



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 189 OF 2015**

**REUBEN KAMAU MUCUHA.....CLAIMANT**

**VERSUS**

**KARURI WATER AND SANITATION COMPANY LIMITED....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 11<sup>th</sup> November, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 28.10.2015 in person. The claimant subsequently appointed Ishmael & Company Advocates to act in the matter. The claimant prayed for judgment against the respondent for:

- a. Declaration that the termination of the claimant's employment was unlawful and violated the claimant's rights to fairness and fair labour relations as provided for under Article 50 of the Constitution and the Employment Act.
- b. Damages for wrongful dismissal being the equivalent of his salary for 12 months.
- c. Aggravated or exemplary damages for mental anguish suffered by the claimant and his family.
- d. Accrued half pay for the period of interdiction and unpaid leave days.
- e. Reinstatement into employment with full and equivalent benefits or better benefits as enjoyed prior to the unlawful termination.
- f. Benefits from the pension scheme as and when they fall due.
- g. An order for issuance of a certificate of service.
- h. Costs of the suit.
- i. Interest on b, c, d, e, and g above at court rates.
- j. Any other relief that the court may deem fit to grant in the circumstances.

The response was filed on 16.11.2015 through Titus W. Ranja, Senior Legal Counsel, County Government of Kiambu. The respondent prayed that the respondent's suit be dismissed with costs.

The claimant was employed by the Town Council of Karuri as a water operator. After the Water Act, 2002 came into operation the respondent was established and it engaged the claimant as the Commercial Manager. In 2011 the respondent confirmed the claimant in the position of the Commercial Manager.

The claimant's case is that for the Financial Year 2013 to 2014 the respondent received a grant to expand Gachie Water Project and the project commenced on 21.03.2014. The claimant's case was that he raised issues on the quality and quantity of water pipes that were used in that project and as the project sociologist charged with updating the community on the progress he had a higher duty to ensure the good delivery of the project. Thus he made a verbal complain to the respondent's Managing Director on the discrepancies on the pipes that had been used. On 18.06.2014 the claimant wrote to the Managing Director but there was no response.

By the letter dated 24.02.2015 the claimant was put on compulsory leave on account of collecting money from new customers for payment on their behalf for new connection fees and depositing in the bank amounts less than the prescribed fees; connecting new customers and giving them discontinued accounts and therefore no revenues collected by the respondent; connecting persons for water supply whereas such persons were not registered as the respondent's customers; withholding consumption reports for certain community projects consuming water from the Nairobi line bulk meter off takes. The claimant was informed not to interfere with the investigations. By the letter dated 15.04.2015 the compulsory leave was extended for a further 46 days from 16.04.2015 because the investigations had not been completed. By the letter dated 29.05.2015 the claimant was interdicted from service pending disciplinary action. The interdiction was said not to exceed 3 months with 50% payment of basic pay less statutory deductions.

The claimant testified that on 31.09.2014 the Gachie Water Project was commissioned. By the letter dated 08.10.2014 to the respondent's Managing Director, the claimant conveyed that the project was incomplete and the goods and services were substandard so that an incomplete project had been commissioned. The details of the substandard works were stated in that letter. By the letter dated 02.02.2015 the claimant wrote to the respondent's Managing Director conveying that the payments for casual labourers had been exaggerated to allegedly benefit the Technical Manager and further there were water connections without relevant connection numbers and meters and the claimant named the officers alleged to have been corruptly involved in the illegal connections. Thus the claimant's evidence was that it was his effort to curb corruption and substandard works at the Gachie Water Project that lead to his predicament - the compulsory leave, the interdiction and finally the dismissal. It was his case that he had not received a reply to the reports he had made to the respondent's Managing Director.

A management meeting held on 04.02.2015 deliberated the claimant's letters but no reports were made to agencies responsible for investigating alleged corruption. Internal and external audits of the project were made and some discrepancies in the project were disclosed.

On 14.04.2015 the claimant testified that he was serving the compulsory leave. He was called on phone to see the Finance Officer on 15.04.2015. By SMS he was summoned to the Board meeting of 16.06.2015 without having been served with a show cause notice and particulars of the allegations to be answered at the meeting. By the letter dated 15.07.2015 his employment was terminated effective 15.07.2015 for omissions and commissions as the Commercial Manager leading to loss of money and customers' goodwill.

The respondent's Managing Director (RW) testified as follows:

1. The claimant was the secretary to the Gachie Water Project and he never raised the issues of corruption and discrepancies in the quality of supplies and the works during the relevant management meetings.
2. The Technical Manager one Stephen Gacheru chaired the investigation committee looking into the allegations that were levelled against the claimant.
3. The project was commissioned on 30.09.2014 by the Governor and the claimant was part of the

Commissioning Committee.

4. The claimant attended the Board disciplinary hearing and was subsequently dismissed. The claimant was not allowed to face his accusers at the disciplinary hearing.
5. The dismissal was due to the revenue collections that were not accounted for.
6. Corruption allegations were raised after the claimant had been sent on compulsory leave.
7. The claimant was not responsible for cash collection but he colluded with customers or potential customers to defraud the respondent of due revenues.
8. The termination letter did not specify the details of the reasons for termination.

The **1<sup>st</sup> issue** for determination is whether the termination was unfair. The Managing Director (RW) confirmed that the claimant did not face his accusers during the disciplinary hearing. RW further confirmed that the termination letter did not specify the particulars of the reason for the termination. The court has considered the evidence and returns that the respondent has failed to establish the valid reason for the termination as is provided for in section 43 of the Employment Act, 2007. The termination was therefore unfair for want of a genuine reason for termination as at the time of the termination.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. As the termination was unfair, the claimant is entitled to the declaration accordingly.
- b. The court has considered the claimant's length of service and that he desired to remain in the respondent's service. The court has considered the aggravating factor that despite having raised concerns and questions about the quality of the works at the Gachie Water Project and the possibility of corruption or irregularities, the respondent decided to terminate the claimant's employment without resolving the issues the claimant had raised. Article 236 of the Constitution protected the claimant from victimisation for having performed the duties of his office and it was unfair labour practice contrary to Article 41 of the Constitution to dismiss the claimant without resolving the serious allegations of corruption and irregularities the claimant had tabled about the Gachie Water Project. For the unfair termination the court returns that the claimant, in the circumstances of the case, is awarded 12 months salaries under section 49 (1) (c) of the Employment Act, 2007 at Kshs.105, 635.00 per month making **Kshs. 1, 267, 620.00**.
- c. The award for unfair termination is deemed sufficient and the prayer for aggravated or exemplary damages for mental anguish suffered by the claimant and his family is deemed abandoned for want of justification and submissions not having been made in that regard.
- d. Accrued half pay for the period of interdiction in May and June 2015 is awarded at **Kshs. 105, 635.00** as submitted and unpaid leave days for a year at **Kshs. 105, 635**. While making that finding the court considers that the compulsory leave was not said to be the annual leave and the compulsory leave had no statutory or contractual basis.
- e. The prayer for reinstatement into employment with full and equivalent benefits or better benefits as enjoyed prior to the unlawful termination is deemed abandoned as no submissions were made in that regard and compensation is found sufficient in the case.
- f. It is not disputed that the claimant is entitled to benefits from the pension scheme as and when they fall due and the same is awarded.
- g. The claimant is entitled to a certificate of service.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the termination of the claimant's contract of employment by the respondent was unfair.
- b. The respondent to pay the claimant **Kshs.1, 478,890.00** by 15.12.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- c. The respondent to deliver to the claimant the certificate of service by 15.12.2016 in the prescribed statutory form.
- h. The declaration that the claimant is entitled to benefits from the pension scheme as and when they fall due and the same is awarded accordingly.
- d. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 11<sup>th</sup> November, 2016.**

**BYRAM ONGAYA**

**JUDGE**