



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 947 OF 2013

PAUL KIGONDU KAMANDE.....CLAIMANT

VS

KENYA INDUSTRIAL ESTATES.....RESPONDENT

AWARD

Introduction

1. Paul Kigonde Kamande, the Claimant in this case, was an employee of Kenya Industrial Estates, the Respondent herein. The Claimant brought this action seeking relief for unlawful termination of employment. The claim is contained in a Statement of Claim dated 20th June 2013 and filed in Court on even date. The Respondent filed a Response on 15th July 2013.

2. At the hearing, the Claimant testified on his own behalf and the Respondent called its Corporate Strategy & Planning Manager, Monica Chirchir Kotut and the Development & Incubation Services Manager, Reginald Kimanathi. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 1st November 1996 in the position of Project Assistant to which he was confirmed on 17th April 1997. He rose through the ranks to the position of Branch Manager but appears to have been demoted to the position of Senior Research Officer, which position he held up to the time he left the Respondent's employment.

4. On 25th April 2012, the Claimant was suspended on allegations of improper conduct with regard to plot No 37 KIE Malindi, an allegation he denied. He stayed on suspension for three (3) months and on 10th August 2012, he was dismissed for gross misconduct. The Claimant states that the Respondent unlawfully retained his personal effects, being a jacketed steel tank valued at Kshs. 800,000, files and books. It is the Claimant's case that the termination of his employment was unlawful and unfair.

5. He claims the following:

- a. Reinstatement
- b. Release of jacketed steel tank and other personal items
- c. Salary in lieu of notice.....Kshs.195,000
- d. Unpaid leave allowance.....195,000
- e. Loss of income effective 1.4.2012 up to date of reinstatement

@ Kshs. 75,000 per month

- f. Service pay for 16 years.....1,040,000
- g. Loss of future earnings.....15,300,000
- h. HELB loan recovered and not remitted.....120,000
- i. Costs plus interest

The claim for HELB loan deductions was abandoned in the course of the trial.

The Respondent's Case

6. In its Response filed in Court on 15th July 2013, the Respondent states that the Claimant had, over time, developed a history of poor performance, laxity and lack of commitment to his work.
7. The Respondent adds that at the time of his dismissal, the Claimant had committed gross misconduct and was in breach of the terms of his employment contract. Specifically, the Respondent accused the Claimant of engaging in improper conduct with third parties thus placing himself in a position of conflict of interest and thereby occasioning serious material loss to the Respondent.
8. The Claimant had been warned in writing and ultimately given an opportunity to defend himself prior to the termination. In addition, he was given due notice by virtue of his being put on suspension. It is the Respondent's case therefore that the termination of the Claimant's employment was justifiable and lawful. The Respondent denies the Claimant's entire claim.

Findings and Determination

9. The issues for determination in this case are as follows:
 - a. Whether the Respondent had a valid reason for terminating the Claimant's employment;
 - b. Whether in effecting the termination the Respondent observed due procedure;
 - c. Whether the Claimant is entitled to the remedies sought.

Reason for Termination

10. The events leading to the termination of the Claimant's employment commenced with a suspension letter dated 25th April 2012. The letter states as follows:

“Dear Sir,

RE: SUSPENSION FROM DUTY

Reference is made to the hearing of a public complaint against you held on 4th April, 2012 and your written response to the said complaint dated 12th April, 2012.

Following the hearing of a public complaint raised against you by a member of the public, Mr. Famau Mohamed Famau regarding your irregular involvement on (sic) the KIE Malindi Plot No. 37, and your subsequent written response to the allegations raised therein, it has been found necessary to suspend you from your duties with immediate effect to pave way for further investigations in accordance with our Human Resource policy Section 2.4(f).

While on suspension, you shall not be entitled to any salary and you shall report to your Supervisor (Corporate Strategy and Planning Manager) at least once a week but must stay away from the premises of the company unless otherwise required. You will also be required to avoid any interference with the ongoing investigations.

M.C. KOTUT

FOR: MANAGING DIRECTOR”

11. The Claimant was subsequently terminated by letter dated 10th August 2012 which states in part:

“Dear Sir,

RE: TERMINATION OF SERVICES-GROSS MISCONDUCT

Reference is made to the audit carried out in Malindi branch from 3rd-4th May, 2012, a hearing held on 4th April, 2012 in regard to a public complaint (affecting the company's property) labeled (sic) against you by a member of the public, Mr. Famau Mohamed and to the disciplinary meeting held on 29th June, 2012.

We wish to bring to your attention that your verbal responses during the hearing and official written response to the said complaint is not sufficient to exonerate you from the allegations. The audit investigations carried out revealed that you were involved in culpable acts that are detrimental to the company and likely to bring the company into disrepute as follows:-

1. Conflict of interest to the substantial detriment of the company or company's property.

Investigations revealed a corroboration of facts between Mr. Famau Mohamed and Mr. Ali Mohamed that you were the link person to their transactions on company's Malindi Plot No. 37.....

2. You failed to protect company's (public) property entrusted to you as the then Branch Manager in Malindi. *The investigations revealed that even though you had restrained Mr. Famau Mohamed from developing the said plot following instructions from the Managing Director to revoke all previous allotments, you convinced Mr. Famau Mohamed to sell the plot to Mr. Ali Mohamed. You were in full knowledge that transferability was not possible following the earlier revocation of allotments but you convinced both parties that it was possible because you were an insider. This culpable act on your part resulted to the sale of the plot to Mr. Ali Mohamed without the company's approval and knowledge. The purported owner of the plot has since been involved in a tussle with the company and a case was filed in court for purposes of safeguarding the company's interests.....*

3. You provided false and misleading information to the public. *By engaging yourself in the transactions of the plot which you were fully aware belonged to the company in the pretext that as an insider you would ensure the plot was transferred, amounts to dishonesty and is likely to bring the company into disrepute.....*

*In view of the above, the management has noted with great concern that your gross misconduct and your continuous stay with the company is likely to be detrimental to the institution. Consequently, in accordance with The Employment Act, 2007 Part VI and The Public Officer Ethics Act, 2003, the company has decided to **terminate** your services with **immediate effect**. The company shall pay you in lieu of notice.*

You will be paid your dues less any debts owed to the company.

Yours faithfully,

JULIUS O. MOKOGI

MANAGING DIRECTOR”

12. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. As held by this Court in *Evans Kamadi Misango v Barclays Bank of Kenya Limited [2015] eKLR* the burden placed on the employer by Section 43 is to demonstrate a valid reason which would cause a reasonable employer to terminate the employment of an employee.

13. The *Halsbury's Laws of England (4th Edition Vol 16) at page 482* expounds this principle as follows:

“In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views with those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”

14. In determining cases such as the one now before me, the Court does not seek to re-enact the internal disciplinary process already undertaken at the workplace. The responsibility of the Court is to examine the legality and reasonableness of the action taken by an employer against an employee and if the set standards are satisfied, then the Court will not interfere.

15. From the evidence adduced in Court, the reason for the termination of the Claimant's employment had to do with alleged irregular involvement with the Respondent's plot No 37 situated in Malindi. It is not in contest that this plot had generated a dispute between a member of the public and the Respondent. It was alleged by the Respondent that the Claimant had a direct hand in an irregular transaction on this plot between two members of the public namely; Famau Mohamed Famau and Mohamed Abdallah Mohamed.

16. The Claimant told the Court that both Famau and Abdallah Mohamed were known to him. He referred to Abdallah Mohamed as a family friend and at some point, he called him to meet with the Respondent's Chief Executive Officer regarding the problematic plot.

17. Apart from a general statement that he was not involved in any irregular transaction regarding the plot, the Claimant was unable to explain the coincidence of having his close friend, Abdallah Mohamed caught up in the dispute regarding the plot. He did not tell the Court what he knew about the transaction and his testimony created doubts in the mind of the Court which formed the opinion that he was not telling the truth. Employment matters are decided on a balance of probability and in this case, the Court is persuaded that the Respondent had a valid reason for terminating the Claimant's employment.

Termination Procedure

18. Having found that the termination of the Claimant's employment was justifiable, I must now examine the procedure adopted in the termination exercise. By an internal memo dated 2nd April 2012, the Claimant was summoned to appear before the Staff Committee of Management on 4th April 2012 to answer to a complaint regarding plot No 37 KIE Malindi.

19. The Claimant testified that at a meeting with the Respondent's Chief Executive Officer, Company Secretary and Human Resource Manager, he was asked to explain his relationship with Abdallah Mohamed. He was also shown a letter of complaint by Famau Mohamed Famau. The Claimant put in a written response to the complaint on 12th April 2012. It seems to me that cumulatively, the procedural fairness requirements set out under Section 41 of the Employment Act were satisfied.

20. For the foregoing reasons, the Claimant's claim for unlawful termination fails and is dismissed. That dispenses with the prayers for reinstatement, loss of income and future earnings. With regard to the claim for a jacketed steel tank, the only thing to say is that no evidence was led in proof of ownership and the circumstances under which the tank ended up in the Respondent's premises. This claim therefore fails and is dismissed. The Claimant was a member of the Respondent's Staff Retirement Benefits Scheme as well as the National Social Security Fund (NSSF) and is therefore not entitled to service pay.

21. The claims for salary in lieu of notice and leave pay are admitted and are payable.

22. Each party will bear their own costs.

23. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF APRIL 2016

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JUDGE

Appearance:

Paul Kigundu Kamande (the Claimant in person)

Mr. Nyambati for the Respondent