. The Claimant was suspended. He was not to earn salary while under suspension. He requested for a personal hearing. He was granted a fair hearing by the Committee. He was found guilty and dismissed. He appealed against the decision to dismiss him. He is entitled to final dues. Ngolia expected the Claimant to have been paid his dues. The Human Resources Manager wrote to the Financial Controller asking the Financial Controller to expedite payment of Claimant's terminal dues.

19. Cross-examined, Ngolia stated that the Claimant was not in lawful possession of the items when arrested. He obtained the items legally. They were to be used in repair of the Boat. This is where the Claimant worked. Okwi had authorized use of the container for storage. The particular spare part could only be used in the Boat. There was a tendency however, to steal spares and resell them to KPA. It was not fair for the Respondent to say the Claimant admitted guilt. Osiyo told the Criminal Court that the Claimant was in lawful possession of the spare parts. Ngolia was not able to say if Members of the Committee of Inquiry disagreed over the matter. Redirected, Ngolia testified that the Respondent did not have control over the criminal proceedings.

The Court Finds:-

20. The Claimant was first employed by the Respondent on 15th December 1976. He worked initially as a Labourer in the dockyard. He was trained later and became an Engine Room Assistant, assisting Marine Engineer in maintenance of vessels. He was summarily dismissed by the Respondent on 20th January 2004, after he was allegedly caught by Port Security Officers, stealing spare parts from the Port. He earned a monthly basic salary of Kshs. 19,650 and house allowance of Kshs 9,520 – total Kshs. 29,170, as at the time of dismissal.

21. He explained that he was on duty on 30th July 2003. He was assigned to work on Pilot Boat Baharia. He was working under the Marine Engineer. He needed repairs for the Boat. He filled material release note on the instructions of his Section Head. A turbo charger was to be fixed in the Boat. He made the requisition. The store transaction form was filled. The documents were approved by Marine Engineer Okwi, and Section Head Osiyo.

22. Osiyo asked the Claimant to first attend to Tug Boat 2 which was in an emergency. It was already 3.00 p.m. The Claimant would attend to the emergency work up to 6.00 p.m. He was authorized by Okwi and Osiyo to work overtime to complete servicing Tug Boat 2. He completed work at 5.45 p.m. He went back to Pilot Boat Baharia, where he showered, then went on to the Jetty, where he stored the spares in an authorized container.

23. The Port Security Officers were on high alert. Going by the evidence of the Respondent, there were many theft cases reported within the Port, hence the increased level of security alertness. Security Officers were observing the Claimant as he moved up and down the dockyard. The confronted him, alleged he had stolen the spare parts in his hands, and arrested him. He was locked up, arraigned in Court for the offence of stealing, tried and eventually acquitted.

24. At the time he was arrested by Port Security Officers, Marine Engineer Okwi intervened and confirmed with the Port Security Officers that the items in the possession of the Claimant, were removed from Respondent's stores, and placed in the hands of the Claimant regularly. The Port Officers did not listen to Marine Engineer Okwi.

25. Subsequently the Respondent constituted its Committee of inquiry, which heard the Claimant, and concluded he was guilty of an employment offence. It was recommended the Claimant is summarily dismissed, which came to pass, opening the way for this longstanding litigation.

26. The Committee of Inquiry does not seem to have considered the documents showing the Claimant had obtained the spares regularly from the stores with the approval of Okwi and Osiyo. Unless Okwi and Osiyo were involved in a joint undertaking to steal from the Respondent, it is difficult to see how a transaction, which was approved by Okwi and Osiyo, would result in an employment and criminal

offence committed individually by the Claimant, who was junior to Okwi and Osiyo. Requisition and supply of the spare parts was done in accordance with the regulations applicable at the workplace.

27. The Respondent appears to have just moved blindly, probably because it was under pressure to bring to a halt reported upsurge of theft of its items at the Port. This is apparent in the hastily generalized report by Patrick Kioko Head of Security Services dated 18th August 2003, from which precipitate action against the Claimant ensued.

28. Kioko informs the Human Resources and Administration Manager that the Claimant was arrested with a spare part on 30th July 2003 in suspicious circumstances. He states in very confusing language, that Port Police, *“apparently adduced enough evidence to sustain a criminal suit....Investigations into thefts emanating from dockyard end up with circumstances that suggest insiders’ involvement, but we mostly fail to identify specific culprits. The arrest of Mr. Kima gave a vital clue into how these thefts are perpetrated. It calls for serious action.”*

29. The actions taken by the Respondent after this cryptic report were not fair and objective. The documents relied upon by the Claimant in answering the charges against him, were disregarded. The explanation by his Superiors Okwi and Osiyo were ignored. If the Respondent for some reason did not trust what Okwi and Osiyo said of the incident, and perhaps depended on the criminal trial to establish the truth, the outcome was that the Claimant was acquitted, the Court having found that he obtained the spare parts regularly. Although the Respondent was not bound by the criminal proceedings and outcome, and was at liberty to move on with its administrative process, it was incumbent upon the Respondent to show that its own process was fair and objective, and attempt at the hearing of the Claim herein, to fault or qualify the outcome of the criminal trial. It is not enough for the Respondent to allege that it merely reported to the Police, who carried out their investigations and prosecuted the Claimant. The Respondent was the complainant, and knew what evidence was available from Okwi and Osiyo.

