



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 793 OF 2015

FADHIL JUMA KISUA.....CLAIMANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

J U D G M E N T

Introduction

1. The Claimant was employed by the Respondent from 2008 as a Cadent Trainee Div. 1A Grade HG1/HM4. He started with 2 year renewable contracts which were renewed regularly until March 2014 when he was employed on Permanent and Pensionable Terms. His salary was ksh. 108000 per month. On 28.7.2015 he received a Show cause letter from the Respondent giving him 72 hours within which to explain why disciplinary action should not be taken against him for the offence of presenting forged documents to the Respondent to secure employment. The Claimant responded on 3.8.2015 within the 72 hour given. Thereafter he was served with a Summary Dismissal Letter for alleged failure to respond to the Show cause letter and for presenting forged academic certificates to the Respondent to secure employment.

He now brings this Suit claiming that his dismissal was unfair and unlawful and seeking to recover terminal dues plus compensation.

2. The Respondent has denied that the dismissal of the Claimant was unfair and unlawful and avers that there was good cause for his dismissal. According to her the Claimant presented fake academic certificates which led her to employ him but after the offence was discovered, she served him with a Show cause letter which he failed to respond within the 72 hours given.
3. The Suit was heard on 8.2.2016 when CW1 testified as CW1 and the Respondent called Marco Ngolia as RW1. All the documents filed by the 2 Parties were produced by consent. Thereafter the both Parties filed Written Submissions.

Claimant's Case

4. CW1 testified that he was employed by the Respondent on 2 years contract from 3.3.2008 in the Administration Department as Assistant Administrative Officer earning 63000 per month. That contract was renewed for the same term of 2 years in 2010 and 2012. That in 2014, he was confirmed to the same office on permanent and pensionable terms earning kshs. 108,000 per month. That he applied for the job using Form Four (KCSE) Certificate) from Kapsengere

Secondary School.

5. On 29.7.2015 he received a show cause letter to explain within 72 hours why disciplinary action should not be taken against him in relation to the fake Certificate he allegedly presented to the Respondent. That he responded to the letter on 3.8.2015 which was within the 72 hours limit. That the Respondent went silent until CW1 served a letter through his lawyers demanding that he be cleared from the alleged offence. That on 12.10.2015 when CW1 was about to report back to work from his leave, he received a dismissal letter dated the same date.
6. The grounds cited for the dismissal included the failure by him to respond to the show cause letter and presentation of fake academic certificates to the Respondent to secure employment. He denied the offence and maintained that he responded to the show cause letter on time through his Head of Department (HOD). He denied the offence of presenting fake academic certificates including the certificate indicating that he studied at Lenana High School and scored C+ in KCSE. He maintained that he schooled at Kapsengare Secondary School and attained the KCSE D+ which he used to secure the job with the Respondent in 2008.
7. On the other hand CW1 contended that he was dismissed without following a fair hearing as required by the law. That the KPA Disciplinary Handbook 2015 only came into force on 1.3.2015 and as such it was not applicable to him. He prayed for reinstatement because he believed that he was qualified for the job.
8. On cross examination, CW1 maintained that when he was first employed on fixed term contract, he presented a KCSE Certificate from Kapsangare Secondary School. He however could not show it to Court when challenged to do so by the defence Counsel. He maintained that he personally presented the certificate to the HR Manager and filled the Employee Details Form which he left with the Manager. He denied ever saying that he had an Advanced Diploma in Lotus 1 & 2. He admitted that on 21.9.2015 he wrote to the Respondent requesting for extension of time within which to respond to the show cause letter dated 28.7.2015. That he had been on leave from 31.8.2015 upto 12.10.2015. He further admitted that by his letter dated 3.8.2015, he requested to be retired in the public interest if his certificate was not adopted. He also admitted that he was served with a second show cause letter dated 26.8.2015 on 2.9.2015.
9. He explained that he lost his KCSE Certificate in August 2015 while on his journey from Nairobi to Mombasa and reported the matter to the KICC Police Station and obtained a Police Abstract. He confirmed that the Abstract indicated that the Certificate got lost in January 2015.
10. He further confirmed that he never got any replacement to the lost KCSE Certificate after his application. He denied ever presenting to the Respondent the Degree Certificate from Kenyatta University (KU) produced as exhibit by the Respondent. He also denied ever presenting KCSE Certificate from Lenana High School produced as exhibit by the Respondent. He however admitted that the Degree and the KCSE Certificates bore his name. He further admitted that he was appointed to a management position by the Respondent but he denied that under the KPA HR Manual 2008 he was required to be a University graduate.
11. CW1 admitted that he never requested for a personal hearing but he maintained that it was the duty of the Respondent to call him for the hearing. He confirmed that he heard of a Committee which was hearing cases for the employees who were accused of presenting fake certificates but he maintained that he was never called to appear before the Committee.

Defence Case

12. RW1 is the Respondent's HR Office and has access to the employment records to all employees including the Claimant. He testified that CW1 was employed by the Respondent on 4.2.2008 as Cadet Trainee Div. 1A HG1/HM4. That under the KPA HR Manual 2008, such a post required the candidate to hold at least a Higher National Diploma. That the appointment was on a 2 year

- contract which was renewed in 2010 and 2012 for equal terms. That the Claimant filled the Employee Details Form but page 4 of the form which provides for the education background is missing.
13. RW1 explained that during the interviews for employment and subsequent promotion, CW1 presented Statement of Examination Results for his KCSE examination which he allegedly sat for in 1993. That the Claimant presented 2 KCSE Certificates from Kapsengere Secondary School one showing the mean grade scored as D and the other as D+. That the Claimant also presented another KCSE Certificate from Lenana High School showing that he sat for the exam in 1991 and scored C+. That the Respondent's Ethics and Integrity Department did investigations on the qualifications of the Respondent's management staff including the Claimant and discovered anomaly in the Claimant's academic certificates and sent them for authentication by the Kenya National Examination Council (KNEC), Kapsengere Secondary School, Lenana High School and Kenyatta University from where the Claimant had purportedly obtained the Certificates.
14. According to RW1, the University confirmed by the letter dated 6.6.2011 that CW1 never graduated from the University and denied the Degree Certificate which was presented to the Respondent by the Claimant. That Lenana High School also wrote on 6.6.2011 denying that CW1 went to that school and confirming that index number appearing on the KCSE Certificate presented to the Respondent did not belong to the Claimant. However Kapsengere Secondary school confirmed that the Claimant went to that school and he had collected his certificate.
15. RW1 explained further that CW1 was served with a Show cause letter on 28.7.2015 and given 72 hours within which to explain why disciplinary action should not be taken to him for presenting fake academic certificates to the Respondent. That CW1 never responded to the said letter and the second show cause letter dated 26.8.2015 which required him to explain the various malpractices in the administration of allowances to the Respondent's Volley Ball Team during a trip to Nyeri. That on 11.9.2015, the HR Manager wrote to the CW1 reminding him that he had failed to respond to the Show cause letters dated 28.7.2015 and 26.8.2015. That CW1 responded by an undated letter which was received on 21.9.2015 seeking more time to respond to the show cause letter dated 28.7.2015 after he reported back to work from leave on 10.10.2015. In a strange turn of events however, CW1 engaged his lawyer to write to the Respondent on 28.9.2015 alleging that CW1 had indeed responded to the show cause letter on 3.8.2015. The allegation was however investigated and found to have been a fraud by CW1 who lied to the personal secretary to General Manager HR and Administration that his response to the Show Cause delivered on 3.8.2015 had been misplaced and that he was asked to give another copy with receiving stamp back dated to 3.8.2015. That as a consequence of the foregoing matters, the Claimant was dismissed vide the Respondent's letter dated 6.10.2015.
16. On cross examination RW1 maintained that all the correspondences to the HR Department dealing with discipline passes through his hand. He confirmed that the HR Manual 2008 came into force in March 2008 under which Job Grade HG1/HM4 required a mandatory qualification of Degree Certificate. That the person seeking the Managerial post like CW1 was required to present a Degree and other academic certificates before applying. RW1 could not however, tell which certificates were presented by the CW1 when seeking the employment because he did not see his application for the employment. He however maintained that CW1 never responded to the Show cause letter dated 28.7.2015 within the 72 hours given to him to do so. Although he admitted that the stamps on response to the Show cause letter dated 3.8.2015 were genuine, he maintained that the stamps were unlawfully backdated according to the explanation by Madam Kulthum Suleiman, the personal secretary to the General Manager HR and Administration. RW1 maintained that CW1 was dismissed for presenting fake Certificates and failure to respond to a show cause letter within the required time.
17. Lastly RW1 confirmed that the KPA Disciplinary Handbook 2015 came into force on 2.2.2015. That the disciplinary handbook provides that an employee is only given a personal hearing if he requests for the same or if the management sees the need for the employee to provide more details. RW1 confirmed that he was the second secretary for the committee of inquiry (Yobesh

Committee) and that CW1 was not invited to hearing by the Committee because he never requested for personal hearing like the others did.

Analysis and Determination

18. There is no dispute from the pleadings, evidence and submissions that the Claimant was employed in a management position by the Respondent from 2008 till 6/10/2015 when he was dismissed summarily. The issues for determination herein are:-

- a. Whether the dismissal was founded on a valid and fair reason.
- b. Whether a fair procedure was followed before the dismissal.
- c. Whether the reliefs sought should be granted.

Reasons for Dismissal

19. The dismissal letter dated 6.10.2015 cited the reasons for the dismissal of the Claimant as the presentation of fake KCSE Certificates from Lenana High School and Kapsengere Secondary school and also a Degree Certificate from Kenyatta University. The second reason for the dismissal was the failure to respond to the Show cause letter dated 28.7.2015 regarding the said fake academic certificates. The question that arises is whether the said reasons were valid and fair to warrant the summary dismissal of the Claimant.

Presenting Fake Certificates

20. The Claimant contended that the only academic certificate he presented to secure employment by the Respondent was KCSE Certificates of mean grade D+ from Kapsengere Secondary School. He denied ever presenting any other academic certificates to the Respondent. He however did not produce as exhibit the said certificate but instead he produced a Police Abstract indicating that the same had been lost. The Respondent has on the other hand maintained that the Claimant presented the said fake academic Certificates and produced copies as exhibits. She further produced letters from Lenana High school and Kenyatta University confirming that the Claimant never studied there. The KCSE and the Degree Certificates from Lenana High school and Kenya University were therefore fake.

21. The KCSE Certificate and letter from Kapsengere Secondary School dated 16.9.2015 filed by the defence and another one dated 30.7.2015 and the KCSE KNEC Roll for Kapsengere Secondary School filed by the Claimant, confirm that the claimant studied at Kapsengere Secondary School and scored a mean Grade D+ in KCSE in 1993. The Claimant maintained that the foregoing KCSE Certificate is the only certificate he presented to secure employment with the Respondent which fact is corroborated by the dismissal letter which states in part as follows:-

“It is also confirmed that the KCSE Certificate you first presented from Kapsengere Secondary School upon employment differs from the records held at Kenya National Examination Counsel (KNEC).”

The Respondent has however not adduced any evidence to prove that the certificate presented to her by the Claimant upon employment was fake as alleged in the dismissal letter. The two certificates filed by the defence on 17.12.2015 and appearing on page 53 and 54 of the Respondent's bundle of documents are identical copies. Consequently the Court finds that the Claimant studied at Kapsengere Secondary School and attained KCSE mean grade D+ as per the said copies produced by the Respondent herein.

22. The question that for begs answers is who presented to the Respondent the other fake certificates from Lenana High School and Kenyatta University and for what reason. In this Court's view, the fake documents were presented by the Claimant to the Respondent to fulfil the requirements for appointment to the management position of HM4. Naturally, the employer would not forge

academic certificates for the benefits of their employees. According to RW1, the minimum qualification for appointment to the Managerial position of HM4 was a University Degree. The said requirement is confirmed by Appendix A to the KPA Human Resource Manual 2008 which came into force on 1.3.2008. The said Manual applied to the appointment of the Claimant who accepted the offer of employment on 3.3.2008 and signed the formal contract on 15.12.2008.

23. The Court finds that even if he had initially presented a genuine certificate from Kapsengere Secondary School for mean grade D+, the Claimant must have acted fraudulently before 11.2.2010 by presenting the fake KCSE Certificate from Lenana High School for mean grade C+ and BEd. Arts Degree from Kenyatta University to secure a renewal of his contract of employment. The reason for the foregoing is that the request for the renewal of the Claimant's employment contract through the Internal Memo by the Personnel Manager to the Managing Director dated 11.2.2010 indicated the Claimant's academic qualifications as including KCSE Mean Grade C+ and Bed Arts Degree plus two years' experience. The Memo also indicated the scheme of service for HM4 as Bachelor's Degree in Social Sciences or Commerce or Higher National Diploma in HR Management and two years' experience. The Personnel Manager must have written the said Memo after considering the fake KCSE and the University Degree Certificate. They all bore the name of the Claimant and as such he must have presented them to secure employment from the Respondent. The said offence was criminal in nature and constituted a valid and fair reason for the dismissal of the Claimant from the Respondent's employment.

