



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 370 OF 2013

SAMMY MWITIKI

CLAIMANT

v

KERIO VALLEY DEVELOPMENT AUTHORITY RESPONDENT

JUDGMENT

1. Sammy Mwitiki (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 allegations 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 Sammy Mwitiki*.
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*.
4. The Respondent though granted leave did not amend its Statement of Response.
5. On 8 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).
6. The Court gave directions as to the filing of submissions but only the Claimant's submissions were on record by the time of preparation of this judgment.
7. The Court has considered the pleadings, documents filed and the submissions by the Claimant and identifies the issues for determination as, *whether the summary dismissal of the Claimant was unfair, the transfer question and appropriate remedies*.
8. But first, some background.

Background

9. The Respondent carried out a mass transfer of employees in April 2013 and the Claimant (among over

100 other employees) was transferred to Wei Wei Station through a Memo/letter dated 26 April 2013. The transfer was effective from 29 April 2013.

10. On 25 June 2013, the Respondent's Project Manager, Wei Wei in a Memo to the Managing Director reported that the Claimant had reported on 4 May 2013 and had left on 12 May 2013 to go and handover in the previous station, but had not reported back by the date of the Memo..

11. As a consequence, the Respondent issued a show cause dated 27 June 2013 to the Claimant, to show cause within 7 days why disciplinary action should not be taken against him on account of *absence from duty for over 14 days* without leave or lawful cause and *failing to hand over*. The letter also informed the Claimant that his salary had been stopped.

12. The Claimant responded to the show cause through a letter dated 3 July 2013 stating that the show cause was unnecessary because the *process of tracing lost persons had not been initiated*. He also indicated that he had failed to secure accommodation at the new station and was also addressing certain family issues.

13. Thereafter, the Respondent invited the Claimant through a summons dated 12 August 2013 to appear before the Staff Disciplinary Committee on Discipline on 19 August 2013 to answer to a charge of *desertion of duty*.

14. 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 objected to the composition and jurisdiction of the Disciplinary Committee.

15. 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 Disciplinary Committee as constituting unfair labour practices and in violation of their constitutional rights.

16. 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 carry out disciplinary action against its employees.

17. In the event, the Claimant failed to appear before the Disciplinary Committee on Discipline on 19 August 2013 and the Committee recommended that his case be dealt with at the same time as that of the other employees who had objected to the disciplinary process.

18. Consequently, the Respondent dismissed the Claimant through a letter dated 18 September 2013.

Whether dismissal was unfair

Procedural fairness

19. The Claimant challenged the disciplinary process on the grounds that it was unprocedural, unlawful, null and void. The particulars were not outlined in the Amended Memorandum of Claim but were set out in the submissions.

Particulars of charges and adequacy of time

20. The Claimant was informed of the allegations to confront through the letter dated 27 June 2013 (absence without leave or lawful cause for more than 14 days). He was given 7 days to respond and he responded on 3 July 2013.

21. The Respondent then summoned the Claimant through a letter dated 12 August 2013 to appear for an oral hearing slated for 19 August 2013. The summons indicated the charge as *desertion of duties*.

22. The Claimant did not attend the oral hearing and the reasons were given in his advocate's letter dated 16 August 2013.

23. In his response, the Claimant did not raise the sufficiency of time or allege or complain that he did not understand the allegations/particulars forming the basis of the disciplinary process.

24. In the Court's view the Respondent set out with sufficient clarity the allegations the Claimant was to confront and he was given sufficient time to respond. In any case, he has not demonstrated any prejudice or injustice suffered because he had 7 days to respond.

Service of summons

25. The Respondent also invited the Claimant through a summons dated 12 August 2013 to appear for an oral hearing. He failed to appear.

26. The Claimant's advocate responded to the summons challenging the disciplinary process on 16 August 2013. The Claimant and 5 others then moved to the High Court in Eldoret on 20 August 2013.

27. From the material before Court, it is clear that the Claimant was served with the summons, otherwise the advocate would not have responded nor could they have moved to Court on 20 August 2013.

28. In the view of the Court, the Claimant was informed of the charges and was also afforded an opportunity to make representations in terms of section 41 of the Employment Act, 2007 and the Respondent cannot be faulted on that account.

Jurisdiction of the Disciplinary Committee

29. The Claimant was in grade KV 7 (see August 2013 payslip) as of August 2013.

30. An extract of what appears to be the Respondent's Code of Regulations (Terms and Conditions of Service) was filed in Court.

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

32. 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.

33. 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.

34. 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 to handle all disciplinary matters.

35. 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.

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

37. 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

38. 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.

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

Substantive fairness

40. The reasons given for the dismissal of the Claimant was that he was absent from work without lawful cause and failing to hand over.

41. The Claimant's response to the show cause attempts to explain his absence as addressing family issues and not securing accommodation to settle down in the new station.

42. There is however no explanation as to why the Claimant did not seek for more time to settle down or inform the Respondent at the first instance, before the show cause notice.

43. As a not too junior employee, more was expected of the Claimant and without any explanation why further leave was not sought, the Court finds that he was absent without permission or lawful cause and that was a valid and fair reason to dismiss him.

The transfer question

44. The Claimant made much of his transfer to carry out duties he was not suited for. Malice and ill will have been alleged.

45. 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).

46. The question of the legality or otherwise of the transfers of the Claimant and 5 others is pending before the High Court in Eldoret and that would be the proper forum to canvass the issue.

47. In any case, proof of malice requires evidence to be led, which was not the case here as the Cause has been determined on the papers.

Appropriate remedies

Reinstatement

48. 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

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

General damages

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

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

Unpaid wages during suspension

52. Without a statutory or contractual authority, withholding of wages during suspension is unlawful (the Claimant was not expressly suspended but his salary was stopped at the behest of the Respondent with effect from 27 June 2013).

53. 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.

54. The Respondent's letter stopping the Claimant's remuneration did not suggest any financial loss. The 2 page extract of the Terms and Conditions of Service also does not show whether the Respondent could stop an employee's salary.

55. The Court would therefore find that the Claimant is entitled to wages from 27 June 2013 up to date of dismissal.

Certificate of Service

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

Conclusion and Orders

57. 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.

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

59. 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. Musembi instructed by Wambua Musembi & Co. Advocates

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

Court Assistant Nixon