



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 38 OF 2013
(ORIGINALLY NAIROBI CAUSE NO. 1528 OF 2012)

DOUGLAS TAABU MAKOKHA

CLAIMANT

V

MUNICIPAL COUNCIL OF ELDORET

1ST RESPONDENT

UASIN GISHU COUNTY GOVERNMENT

2ND RESPONDENT

JUDGMENT

1. Douglas Taabu Makokha (Claimant) was employed by Municipal Council of Eldoret (1st Respondent) on 31 October 1997 as a Refuse Collector.
2. On 19 February 2009, the 1st Respondent suspended the Claimant on allegations of being involved in misapplication of cash and use of fake receipts.
3. Through a letter dated 2 September 2009, the 1st Respondent terminated the services of the Claimant. The Claimant being aggrieved filed a Memorandum of Claim against the 1st Respondent on 30 August 2012 and he stated the issue in dispute as *wrongful termination*.
4. The 1st Respondent filed a Response on 7 February 2013 (another Response was filed on 2 July 2013).
5. On 5 May 2014, Kariuki Mwaniki & Co. Advocates filed a Notice of Change of Advocate to come on record for the Claimant.
6. On 4 July 2014, the Claimant filed an Amended Memorandum of Claim and Uasin Gishu County Government was added as the 2nd Respondent.
7. The Respondents filed their List of Documents on 17 July 2014.
8. On 2 October 2014, Mr. Muli held brief for Mr. Onkoba for the Respondents and hearing was fixed for 21 January 2015. The Respondents were not represented during the hearing.
9. The Cause was heard on 21 January 2015. The Claimant was directed to file submissions before 6 February 2015, but none were on file by this morning.

Background

10. The background to the present complaint is not really in dispute. In fact, the Claimant stated he was relying on the documents filed by the Respondents and produced some of them as his exhibits.
11. Around 9 July 2008, the Claimant was transferred from the Accounts section to be the In-charge/Supervisor of Main Market with general supervision over revenue collection.
12. On or around 10 February 2009, the Respondent asked the Claimant to show cause within 7 days

- why disciplinary action should not be taken against him after an audit allegedly established he was involved in false and fraudulent accounting.
13. The Claimant responded to the show cause letter through two letters dated 17 February 2009 and addressed to the Town Clerk and the Municipal Treasurer.
 14. Following up on the show cause letter, the Respondent suspended the Claimant through a letter dated 19 February 2009, because his explanations/response to the show cause letter had been found unconvincing. The suspension letter informed him that his case would be presented before a Council Committee for deliberations after further investigations.
 15. On 25 February 2009, the Respondent's Auditor wrote to the Town Clerk giving details of the further investigations. The Claimant was implicated in the report.
 16. The report recommended that the concerned staff should appear before the Finance, Staff and General Purposes Committee.
 17. Consequently, the Claimant was invited through a letter dated 24 April 2009 to appear before the Finance, Staff and General Purposes Committee on 28 April 2009. The Committee requested for further investigations to be carried out.
 18. On 20 May 2009, the Claimant was invited to appear before the Chief Internal Auditor to make certain clarifications as result of which the Audit department made another report dated 22 May 2009. The report recommended disciplinary action against the Claimant.
 19. The Claimant was thus again invited to appear before the Finance, Staff and General Purposes Committee on 26 May 2009 where he was charged with 8 charges (it appears the case was adjourned). Another hearing was held on 28 July 2009, and on 2 September 2009, the Claimant's employment was terminated.
 20. An appeal to the Public Service Commission was disallowed and communication to that effect was made to the 1st Respondent through a letter dated 13 September 2010. The Claimant was informed accordingly through a letter dated 5 October 2010.

Claimant's case

21. The Claimant pleaded that the termination of his employment was unlawful, unprocedural and contrary to law. He also pleaded that he was a victim of a vendetta.
22. During testimony, the Claimant stated that he was suspended before he was given a hearing, and further that he was penalized twice, in that he was surcharged and also dismissed. He also denied issuing the fake receipts and stated that the clerks who issued the receipts were not called to testify during the hearing.
23. According to the Claimant, the process was unprocedural and he made reference to minutes of the Full Council held on 28 May 2009 in which the Town Clerk was recorded as stating that the ruling on the Claimant's case was unprocedural.

Issues for determination

24. The main issues for determination are whether the dismissal of the Claimant was unfair and if so, appropriate relief.

Whether dismissal was unfair

Procedural fairness

25. The Claimant was issued with a show cause letter. The letter informed him of some 6 allegations to respond to. He was given 7 days to respond. The Claimant responded but his response was found wanting.
26. Subsequently he was invited to appear before the 1st Respondent's Auditor and Finance, Staff and General Purposes Committee. He appeared before the Committee more than once. He made representations.
27. The Claimant's reference to the statement by the Town Clerk on unprocedural process cannot help his cause because he had another invitation after 28 May 2009 to appear before the Finance, Staff and General Purpose Committee through the notice dated 27 July 2009.

28. The Claimant further appealed and also sought for a review from the Public Service Commission. The appeal and review were rejected.
29. From the material placed before Court, the Court is satisfied that the Respondents complied with the requirements of procedural fairness and the termination of employment was procedurally fair.

Substantive fairness

30. The Respondents did not appear during the hearing of the Cause. It is the statutory responsibility of an employer to prove the reasons for termination of employment and prove that the reasons are valid and fair.
31. But before an employer is called upon to discharge the burden, an employee has a low threshold obligation to prove that an unfair termination of employment or wrongful dismissal has occurred.
32. That is the burden placed upon employees by section 47(5) of the Employment Act, 2007.
33. On the reasons for the termination of employment, the Claimant testified that he did not issue or use the fake receipts. He further stated that the clerks who allegedly issued the fake receipts were not called before the Council Committee.
34. The Court has perused the minutes and the appeal and review by the Claimant. The same were rejected even by the Public Service Commission.
35. Despite the Respondents failing to appear during the hearing, the Court is unable, on the material on record to accept the Claimant's invitation to find that the termination of his employment was substantively unfair.
36. The Claimant did not in any case demonstrate that there was *wrongful termination of employment*.

Appropriate relief

Reinstatement

37. This was the main remedy sought by the Claimant. Over 3 years have lapsed since the separation. Mutual trust and confidence is also essential in the employment relationship and this does not appear to be the case here.
38. Reinstatement would not be an appropriate remedy in this case.

Compensation

39. The Claimant, in the alternative sought compensation pursuant to section 49(1)(c) of the Employment Act, 2007.
40. Compensation is discretionary. With the conclusion reached, the Court will not exercise the discretion in favour of the Claimant.

Conclusion and Orders

41. With the foregoing, the Court orders the Claim herein dismissed. There will be no order as to costs.

Delivered, dated and signed in Nakuru on this 13th day of March 2015.

Radido Stephen

Judge

Appearances

For Claimant	Mr. Kariuki instructed by Kariuki Mwaniki & Co. Advocates
For Respondent	Gicheru & Co. Advocates (did not appear at hearing)