



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 713 OF 2015

BETWEEN

RICHARD KASHERO CLAIMANT

VERSUS

KILIFI MARIAKANI WATER AND SEWERAGE

COMPANY LIMITED [KIRIWASCO] RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Muranje & Company Advocates for the Claimant

Chilango & Associates, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim, on 17th September 2015. He states he was employed by the Respondent Company as a Water Meter Reader, on 8th February 2010. The Respondent dismissed the Claimant on 15th May 2014, in circumstances the Claimant feels, were unfair and unlawful. He was aged 38 years on the date of dismissal. He expected to work until the age of 60 years. He earned a gross monthly salary of Kshs. 35,932 as of the time of dismissal. He prays for Judgment against the Respondent in the following terms:-

a) Re-instatement.

Alternatively:-

b) The Respondent to pay the Claimant all his salary

and dues that would have been payable to the

Claimant, if the Claimant had served up to 60 years.

c) Damages for wrongful dismissal.

d) Any other relief.

e) Costs of the Claim.

2. In his Closing Submissions filed on 30th March 2017, the Claimant states reinstatement is not feasible, dismissal having taken place on 15th May 2014. The Management Team responsible who dismissed him is still in place, and the environment therefore, not conducive for Claimant's return. The Court understands this to mean the Claimant has abandoned reinstatement, and wishes to pursue the alternative to reinstatement solely.

3. The Respondent seems not to have filed a Statement of Response. Instead, response is made in form of a Replying Affidavit sworn by Engineer Mwamuye Chigunda, Respondent's Managing Director, on the 15th October 2015.

4. Chigunda concedes the Claimant was employed by the Respondent on the terms and conditions of service indicated in the Statement of Claim. He was summarily dismissed for gross misconduct. There was valid reason for the decision, and fair procedure was followed. The Claimant was charged with illegal connection of water; unauthorized receipt of money from Customers; and illegal interference with the system by closing a valve, leading to water shortage at Kiwandani. The Claimant opted not to give evidence at the disciplinary hearing. An adverse decision was made against him. He appealed. He did not have good grounds on appeal. He was dismissed based on gross misconduct, having violated Respondent's Code of Conduct. The Respondent prays for dismissal of the Claim.

5. The Claimant gave evidence, and closed his case, in the presence of his Advocate and the Advocate for the Respondent, on 7th December 2016. Respondent's case was fixed for hearing with the consent of the Advocates, at the end of Claimant's case, on 16th March 2017. On this date the Respondent and its Advocates did not attend Court. Proceedings were marked as closed, and Claimant directed to file his Closing Submissions, which he did on 30th March 2017. Judgment was scheduled for delivery at Malindi, on 9th June 2017, when the Court would have a session there.

Claimant's Case

6. The Claimant adopted his Pleadings, Witness Statement and Documents on record as his evidence. He was issued a letter by his Area Manager to appear before the Disciplinary Committee. He was issued the letter on a Friday, 9th May 2014, at 4.30 p.m. to appear before the Disciplinary Committee on Monday, 12th May 2014. The notice was short.

7. He presented himself before the Committee on 12th May 2014 nonetheless, as directed. The Committee was not ready to listen to the Claimant. It had already determined to dismiss him.

8. It was alleged the Claimant took money from Customers. No Customer came forward to substantiate this. It was said the Claimant connected water to Consumers illegally. No Consumers presented evidence before the Committee. He did not interfere with the water system as alleged.

9. He was 38 years, and would have worked till the age of 60 years. He wishes the Court to grant him damages using a multiplier of 22 years. The computation is as worked out in Claimant's letter of demand before action, totaling Kshs. 11,470,742.

10. Cross-examined, the Claimant testified he was a Meter Reader. He forwarded readings to the Billing Officer. He did not connect or disconnect water pipes. He did not read meters at Kiwandani. He worked at Mazeras. He made an appeal after dismissal. He mentioned in the Appeal, that he was closing water for Customers. Officers Kai and James did the closing. In the Appeal also, the Claimant apologized for his actions. He was advised by his Manager to apologize. He received 3 day notice to appear before the Disciplinary Committee. He needed 1 month, not 3 days. Claimant's contract did not provide for 1 month

notice. He was heard, but the Committee was harsh to him.

Respondent's Case

11. The Respondent as stated above did not present evidence and failed to attend Court to respond to the Claim, when scheduled to do so. The Respondent only presented a Replying Affidavit, contrary to the Industrial Court [Procedure] Rules 2010, which requires the filing of a Statement of Response.

12. The Respondent's case is therefore wanting, listed Witnesses having not appeared in Court to explain Respondent's position and assist the Court in understanding the documents filed by the Respondent.

The Court Finds:-

13. The history of Claimant's employment with the Respondent; his terms and conditions of employment; and dismissal by the Respondent are not contested facts.

14. Was the dismissal based on valid ground, carried out fairly and is the Claimant entitled to the remaining prayers sought?

15. The Claimant was alleged to have connected water to Customers illegally; received money from Customers illegally; and interfered with supply of water by closing a valve, choking supply to the area known as Kiwandani.

16. The record of the disciplinary proceedings does not establish any of these allegations. Without the evidence of the Respondent before the Court, the allegations remain bare allegations. The Claimant testified there were no Customers called before the disciplinary hearing, supporting the allegations that the Claimant connected water illegally; that he took money from Customers illegally; or that he choked supply of water to the Residents of Kiwandani. The alleged admission by the Claimant on some of the allegations on appeal, and the fact that the Claimant apologized, was explained by the Claimant to have resulted from the advice of his Manager. Apology was made as a way of reinforcing the appeal and boosting Claimant's chance of continued service. These, in the absence of evidence from the Respondent, and viewed against the evidence of the Claimant denying any wrongdoing on his part, cannot be taken as unequivocal admission of guilt for the offences which the Claimant was charged with.

17. Dismissal of the Claimant was not based on valid ground under Section 43 and 45 of the Employment Act 2007.

18. Disciplinary hearing, save for the notice of the hearing, and the absence of a colleague of the Claimant's choice, or shop-floor Trade Union Representative, largely met the statutory threshold on fair procedure under Section 41 and 45 of the Employment Act. The Claimant was supplied with specific charges; he was heard; he was given an opportunity to appeal; and appealed unsuccessfully. He should however have been given adequate notice. He should have been advised on his right to be accompanied by a workmate or trade union representative. Fair procedure was observed, but not entirely.

19. The Claimant is entitled to compensation for unfair dismissal under Section 49 of the Employment Act, read together with Section 12 of the Employment and Labour Relations Court Act.

20. There is no merit however, in the prayer for salaries for a period of 22 years the Claimant expected he would go on working. There is nothing in the contract of employment showing the Claimant was promised he would retire at the age of 60 years. He did not direct the mind of the Court to any law governing the Respondent, which placed retirement age at 60 years. He did not show to the Court any instrument placing mandatory retirement at the age of 60 years.

21. Even if he did show he would have retired at the age of 60 years, the Court is not bound to grant him anticipated salaries over a period of 22 years. He no longer serves the Respondent. Anticipated salaries would not amount to fair remuneration. Employees are ordinarily granted remuneration, in exchange of

their labour. The contract under which the Claimant served had a termination clause. There was no guarantee the relationship would have survived to the expected age of retirement. The Employment Act requires Employees who lose their jobs to move on, and mitigate loss of employment. The claim in the sum of Kshs. 11,470, 742 as detailed in Claimant's demand notice dated 1st July 2015, contains other unsupported items such as cost of pipes and water connection accessories, alleged to have been procured by the Claimant. The claims for anticipated salaries, and the peripheral prayers detailed in the letter of demand have no foundation.

22. The Claimant is granted the equivalent of 12 months' salary at Kshs. 431, 184 in compensation for unfair dismissal.

23. Under any other suitable relief, he is granted 1 month salary in lieu of notice at Kshs. 35, 932.

24. He is granted costs, and interest at 14% per annum from the date of Judgment.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Claimant is granted the equivalent of 12 months' salary at Kshs. 431, 184 in compensation for unfair termination; and 1 month salary in lieu of notice at Kshs. 35,932- total Kshs. 467,116.

c) Costs to the Claimant.

d) Interest granted at 14 % per annum from the date of Judgment till payment is received in full.

Dated and delivered at Mombasa this 9th day of June 2017.

James Rika

Judge