



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1180 OF 2012
EDWARD NYAKUNDI ONCHWARI.....CLAIMANTS
VERSUS
RURAL ELECTRIFICATION AUTHORITY.....RESPONDENT

Carolyn Muumbo for claimant

Mr. Makori for respondent

JUDGMENT

1. The matter proceeded before Justice Makau on 2nd February 2016 and is based on an amended statement of claim dated 25th September 2014. The trial judge being out of the jurisdiction of the court on training, I was assigned to write and deliver the judgment.
2. The claimant was employed as a Chief Manager Finance on 1st June 2008, by the respondent. The terms and conditions of employment are contained in the letter of employment produced as exhibit 1.
3. On 21st March 2012, the claimant received a show cause letter with five allegations levelled by the CEO Mr. Zakary Ayieko.
4. The claimant responded to the said notice to show cause and appeared before the respondent's adhoc committee on disciplinary matters on 26th March 2012. The response was produced as exhibit 3.
5. The claimant reiterated the said response in his written statement dated 10th July 2015 and filed on 13th July 2015, which the claimant adopted as his evidence in chief.
6. On 11th April 2012, the claimant received a letter of termination. The letter was produced as exhibit 4.
7. The claimant was dissatisfied with the termination and appealed the decision in terms of paragraph 7.10 of the respondent's Human Resource Manual. The termination was said to be due to unsatisfactory performance.
8. The claimant states that his position was advertised on or about 10th May 2012 before the appeals' committee had determined the matter. The appeal was rejected without summoning the claimant before it.

9. The claimant states that he was a high performer. That he was diligent, efficient and faithful in his work and that allegations of poor work performance were false. That the claimant earned accolades, bonuses, salary increment and additional responsibilities in recognition of his good work. He produced appendix 8 (a, b, c, d, e, f, g, h, and i) being evidence in support of his good performance.

10. That his termination was not for a valid reason, was unlawful and was activated by malice. That the Chief Executive Officer (CEO) acted as the accuser, jury and appellate judge and the executioner. That the claimant was not given a chance to face the CEO to counter the false allegations levelled against him.

11. The claimant had served the respondent for three years and nine months and earned a monthly salary of Kshs.460,133.31/=. The claimant produced his payslip as exhibit 9.

12. That in his career at the respondent's employ, he had received a single warning letter. That in spite of demand to make good the damage occasioned the claimant, the respondent neglected and/or refused to respond hence the suit.

13. The claimant seeks;

- (i) Immediate unconditional reinstatement to his last position without loss of full remuneration.
- (ii) In the alternative payment of terminal benefits including Kshs.862,749.96/= severance pay and
- (iii) 12 months' compensation for the unlawful termination of employment.
- (iv) Certificate of service
- (v) Costs and interest

Response

14. The respondent filed an amended statement of response on 23rd May 2014 and called RW1 Edward Muchiri Gakunju, Chief Economist of respondent in support of its case.

15. In summary, the respondent's case is that on 16th March 2012 following a report on performance of the respondent's Finance Department as well as on the claimant's performance, the respondent's Board of Directors resolved to establish an Adhoc Committee to consider the issues which had been raised, receive and consider representation from the claimant and other relevant persons, carry out investigations and give a report on their findings.

16. The following issues of poor work performance against the claimant were raised;

- (a) Lack of reconciliation of bank accounts.
- (b) Lateness in the preparation of the 2012/13 financial year budget
- (c) Lateness in the preparation of the 2010/11 financial year accounts;
- (d) Lateness in responding to the management letter from the Kenya National Audit Office (KENAO)
- (e) Delay in the payments to contractors, surveyors and other suppliers.

17. The claimant was given a show cause letter on 21st March 2012 and was invited to appear before the committee on 26th March 2012 to make representations on the issues raised. The claimant made a written response and appeared before the committee as scheduled.

18. Upon conclusion of the hearing, the committee concluded that;

(1) The claimant as the Head of the Finance Department had failed to spearhead, supervise, monitor and to give necessary impetus to the reconciliation exercise for two years hence placing the respondent at tremendous financial risk.

(2) Failure to reconcile accounts, created fertile ground for fraud.

(3) As a result, the CEO had to appoint a team headed by the procurement manager to assist in carrying out the bank reconciliation which exercise was concluded two months after the claimant's termination.

(4) The committee was satisfied that lateness to submit the budget was carried by the claimant who received the departmental budgets in good time but had no justification to submit final budget to the finance committee on the eve of the committee's meeting.

(v) The committee also found that the claimant was guilty of delaying the letter to the managers of the concerned departments which in turn led to a delay in responding to KENAO and to poor quality response.

(vi) The committee also blamed the claimant for delayed payments to contractors, surveyors and other suppliers. As result the CEO had to take over the supervision of payments which was the claimant's responsibility.

19. In sum, the claimant was unable to lead the Finance Department hence the termination was for a valid reason and the termination followed a fair procedure.

20. The respondent produced records to show the trail of events that demonstrate the claimant's poor work performance. Documents documenting the procedure followed to discipline the claimant were also produced. The respondent submits that the termination was lawful and fair and the suit be dismissed with costs.

21. Upon termination, the claimant was paid Kshs.1,163,956.75/= in lieu of leave days not taken. The claimant also received payment in lieu of three months' notice in the sum of Kshs.1,380,400/=.

22. The respondent deducted PAYE, car loan and black berry cost from the terminal dues of the claimant leaving a net of Kshs.624,903.57/=. This payment is not in dispute.

23. RW1 adopted a witness statement dated 28th September 2015 as his evidence in chief. RW1 supported the statement of response to the amended claim in all material respects. RW1 testified that the claimant had a performance contract with the CEO and same was cascaded to departmental levels. The performance of the claimant was done on a month to month basis.

24. That the disciplinary hearing was based on the claimant's monthly performance. The Adhoc committee found that the performance targets were not met.

25. RW1 as the Chief Economist of the respondent worked under the General Manager in charge of corporate planning and his duties were among others to evaluate performance, strategic planning and assisted in planning of departmental projects, monitoring the departmental program, reviewed performance targets with a view to find out if the targets were met.

26. RW1 told the court that the operational targets were monthly specific but evaluation is done at year end. The claimant received a warning on monthly performance and this was the concern of the Board. The claimant received a 2nd letter from the CEO which was a final warning. One letter was before court though RW1 insisted that the performance report was not taken and denied that it was meant to victimize the claimant. The warning letter did not reflect it was a final warning on the face of it.

27. RW1 clarified that KENAO audited the organization and not departments. The audit report therefore did not refer to a specific department. The CEO was the overall manager of the organization and was answerable in that respect to the board and government.

28. RW1 stated that the adhoc committee members were members of the Board. He confirmed that the claimant appeared before them. That the board heard the appeal. He produced the minutes of 8th May 2012.

Determination

29. The issues for determination are;

- (a) Whether the termination was for a valid reason.
- (b) Whether the termination was done in terms of a fair procedure
- (c) What remedies if any are available to the claimant

Issue (a) and (b)

30. The court will deal with issues (a) and (b) together. Based on the evidence before court, I have arrived at the following conclusions of fact;

(a) That the adhoc committee was not a disciplinary committee *strictu sensu* but was investigating performance of the finance department and the officers including the claimant following an audit report by KENAO. The audit report by KENAO was global but had noted specific areas of weakness in the finance department.

(b) The court has concluded that the claimant was during the larger part of his three years and 9 months service rated very highly on the monthly and annual evaluation done by the respondent. For example the claimant's performance appraisal in November 2011, was rated 'very good' and as a result was given performance bonuses. The claimant was appointed to the budget committee; training and advisory committee; corruption prevention committee and was vice chair of the tender committee.

It is inconceivable that his performance could have taken such a down turn shortly thereafter in a wide range of his areas of performance.

(c) The claimant satisfied the court that he relied on a team in the finance department which was shielded by the CEO whenever the claimant challenged their performance and this caused delays in reconciliation, making of budgets and communication of reports, which delay the court was satisfied more likely than not was attributable to the conduct of staff who were not completely under his control but were shielded by the CEO.

(d) The respondent did not produce any systematic reports showing a downward trend by the claimant and the proceedings conducted by the adhoc committee were investigative in nature and ought to have resulted in a raft of remedial measures in key performance areas of the department with a directive and caution probably to the claimant and the team to up their game within a given time frame.