30. In the end, the Respondent could not justify before this Court, why the Claimant’s contract, after 20 years of service, was terminated. Some of the cases emanating from the Port are poorly handled from their inception, which leaves Mr. Marco Ngolia with a very difficult task of justifying actions taken by the Respondent. He did not even know if the Claimant was paid terminal dues. He expects the Claimant was paid his dues. It is difficult to justify certain decisions against Employees by KPA Management. Compounding this is the inability by KPA to remedy these cases before they are brought to Court. The case of Francis Agonga Kima is one KPA should have remedied before it was brought to Court.

31. The Court is satisfied his contract was unlawfully terminated. The Respondent had an Obligation to justify termination and act fairly against the Claimant, under the applicable Staff Regulations. There was no justification in the decision arrived at by the Respondent, and the Committee of Inquiry ignored exculpatory evidence given by the Claimant. The Chairman of the Committee was, as suggested by the Claimant, not fair to the Claimant, shouting at the Claimant in the course of the proceedings *“do not lie!”* An appeal lodged by the Claimant after acquittal went unanswered.

32. The Claimant seeks to be paid salary he would have earned up to his expected date of retirement in 2009. He prays for terminal leave allowance at Kshs. 92,400. He did not explain in his evidence what this item is based on. The item is rejected. He prays for goods allowance. Again he did not make the Court understand what this item is based on. The item is rejected. He pleads underpayment. He did not sufficiently explain to the Court what he meant by implementation of revised salary. He gave no dates when revision was made, and through which wage instrument. He states he should be refunded Kshs. 52,500 allegedly in legal costs, arising from the criminal trial. There was no evidence of legal costs presented before this Court by the Claimant.

33. The Court does not think grant of anticipatory salary is merited. It is not certain that the Claimant would have worked until the expected age of retirement. He was expected in law, to move on and mitigate his loss as held in the case of *Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLR* cited in the Respondent’s Submissions. Payment of salaries up to the date of retirement would not constitute fair remuneration. The Court is convinced a compensatory award as prayed for under paragraph

[c] of the Plaintiff would suffice.

34. ***He is granted damages for unlawful termination at Kshs. 350,040.***

35. He prays the Court to order that he is placed on Respondent's pension scheme. Details of membership to such a scheme were not provided to the Court. The trustees to such a scheme were not called to give evidence, and educate the Court on what it entails to be reinstated to the scheme.

36. Ngolia however told the Court he expected the Claimant was paid terminal benefits. He was not sure if any terminal benefits were paid. There is no document giving details of any payment. The Claimant prays the Court to find that he is entitled to terminal benefits. The Claimant similarly gave the Court no details of terminal benefits he expected to receive from the Respondent.

37. It is accepted the Claimant worked for the Respondent for 20 years. The Respondent should, as a minimum, have recognized and rewarded these years of service. The Court is of the view the Claimant should have received gratuity or service pay as is commonly known today, based on the widely used 15 days' salary for every completed year of service. He should have received notice pay. The Court shall treat terminal benefits unspecified by the Parties as comprising service pay and notice pay. ***The Claimant is granted service pay at 15 days' salary for every completed year of service, amounting to Kshs. 336,576, and 1 month salary in lieu of notice at Kshs. 29,170.***

38. Lastly, the Court has suggested the Respondent should have endeavoured to settle the Claim at the earliest, in light of the position taken by its own Officers Okwi and Osiyo on the incident. This was not done with the result that the Claimant spent considerable time looking for assistance from the various Courts. Terminal benefits was should have been paid within a reasonable time of termination. As it is, the Respondent does not even know if any payment was made. The prayers for costs and interest are well-founded. ***The Claimant is granted costs, and interest at 14% per annum, from the date of dismissal, 20th January 2004, till payment is made in full.***

IN SUM, IT ORDERED:-

a) Termination of the Claimant's contract was unlawful.

b) The Respondent shall pay to the Claimant Kshs. 350,040 in damages for unlawful termination; service pay at Kshs. 336,576; and notice pay at Kshs. 29,170, total – Kshs. 715,786.

c) Costs to the Claimant.

d) Interest granted at 14% per annum from the date of termination, 20th January 2004, till payment is made in full.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge