



**THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**CAUSE NO. 72 OF 2017**

**PETER OTABONG EKISA.....CLAIMANT**

**VS**

**THE COUNTY GOVERNMENT OF BUSIA....RESPONDENT**

**Calistus & Co. Advocates for Claimant**

**Mr. J.P Makokha for Respondent**

**JUDGMENT**

1. The suit was filed vide a memorandum of claim dated 5<sup>th</sup> September, 2016 on the even date. The Claimant sought a declaration that his interdiction from work was unlawful and that he be returned to work and he be paid withheld salary.
2. The suit was filed together with an application seeking an interdict against the interdiction pending the hearing and determination of the suit. However the interim orders were not granted and the court directed that the main suit be heard on the merits. The Court ordered the withheld salary be paid and the respondent complied with the order. The disciplinary process continued meanwhile.
3. The respondent filed a memorandum of reply to the memorandum of claim on 28<sup>th</sup> September, 2016 in which it denied the claim in its totality and averred that the suit had been filed prematurely whilst the disciplinary process was on going.
4. The respondent had also simultaneously filed grounds of opposition stating that the suit be dismissed as was premature and claimant ought to await the conclusion of internal process.
5. The claimant was however summarily dismissed from employment on 10<sup>th</sup> February, 2016 and on 27<sup>th</sup> April, 2017 he filed an Amended Memorandum of claim in which he seeks orders-
  - a. For a declaration that the summary dismissal was unlawful null and void*
  - b. The respondent be mandated to take the claimant back to work*
  - c. The claimant be compensated for the unlawful summary dismissal*
  - d. Costs of the suit.*

6. The respondent filed a reply to the Amended Memorandum of claim on 25<sup>th</sup> August, 2017 in which is denied all particulars of claim and prays the suit be dismissed with costs.

### **7. Analysis of Facts of the case**

The claimant was charged with various offences said to be gross misconduct and was asked to show cause why his employment ought not to be summarily dismissed by a letter dated 11<sup>th</sup> May, 2016.

8. Meanwhile the claimant was suspended on half pay. The claimant responded to the charges on 14<sup>th</sup> May, 2016 by a letter written by his advocates Anwar and Co. Advocates.

9. By a letter dated 28<sup>th</sup> September, 2016, a disciplinary hearing was scheduled for 7<sup>th</sup> October, 2016. The claimant responded by a letter dated 5<sup>th</sup> October, 2016 stating that he could not attend the hearing due to sickness. The meeting was rescheduled but the claimant did not attend citing a case which was already pending in court.

10. In short the claimant did not attend the disciplinary hearing by the County Human Resource Management Advisory Committee. However the claimant in his written response to the charges denied the charges and the respondent called witnesses during the disciplinary hearing in support of the charges in the absence of the claimant.

The charges and the outcome were as follows-

#### **Charge 1.**

*a. Involvement in political activity contrary to Section 16(1) of the Public Officer Ethics Act, 2003:*

*b. In response, the claimant stated that in the course of his work, he interacted with people of all colour and creed, political background and affiliation.*

*c. The claimant denied involvement in any partisan political activity and in particular he denied having supported a particular candidate. The respondent heard two witnesses namely Mr. Ezekiel Okwach, Chief Officer, Office of the Governor and Mr. Robert Muganda, the immediate supervisor of the claimant and Director, Public Administration who testified that the claimant was involved in partisan politics and campaigned for particular candidate. The respondent found the claimant guilty as charged.*

#### **Charge 2.**

*a. Negligence of duty: Absenteeism from work station without Authority hence denying the public government service:*

*b. This charge was denied by the claimant and was dismissed by the respondent for lack of evidence.*

#### **Charge 3.**

*a. Using abusive language and behaving in a manner likely to cause a breach of the peace:*

*b. The claimant was accused of causing a fracas in the office of the Chief of Staff in the Governor's Office on 5<sup>th</sup> May, 2016 in front of members of public leading to a confrontation. The claimant denied the charge.*

*However one Mr. Peter Ipara told the committee at the hearing that he was confronted and*

*abused by the claimant in public. It was confirmed by Robert Muganda, the supervisor of the claimant that the claimant confronted Peter Ipara in his office as described. The Committee found the claimant guilty as charged.*

**Charge 4.**

*a. **Insubordination:** making statements in public against the County Government he served:*

*b. The claimant denied the charge but Mr. Robert Muganda testified that the claimant defied instructions from him to desist from making negative statements against his employer. The claimant also absconded duty contrary to instructions given him in the letter of suspension. The claimant was found guilty of this charge.*

**Charge 5.**

*a. The claimant was also found guilty of making unsavory statements on social media against members of the public and other elected leaders despite of his written denial.*

**11. Determination**

The issues that fall for determination are as follows-

- a. Was the summary dismissal of the claimant for a valid reason and in terms of a fair procedure?
- b. Is the claimant entitled to the reliefs sought?

**Issue (a)**

12. The parties agreed to proceed with the matter by relying on the pleadings, attached documents and written submissions. No oral evidence was adduced therefore. In terms of Section 43 of the Employment Act, the employer must demonstrate it had valid reason(s) for dismissing the claimant.

13. The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce *prima facie* evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.

In **Eastern Produce (K) Ltd V. John Lumumba Mukosero, Eldoret Civil Appeal No. 25 of 1998**, it was held-

***“ The fact that one party has filed a suit or made a claim by itself is not proof that there is a prima facie case which the defendant must rebut. It is for the plaintiff to prove liability and this onus of proof does not shift whatsoever”***

14. This burden is not lessened even where parties agree not to adduce oral evidence as in the present case or even where the respondent does not adduce any evidence at all. In **Karugi & another V. Kabiya & 3 others [1978] KLR 347**, it was held that the burden of proof is always on the plaintiff to prove his case on the balance of probabilities, and such burden is not lessened even if the case is heard by way of formal proof.

15. The claimant worked as a county sub-administrator, County Government of Busia from 13<sup>th</sup> March, 2014 which position he held until he was interdicted on 5<sup>th</sup> September, 2016 and was dismissed on 10<sup>th</sup> February, 2017.

16. The claimant was charged with the aforesaid offences and served with a show cause letter to explain himself in terms of Section 41 of the Employment Act 2007.

17. The court has considered the evidence before it as against Sections 41, 43, 44, 45 and 47 of the Employment Act and has come to the inevitable conclusion that the respondent has discharged the evidential burden of rebuttal and has therefore demonstrated that it had valid reasons to charge, suspend and summarily dismiss the claimant from its employ.

18. The employment of the claimant was also terminated in terms of a fair procedure in that he was charged and served a notice to show cause why the employment should not be terminated.

19. The claimant made unsatisfactory explanation through his advocate. The claimant was given opportunity to appear before a disciplinary committee but he forfeited that chance.

20. This court has said time again that court proceedings are not a substitute for internal disciplinary processes unless the court has interdicted such internal procedures.

21. The charges brought and proved against the claimants are in terms of Section 44 of the Employment Act and attract summary dismissal. The Court cannot fault the respondent in this respect. The court equally does not fault the procedure followed by the respondent

22. Accordingly, the second issue for determination is answered in the negative. The claimant is not entitled to any of the reliefs sought as the suit by the claimant lacks merit and is dismissed with costs to the respondent.

**Dated at Bungoma, this 1st day of December, 2017**

**HON. MATHEWS NDERI NDUMA**

**JUDGE, ELRC**