Failure to Respond to the Show Cause Letter

24. The Claimant has contended that he received the show cause letter dated 28.7.2015 on 29.7.2015 and responded on 3.8.2015 which was within 72 hours. The Respondent has maintained that the Claimant never responded to the show cause letter within the required 72 hours. That on 21.9.2015, she received an undated letter from the Claimant requesting for extension of time within which to respond to the show cause letter dated 28.7.2015 upto 10.10.2015 because he was away on leave until 9.10.2015.

25. After careful considerations of the evidence adduced, the Court finds on a balance of probability that the Claimant never responded to the show cause letter dated 28.7.2015 within the 72 hours' time required. The reason for the foregoing finding is that the Claimant delivered the undated letter to the Respondent on 21.9.2015 requesting for extension of the time for responding to the show cause letter. The Claimant admitted that he wrote the said undated letter and never denied in his testimony that he served it on the Respondent on 21.9.2015. The foregoing view is further corroborated by the letter by Kulthum Khamis dated 2.10.2015 which stated that she was deceived by the Claimant on 29.9.2015 to back date the receiving stamp in respect of his response to the Show cause letter also backdated to 3.8.2015.

26. In the opinion of the Respondent, the failure to respond to the Show cause letter meant that the Claimant had no defence to offer against the charge levelled against him that he presented fake academic Certificate to the Respondent to secure employment. Consequently, according to her, that was a valid and fair reason to warrant summary dismissal of the Claimant.

Procedural Fairness

27. The Respondent contended that under her disciplinary Handbook 2015, the Claimant could only be given a personal hearing if he responded to the Show cause letter denying the offence and requesting for the personal hearing. That because he failed to respond to the show cause letter in time the Respondent deemed that the Claimant had no defence to offer and proceeded to dismiss him summarily for the said misconduct. The Claimant has on the other hand contended that he was not dismissed through a fair procedure because he was not accorded a fair hearing before the dismissal. According to CW1 the obligation was upon the employer to invite him for a hearing before the dismissal. He contended that since he was employed in February 2014 long before the KPA Disciplinary Handbook 2015 became effective on 1.3.2015, the same was not applicable to

him. The Court understood the Claimant as saying that the new Disciplinary Handbook was not part of his contract. He did not deny that the new Disciplinary Handbook had been communicated to him. The Court therefore finds on a balance of probability that the Claimant knew about the publication of the new 2015 Disciplinary Handbook.

28. Under Section 12 of the Employment Act (EA) the contract of employment prepared by the employer under section 9 and 10 of the Act shall provide a statement detailing disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the disciplinary rules applicable to him. Section 13(1) of the Act clarifies that if the employer changes particulars and disciplinary rules, the employer shall give the employee a written statement containing particulars of the change. In this Case there is no dispute that the 2015 Disciplinary Handbook was published after the Claimant had commenced his contract of employment. There is also no dispute that the Claimant had been made aware of the changes in the disciplinary rules. The new rules had therefore become applicable to the Claimant.

29. The question that arises from the foregoing is whether the Respondent's 2015 Disciplinary Handbook is in conflict with the section 41 of the E.A and if so, which one prevails. The Respondent's Handbook allegedly provides that a personal hearing will be accorded upon request by the employee or if the employer is of the opinion that the employee should provide more details. On the other hand, section 41 of the EA provides that before an employer terminates the employment of an employee for misconduct under section 44(3) and (4) of the EA, he shall first explain to the employee the reason for the intended termination in a language of the employee's understanding. That the employee shall be entitled to the presence of another employee or shop floor Union Representative of his choice during the said proceedings. That the employee and his chosen companion shall be entitled to respond to the alleged grounds of misconduct for consideration by the employer before terminating the employee. In this Court's view, the provision of section 41 of the EA entitles an employee to an automatic personal hearing whenever the employer considers dismissing him on ground of misconduct. The said provision puts on obligation on the employer to make the first move towards the hearing. Reasonably therefore if the employer who is offended by the conduct of his employee, he should invite the employee to a hearing and not the vice versa.

30. After considering the Submissions on the Provisions of Respondent's Handbook and section 41 of the EA, the Court finds that there is conflict in as far as the right to fair hearing before dismissal is concerned. There is no doubt that the Handbook is a contract between the parties while section 41 of the EA is a National Statute Law. The question that arises is whether private persons can enter into an employment contract that defeats an express provision of a statute law. In the opinion of this Court, the answer is in the negative. Parties cannot execute any contract that is contrary to the law. Simply put, Parties freedom of contracting must be exercised within the legal bounds. Consequently, the Court will not enforce any term of a contract that runs contrary to an express provision of a Statute Law. In this Case, the Court therefore find and hold that the provisions of section 41 of the Employment Act takes precedent over the Respondent's Disciplinary Handbook 2015.

31. In making the foregoing finding, the Court is also alive to the provision of section 26 of the EA which is to the effect that the provisions of the Act constitute the basic minimum terms and conditions of contract of service and that they can only be improved by the parties to the private contract, collective agreement or pronouncement by the Court. Consequently, the Respondent had no right to dismiss the Claimant as she did without first inviting him to a disciplinary hearing as contemplated by section 41 of the EA. The Court therefore finds and holds that the procedure followed before dismissing the Claimant was not fair within the meaning of section 41 and 45 of the EA.

Reliefs

Declaration

32. In view of the observations and findings above, that the Respondent did not follow a fair procedure before dismissing the Claimant, the Court makes declaration that the dismissal was wrongful and unfair as prayed.

Reinstatement

33. The Claimant has also prayed for reinstatement or in the alternative, he be awarded damages. Section 49(3) of EA empowers the Court to order reinstatement if the employment was unfairly terminated. Section 12 of the Employment and Labour Relations Court Act (ELRCA) limits the said power of the Court to cases where the employee has not exceeded 3 years after the termination. Section 49(4) of the EA on the other hand requires that in deciding whether to order reinstatement or payment of damages, the Court must consider the several matters listed thereunder. In this Court's view reinstatement will not be granted. The reason for the foregoing finding is that despite the Claimant wishing to be reinstated, the circumstances surrounding his dismissal do not favour that relief. As already held herein above, the Claimant committed or was reasonably suspected to have committed a fraud against the employer by presenting fake academic Certificates that enabled him to secure employment. He therefore contributed to his termination through misconduct. Secondly, it will not be practicable to reinstate the Claimant because he is not qualified for the job. The Claimant admitted on oath that he has no University degree qualifications but only KCSE Mean Grade D+. Such qualification is way below the Respondent's Scheme of Service for the managerial position of Grade HM4 which require minimum qualification of a Bachelors Degree from University.

Damages

34. Under section 49(1) of the EA, a wrongfully and unfairly dismissed employee is entitled to salary in lieu of notice, accrued benefits plus compensation for dismissal.

Salary in lieu of Notice

35. The Claimant was dismissed without following the procedure for summary dismissal laid down by section 41 of the act and he was not served with a prior notice as provided by section 35 and 36 of the Act, which provides for notice before dismissal. The Claimant is therefore awarded kshs. 108000 as one month's salary in lieu of notice as prayed. This is a mandatory statutory provision as well as contractual entitlement to Claimant and it cannot be denied.

Compensation

36. The Claimant has prayed for 12 months' salary as compensation for unfair termination. The court however declines to award the Claimant because in its view the misconduct committed by the Claimant is serious and had illegally given the Claimant an opportunity to earn income. Whatever he earned using fake academic certificate during his 9 years or so is enough compensation. Compensation for unfair termination, is meant to cushion the employee while looking for another job. The relief is discretionary and should only be granted judiciously to innocent employees who are victims of unfair dismissals. In this case, the claimant was not the right person in the office he was serving. He ought not to have been in that office in the first place because he secured the appointment through fraud and as such he will not benefit from this discretionary relief.

Pension

37. The Claimant should in this Court's view not be paid pension from tax payers' money. However he is entitled to a refund of his contribution to the Pension plus any accruals earned. Paying him full pension would be tantamount to rewarding the Claimant for his wrong doing and set a bad example to other mediocres.

Future Earnings

38.The Claim for future earnings is dismissed because the Claimant was not serving under a fixed term contract. Under an indefinite term contract like in this case, an employee has no guarantee of serving till retirement age. In any event, as already held above, the Claimant was not rightfully in that employment.

Disposition

39.Judgment is entered for the Claimant declaring his dismissal by the Respondent unfair and wrongful and awarding him kshs. 108000. The Claimant will also get refund of his pension contribution if any and half costs of the Suit plus interest.

Dated, Signed and delivered this 24th day of June 2016.

O. N. MAKAU

Judge