



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1931 OF 2013

SOLOMON GITHAE IRUNGU.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND

SEWARAGE COMPANY LIMITED.....RESPONDENT

Mr Njagi for Claimant

Mr Nyamweya for Respondent

JUDGEMENT

1. The claimant brought this suit vide a statement of claim dated 28th November 2013 and filed in court on 3rd December 2013. The claimant pleaded he had been wrongly dismissed from the respondent services on 27th September 2013. The respondent filed a memorandum of defence dated 15th January 2014 and filed in court on 20th January 2014.
2. The claimant testified on his behalf while M/s Monica Kwamboka, respondents industrial relations officer testified on behalf of the respondent.
3. The claimant was initially employed by the then Nairobi City Council (now Nairobi City County) on 6th November 1998. On 22nd April 2004, the claimant was seconded to the respondent company. The claimant worked for the respondent until 27th September 2013 when he was summarily dismissed.
4. The claimant held the position of marketing assistant upto 1st January 2006, when he was promoted on an acting capacity to the position of disconnection/reconnection supervisor. He acted for a period of six (6) months but was not paid acting allowance. On 27th June 2006 the claimant was confirmed to the position and supervised seven marketing assistants. He was assigned duties at Githurai 45 Kahawa Wendani, Kahawa Sukari on the respondent's northern region.
5. The claimant earned a gross salary of Kshs 39,142.10 made up of Kshs 28,142.10 basic salary and 11,000 house allowance. The claimant seeks acting allowance of six (6) months in the sum of Kshs 547,720.

Dismissal

6. The respondent issued a letter of suspension and transfer to the claimant dated 19th August 2008

- on allegations that the claimant had received a bribe to reverse the water meter of a customer. In terms of the letter of suspension the respondent withheld the allowance due to the claimant. The claimant was asked to show cause why he should not be dismissed from employment and he responded by a letter dated 5th September 2008.
7. The claimant remained on suspension for a period of seven (7) months from 19th August 2008 to 5th February 2009. The claimant states that he did not attend any disciplinary hearing during the time until when he received a letter of summary dismissal on 5th February 2009.
 8. The claimant states that the summary dismissal was unlawful and unfair and was in violation of the respondent's Human Resource manual and procedure Section 8:24:5 which provided that suspension could not exceed a period of 90 days and 8:22:3 which provides that no employee shall be punished without an opportunity to state his case and to be accompanied by a colleague or by a union representative during a disciplinary hearing.
 9. The claimant appealed to the Human Resource Director on 18th February 2009. The appeal was rejected vide a letter dated 29th April 2009 in which the respondent threatened to have the claimant arrested and prosecuted for theft. The claimant filed a 2nd appeal on 18th December 2010 but the same was not responded to. The claimant reported the matter to the Ethics and Anti-corruption Commission and Criminal Investigations Division among others by a letter dated 3rd April 2012.
 10. The claimant alleges that he was victimized by the Managing Director for disconnecting a meter belonging to the wife of the Managing Director of Malindi Water Services Corporation. That the Managing Director for Malindi Water Services Corporation visited the respondent to make a complaint against the claimant. That is when the trials and tribulations the claimant has suffered at the hands of his employer started. That the charges against him were trumped up and only meant to divert attention from the real issue regarding irregular non-payment of meter by the Managing Director of Malindi Water Services Corporation and change and/reversal of the water to aid in the non-payment of water by the said person with apparent collusion with the respondent's Managing Director.
 11. The claimant made several letters of demand to no avail. By a letter dated 27th September 2013 the Managing Director informed the claimant that his 2nd appeal had been rejected. The respondent took two(2) years and nine (9) months to inform the claimant about the appeal verdict contrary to section 8:24:5 of the Human Resource manual which provides that an employee shall be informed of the outcome of his/her case within 30 days upon conclusion of hearing. The claimant filed this suit seeking the reliefs sought.

Response

12. RW1 on behalf of the respondent testified under oath. She filed and adopted a written statement dated 16th September 2015. Contrary to the testimony by the claimant, she told the court that the claimant was dismissed for reversing a customer's meter Account N 1470701. That she did not handle the case for the claimant but her testimony was based on the records contained in the claimant's file and produced in court. That the claimant demanded to be paid a bribe of Kshs 30,000 but he was actually paid Kshs 25,000 subsequent to which he reversed the meter readings to avoid payment of the meter used by the customer to the respondent.
13. That this constituted fraud against the respondent and was gross misconduct for which the claimant was summarily dismissed. That the claimant was given a show cause letter which he responded to in writing. That the explanation was not found to be satisfactory. The claimant was brought before a disciplinary committee and he was summarily dismissed on 5th February 2009.
14. That reversing a customer's meter is a gross misconduct as per clause 8:2:4 (g) and also constituted a criminal offence. The matter was not reported to the police. That an appeal to the Corporate Appeal Committee was dismissed by a letter dated 29th April 2009. The 2nd appeal was determined on 27th September 2013. The claimant complained to the Commission on Administrative of Justice which held that the respondent had inordinately delayed to communicate its decision to the claimant.
15. The suit was subsequently filed on 10th December 2013. RW1 denied that the claimant had been

- promoted from the position of marketing assistant according to the records in his file. However, she admitted that there was a letter from the respondent to the claimant's bank confirming that the claimant held the position of Disconnection/Reconnection Supervisor. She denied that this was a letter of promotion.
16. RW1 confirmed that no criminal charges were preferred against the claimant on the matter subject of this case. RW1 however, confirmed that the claimant was a prosecution witness in criminal case No 28 of 2008 against one Godfrey Okaya on corruption charges. RW1 admitted that it was irregular to keep the claimant on suspension for a period of seven (7) months. RW1 said that the claimant ought to have been paid allowances for that period. RW1 insisted that the claimant must have attended a disciplinary hearing even though there was no evidence that the claimant had received the letter inviting him to attend the hearing dated 19th January 2009.
17. RW1 also conceded that it took inordinately long a period of two (2) years and nine (9) months for the respondent to communicate the decision of the 2nd appeal which was filed on 18th December 2010 and the decision was made on 27th September 2013. RW1 said that this delay was in contravention of the Human Resource Policy Manual for the respondent. RW1 also conceded that a Collective Bargaining Agreement (CBA) filed in court on 9th December 2015 was applicable to the claimant.
18. The respondent wished to call a second witness but had not filed a witness statement in respect of the witness nor was the identity of the witness disclosed to the account. The application for adjournment was refused on account of the length of time the case had taken to conclude and failure by the respondent to notify the claimant and the court of its intention in good time. Both parties filed written submissions on which they rely to have the court determine the matter.

Determination

19. The issues for determination in this case are as follows;
- i. Whether the claim was filed out of time;
 - ii. Whether the summary dismissal of the claimant was for a valid reason and whether the decision was made pursuant to a fair procedure;
 - iii. Whether the claimant is entitled to the reliefs sought.

Issue i

20. The claimant submits that he presented a 2nd appeal to the Managing Director of the respondent on 18th December 2010. The respondent acknowledged receipt of the appeal and promised to finalize the issue within two months. The memo for the 2nd appeal was produced as App 'SG19'. The response by the Managing Director Eng Philip Gichuki dated 25th March 2011 was produced as App 'SG1 10'.
21. The Managing Director in very clear terms gave hope to the claimant on 25th March 2011 that he would consider the claimant's appeal against dismissal within two (2) months from 25th March 2011. The respondent submits that by the time the claimant made a second appeal to the Managing Director, the disciplinary and appeal procedures as laid down in the respondent's Human Resource Policy and Procedures Manual at article 8 had been exhausted and final decision given. Therefore, according to the respondent, time for filing (suit) started to run from February 2009 when the appeal was concluded and letter of dismissal given to the claimant.
22. It is the court's considered view and finding that nothing would have been easier than for the Managing Director of the respondent to inform the claimant that the second appeal against the dismissal was not provided for but instead the Managing Director responded to the second appeal and gave the claimant hope that it would be considered and finalized within two months from 25th March 2011. The internal process had not been finalized and since the Managing Director did not communicate further to the claimant the internal disciplinary process concluded after expiry of two months within which a final decision had been promised by the Managing Director.
23. Time therefore, started running for the purpose of filing suit from 25th May 2011. The suit was

therefore filed within time and is not statute barred.

Issue ii

24. On the merits of the case, the claimant has submitted that he has proved on a balance of probabilities that he was victimized by the respondent for exposing fraudulent activities in a premises owned by the Managing Director of Malindi Water Services Corporation who was a friend of the respondent's Managing Director. That the charges against the claimant were trumped up and intended to cover up the said fraud. The claimant denies that he was even subjected to a disciplinary hearing within the stipulated time as provided in clause 8:24:5 of all the Human Resource Manual and Procedure.
25. That the claimant was unlawfully kept under suspension without pay for a period of 7 months when the manual provided that suspension should not exceed 90 days. That the allegations by the respondent that the claimant attended a disciplinary hearing on 27th January 2008 when the allegations against the claimant were made on 13th August 2008 shows that the claim by the respondent is patently false. It is clear according to the claimant that he wrote to the respondent on 18th February 2009 requesting the respondent invite him to a disciplinary hearing. This did not happen. Instead he received a letter of summary dismissal dated 5th February 2009 which decision he appealed against twice without success.
26. The respondent on the other hand submits that contrary to the allegations by the claimant that he was victimized for exposing a fraud involving the Managing Director of Malindi Water Corporation, the true position is that the claimant in collusion with his supervisor Mr Geoffrey Okaya reversed a water meter reading upon being paid a bribe. That the bribe was requested and received by Mr Okaya and the claimant was instructed to reverse the meter reading, which he proceeded to do.
27. RW1 the witness for the respondent was not involved in this case and was unable to adduce evidence on the truthfulness of these allegations made in the respondent's memorandum of response and in the final written submissions by the respondent. RW1 could also not testify on the allegations made by the claimant because she was not privy to the matter and was not involved in the disciplinary process that led to the dismissal of the claimant.
28. To this extent, the evidence tendered by the claimant under oath remains largely uncontroverted. The claimant was closely cross examined by counsel for the respondent and he came out as a truthful witness. His testimony was forthright, consistent and well supported by the documentation produced by the claimant and attached to the memorandum of claim.
29. The court believes the testimony by the claimant in the absence of any credible version put forth by the respondent to counter it. Accordingly, the court finds that the claimant was framed up for daring to challenge a fraud perpetrated in a building owned by the Managing Director of the Malindi Water Corporation.
30. The court finds therefore that the respondent had no valid reason in terms of section 43(1) of the Employment Act, 2007 to summarily dismiss the claimant from the employment of the respondent. The court makes a finding of fact that the claimant has on a preponderance of evidence proved on a balance of probability that his summary dismissal by the respondent was wrongful and unfair within the meaning of Section 45 of the Employment Act 2007. The claimant is therefore entitled to relief sought in terms of section 49(1) (c) as read with section 49 (4) of the Employment Act 2007.
31. The claimant has sought reinstatement to his previous job and in the alternative compensation for the unlawful and unfair summary dismissal. In terms of section 49(4) the court has taken the following into consideration;
 - i. That the claimant was dismissed on 5th February 2009, more than seven (7) years ago. Section 12 (3) (vii) allows the court to make an order for reinstatement within three years of dismissal. The court therefore declines to reinstate the claimant to his previous employment in view of the above.
32. With regard to compensation, the court takes into consideration that;
 - i. The claimant wished to be reinstated to his job but the courts hands were tied by law
 - ii. The claimant was kept in suspension unlawfully and without pay for a period of seven (7) months

- iii. The claimant was victimized for doing his job properly against a prominent individual in society who was a friend to the Managing director of the respondent.
- iv. The claimant was not paid any terminal benefits upon dismissal including payment in lieu of notice
- v. The respondent took inordinately long period to conclude the disciplinary process in violation of its own manual.
- vi. The claimant had not obtained alternative employment and had suffered immense loss and damage.

33. The court finds the conduct of the respondent against the claimant grossly vindictive and awards the claimant maximum compensation equivalent to 12 months' salary for the unlawful and unfair termination of employment in the sum of Kshs 301,056.

Terminal Benefits

Notice Pay

34. The court having found that the summary dismissal of the claimant was unlawful and unfair awards the claimant, one month's salary in lieu of notice in the sum of Kshs 62,276.10.

Salary Arrears

35. The court finds that the respondent did not pay to the claimant arrears salary in sum of Kshs 45,000 for days worked.

Salary accrued during the period of suspension

36. The evidence that the claimant remained in suspension without pay is not in dispute following the finding of the court that the respondent was in violation of its manual in this regard and that the summary dismissal was unlawful and unfair finds that the claimant is entitled to accrued salary during the period of suspension and awards the claimant Kshs 175,828.10

Service Pay

37. It is not in dispute that the CBA between the respondent and the union applied to the claimant. The claimant is therefore entitled to service pay in terms of the CBA in the sum of Kshs 276,301.30 which the court so awards.

Payment in lieu of leave

38. The claimant has also demonstrated that he had 40 days untaken leave at the time of dismissal. The court awards him Kshs 31,435.38 in lieu of untaken leave days.

Acting Allowance

39. The claimant proved on a balance of probabilities he was appointed disconnection/reconnection supervisor on an acting basis for a period of six (6) months and was not paid acting allowance calculated on the difference between the salary he earned and that earned by the supervisor. The claimant proved on a balance of probability that he is owed a sum of Kshs 448,672 in this respect. The court awards him accordingly;

40. In the final analysis the court makes the following orders:-

- i. Respondent to pay the Claimant Kshs 1,341,068.88
- ii. The award is payable with interest at court rates from date of filing suit till payment in full.
- iii. The Respondent to pay costs of the suit.

Dated and delivered at Nairobi this 29th day of June, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE