



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 374 OF 2013**

**DAVID TANUI**

**CLAIMANT**

**v**

**KERIO VALLEY DEVELOPMENT AUTHORITY**

**RESPONDENT**

**JUDGMENT**

1. David Tanui (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 Memorandum of Defence filed on 11 February 2014, the Respondent however stated the issue in dispute as *alleged unfair termination of the Claimant David Tanui*.
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 but was admitted by the Court on 10 October 2014).
4. The amendments led to the Respondent filing a *Response to Amended Memorandum of Claim* on 15 March 2015.
5. When the Cause was called out for hearing 8 February 2016, the parties informed the Court that they had agreed it be determined on the basis of the record, submissions to be filed and testimony taken in a related Cause, Nakuru Cause 368 of 2013, *Barnabas Kiprono v Kerio Valley Development Authority*.
6. The Court acceded to the agreement as rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2010 envisage such a course of proceeding.
7. The Claimant filed his submissions on 15 March 2016, while the Respondent's submissions which ought to have been filed before 8 April 2016 were not on file by this morning.
8. The Court has considered the pleadings, evidence and submissions and adopts the issues as framed by the Claimant in the written submissions being, *whether the termination of the Claimant's employment was unfair and appropriate remedies*.
9. But before examining the identified issues a factual background as captured in common documents

which are not in dispute would be in order.

## **Background**

10. The Respondent carried out a mass transfer of employees in April 2013 and the Claimant (among over 100 other employees) was transferred to Lodwar/Turkana as Regional Manager through a letter dated 26 April 2013.

11. On 3 July 2013, the Respondent's Acting Liaison Officer, Lodwar wrote an Internal Memo to the Managing Director informing him that the Claimant had reported on 16 May 2013 but left for the head office in Eldoret to follow up on his transfer allowance/mobilise for funds.

12. The report from the Liaison Officer prompted the Respondent to issue a show cause notice dated 5 July 2013 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.

13. The Claimant responded to the show cause through a letter dated 16 July 2013. He gave particulars of his whereabouts up to 28 June 2013.

14. Thereafter, the Respondent summoned the Claimant through a letter dated 12 August 2013 to appear before an Ad Hoc Committee on Discipline on 21 August 2013.

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

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

17. On 21 August 2013, the Respondent replied to the letter of objection by the Claimant's legal advisers asserting it had the power to take disciplinary action against its employees.

18. In the event, the Claimant failed to appear before the Ad Hoc Committee on Discipline on 21 August 2013.

19. On 20 September 2013, the Respondent's Finance and Establishment Board Committee met and directed that the transferred staff who had not reported to their new stations be suspended and be invited to appear before a Subcommittee of the Board which would in turn make recommendations to the Full Board.

20. The Respondent, on the same day wrote to the Claimant informing him that his response to the show cause notice did not give convincing reasons for the absence; noting his failure to appear before the Ad Hoc Committee on Discipline and suspending him from duty pending finalisation of his case. He was also informed of stoppage of salary.

21. The letter also invited the Claimant to appear before an Ad Hoc Committee of the Respondent's Board on 26 September 2013 to answer to charges of absenteeism.

22. The Claimant failed to appear before the Committee of the Board, and the Committee recommended to the Full Board that he be dismissed summarily.

23. The Respondent's Board met on 18 December 2013 and approved the recommendation to dismiss the Claimant (and other employees) and consequently, the Respondent's Managing Director wrote to the Claimant on 6 January 2014 informing him of his dismissal.

24. The reasons given for the dismissal were desertion of duty and failure to obey a lawful and proper command (failure to appear before the Board). Conflict of interest was also mentioned.

### **Whether dismissal was unfair**

#### **Procedural fairness**

25. The Claimant challenged the procedural fairness of the dismissal by contending that the summons did not adequately state the charges he was facing, that the Disciplinary Committee as constituted lacked jurisdiction in terms of the Terms and Conditions of Service.

26. Section 41 of the Employment Act, 2007 has given content to the general constitutional right to fair labour practices provided for in Article 41 of the Constitution, and it provides the irreducible minimums as to the procedural content of the right.

27. The Court will examine the challenge posed by the Claimant with reference to the said provision and any contractual provisions on discipline.

#### *Adequacy of charges*

28. The show cause notice of 5 July 2013 informed the Claimant that the Respondent had received reports that he had not been at the duty station after reporting on 17 May 2013 and that this was in breach of the Respondent's Regulations.

29. He was requested to explain in writing within 14 days and that disciplinary action was contemplated. The Claimant responded on 16 July 2013.

30. On 12 August 2013, the Claimant was invited to appear before an Ad Hoc Committee on Discipline and the charge was stated as desertion of duties.

31. Through a letter dated 20 September 2013, the Respondent again set out the allegations against the Claimant as unlawful absence/absenteeism for 110 days (gross misconduct) and section 44(4)(a) of the Employment Act, 2007, and section 10.4.1(a) of the Respondent's Code of Regulations were cited.

32. From the foregoing, the Court is of the considered view that the Claimant was informed and was aware with sufficient clarity of the allegations to confront. The allegations as set out were not vague and contained sufficient particulars.

33. The Court finds that the allegations or charges as set out and put before the Claimant met the statutory requirements as outlined in section 41 of the Employment Act, 2007.

#### *Jurisdiction/competency of the Disciplinary Committee*

34. There is no statutory requirement as to the composition of a disciplinary committee in this country and therefore the Court must examine whether the Respondent had provided for the composition and jurisdiction of a disciplinary committee in the Terms and Conditions of Service.

35. The Claimant filed with the *Amended Memorandum of Claim* a 2 page extract of a document which appears to be part of a Code of Regulations/Terms and Conditions of Service.

36. The Respondent did also not do any better. It annexed to the Response a 2 page extract.

37. Section 10 of the extract deal with disciplinary provisions.

38. Under section 10.1 the Respondent is expected to establish an Advisory Committee to advise the Management disciplinary matters involving employees in Job Groups K.V 9 and below (Claimant was in

Job Group KV 12).

39. Section 10.2 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.

40. 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.

41. 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.

42. The documents placed before Court show that the Ad Hoc Committee to deal with disciplinary cases involving staff in Job Group KV 9 and above was appointed by the Respondent's Managing Director initially through an Internal Memo dated 30 July 2013.

43. The Claimant by virtue of his Job Group was susceptible to the jurisdiction of the Disciplinary Committee envisaged by section 10.3.2.

44. Further, the Claimant was also invited to appear before a Committee of the Board, but he snubbed the opportunity and he cannot now complain. He was afforded an opportunity to make representations at the highest levels of the Respondent's structures.

45. 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 in disciplinary process*

46. 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.

47. The Board of Directors get involved only when an employee is in Job Group KV 9 and above. The Board was involved in the instant case when the Claimant was invited to appear before a subcommittee of the Board and again when the Board sanctioned the recommendation to have him dismissed.

48. The Claimant's contentions on the mandate of the Managing Director vis a viz the Board are therefore misplaced, in the Court's view.

49. The Court therefore reaches the conclusion that the Respondent was in compliance with both the statutory and contractual requirements as to procedural fairness.

#### *Right to fair administrative action*

50. In his submissions, the Claimant made reference to the right to fair administrative action.

51. Considering the manner of the pleadings herein (no mention of Article 47 or right to fair administrative action) and the way the Cause was prosecuted, the Court is of the view that an examination of that right in the context of the employment relationship would not be decisive save to observe that in dismissing the Claimant, the Respondent was acting pursuant to an employment contract (as an employer and not taking administrative action, and therefore primarily it is the right to fair labour practices is more relevant).

52. Of course the Court is alive to situations where the right to fair administrative action may be implicated especially where the employment relationship is underpinned by public/statutory law.

53. The Court further wishes to observe that an employee is under an obligation to cooperate with an employer during disciplinary proceedings and any misgivings during the process ought to be raised with the employer at the first instance and not in Court.

### **Substantive fairness**

54. Two reasons were given for the summary dismissal of the Claimant and these were absenteeism and failure to obey a lawful command (the Court will not consider the conflict of interest as such allegation was never put to the Claimant).

55. Pursuant to sections 43, 45 and 47(5) of the Employment Act, 2007, these are the reasons the Respondent was expected to prove and not only prove, but prove as valid and fair.

#### *Absenteeism*

56. The Claimant did not deny that he was absent. Instead he attempted to give reasons and or explanations.

57. In the response to the show cause, he detailed his whereabouts up to 28 June 2013.

58. As to his whereabouts thereafter, the Claimant did not tender any explanations.

59. The Claimant did not explain this absence before the Committee as he failed to appear it on 26 September 2013.

60. The Claimant's suspension only came on 20 September 2013 and the suspension letter requested the Claimant to explain the further absence from the duty station.

61. The Court finds that the Claimant had sufficiently explained his activities up to 28 June 2013, but offered no explanations thereafter and a summary dismissal on account of that absence was for fair or valid reason(s).

62. The Court has already alluded to the obligation upon an employee to cooperate with the employer even during disciplinary proceedings. The Claimant appeared to have been misadvised not to cooperate. He could have easily explained his whereabouts if indeed he was at work during July, August and September 2013.

63. The Court can therefore infer that the Claimant was not at his duty station after 28 June 2013 and that the absence was without permission and or lawful cause.

64. The Court therefore finds that the Respondent had valid and fair reasons to dismiss the Claimant on account of the absence.

#### *Failure to obey lawful command*

65. It is not disputed that the Claimant did not appear before a Committee of the Board on 26 September 2013.

66. He did not dispute receiving the invitation letter.

67. It is incumbent upon an employee to cooperate with the employer even during disciplinary proceedings and non-cooperation may constitute valid and fair reasons to bring the relationship to an end or impose other appropriate sanctions.

68. 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.

69. The Claimant made much of his transfer to carry out duties he was not suited for.

70. The Court has 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).

71. That dispute is pending before the High Court in Eldoret and this Court will therefore not delve into it.

### **Appropriate remedies**

#### ***Reinstatement***

72. 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.

#### ***General damages***

73. Section 49(1) of the Employment Act provide for the primary remedies where the Court reaches a finding of unfair termination of employment.

74. One of the remedies is the equivalent of not more than 12 months gross wages. It is not described as damages but by practice and custom it is referred to as compensation.

75. It is equally not available with the conclusion on the fairness of dismissal.

#### ***Salaries and allowances during suspension***

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

77. 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.

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

79. Equally, the Claimant was not informed whether he would be on half pay.

80. The Court would therefore find that the Claimant is entitled to wages up to 6 January 2014 when he was informed of the decision to dismiss him.

#### ***Certificate of Service***

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

### **Conclusion and Orders**

82. The Court finds and holds that the summary dismissal of the Claimant was fair but that he is entitled to unpaid wages up to 6 January 2014.

83. Unfortunately the same were not computed and the Respondent is ordered to compute and pay the Claimant the same.

84. 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 12<sup>th</sup> day of July 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Musembi instructed by Wambua Musembi & Co. Advocates

For Respondent Mr. Molenje, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Nixon