



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 242 OF 2012

KENYA UNION OF COMMERCIAL, FOOD

AND ALLIED WORKERS.....CLAIMANT

VERSUS

KITUI WATER & SANITATION CO. LTD.....RESPONDENT

TANATHI WATER SERVICES BOARD).....1ST INTERESTED PARTY

JUDGMENT

1. The claimant in this suit averred that he was employed by the respondent on 12th October, 1995 as a meter reader and line patrol personnel.
2. It was his evidence that he worked for the respondent until 24th May 2000 when he was dismissed on grounds that he defrauded the respondent.
3. Before dismissing him, the claimant complained that he was never called to appear before any disciplinary panel and despite the gravity of the accusations against him he has never been summoned by police to record any statement or prosecuted for any related offence.
4. It was his evidence that his basic pay at the time of dismissal was Kshs.11,000/= and a house allowance of Kshs.4000/=.
5. In cross-examination he stated that Kitui Beach Hotel had its meter supply disconnected. He denied knowledge of Mr. Mugambi whom he was accused of receiving a cheque from.
6. The respondent on its part through Mr. Victor Muimi informed the Court that he was working for the respondent as an internal auditor. In 2010, he and his team carried out monitoring in Kitui area where the claimant was. When they visited Kitui Beach Hotel they found it had running water supply yet it was supposed to be under disconnection. They were informed by the owner that the claimant advised them to apply for a new meter in order to avoid the previous bill.
7. In their submissions before the Court, the Union on behalf of the claimant submitted that the claimant was condemned unheard in that he was issued with a suspension letter on 21st April, 2010 before he was given a show cause letter and that the suspension letter never gave him a chance to respond to the allegations against him but he responded all the same. The claimant was

dismissed subsequently hence was condemned unheard.

8. The union further submitted that the respondent's witness Mr. Muteti told the Court that the report made after the line inspection was meant for the Managing Director only. This according to the union showed want of good faith on the respondent's part. According to the union, section 43 of the employment Act demands of an employer to provide proof for reasons to terminate employment when asked to do so. In this case, the union submitted, the respondent neither orally nor through documents filed in Court gave valid reasons for terminating the claimant's services.

9. The union further submitted that the claimant was never served with Mr. Mugambi Kibanga's letter dated 18th May, 2010 hence was never aware of it and came to know of it when the matter was already filed in Court. The letter could not therefore be relied on by the respondent to dismiss or justify the claimant's dismissal. Furthermore, the said letter was written after the claimant had been suspended on 21st April, 2010 and made his defence on 27th April, 2010 respectively. The respondent therefore, could only rely on the same letter after it was subjected to proper interrogation in a fair disciplinary hearing.

10. The union further submitted that the respondent had no power to dismiss the claimant from service since he was only on deployment by the Interested Party. The worst it could have done was to send back the claimant to the interested party who would then communicate to the principal employer.

11. The respondent's counsel on the other hand submitted that sections 41 of the Employment Act simply provide for the employee to be notified of the reasons relied on in summarily dismissing an employee. According to Ms. Ingati, the letter dated 21st April, 2010 amounted to the explanation of the misconduct that the respondent deemed to be reasonable grounds to warrant dismissal. The letter, according to Counsel explains as required by section 41 of the Employment Act the reasons being that the claimant conspired with a client by the name Kambi Mugambi of Kitui Beach Hotel, to defraud the respondent of Kshs.35,160/=. The claimant made representation on the matter of his alleged misconduct to the respondent via his letter dated 27th April, 2010.

12. On the issue of locus standi to terminate the claimant's services Counsel submitted that the respondent was cognizant of the fact that the grievant was in a position where he was offering services to the respondent hence the respondent acted within the scope of its power in relieving the claimant of his duties in so far as they affected the respondent as an organization.

13. Termination of employment in context of the revised labour laws lay emphasis on justification for reasons for termination and the fairness of procedure followed in carrying out such termination of employment. Once these tests are satisfied, the Court cannot interfere in the cessation of employer - employee relationship. Whilst the Act provides certain minimum conditions that must be met before employment is terminated, it was never the intention of Parliament that all the stipulations in the Act must be met in the minutest detail before an employment contract can be terminated. If that were the case, no employment contract would be terminated which could be said to be in conformity with the Act.

14. The claimant in this suit was accused of colluding with the respondent's customer to make unauthorized water connection in order to avoid a previous bill. He was suspended via a letter dated 21st April, 2010. He responded to the accusations via his letter 27th April, 2010. This therefore meant that the claimant must have read and understood the accusations against him in order for him to have responded. To contend therefore that he was dismissed without hearing is therefore not correct.

15. The claimant in his letter in response to the suspension raised fundamental questions which ought to have prompted the respondent to conduct additional investigation prior to dismissing the claimant. He complained that his job description neither entailed approval of meter application

nor installation of new ones. He further complained that application for new meter with intention of evading payment of the outstanding bill should have been treated as fraud on part of the respondent's client (Kitui Beach Hotel) and necessary action taken. He also complained that the collection of the outstanding Kshs.35,160 was the responsibility of the officer charged with debt/revenue collection which was not his docket.

16. The onus of proof of reasons for dismissal is placed by law on the employer. The issues raised by the claimant, cited above made necessary for the respondent to interrogate more the accusations against him before his dismissal. No evidence was tabled in Court that t his was either attempted or done. The Court therefore comes to the conclusion that the dismissal was unfair and orders that the grievant be reinstated to his employment without loss of benefits or seniority.

17. The respondent shall further pay the claimant his salary for the period he has remained outside his employment together with increments and allowances that personnel of his grade and caliber have benefited from time to time.

18. The Court further awards the grievant six months' salary as compensation for unfair dismissal from employment.

19. The grievant shall be redeployed to the Interested Party and assigned other or similar duties.

20. It is so ordered.

Dated at Nairobi this 22nd day of May 2015

Abuodha J. N.

Judge

Delivered this 22nd day of May 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge