



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NUMBER 1795 OF 2013

JULIUS CHELIMO KEINO.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 7th November, 2013 the claimant averred that he was employed by the respondent as a graduate trainee on 17th January, 2005 and rose through the ranks and was in the position of Revenue Officer 1 at the time of termination of his services.
2. The claimant averred that on 25th May, 2009 the respondent maliciously and without lawful cause had him arrested and charged for stealing. He was subsequently acquitted of the said charges on 23rd of October, 2012. The claimant further pleaded that during the pendency of the criminal suit he was placed on interdiction and subsequently retired in the interest of the respondent. The claimant averred that following the illegal and unfair termination of his services he suffered loss for which he sought an order of compensation from the court.
3. The respondent through its memorandum of response filed on 19th December, 2013 admitted paragraphs 3 to 8 of the claimant's memorandum of claim since they were merely a chronicle of the claimants employment history. The respondent in addition stated that the claimant was issued with respondent's revised code of conduct on 19th September, 2005 and he agreed to abide by its terms and conditions.
4. Concerning the claimant's arrest and arraignment in court the respondent pleaded that there were reasonable and justifiable grounds for the claimant's arrest and prosecution. The respondent further pleaded that there was no requirement in law that once an acquitted is secured in criminal proceedings then the adverse findings of a disciplinary proceedings would be automatically reversed.
5. According to the respondent, the investigations revealed that on 15th December, 2008 the claimant received a cheque together with a forwarding letter from Strabag International and stamped the letter in acknowledgement using the Commissioner LTO receiving stamp. Mr Raymond Anthony of Strabag International contacted him severally to follow up the receipts but he kept telling him to wait. The cheque was later found to have been directed to the account of Phaseline Supplies with Paramount Bank and was deposited on 23rd December, 2008.

6. According to the respondent the claimant was subsequently informed through a letter dated 28th September, 2009 that disciplinary proceedings may be instituted against him after he did not show cause why the same should not be commenced. The claimant was further informed of the relevant sections of the respondent's code of conduct which he breached. The respondent further pleaded that by a letter dated 12th October, 2009 the claimant denied involvement in the loss of the said cheque and urged the respondent to await the determination of his case which was before the criminal court and that if any disciplinary action was taken against him, the same would amount to double jeopardy.

7. The respondent further averred that claimant's supervisor Mr Mutugi vide his letter dated 3rd December, 2009 addressed to Senior Deputy Commissioner-HR confirmed that indeed it was the claimant who received the cheque and that he did not account for it. The said cheque was found to have been fraudulently banked in an account of Phaseline Supplied firm and the claimant could not satisfactorily account for its whereabouts despite having acknowledged receipt of the same.

8. The respondent further pleaded that the claimant was invited to defend himself before the respondent's disciplinary committee on 22nd December, 2009 which was rescheduled to 17th February, 2010 where the claimant was granted an opportunity to appear before the committee to make representations. The committee after carrying out its deliberations found that the claimant was negligent in his duties and made a recommendation to the commissioner for his retirement in the respondent's interest.

9. The claimant was therefore retired through a letter dated 2nd March, 2010 in which he was also informed of the terminal dues payable to him. According to the respondent the claimant to date has not collected his dues. In conclusion the respondent pleaded that the claimant was afforded a fair hearing in accordance with the Constitution, the Employment Act and respondent's Code of Conduct.

10. In his oral evidence in court the claimant further stated that he was taken through disciplinary hearing by the employer and that the hearing concluded that he was guilty of stealing a cheque and a decision made to retire him in the respondent's interest. He further stated that they were engaged in an exercise called nature cleaning in which he was handling a client by the name Strabag International. He noted that the client had not filed returns and paid taxed so he called them and they came to his office with the returns and a cheque for the tax. He took the documents to be received by the Commissioner's office and were received by the Commissioner's secretary. He therefore informed the client's representative that returns were filed at the tax returns unit and cheques paid at the cash office. His work was merely to facilitate. According to him, the tax payer left to follow as advised. He denied taking the documents and the cheque. He further denied diverting the cheque and knowledge of Phaseline Supplies.

11. In cross-examination he however stated that he received all the documents and the cheque and took them to the commissioners office. He stated that he received the cheque on behalf of complainer and Debt Section. According to him, in this particular case everyone was not following the standard procedure in handling cheques. He further stated that he did not account for the cheque in his monthly returns because it was not reflecting in the system. Regarding his terminal benefits he stated that he was required to provide a clearance certificate before being paid.

12. The respondent's first witness Mr Chrispin Agata stated that he was the Manager in charge of tax payers section. It was his evidence that the claimant was accused of flouting procedures leading to loss of a cheque which was slater found to have been banked in another account other than the respondent's. It was further his evidence that in September, 2009 the respondent wrote to the claimant informing him of the procedures he flouted and was called upon to defend himself. The claimant appeared before the disciplinary committee and responded to the charges. It was his evidence that the committee found the claimant negligent and the claimant informed of the decision.

13. In cross-examination he stated that the allegations against the claimant were not related to the court case. It was his evidence that the claimant violated the respondent's code of regulations. The respondent's second witness Mr Frida Kadima stated that on 15th December, 2008 he was in the office when the claimant came with a cheque for Kshs 3,684,906 in the name of Strabag. She recorded the

cheque and the claimant signed for it. He therefore left with the cheque and took it to the Deputy Commissioner. In cross-examination she stated that the procedure used by the claimant was not a proper procedure.

14. The respondent's final witness Mr Mutugi informed the court that he checked the Commissioner's office and found an entry concerning the cheque signed by the claimant. He further stated that the cheque was not reported by the claimant in his report for the month. It was his evidence that all documents are received at the Commissioner's office and registered. They are then transferred to the Deputy Commissioner then to Head of Debt and then to the managers. The claimant did not follow this procedure. The cheque was never receipted or entered in the taxpayers ledger.

15. Employment contracts like ordinary contracts are terminable either as provided in the contract between the parties or by breach. Where the latter happens the Employment Act provides for remedies which a person aggrieved by such wrongful and or unfair termination. In order to reach a finding that a termination or dismissal is unfair the court must find that the dismissal or termination was as a result of invalid or unjustifiable reasons and further that in carrying out the dismissal or termination an unfair procedure was followed. That is to say the employee was not taken through a disciplinary process or the process was contrary to the right to fair administrative action and or offended rules of natural justice.

16. The court has carefully considered the pleadings and evidence in this matter and it would seem that the claimant does not dispute the fact that he was taken through a disciplinary process by the respondent. The claimant further does not deny that the respondent had a reason to retire him in the interest of the organization. The claimant's only contestation is that he was not negligent when the cheque he allegedly handled got lost and was eventually diverted to third party accounts with the resulting loss of the value of the cheque.

17. Whereas the claimant denies being negligent about the lost cheque, he does not deny handling the said cheque. He further did not give a good account of whether after having the cheque registered in the Commissioner's office he handed it to someone else. The claimant further admitted not accounting for the said cheque in his monthly report because it was missing from the system. He however did not say what effort he made to establish the whereabouts of a cheque he was the last person to handle before it disappeared.

18. Negligence is a valid ground for dismissal or termination of employment since an employee owes an employer duty of skill and care in carrying out the work for which he was hired to perform. For purposes of disciplinary process, the standard of proof for negligence is on a balance of probabilities. That is to say any reasonable person looking at the facts and circumstances of the issue at hand would most probably conclude that the person accused was negligent. The standard of proof is not beyond reasonable doubt as in criminal cases. In this regard it was erroneous for the claimant to argue that because he was acquitted of the criminal charges arising from the lost cheque his employer could not take disciplinary action against him based on the same facts.

19. The court has therefore come to the conclusion and finds that the respondent had valid and justifiable reasons for terminating the claimant's services and further that in terminating the claimant's services, the respondent followed a fair procedure. The claim is therefore found without merit and is hereby dismissed with costs.

20. The respondent will however pay the claimant his terminal benefits as stated in their letter retiring the claimant in the interest of the respondent.

21. It is so ordered.

Dated at Nairobi this 1st day of December 2017

Abuodha J. N.

Judge

Delivered this 1st day of December 2017

Abuodha J. N.

Judge

In the presence of:-

..... for the claimant

..... for the Respondent