



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 373 OF 2013

JOHN RONO.....CLAIMANT

v

KERIO VALLEY DEVELOPMENT AUTHORITY.....RESPONDENT

JUDGMENT

1. John Rono (Claimant) commenced legal proceedings against Kerio Valley Development Authority (Respondent) on 28 October 2013, and the issue in dispute was stated as *unlawful termination of employment*
2. The Respondent filed a Memorandum of Defence on 11 February 2014.
3. When the Cause was called out for hearing on 11 February 20126, the parties informed the Court that they had agreed that the Cause be determined in terms of rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2010 (the rule empower the Court to determine a case on the basis of the record if parties agree).
4. The Court therefore directed the parties to exchange submissions, and in this regard the Claimant filed his submissions on 15 March 2016, while the Respondent's submissions which ought to have been filed before 11 April 2016 were not on file by this morning.
5. The Court has considered the pleadings, evidence and submissions and identifies the issues for determination as, *whether the summary dismissal of the Claimant was unfair and appropriate remedies.*

Whether the summary dismissal was unfair

Procedural fairness

6. The Claimant challenged the procedural fairness of the dismissal by contending that *he was not accorded a hearing, due process was not followed and that the Respondent's Managing Director had no power to take action against him.*
7. 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 (procedural fairness aspects of the right).
8. The said statutory protection provides the irreducible minimum on procedural fairness to be observed by employers to whom the Employment Act, 2007 applies.
9. On 11 May 2011, the Respondent's Chief Accountant issued an Internal Memo to the Claimant to explain a cash shortage of Kshs 965,478/20.
10. The Claimant responded through a letter dated 3 June 2011.
11. On 15 June 2011, the Chief Accountant informed the Claimant that his explanations had been found unacceptable and so he should provide better explanations and also disclose how he intended to refund the shortage/monies.

12. Come 8 July 2011, the Respondent's Acting Managing Director requested the Claimant to account for the Kshs 965,478/20 and how he intended to repay the same (particulars were given in the letter including failure to make appropriate entries into the cash book).
13. The Claimant replied to the Managing Director's letter on 12 August 2011.
14. The Respondent revisited the issue of the funds again on 28 February 2012 when the Claimant was asked to show how he intended to repay the monies or risk further action.
15. On 13 June 2012, the Respondent's Manager Internal Audit, informed the Managing Director that the amount which could not be accounted for by the Claimant had risen to Kshs 1,523,490/20.
16. This prompted the suspension of the Claimant on 17 June 2012. He was given 2 weeks to account for the money.
17. It appears the Claimant did not account for the money for on 21 January 2013, he was invited to appear before the Staff Disciplinary Committee for an oral hearing set for 24 January 2013.
18. The hearing proceeded and the Minutes of the hearing indicate that the Claimant was present.
19. The Committee recommended that the Claimant be given time to account for the funds or action be taken in terms of the Respondent's Code of Regulations.
20. The Claimant failed to account and he was dismissed through a letter dated 25 July 2013.
21. It is clear to the Court from the material placed on record that the Claimant was made aware of the allegations to confront through the letters dated 11 May 2011, 15 June 2011, 8 July 2011, 28 February 2012, 17 June 2012 and 21 January 2013.
22. The Court is further satisfied that the Claimant made representations in writing and orally when he appeared before the Staff Disciplinary Committee.
23. The Court finds the allegations or charges as set out in the letters and put before the Claimant met the statutory requirements as outlined in section 41 of the Employment Act, 2007.

Jurisdiction/powers of the Managing Director

24. The Respondent annexed to the Response a 2 page extract of the Code of Regulations.
25. Section 10 of the extract provides disciplinary provisions.
26. 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 (Claimant was in Job Group KV 9).
27. 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.
28. 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.
29. The 2 sections may appear to suggest existence of distinctive and/or parallel Disciplinary Committees.
30. 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.
31. Clause 10.2.3 of the Code on the other hand empowers the Managing Director to interdict, suspend or *dismiss* an employee for *serious misconduct* but he must report the action taken to the Board if the employee is in Job Group KV 9 and above (failure to account for public funds must in any event constitute serious misconduct in the Court's view).
32. The documents placed before Court show that the Claimant appeared before a Disciplinary Committee which then made recommendations, after which the Managing Director conveyed the dismissal decision on 25 July 2013.
33. There is nothing on record to suggest that the Managing Director referred/reported the question of the Claimant's dismissal to the Board in terms of section 10.2.3 of the Terms and Conditions of Service.
34. In this regard, the Respondent did not comply with one of its disciplinary action prerequisites and thus the dismissal was tainted with procedural impropriety.

Substantive fairness

35. The reason given for the summary dismissal of the Claimant was failure to account for Kshs 1,523,490/20.
36. 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.
37. The documents on record including the responses by the Claimant leave no doubt in the Court's mind that the Claimant could not account for the sum of Kshs 1,523,490/20 and that fact is corroborated by the audit report dated 25 June 2013 by the Auditor General.
38. The Court therefore reaches the conclusion that the Respondent had and has proved valid and fair reasons to dismiss the Claimant.

Appropriate remedies

Reinstatement

39. This remedy is not appropriate in view of the conclusion reached on the substantive fairness of the dismissal and the time lapse of more than 3 years since dismissal.

General damages

40. Section 49(1) of the Employment Act provide for the primary remedies where the Court reaches a finding of unfair termination of employment.
41. 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.
42. Although the Court has reached a conclusion the dismissal was substantively fair, it was tainted by procedural unfairness in that the Board was not involved.
43. In the Court's view, this is not an appropriate case to award compensation, a discretionary remedy.

Conclusion and Orders

44. The Court finds and holds that the though the summary dismissal of the Claimant was substantively fair it was tainted with procedural impropriety which does not avail any of the remedies sought.
45. The Claim is therefore dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 11th 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