



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 369 OF 2013

DANIEL KOSGEI

CLAIMANT

v

KERIO VALLEY DEVELOPMENT AUTHORITY

RESPONDENT

JUDGMENT

1. Daniel Kosgei (Claimant) commenced legal proceedings against Kerio Valley Development Authority (Respondent) on 28 October 2013 and the issue in dispute was stated as *withheld salaries and allowances* (this is one of a series of Causes by employees of the Respondent dismissed on allegation of absenteeism filed on the same day).
2. In a Response filed on 11 February 2014, the Respondent however stated the issue in dispute as *alleged unfair termination of the Claimant Daniel Kosgei*.
3. The Claimant must have realised that he had misstated the issue in dispute, for on 9 October 2014, he filed an *Amended Memorandum of Claim* after getting leave of Court and in which he stated the issue in dispute as *unfair/wrongful termination of the Claimant* (amended Memorandum of Claim was filed outside the agreed timeline of 15 July 2014 but was admitted by the Court).
4. The Respondent though granted leave did not amend its Statement of Response.
5. The Claimant filed a *Further Amended Memorandum of Claim* on 17 December 2015 after a new firm of Advocates had come on record.
6. Because the *Further Amended Memorandum of Claim* was filed without leave and no mention was made to it during the appearance on 10 February 2016, the Court will not consider it. It is not even clear whether it was served upon the Respondent.
7. On 10 February 2016 when the Cause came up for hearing, the parties agreed that it be determined on the basis of the record and submissions to be filed pursuant to rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2010 and with reference to the evidence tendered in a related matter, Nakuru Cause No. 368 of 2013, *Barnabas Kiprono v Kerio Valley Development Authority* (in the Court's view, parties ought to be cautious when agreeing to this mode of determination when there are disputes of facts or facts which require proof through evidence/documents).
8. The Court gave directions as to the filing of submissions but only the Claimant's submissions were on record by time of preparation of this judgment.
9. The Court has considered the pleadings, documents filed and the submissions by the Claimant and

identify the issues for determination as, *whether the summary dismissal of the Claimant was unfair* and if so, *appropriate remedies*.

10. But first, some background.

Background

11. The Respondent carried out a mass transfer of staff in April 2013 and the Claimant (among over 100 other employees) was transferred to Turkwel Station through a letter dated 26 April 2013. The transfer was effective from 29 April 2013 (Claimant was also instructed to hand over).

12. The Claimant did not hand over and in a letter dated 5 June 2013 the Respondent noted that the Claimant had not handed over and requested him to hand over to ensure smooth running of his former office.

13. On 28 June 2013, the Respondent's Liaison Officer in Turkwel wrote a Memo to the Managing Director informing him that the Claimant had reported on 17 May 2013, and had been granted 10 days and had also requested for transport to ferry his belongings to Turkwel.

14. On 5 July 2013, the Respondent issued a show cause notice to the Claimant to show cause within 14 days why disciplinary action should not be taken against him on account of absence from duty without leave or lawful cause (the notice also informed the Claimant of the stoppage of his salary).

15. The Claimant responded to the show cause through a letter dated 12 July 2013, explaining that he had not resumed duty after the 10 days off due to domestic issues and the failure to sort out accommodation and transport allowance. He also sought for leave.

16. Thereafter, the Respondent through a summons dated 12 August 2013 invited the Claimant to appear before the Staff Disciplinary Committee on Discipline on 19 August 2013 to answer to a charge of desertion and failing to hand over.

17. The Claimant (and others) in a letter dated 16 August 2013 from Mwinamo Lugonzo & Co. Advocates addressed to the Respondent challenged the disciplinary process and also objected to the composition and jurisdiction of the *Ad Hoc Committee*.

18. The Staff Disciplinary Committee nevertheless went ahead to meet and recommended that the case of the Claimant be dealt with together with that of other employees who had challenged the disciplinary process, though the Claimant did not attend.

19. On 20 August 2013, the Claimant (and 5 other employees) filed Eldoret High Court Petition No. 16 of 2013 challenging the transfers and disciplinary process by the *Ad Hoc Committee* as constituting unfair labour practices and in violation of their constitutional rights.

20. On 21 August 2013, the Respondent replied to the letter of objection by the Claimant's legal advisers, asserting that it had the authority to conduct disciplinary action against its employees.

21. Consequently, the Respondent's Managing Director dismissed the Claimant through a letter dated 18 September 2013. He was informed of a right of appeal within 42 days.

Whether dismissal was unfair

Procedural fairness

22. The Claimant was informed of the allegations to confront through the letter dated 5 July 2013. He was given 14 days to respond and he responded on 12 July 2013.

23. The Respondent then summoned the Claimant through a letter dated 12 August 2013 to appear for an oral hearing slated for 19 August 2013. He did not attend and the reasons were given in the advocate's letter dated 16 August 2013.

24. The Claimant challenged the process on the grounds that it was unprocedural, unlawful and null and void because he was only given 7 days to respond, the charges were not adequately set out, summons to appear before the Disciplinary Committee was not served upon him, the Disciplinary Committee had no jurisdiction and that he was not afforded a hearing.

Adequacy of time to show cause

25. The show cause letter requested the Claimant to respond within 14 days but he did so in around 7 days. The Claimant did not allege in the response that the time was not adequate.

26. He has also failed to demonstrate any prejudice suffered because of the time.

Service of summons

27. The Claimant also contends that the summons was not served upon him and again that the 7 days from 12 August 2013 to 19 August 2013 was not sufficient.

28. The Claimant's contention that the summons was not served upon him cannot be true because his advocate acknowledged service of the notice(s) and responded on 16 August 2013, objecting to the jurisdiction of the Disciplinary Committee.

29. As to the adequacy of 7 days to prepare and appear before the Staff Disciplinary Committee, the Claimant had been aware of the allegations as far back as July 2013 and in the Court's view, the time was sufficient.

30. In any case, again, the Claimant did not allege the time was not enough in the advocate's letter.

Adequacy of charges

31. The Claimant also challenged the process on the basis that the charges were not clearly set out.

32. The show cause notice set out the charge as absence without cause for more than 14 days while the summons outlined the charge(s) as desertion of duties and failure to hand over.

33. In the Court's view, the particulars were adequate to put the Claimant on notice on exactly what to respond to.

Jurisdiction of the Disciplinary Committee

34. The Claimant was in grade KV 8 (see August 2013 payslip) as of time of the disciplinary action.

35. An extract of what appears to be the Respondent's Code of Regulations (Terms and Conditions of Service) was filed in Court (Claimant filed the complete document with the submissions).

36. Section 10 of the Terms and Conditions of Service deal with disciplinary provisions.

37. Under section 10.1.1 the Respondent is expected to establish an Advisory Committee to advise the Management on disciplinary matters involving employees in Job Groups K.V 9 and below.

38. Section 10.1.2 mandates the Respondent's Managing Director to appoint the Chairperson of the Advisory Committee from among senior staff not below Job Group KV 12. The Personnel Manager is the automatic Secretary and the Committee is composed of 5 members.

39. In what may appear to be a contradiction, section 10.3.2 provide for a Disciplinary Committee consisting of not less than 3 and not more than 9 members, appointed by the Managing Director.

40. Although the parties did not address the apparent contradiction, in the Court's view, the role of the Advisory Committee is to advise and or set the policy guidelines while it is the mandate of the Disciplinary Committee envisaged under section 10.3.2 to handle or deal with *live/actual* disciplinary cases.

41. The documents placed before Court do not show whether the Disciplinary Committee which met on 19 August 2013 was appointed by the Managing Director.

42. Failing evidence on the issue, the Court can only assume that it was so appointed by the Managing Director or was a standing committee (minute 01/8/2013 suggest the Committee had even dealt with other disciplinary matters in the past).

43. In the Court's considered view, the Disciplinary Committee was validly constituted and it was competent and had jurisdiction over the Claimant.

Role of Board of Directors in disciplinary cases

44. In terms of section 10.2.2 of the Terms and Conditions of Service, the power to dismiss an employee in Job Group KV 9 and below is vested in the Managing Director without reference to the Board.

45. The Board of Directors get involved only when an employee is in Job Group KV 9 and above.

46. Considering the Claimant's grade, the Board had no role to play in the disciplinary process.

47. The resolution by the Board as to waiting for determination by the Courts of pending cases cannot assist the Claimant as he had been dismissed by the date of the resolution.

Substantive fairness

48. The reasons given for the dismissal of the Claimant was that he was absent from work without lawful cause and declining to appear before the Disciplinary Committee. Reference was made to the relevant sections of the Terms and Conditions of Service and the Employment Act, 2007.

49. The Claimant's response to the show cause attempts to explain his absence after the expiry of the 10 days off he was given to settle.

50. There is however no explanation as to why the Claimant did not seek for more time to settle down/organise himself after the 10 days had lapsed.

51. As a not too junior employee, more was expected of the Claimant and he should not have waited for a show cause notice to explain his whereabouts.

52. The Court finds that that the Respondent had and has proved that the Claimant was absent without permission or lawful cause and that constituted a valid and fair reason to dismiss him.

53. Before addressing the question of remedies, it is apparent to the Court that the Claimant was misadvised by his then legal advisers and further that the mass transfers unsettled quite a number of employees.

54. However, the question of the legality or otherwise of the transfers is pending before the High Court in Eldoret and that would be the proper forum to canvass the issue.

55. The Court has also been bothered that the Claimant attempted to introduce the transfer question in

these proceedings when a similar question is pending litigation before the High Court without making an election as to how to proceed.

Appropriate remedies

Reinstatement

56. This remedy is not available with the conclusion reached on the fairness of the dismissal and in any case, it is more than 3 years since the dismissal of the Claimant and pursuant to statutory prohibition and the circumstances of this case, reinstatement would not be an appropriate remedy to grant.

Declaration dismissal unlawful

57. This head of relief is not available considering the conclusion on dismissal.

General damages

58. The Court understands this prayer to relate to compensation in terms of section 49(1)(c) of the Employment Act, 2007.

59. With the conclusion reached, general damages (compensation) become legally untenable as a remedy.

Unpaid wages during suspension

60. Without a statutory or contractual authority, withholding of wages during suspension is unlawful.

61. Section 10.2.4 allows suspension of staff on half salary or without salary where in the opinion of the Respondent's Managing Director, financial loss may be involved.

62. The Respondent's suspension letter did not suggest any financial loss nor was there any such indication in the course of oral testimony.

63. The Court would therefore find that the Claimant is entitled to wages up to date of dismissal.

64. It is regrettable the Claimant purported to sneak in the computations, and Terms and Conditions of Service through submissions (a practice unknown to law as a basis ought to have been laid through documentation such as contractual documents, pay slips or proof of the unpaid salaries).

Annual leave arrears

65. Annual leave arrears were not a head of claim or head of relief sought in the pleadings and it is rejected.

Certificate of Service

66. This is a statutory right and the Respondent is directed to issue one to the Claimant within 14 days.

Conclusion and Orders

67. The Court finds and holds that the summary dismissal of the Claimant was fair, but that he is entitled to unpaid wages up to 18 September 2013.

68. Unfortunately the same were not computed and proved in Court and therefore the Respondent is ordered to compute and pay the Claimant the same.

69. Save for the unpaid wages during suspension, the Cause is dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 12th day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Angu instructed by Angu Kitigin & Co. Advocates

For Respondent
Employers

Mr. Molenje, Senior Legal Officer, Federation of Kenya

Court Assistant

Nixon