(e) No evidence was tendered before court of any loss occasioned to the respondent as a direct result of any conduct by the claimant be it of commission or omission. The committee engaged in speculation that the claimant had made the respondent a fertile ground for fraud without demonstrating that a single fraud took place during the period under review.

31. The court concludes that there was no reason proved by the respondent on a balance of probability

within the meaning of Section 43 of the Employment Act, 2007 which provide;

“In any claim arising out of termination of a contract, the employer shall be required to give the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

32. A disciplinary hearing must be specific to the employee within the meaning of Section 41 of the Act. An employer cannot convert general investigations of a department involving many employees into a hearing that may result to a termination or dismissal. Such investigatory process ought to result in a recommendation to hold a disciplinary hearing against named officers.

33. To this extend, the process followed by the adhoc committee was in the court’s view not fair to the claimant even though the claimant made a written report to it and also appeared before it in his capacity as a department head.

34. In the words of RW1,

“It was an investigation committee on issues raised by an external audit and ought not to have been a disciplinary hearing as such. Indeed, in its meeting held on 26th March 2012, the claimant was informed that the committee was formed to review the performance of the department and make recommendations of the Board”

35. The claimant was not informed that this was a process that could result to his separation with the respondent without a further process pursuant to the recommendations of the adhoc committee.

36. The claimant was not informed of his right to have an employee of choice to appear with him at the hearing.

37. The explanation by the claimant in writing was reasonable and relevant to all the issues raised against his department and therefore, the respondent was bound to conduct a proper and fair hearing before terminating his employment.

38. The claimant produced several letters he wrote to his subordinates urging them to improve their performance but he did not receive support from the CEO whenever he wished to discipline them for poor work performance and failure to meet their targets. The claimant was placed in a *catch 22* situation by the CEO.

39. Accordingly, the court finds that the termination of the employment of the claimant violated Section 41, 43 and 45 of the Employment Act and is unlawful and unfair. The claimant is entitled to reliefs under Section 49 of the Act.

Reinstatement

40. The claimant seeks reinstatement to his job. The termination of his employment took place on 11th April 2012.

41. Section 12 (3) (vii) of the Employment and Labour Relations Court Act, 2014 provides that;

In exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders: -

“an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstance contemplated under any written law;”

42. It follows that the court has no power to order reinstatement of an employee after expiry of three years

from the date of dismissal or termination. The hands of the court are tied in this respect. The court would have considered re-engagement but same was not pleaded.

43. This brings the court to the alternative prayer for award of 12 months' salary being damages for unlawful termination and payment of severance pay.

Severance

44. Severance pay is only payable under Section 40 of the Employment Act, 2007, where an employee has been declared redundant for operational reasons. This is not the case in the present matter and therefore this relief is not available to the claimant.

Compensation

45. Section 49 (1) (c) of the Act, provides that the court may award;

“the equivalent of a number of months’ wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

46. Under Section 49 (4) are guidelines in awarding compensation, under subsection 49 (1) (c) aforesaid. The relevant ones in this case are as follows;

- a. The claimant wished to be reinstated but for reasons of not his own making the remedy is no longer available to him.
- b. The claimant who was a high performer was victimized in a most callous manner.
- c. The claimant had served the respondent for a period of three years and nine months and had served diligently for most of the period.
- d. The claimant lost, a lucrative position and was unlikely to get a similar position following the adverse effect of a termination such as this one.
- e. The claimant was paid terminal benefits upon termination which is an extenuating factor.
- f. The claimant suffered damage, mental anguish and financial loss as a result of the sudden termination of employment.

47. Each case must be treated on its own merit. In most cases, the award of the maximum compensation is not sufficient to mitigate the loss suffered.

48. This in the court's view is such a case given demonstration of *mala fides* by the claimant on the part of the CEO of the respondent resulting in his victimization as a Senior Officer in the public sector.

49. Accordingly, the court awards the claimant maximum compensation, equivalent to 12 months' salary in the sum of Kshs.5,521,599.72/=.

50. In the final analysis judgment is entered in favour of the claimant as follows;

- (a) Kshs.5,521,599.72/= being equivalent of 12 months' compensation.
- (b) Interest on the award at court rates from date of judgment till payment in full.
- (c) Costs to follow the outcome.
- (d) Certificate of service within 30 days of judgment.

Dated and Delivered at Nairobi this 30th day of June 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE