



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE 445 OF 2014

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT

VS

MOMBASA WATER SUPPLY & SANITATION CO. LIMITED.....RESPONDENT

AND

COAST WATER & SERVICES BOARD.....INTERESTED PARTY

JUDGMENT

Introduction

1. This is a Claim for terminal dues plus compensation for unlawful and unjustified dismissal of Mr. Francis Kiema (herein referred to as the grievant). It is brought by grievant's trade union against the Respondent and the basis of the suit is that the dismissal of the grievant was not founded on any valid and fair reasons.
2. The Respondent has denied liability for the alleged unlawful and unjustified dismissal. She avers that the grievant committed gross misconduct which justified his dismissal from employment.
3. The Suit was heard on 23.11.2015 and 3.12.2015 when the grievant testified as CW1 and the Respondent called Jamal Abdala Ahmed as RW1. Before the hearing the Claimant withdrew the Suit against the Interested Party. On the other hand the grievant appointed a Counsel to appear for him and to act jointly with the Union Representative in the Suit. After the hearing the Parties filed Written Submissions.

Claimant's Case

4. CW1 was employed by National Water Conservation and Pipe Line Corporation (NWPC) AS 15.10.2001 as a Meter Reader II. On 12.2006 he was deployed to Coast Water & Service Board and then to the Respondent following Water Section Reforms. His duties were basically meter reading but later he was made a New Connection Officer stationed at Kisauni.
5. On 29/10/2012 he was served with a Show Cause Letter accusing him of misconduct and he responded on 2.11.2012 denying the offence. He then proceeded on leave on 3.12.2012 and while there he received a suspension letter dated 21.12.2012. He wrote his defence on 31.12.2012 and on 10.1.2013 he received another letter accusing him of interfering with six inch line at Kiembeni Estate on 7.12.2012 which he denied. He explained that on 30.10.2012 he did survey for a new connection in the area and did the quotation for the changes payable but denied ever going to the site on 7.12.2012 when the work was done as he was already on leave. He denied ever soliciting

- money from customers or acting beyond his mandate or ever misadvising anyone. He maintained that all the connections done under his watch were done with full approval by the relevant managers and the connect charges were paid in full. He admitted that the customer called Mr. Francesco Lepri wrote cheques in his name but maintained that it was for purchase of connection materials. He however maintained that the cheque was cashed by the customer himself after asking him (CW1) to give him his national identity card for that transaction. CW1 produced receipts for Kshs. 60000 from the Hardware where he purchased the connection materials on 18.10.2012. He also contended that on 22.10.2012 the customer again asked for his ID Card and used it to encash cheque for Kshs. 12000 for purchase of materials which he purchased by the receipt for Kshs 12000 on the same date. He maintained that the customer never lodged any complaint against him and never testified against him during the disciplinary hearing.
6. On Cross Examination he admitted that he never objected to the cheques being written in his name because the customer had already paid the relevant connection fees to the Respondent. He denied the accusation of corruption made against him in the Show Cause Letter and maintained that the money was received by the Customer's Care Taker and was for the purchase of materials.

Defence Case

7. RW1 is the General Manager for the Respondent. He adopted his Written Statement filed on 1.12.2015 as his evidence in chief. The statement confirmed that the Claimant was employed by the NWCPC on 15.10.2001 as a Meter Reader and on 12.5.2006 he was deployed to CWSB in the same capacity. That following the reform in the water sector the claimant became an employee of the Respondent and 25.5.2016, he was re-deployed to Kisauni Area as the New Connection Officer.
8. RW1 further stated that on 15.5.2007, a customer wrote to the Respondent complaining that CW1 had delayed customer's forms and was impolite when contacted for assistance. After hearing the case, the area manager in Kisauni observed that CW1 was unable to advise the customer well and he had failed to be proactive in assisting the customer.
9. RW1 further stated that on 27.9.2012, another customer made a complaint that his water meter had not been reconnected and accused CW1 of rudeness to customers and failure to give the customer the mobile telephone number for the Area Manager-Kisauni. CW1 went for his annual leave from 30.11.2012 to 2.1.2013. While CW1 was on leave another customer called Francesco Lepri lodged a complaint vide the letter dated 25.10.2012. In the letter the customer alleged that CW1 and another person advised him that line supplying water to his units was not powerful enough and that he needed to apply for alteration of his pipe line. That CW1 helped the customer to fill the forms for the pipeline alteration and a fee of Kshs. 15000 was paid to the Respondent for the alteration.
10. While the investigations were going on, yet another complaint was received from another customer alleging that their water at Kiembeni estate had been disconnected. After investigations 2 Managers of Mulji and Devji Construction Company were arrested and confessed that the alleged illegal alteration was sanctioned by the CW1 on 30.11.2012. That the customer admitted liability and paid a penalty.
11. As a result of the said alleged misconduct, the Claimant was suspended on 21.12.2012 and was given 14 days to respond to the said allegations. He responded on 31.12.2012 denying any wrong doing in respect of the alleged illegal line alteration and receiving money from customers. That according to CW1, the alteration for Mr. Lepri was authorized and the money he received from him was under a private arrangement meant to assist the customer in purchasing the connection materials. RW1 maintained that the conduct of the CW1 was an affront to Public Officer's Ethics Act and amounted to a criminal offence and gross misconduct under section 44 of the employment Act (EA). CW1 was then summoned to appear before the staff Advisory Committee (SAC) and after the hearing he was dismissed summarily. He appealed and the board of Directors HR Sub Committee upheld the dismissal on 18.7.2015. The claimant referred the matter for conciliation by the Labour Minister who found that the dismissal was unfair and unjust and recommended that CW1 be unconditionally reinstated or redeployed to CWSB but the Respondent declined the recommendation by letter dated 20.6.2014.
12. On cross examination RW1 admitted that the receipts issued for the alterations requested by Mr.

Francesco Lapri were genuine. He further admitted that the correct fees for the connection was paid by the customer. He also admitted that the letter by Mr. Lapri dated 25.10.2012 never complained that CW1 had solicited money from him. That the application for the connection was stamped by the Commercial Supervisor Kisauni. He however maintained that the customer ought to have paid more fees above the Kshs. 15000 because of the works. RW1 further admitted that CW1 went for leave from 30.11.2012 and as such he could not have been on duty on 7.12.2012. He further admitted that the maximum period one can be suspended is 2 months with no option of extension.

13. RW1 confirmed that the Kshs. 60000 was used to buy materials from Hardware. That Mr. Lapri never appeared as a witness in the disciplinary hearing nor did the Hardware deny that the money for the material was never paid. That the customer with the illegal connection of water at Kiembeni confessed and were surcharged.

Analysis and Determination

14. There is no dispute from the pleadings, evidence and submissions that the grievant was employed by the Respondent as a Meter Reader and later as a New Connection Officer. There is further no dispute that the Claimant was dismissed from employment on 3.7.2013 after being accorded a fair disciplinary hearing. The issues for determination are:

- a. **Whether the grievant grossly misconducted himself between September and December 2012.**
- b. **If so, whether the termination of his employment was unlawful and unjustified.**
- c. **Whether he is entitled to the reliefs sought.**

Gross Misconduct

15. The dismissal letter dated 3.7.2013 captured the reason for the dismissal in its paragraph 2 as follows:

“The Corporate Management Team (CMT) ratified the discussion of the SAC to summarily dismiss you from employment for the offence of unlawfully misadvising, taking part in unauthorized pipe alteration, soliciting and receiving money from A/C No. 73-004-12260 (Francesco Lepri to carry out an alteration and taking part in an alteration at Kiembeni estate in collaboration with Mulji and Devji Construction”

16. The dismissal letter went on to explain that the offence by the grievant amounted to gross misconduct under section 44 (4) (c) and (g) of the EA because it amount to negligent performance of duty and also criminal offence. That the offence was also a breach of section 10.3.3(g) and (i) of the Respondents HR policies and procedures which barred the grievant from improperly receiving or soliciting for tips, bribes, fees, commissions or favours from customers, suppliers or visitors. The grievant has denied committing any of the offences outlined in the dismissal letter and maintains that his dismissal from employment was unlawful and unjustified.

Misadvise

17. The customer who was allegedly misadvised has not recorded any statement and was never called as a witness both in the disciplinary hearing, conciliation proceedings or herein. The burden of proving that offence as a reason for dismissing the grievant was and still is on the Respondent. That was however not discharged and on a balance of probability, the court finds that the grievant did not misadvise any customer or the employer.

Participating in Unauthorized Pipe alteration

18. The grievant produced application for water connection by Mr. Francesco Lepri for Account No. 73004112260 and alteration charges approved by the commercial supervisor Kisauni as Kshs. 15000. He also produced cheque for Kshs. 15000 dated 28.10.2012 and receipt issued by the Respondent for the said cheque which RW1 admitted that they were genuine documents and the fees was the correct amount for the pipe alteration. The court therefore finds on a balance of the probability that the alteration was lawful and did not constitute any offence by the grievant. If it was unlawful exercise, the customer could have been penalized with a surcharge like in case of Kiembeni illegal alteration.
19. As regards the illegal alteration at Kiembeni by Mulji and Devji Company, CW1 admittedly only did the survey of the pipe line before going on leave on 30.11.2012. That the illegal connection was done between 7th and 20th December 2012 while the grievant was away on leave. RW1 admitted in evidence that CW1 could not have done the connection on the said date because he was on leave. There is therefore no dispute that the illegal connection was done by other people and not CW1 and that they did the same away from the line surveyed by the CW1. Consequently, the court finds also that the grievant never participated in the illegal connection at Kiembeni estate. The only culprit was the customer and that is why she was penalized to pay over Kshs. 180000 to respondent.

Soliciting Money from Francesco Lapri

20. As noted above, Mr. Lepri never recorded any statement or testified during the disciplinary hearing, conciliation proceeding or even in this case. RW1 admitted that the letter by Mr. Lepri dated 25.10.2012 never stated that CW1 solicited for money from him. On a balance of probability therefore, the Court finds that the grievant never solicited for any money from the customer.
21. Although there is evidence that the customer issued cheques in the name of the CW1, the explanation by CW1 that it was the customer who encashed the cheque and gave the money to his Care Taker to buy materials was never contested. It has also not been contested that all the money from the customer was used to buy materials for the customer to effect the connection sought. The court find the view taken by the Respondent to dismiss the grievant for assisting a customer in October 2012 too harsh and contradicting with the earlier view she took against him in 2007 when he was accused of failing to act proactively in assisting another customer. (see paragraph 3 of RW1 Written Statement filed on 1.12.2015). The grievant did not receive or solicit for money or favour when he assisted Mr. Lepri to acquire the correct material for use in the pipe alteration sought. He therefore never breached section 10.3. (g) and (i) of the HR Policies and procedures or section 44(4) (c) and (g) of the EA.
22. Under section 45(2) of the EA, termination of employment is unfair if the employer fails to prove that it was founded on a valid and fair reason. The Burden of justifying the reasons for dismissal is upon the employer under section 47(5) of the EA. That burden has not been discharged by the Respondent in evidence. Consequently, the court finds and hold that the dismissal of the grievant on 3.7.2013 was not founded on a valid and fair reason.

Reliefs

23. In view of the foregoing finding that the dismissal of the grievant was not founded on a valid reason, the Court makes a declaration that the dismissal was unfair and unlawful as prayed. The claimant has prayed for reinstatement to his employment unconditionally and without loss of benefits. Section 12 of the employment and Labour Relations Court Act (ELRCA) donates jurisdiction to this court to order reinstatement of an employee if 3 years have not lapsed after the termination of the employment. Under section 49(3)(a) of the EA, the Court is allowed to order reinstatement of an employee if it finds that the dismissal was unfair. In this Case the Court grants the order for reinstatement unconditionally and without any loss of benefits from the date of termination. In so doing, the Court has considered the wish of the grievant to be reinstated and also the fact that the employer is a public body it will be practicable for the grievant to continue serving and to be absorbed again into the Respondent's establishment after reinstatement. The Court has also considered the length of service by the grievant and the fact that chances of

securing another alternative job might not be easy. The Claimant will therefore be paid all the salary arrears from the date of his dismissal on 3.7.2013 to date being 35 months.

Disposition

24. For the reasons stated above judgment is entered for the Claimant on behalf of the grievant declaring the dismissal of the grievant on 3.7.2013 unfair and unlawful and directing the Respondent to reinstate him to his employment unconditionally and without loss of benefits. Claimant will also have costs.

Dated, signed and delivered this 27th day of May 2016.

ONESMUS MAKAU

JUDGE