



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.97 OF 2015

(Before D. K. N. Marete)

BENJAMIN CHEPKAIROR.....CLAIMANT

VERSUS

KENYA URBAN ROADS AUTHORITY.....RESPONDENT

JUDGEMENT

The matter is originated by way of a Memorandum of Claim dated 7th February, 2014. It does not disclose the issue in dispute on its face.

The respondent in a Response to Statement of Claim dated 5th June, 2014 denies the claim and prays that the same be dismissed with costs to herself.

The claimant's case is that at all material times to this case, he was employed by the respondent as an Accountant. In 2010, he was confirmed and absorbed into permanent status as Senior Accountant. He earned a basic salary of Kshs. 82,000 and a gross of Kshs. 168,800.00.

The claimant's further case is that on or about 22nd November, 2013, he was interdicted following an internal audit. Henceforth, he was put on half pay/salary and mandated to sign the attendance record book at the Regional office on all working days. On or about 21st November, 2013, he was called and asked to go to the headquarters on 22nd November, 2013 whereupon he was served with a dismissal letter. This had been signed by the managing director, a position not existing in the respondent's institution.

The claimant's further case is that the dismissal letter alleged that he (the claimant) had made payments of fuel for Motor Vehicle KBQ 035D while the vehicle was in the garage, payment of fuel for vehicles not belonging to the region without written authority, payment of fictitious invoices, payment of fuel without evidence, failing to reconcile supplier accounts for fuel before making payments and failure to clear long outstanding balances.

It is his other case that despite explaining his position on these allegations, this was discounted in the determination of a case for dismissal. He was not paid his dues or at all even after putting in four years. It is his position that the termination was not only tainted with illegality but was also laced with malice and breach of terms and conditions of the Employment Act, 2007 and should be declared null and void. This is as follows;

a) The termination was contrary to the Employment Act, 2007 and the Constitution of Kenya,

2010.

b) *The claimant was not afforded sufficient opportunity to defend himself.*

c) *The decision to dismiss the claimant from service was arbitrary.*

d) *The respondent did not observe the rules of natural justice when they reached the decision to dismiss the claimant.*

He claims;

a) *Gratuity for the 4 year period of working with the respondent.*

b) *The claimant was aged 48 years at the time of dismissal and earning a gross salary of Kshs. 168,800/per month and would have worked upto 60 years. The claimant claims earnings for the remaining 12 years at the rate of Kshs. 168,800/per month.*

and prays as follows;

a) *A declaration that the claimant dismissal was unlawful.*

b) *The claimant be reinstated to his former employment without any loss of benefits or seniority.*

c) *Seven months retained salary of Kshs. 41,000/per month to be paid to the claimant.*

d) *Annual increment for the period effective from May 2013.*

e) *3 months salary in lieu of notice of termination of employment to be paid to the claimant.*

f) *The claimant's pension contributions and that of the employer to be paid.*

g) *Payment of one month's salary for annual leave.*

h) *Termination benefits and gratuity for the 4 year period that the claimant worked.*

i) *Earning for twelve (12) years that the claimant would have worked at the rate of Kshs. 168,800.00 per month.*

j) *Cost of this claim.*

k) *Interest on a,b,c,d,e,f,g,h,i,j above at the court's rate.*

l) *Any other or further relief that this honourable court may deem fit and just to grant.*

The respondent in defence forments an issue in dispute as;

Wrongful/unfair/summary dismissal and unlawful termination of the claimant Benjamin Chepkairor being aggrieved by such wrongful, unfair and unlawful dismissal.

The respondent states that it is a state corporation under the Ministry of Transport and Infrastructure, responsible for the development, maintenance and rehabilitation of urban roads within the Republic of Kenya. She further states that the claimant had been employed by the respondent as a senior accountant in the Central Kenya Regional office at Nyeri. He was vested with the responsibility of safeguarding the authority's funds, interests and property.

It is the respondent's further case that she had requested for an audit for purpose of reviewing its

transport management at the Central Region. The resultant report of this audit revealed the claimant had acted contrary to the laid down rules and regulations and as a consequence the claimant was placed on interdiction to pave way for further conclusive probe. She throws the claimant to strict proof of his assertions to the contrary. The error on the letter of the dismissal was by dint of an error which error was corrected but the claimant refused to pick the corrected version of the letter of dismissal.

The respondent's further case is that the internal audit revealed that the claimant had been negligent in carrying out his duties and this caused loss of funds through payment of fictitious invoices, payment of fuel without supporting evidence, failing to reconcile suppliers accounts, fueling motor vehicle while the same was at the garage or out of station, fueling vehicles belonging to other regions without written authority (annexed hereto and marked exhibit 2 is a copy of the internal audit report. The claimant was issued with a show cause letter on 6th March, 2013 enumerating offences the offences committed and giving him an opportunity to show cause why disciplinary action should not be taken against him (annexed hereto and marked exhibit 3 is a copy of the notice to show cause.) On 19th March, 2013 the respondent received a response in admission of the misdeeds.

The respondent's further case is that this matter was forwarded to its disciplinary committee which met on 3rd June, 2013 and decided to invite the claimant and his witnesses for a disciplinary hearing on 6th June, 2013. On this date he was accorded a fair hearing and again admitted his omission whereupon the committee summarily dismissed him for gross misconduct. This disentitles him to terminal benefits.

It is the respondent's final case that the cause as pleaded discloses no cause of action against herself and is an abuse of the process of court and therefore should be dismissed with costs.

The matter came to court variously until the 24th May, 2016 when it was heard *inter partes*.

The issues for determination are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. *Is the claimant entitled to the relief sought?*
3. *Who bears the costs of this cause?*

The 1st issue was the termination of the employment of the claimant was wrongful, unfair and unlawful. At the hearing, the claimant, duly affirmed testified on the particulars of the parties and cause. He further testified that he wished to rely on his witness statement, list of documents and a further claimant's list of documents as filed.

In further testimony, the claimant reiterated his case and stated that he was not negligent and further that his duties did not include fuel management as this was for the procurement division. He also testified that the issue of vehicles was for the Regional Manager. It was also his testimony that the payment chain comprised of other actors and in this case, it is only the procurement officer who was fired.

On cross-examination, the claimant testified that they verified invoices for payment but that he had mistakenly admitted and apologised. He further testified that he attested disciplinary proceedings on 6th June, 2013. He only challenged the signature of the letter of dismissal by a Managing Director in a position that did not exist but was okay with it. In reexamination, he testified that the allegations for which he had apologised were not part of his domain and duties.

The respondent called DW1Philip Meoli who, duly affirmed testified that he worked for the respondent and was currently a Human Resource Officer. He reiterated the respondent's case and produced exhibits 17 in defence. It was his evidence that due process was pursued in the dismissal of the claimant.

On cross-examination, CW1 testified that the claimant was appointed as Senior Accountant and his duties spelt out in his letter of appointment. He further testified that fuel payments involved a chain of

officers with the Regional Manager as the final authority on such payment. He further testified that the meeting of 6th June, 2013 agreed on the need to put in strategies to clear lapses on this. On the same breath, he denied there were any lapses at all. The claimant in his written submissions dated 31st May, 2015 reiterates his case of unlawful dismissal. He denies responsibility for fuel management.

“The claimant submits that it was the lack of internal controls that led to the loss of property and not the claimant's negligence or deliberate actions.”

The respondent in his written submissions also reiterates his case. During the hearing the claimant submitted that it was not his duty to verify if the invoices were supported by document before payment. However from the audit report it is clear that there was a collective responsibility between the procurement and finance departments to ensure that all invoices were verified and properly supported before processing payment.

He also submitted that his duty was only to pay as instructed by the regional manager. However the claimant had the duty to verify if the documents were supported and advise the regional manager where the payment was irregular before the payment. He therefore cannot say that his letter of employment did not provide for that. His duties and responsibilities include processing of authority's contracts payments and other disbursements. He therefore could not have processed payments on documents that were unsupported and claim that it was not his duty to verify. The claimant is only trying to evade his role in the accounting process yet at page 28 of the disciplinary committee meeting on 6th June 2013 it was noted that he admitted before the committee but this was an oversight on his part.

a. Industrial court of Kenya causes no. 603 of 2009 (unreported) between Peter Maina Kimani vs. Mwalimu Cooperative Society, which found negligent performance of duty by an employee to compromise valid grounds for termination.

b. Industrial court of Kenya cause no. 487 of 2013 between Josphat Ingosi Andulu & another vs. Nighingale Rubuka (2014) eKLR and cause no.88 of 2013 between Ndao Mahupa vs. Crown Petroleum Ltd (2013) eKLR both adopting the same position that “negligence by employees is a valid ground for termination.”

c. Section 44 (4) (c) of the Employment Act 2007 defines forms of negligence by employees which would amount to gross misconduct for which the employee was summarily dismissed. The elements are:

- 1. Willful neglect by the employees to perform any work which is his duty to perform.*
- 2. Careless and improper performances by the employee at work which from its nature it was his duty under his contract to have performed carefully and properly.*

The respondent's case displays an overwhelming case for the respondent. She ably demonstrates negligence and improper conduct in the performance of the claimant's tasks and duties in the cause of employment leading to loss of funds.

The respondent also demonstrates due diligence and process in the termination of the employment of the claimant. He was accorded a hearing and afforded an opportunity to defend his cause. He did but this was found wanting and therefore the ultimate dismissal of service. This portends a case of lawful termination of employment and I find and hold as such.

With a case of lawful termination of employment, the claimant loses all. He is not entitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim. And this clears all the issues for determination.

Delivered, dated and signed this 19th day of July 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Songok instructed by Kimaru Kiplagat & Company Advocates for the claimant.
2. M/s Janet Kiplagat instructed by State Law Office for the respondent.