



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 760 OF 2015

ABDI MOHAMMED DAIB.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for reinstatement to employment by the claimant following an alleged unfair and unlawful termination of his employment by the respondent on 29.9.2015. In the alternative the claimant prays for compensation for the alleged unfair termination plus General damages for mental stress caused by the malicious allegations made against him by the respondent.

2. The respondent has admitted that she had employed the claimant until 29.9.2015 when she dismissed him for the offence of presenting to her forged certificates for purposes of securing employment and/or promotion. She denies that the termination was unfair and unlawful and avers that it was fair and lawful because the claimant had committed the said misconduct and he was given a fair hearing.

3. The suit was heard on 15.6.2016 when the claimant testified as Cw1 and the respondent called her Head of HR and Administration Department Mr. Marco Ngolia as Rw1. All the documents filed as exhibits by both parties were admitted in evidence by consent without calling the makers. After the close of the hearing, both parties filed written submissions.

Summary of claimant's case

4. Cw1 stated that he was employed by the respondent on 5.6.1995 as a Detective IV Grade PA10 and rose through the ranks to the Position of Assistant Training Officer Grade HM4. The nature of his employment was permanent and pensionable and his retirement age was 60 years. On 1.7.2015 he was served with a Show Cause letter by the respondent alleging that he had presented to her forged Certificate for purposes of securing employment and/or promotion. He responded to the letter denying the allegation and requested for a personal hearing to defend himself. The respondent accorded him a hearing through an Inquiry Committee on 10.8.2015 where he denied the offence and was referred to the Anti-corruption Agency (EACC).

5. Cw1 further explained that he reported to the EACC and after questioning, he was told to go away

pending further investigations. That he was never called back by the EACC and he was never charged in any Court with a crime related to the alleged offence of presenting forged certificates to the respondent. That before the results of investigations by the EACC were communicated, the respondent served him with the dismissal letter dated 29.9.2015. He maintained that the dismissal was unfair and unlawful because he was never charged in a Criminal court and found guilty of the offence of forgery or fraud against the respondent.

6. On cross examination, Cw1 confirmed that he admitted before the committee of Inquiry that the details in the Application for Employment Form were his. He also admitted that he never went to Kenyatta High School for 'A' level certificate. He denied that he presented the forged and false documents including Certificates, Curriculum vitae and Application for Employment Form to the respondent. He further admitted that after dismissal his lawyer applied for and obtained letters dated 17.11.2015 from Kenya National Examination Council (KNEC) verifying his certificates.

Defence case

7. Rw1 stated that in 2012, the Public Service Commission (PSC) issued a circular to all State Corporations to undertake the authentication of academic and professional certificates for all their officers. On 9.7.2012, the Permanent Secretary Ministry of Transport wrote to the respondent to authenticate all her employees' certificate as per the PSC directive. On 27.7.2012, the MD for the respondent directed all the Departmental Heads to inform the entire workforce to submit their original academic and professional certificates for authentication by an ***ad hoc*** committee appointed for that purpose.

8. The Authentication committee did its work upto 27.8.2014 when it submitted its report to the respondents' Board. The report established that some employees including the claimant, had presented forged academic certificates to secure employment and for career progression. The Board then directed the management to take the appropriate action against the culprits.

9. On 1.7.2015, the claimant was served with a Show Cause letter accusing him of the said offence and he responded denying the offence and requesting for a personal hearing. The personal hearing was done on 10.8.2015 before a committee of Inquiry but the committee found that the charges against him were valid and that he was dishonest. Thereafter the claimant was dismissed by letter dated 29.9.2015. He maintained that the dismissal was fair because he grossly misconducted himself. Rw1 however admitted that he never saw the claimant fill the Application for Employment Form.

Analysis and Determination

10. The parties framed the following issues for determination:

- (a) Whether the reason for dismissal cited in the letter dated 29.9.2015 was valid and just.**
- (b) Whether the procedure followed in terminating the claimant's employment was fair.**
- (c) What orders should the court make depending on the answer to (a) and (b) above.**

Reason for termination

11. Under section 45(2) (a) and (b) of the Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was founded on valid and fair reason(s). A valid reason is one which is true in the subjective construction of the employer. Section 43 (2) of the Act defines reason(s) for termination of employment contract as:

“the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employer.”

It is therefore immaterial whether placed in the same circumstances, another person would not have deemed the said reason as gross enough to justify a dismissal.

12. On the other hand, under section 45(2) (b) of the Act, a reason for dismissal is fair or just if: it relates to the employees conduct, capacity and compatibility; or it is related to the operational requirements of the employer.

13. In this case the reason for the dismissal of the claimant from service are cited in the Show Cause letter dated 17.2.2015 according to the dismissal letter dated 29.9.2015 which stated thus:

“You will recall that you were issued with a letter inviting you to show cause why you should not be dismissed from service of the Authority, for reasons contained in the said letter.”

14. The Show Cause letter dated 17.2.2015 outlined the reason as follows:

“Investigations carried out have revealed that you presented forged academic certificates to the KPA Management for purposes of employment or career advancement.

Records from the Kenya National Examination Council (KNEC) indicate that you neither registered nor sat for the 1987 KCE examination at St. Mary’s High School –Lushangonyi. During the 1987 KCE examination the Centre Code number 82001 belonged to Wajir High School. St. Mary’s High School-Lushangonyi Taita was Centre number 11005 during the KCE examination.

Records available from the Kenya Institute of Studies in Criminal Justice also indicate that it does not have you in its records nor were you awarded a Higher Diploma in Forensic Psychology and Criminology during the institute’s graduation on the 24th November 2006.

Further, the Kenya Methodist University has confirmed that, while you were an alumnus of the University and you graduated with a Bachelor of Business Administration (Entrepreneurship) Second Class Honours (Lower Division) on 25th July 2009 and not Upper Division as indicated in the Certificate you presented to the Management.

You were employed and/or promoted on the basis of forged documents and for that reason you are earning salary illegally. The offence... if proved, would amount to gross misconduct justifying summary dismissal...”

15. The respondent relied on the letters written by the KNEC, Kenya Institute of Studies in Criminal Justice (KISCJ) and the Kenya Methodist University to prove that the claimant was employed and/or promoted on the basis of forged academic certificate he had presented to her. She also relies on the claimant’s CV and his application for Employment Form filled on 7.6.1995.

16. The two documents are however in consonance with respect to academic background. That the claimant attained CPE in 1983 from Marasi F. Primary School, KCE in 1987 at St. Mary’s High School and KACE 1989 at Kenyatta High School. That during the disciplinary hearing by the Inquiry Committee, Cw1 admitted that he attended Marasi Primary School from 1977 to 1983. He however denied that he did not go to ‘A’ level but did 8-4-4 system of education.

17. I have carefully considered the letter dated 24.5.2013 from Kenya Methodist University which was verifying whether the claimant was an alumnus of the University. The letter confirmed that he indeed attended the University and graduated on 25.7.2009 with a Bachelor of Business Administration (Entrepreneurship) Second Class Honours (Lower Division). That information was at variance with the Degree Certificate presented by the claimant to respondent which was for Second Class Honour (Upper Division).

18. That letter by KISCJ dated 11.7.2013 confirmed that the claimant was not in her records and was

neither awarded a High Diploma in Forensic Psychology and Criminology on 24.11.2006. The claimant never contested that offence during the disciplinary hearing as per page 586 and 587 of the proceedings of the Inquiry Committee.

19. The letter from KNEC dated 22.7.2013 confirmed that the claimant neither registered nor sat for the 1989 KCSE examination at Kenyatta High School-Taita. It further confirmed that during the 1989 KCSE examination the Centre Code number 81001 belonged to Garissa Secondary School while the Centre Code number for Kenya High School Taita was 11001 during the 1989 KCSE examination. That in another letter dated the same 27.7.2013, the KNEC verified that the claimant neither registered nor sat for the 1989 KACE examination at Kenyatta Boys High School-Taita under index number 81001515 and that the code number 81001 belonged to Garissa Secondary School during the 1989 KACE examination. Therefore the KNEC verified that the KCSE and KACE certificates were forged documents.

20. After considering the said evidence collected from the examining bodies, and upon comparing the same with the Application for Employment Form filed by the claimant during his employment and his CV written after 2010, I find that the respondent has proved that there was a valid and fair reason to warrant dismissal of the claimant from service. As stated herein above, all what the employer is required to do under section 43 of the Act is to prove that she genuinely believed that the claimant had presented to her forged certificates which caused her to employ him or promote him.

21. In this case, I find that the respondent was reasonably entitled to hold such genuine believe after the examing bodies confirmed in writing that the academic certificates attributed to the claimant were forged documents. The belief was more buttressed when some of the examining bodies confirmed that the claimant was a stranger to their records or that he neither registered nor sat for the examinations leading to the award of such academic certificates. Consequently, I find and hold that the answer to the first issue is that the reason cited for the dismissal of the claimant was valid and just. It was just because the conduct of the claimant was brought into question after he was found to have done an act of dishonest.

Fair procedure

22. The claimant has admitted that he was served with a letter to Show Cause why he should not be dismissed for the misconduct herein and that he indeed respondent denying the offence and also requesting for a personal hearing so as to defend himself. The claimant has also admitted that he was accorded the personal hearing by an Inquiry Committee set up by the respondent and he defended himself. The said hearing was in compliance with section 41 and 45 (2) (b) and (5) (c) of the Employment Act and the respondents HR Manual and Disciplinary Hand book.

23. The claimant has however contended that he should not have been dismissed for the said misconduct before the agencies mandated to investigate crimes and determine the guilty of a person have completed their part. That contention is however unfounded and it is dismissed in favour of the respondents' contention that an employer has Managerial prerogative to discipline her employees for misconduct committed to her whenever she desires. Such Managerial Prerogative is not subject to any parallel or intended criminal proceedings unless the Law or contract of employment expressly provides otherwise.

24. In **David Owino vs Kenya Institute of Special Education[2013]eKLR**, Ndolo J held that criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. I concur with that view by Ndolo J which is very relevant herein. Consequently I am satisfied that the respondent followed a fair procedure before dismissing the claimant from his employment on 29.9.2015.

Reliefs

25. In view of the finding herein above that the respondent has proved that the dismissal of the claimant was founded on a valid and just reason and that a fair procedure was followed before dismissing herein, I decline to make declaration that the termination of his employment was unfair and unjust as prayed. I also decline to order reinstatement to his employment or to award him any compensation. I will also not award

him any damages for mental stress caused on him by the termination of his employment because there is no legal or contractual basis for remedying such stress after loss of employment.

Disposition

26. For the reasons stated above the suit is **dismissed**. Each party to bear his or her own costs.

Signed, dated and delivered at Mombasa this 2nd day of December 2016.

O.N. MAKAU

JUDGE