



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT NAIROBI
CAUSE NO 1021 OF 2014

HASSAN MAGIYA KIAGE.....CLAIMANT

Versus

HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

TOURIM FINANCE CORPORATION.....2ND RESPONDENT

Mr. Ndege for Claimant

M/s Mumo for 1st Respondent

Mr. Deya for 2nd Respondent

JUDGMENT

1. The suit commenced by way of a Plaint dated 2nd March, 2011 and filed on the 3rd March, 2014 at the High Court. The matter was subsequently transferred to this court.
2. The Plaint was amended on 5th March, 2014 pursuant to leave of court.
3. The brief facts of the case are that, on 7th January, 2010, the 2nd Respondent, the Tourism Finance Corporation interdicted the Claimant on half pay on grounds that he had been charged before the Anti-Corruption Court in Criminal Case No. 37 of 2009 and later on 30th June, 2010 terminated the Claimant's employment before the hearing and determination of the case.
4. On 22nd July, 2010, the Claimant was acquitted of the charge against him under Section 210 of the Criminal Procedure Code.
5. The Claimant contends that his prosecution and termination of employment was without justifiable cause and therefore claims special damages in the sum of Kshs.39,255,706.55 as particularized in paragraph 16 of the Amended Plaint and general aggravated and exemplary damages.
6. The Claimant relies on his written witness statement and bundle of documents attached to the Plaint filed on 3rd March, 2011.

7. In opposition to the Claim, the 1st and 2nd respondents filed their statements of defence on 18th July, 2011 and 5th April, 2011 and their witness statements on 23rd July, 2013 and 17th May, 2012 respectively.

Issues for Determination

8. The issues that fall to be determined in this dispute are as follows;

- a) Whether the 2nd Respondent had a valid reason to terminate the Claimant's employment,
- b) Whether the Claimant's termination was done in terms of a fair procedure,
- c) Whether the Claimant is entitled to the reliefs sought,
- d) Whether the court has jurisdiction to hear and determine the issue of malicious prosecution and false imprisonment.

Issue A

9. The Claimant's problems started when the 2nd Respondent received complaints regarding the Claimant's participation in the award of a tender to Magaki Cleaning Services. On the 9th June, 2006, the 2nd Respondent advertised for cleaning services *inter alia*. However, the Corporation re-advertised this tender in December, 2006. Several companies applied for the tender and Magaki Cleaning Services was awarded the tender beating Lupat Cleaning Services and Metro Cleaners among a host of others.

10. The losing bidders appealed the decision and in the process the Corporation received complaints which centered around perceived conflict of interest between the Claimant and the winning bidder, Magaki Cleaning Services.

11. The complaints leveled against the Claimant were investigated by the Corporation and it came to the conclusion that not only were the complaints unfounded but also that there was no conflict of interest between the Claimant and Magaki Cleaning Services.

12. The Corporation advised the complainants, if not satisfied with the outcome to lodge a formal appeal to the Appeal Tender Committee at Treasury and the Corporation approved the tender award to Magaki Cleaning Services.

13. The complainants filed a complaint with the Kenya Anti-Corruption Commission (KACC) and who after conducting their own investigations decided to prefer a charge against the Claimant for the offence of,

“knowingly holding a private interest in a contract emanating from a public body contrary to Section 42(3) as read with Section 48(1) of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.” The Corporation officers were called to make statements in regard to the tender award to Magaki cleaning Services.

14. Kenya Anti-Corruption Commission wrote a letter dated 12th January, 2010, to the Managing Director of the 2nd Respondent to take administrative action against the Claimant in accordance with Section 62 (1) of the Anti-corruption and Economic Crime Act, No. 3 of 2003 which provides;

“A public officer who is charged with corruption or economic crimes shall be suspended at half pay with effect from the date of charge.”

15. Pursuant to the above, the 2nd Respondent interdicted the Claimant in terms of Section 17.4.5 of the Corporation's Terms and Conditions of Service, with effect from 30th December, 2009 on half pay.

16. On 25th February, 2010, the Corporation's Board met and appointed Mr. John Mukune as the Acting Finance Manager in place of the Claimant for a period of six months or such earlier period upon the determination of the criminal case. The matter was to be tabled before the Board for review if the criminal case was not determined within six months.

17. The Board convened on 14th and 15th June, 2010 and the matter of the position of Finance Manager was discussed since Mr. John Mukune who held the position in an acting capacity had no requisite educational certificate to fill the position.

18. The Board decided that the Corporation was exposed to financial risks and decided that the position of Finance Manager be filled substantially as a matter of urgency since the criminal case was still pending. The Board therefore resolved to terminate the employment of the claimant as a Finance Manager in accordance with the Terms and Conditions of Service of the Corporation. That the Claimant be paid all dues to which he was entitled to and that the position of Finance Manager be advertised and a candidate be sourced competitively.

19. It is the 2nd Respondent's case that the termination of the Claimant's employment was informed by the Corporation's operation requirements and the need to have a substantive holder of the position of Finance Manager with all the requisite financial skills and expertise.

20. From the evidence adduced by the 2nd Respondent, the Corporation admits that it had no valid reason to terminate the employment of the Claimant in that, the Corporation had conducted its own investigations and exonerated the Claimant from any wrong doing.

21. However, the Claimant was suspended on half pay from employment pending the hearing and determination commenced by the Kenya Anti-Corruption Commission.

22. The Corporation had appointed a person to hold the position of Finance Manager pending the conclusion of the criminal case.

23. The criminal case was concluded on 22nd July, 2010, less than one month from the date the 2nd Respondent decided to terminate the employment of the Claimant.

24. It is the court's considered view based on the particular evidence before court and the law applicable that the 2nd Respondent was bound to await the outcome of the criminal case in that the suspension of the Claimant was expressly stated to be on half pay pending the outcome of the criminal case. It is now common cause that the Claimant was acquitted of the charge against him.

25. The termination of his employment was for no valid reason and was therefore not justifiable at all.

26. This was done in contravention of Section 43 as read with Section 45(1) and (2)(a) of the Employment Act, 2007.

Issue B

27. From the evidence adduced by the 2nd Respondent, it is clear that the Claimant was not notified of the intended termination of Employment, was not asked to show cause why his employment ought not to be terminated and was not brought before a disciplinary committee of the Board, prior to the termination. In its written submissions, the 2nd Respondent states that it had conducted its own investigations and exonerated the Claimant from any wrong doing. The Claimant not only lost his job for no valid reason but also the termination of employment was not done in terms of a fair procedure. This was in contravention of Section 41 as read with Section 45(2)(c) of the Employment Act, 2007.

Issue C

28. From the finding of the court in I and II above, the Claimant was entitled to reinstatement to his employment upon being acquitted by the court in terms of Clause 17.4.5 of the 2nd Respondent's Terms and Conditions of service which provides;

“where an offence involves criminal charges in the court of law, the employee will be placed in interdiction. The Corporation will ask for the court order should the employee be acquitted by a court of law. He/she may be reinstated by the Board on the recommendation of the Human Resource Management Advisory Committee.”

29. The Claimant communicated the outcome of his criminal case by a letter dated 30th July, 2010. The 2nd Respondent failed and or ignored to reinstate the Claimant back to his job and he has suffered loss and damage. The Claimant seeks payment of both exemplary and aggravated damages from the 2nd Respondent. The Claimant further seeks compensation for loss of employment up to the attainment of 60 years being the retirement age in the employment of the Respondent. The Claimant states that he was due to retire in the year 2019 and claim lost earnings in respect thereof.

30. In terms of Section 49(1)(c) of the Employment Act, the court is mandated to award maximum compensation to an employee who has wrongfully and unlawfully lost employment. Such is the case with the Claimant.

31. The court upon considering the factors set out under Section 49(4) to wit;

- a) that the Claimant wished to be reinstated to his job up to the date of his retirement,
- b) the claimant did not contribute to the termination since he was fully exonerated by the 2nd Respondent and the court from any wrong doing,
- c) the Claimant had not sought reinstatement in the Plaintiff,
- d) the Claimant had served the Corporation in a senior position of Finance from 2004 up to 20th June, 2010, a period of over six years and expected to serve the Respondent until retirement in 2019.
- e) The Claimant had not found alternative employment at the time he came to court and chances of getting such employment were diminished by the false charges laid against him.
- f) The Claimant was paid terminal benefits upon termination in the sum of Kshs.258,953.45.

32. Considering all the above factors, the court awards the Claimant the maximum compensation provided by the Act, being equivalent of 12 months gross salary which the Claimant earned at the time of termination on 30th June, 2010 in the sum of Kshs.1,693,107.00.

33. Furthermore, the Claimant is entitled to payment of lost salary during the interdiction period from January, 2010 to June, 2010 in the sum of Kshs.564,369.00

Issue D

34. The question whether the Claimant is entitled to payment of general damages for malicious prosecution and false imprisonment as against the 1st Respondent the Honourable Attorney General calls into question the jurisdiction of the Employment and Labour Relations Court to deal with the matter.

35. The clear evidence before court shows that the 2nd Respondent did not at all contribute to the arrest and prosecution of the Claimant. It is evident that the complainants to Kenya Anti-Corruption Commission were the competitors in the tender process who lost out and were aggrieved. The employer clearly exonerated the Claimant in the matter. The prosecution, be it malicious or not was not at the

behest of the employer and the court so finds. Whether or not the Claimant has a cause of action as against the complainants and the Honourable Attorney General is a matter for the Civil Division at the High Court.

36. The court finds that it has no jurisdiction to deal with it and therefore cannot make any award in respect of the same alleged malicious prosecution and false imprisonment in which the employer did not play any part.

37. In the final analysis the award by the court as against the 1st and 2nd Respondents jointly and severally is as follows;

i. equivalent of 12 months gross salary being compensation for the unlawful and unfair termination in the sum of Kshs.1,693,107.00.

ii. Kshs.564,369.00 being the lost salary during the interdiction period in January, 2010 up to June, 2010.

Total award Kshs.2,257,476.00.

iii. Interest on the award at court rates from the date of filing suit till payment in full.

iv. Costs of the suit.

Dated and delivered in Nairobi this 15th day of January, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE