



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1955 OF 2011**

**PAUL WAIGIRI MURIUKI.....CLAIMANT**

**VS**

**NAIROBI WATER AND SEWERAGE COMPANY LTD.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's case brought by way of Statement of Claim dated 15th November and filed in Court on 18th November 2011 seeks compensation for wrongful termination of employment. The Respondent filed an Amended Reply on 11th December 2012 to which the Claimant replied on 31st January 2013.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Industrial Relations Coordinator, Rose Naliaka Wangila, Acting Relations Manager, John Philip Gichuhi Kaguchia and Investigation Officer, Simon G. Itubo.

**The Claimant's Case**

3. The Claimant was employed by the Nairobi City Commission as a Metre Reader II in the Water and Sewerage Department effective 18th March 1988. By letter dated 16th July 1990, he was re-designated as a Clerical Officer III and was progressively promoted to the position of Clerical Officer I as at 20th March 1997.

4. Following an internal recruitment exercise, the Claimant was appointed to the position of Data Entry Assistant within the Respondent Company effective 16th September 2005. The Claimant worked for the Respondent until 5th August 2011 when he was summarily dismissed. His monthly salary at the time of dismissal stood at Kshs. 59,945.00

5. Prior to the dismissal, the Claimant was issued with an internal memo dated 7th February 2011 from the Respondent's Human Resource Manager alleging that he had failed to surrender water metre number FE007741 attached to account number 18010778 in the name of Focus Development, which he had removed from Land Reference Number 330/735. By letter dated 9th February 2011, the Claimant explained what had transpired with regard to the subject metre.

6. On 17th February 2011, the Claimant was sent on compulsory leave to pave way for further investigations. He was subsequently invited to appear before the Respondent's Corporate Disciplinary Committee on 23rd June 2011 after which he was summarily dismissed on 5th August 2011.

7. According to the Claimant, there was no valid reason for his dismissal and he was not given an opportunity to defend himself. He claims the following:

- a) A declaration that his dismissal was wrongful and unlawful
- b) Reinstatement with full salary, benefits and continuity of service or in the alternative:
  - i) 3 months' salary in lieu of notice.....Kshs.179,885.00
  - ii) Leave pay (arrears).....Kshs.5,000.00
  - iii) Severance pay for 24 years.....Kshs.1,438,680.00
  - iv) Salary arrears.....Kshs.634,000.00
  - v) Acting allowance.....Kshs.1,209,474.00
- c) 12 months' salary in compensation for wrongful dismissal.....Kshs.719,340.00
- d) Costs and interest

### **The Respondent's Reply**

8. In its Amended Reply filed on 11th December 2012, the Respondent admits having employed the Claimant from 22nd September 2005. The Respondent however denies that the Claimant's dismissal was unprocedural stating that on or about 6th June 2011, the Claimant demanded and received a bribe of Kshs. 45,000.00 from the Respondent's customer on the promise that an outstanding water bill of Kshs. 87,447.20 would be waived.

9. The Respondent goes on to plead that the Claimant engaged in various fraudulent activities contrary to the terms of his contract of employment. The particulars of fraud with regard to metre number FE007741 are set out as follows:

- a) Facilitating reversal of account without observing due procedure by reversing metre reading and resultant bill from Kshs. 663,942.72 to Kshs. 136,598.30;
- b) Removing a water metre without testing for defects and replacing it without following the laid down procedures;
- c) Unprocedurally sourcing for a water metre contrary to the laid down procedures;
- d) Failing to inform his Regional Manager (Southern Region) and the Central Regional Manager despite having obtained the water metre and reversed the bill without their knowledge;
- e) Changing the water metre without any justifiable cause and/or urgency contrary to company rules and regulations;
- f) Removing the water metre without checking with the metre reader for Southern Region to confirm whether the metre was defective to warrant removal.

10. The Respondent further states that the Claimant was paid the sum of Kshs. 240,812.78 being salary arrears and leave pay as well as Kshs. 370,324.13 in compensation for acting in the position of Business Development Supervisor which he held prior to his dismissal.

## Findings and Determination

11. The following are the issues for determination before the Court:
  - a) Whether the Respondent had a valid reason for terminating the Claimant's employment;
  - b) Whether in effecting the termination the Respondent observed due procedure;
  - c) Whether the Claimant is entitled to the remedies sought.

## The Termination

12. On 7th February 2011, the Claimant was issued with a show cause memo in the following terms:

*“It has been reported to the HRM on February 04, 2011 that on December 23, 2010 you allegedly removed a meter to account No. 1801078 located on LR No. 330/735 and never handed the same to the office as required. The new meter was allegedly taken from western region and installed without due regard to the laid down procedure. In addition there is contradicting information on the status of the account in the system indicated as normal while investigations reveal otherwise and on the ground status of the mentioned account was wrongly entered as normal only for investigation to reveal that it is a construction.*

*As a result of your action and that of Revenue Coordinator George Kabiru who irregularly reversed the above account, the company was deprived revenue amounting to Kshs. 663,942.72.*

*In view of the gravity of the alleged misconduct you are hereby required to show cause in writing why disciplinary action should not be taken against you failure to which decision will be taken without further reference to you.*

*Lucas Gor*

*Ag. Human Resource Manager”*

13. The Claimant responded to the show cause memo on 9th February 2011 and on 17th February 2011, he was sent on compulsory leave for sixty (60) days to pave way for further investigations.
14. In his response the Claimant states *inter alia*:

*“In December of last year the customer assigned account number 1801078 located on L.R No. 330/735 came to our offices complaining that the account was erroneously billed leading to an overcharge and therefore the disconnection of water supply to this account was wrong. At that time I was the only senior officer present at the office as all the others were away.*

*I investigated the complaint and noted that the account had a stopped meter whose reading was 5070m3 from 2009 to December 2010 (at the time of complaint).*

*Based on the finding I decided that the best cause (sic) of action under the circumstances was to replace the meter with another working meter with a reading of NIL. Since I couldn't find the requisite meter for replacement in the southern region, I requested for one from western region.*

*The replacement was prudent under the circumstances for the reason that, Nairobi Water and Sewerage Company would now have a working meter on L.R. No. 330/735 and therefore be able to bill for water actually consumed, while the complaint was being investigated/resolved.*

*The request to the revenue coordinator was intended to meet the customer's expectations in line with the company's objective. My action was purely aimed at resolving the immediate crisis and*

save the company from losing income.

*Upon removing the meter, I failed to hand the same over for the reason that I heard rumours and feared that it would be tampered with to show a different reading on the ground that there was a claim that there was a reading higher than 5070m3.*

*Yours faithfully,*

PAUL MURIUKI

ACTING BUSINESS DEVELOPMENT SUPERVISORY

SOUTHERN REGION”

15. The contents of the Claimant's response to the show cause memo corresponded in material respects with his statement to the Investigating Officer also dated 9th February 2011.

16. On 23rd June 2011, the Claimant appeared before the Respondent's Disciplinary Committee and on 5th August 2011 he was dismissed. The dismissal letter states in part:

*“Reference is made to our letter ref:NCWSC/HRD/VOL.1/08700/LLGO/mkm dated 17th February 2011 sending you on compulsory leave on account of removing a meter attached to account No. 1801078 located on LR No. 330/735 subsequently appearance (sic) before the Corporate Disciplinary Committee on 23rd June, 2011.*

*This is to inform you that the Committee found you guilty of the offenses mentioned herein on the following precepts;*

- You violated the procedures by facilitating change of a new meter without subjecting the old one to a test*
- You changed a bore hole meter without due regard in the capturing of the previous meter reading units for billing purposes*
- In the course of your action you never consulted or involved the key stakeholders in the region as required.*

*You therefore fundamentally breached your obligation arising from your terms and conditions of service and the Company has therefore decided to summarily dismiss you with immediate effect.*

*You have the right of appeal if dissatisfied with the above decision to the Nairobi Water and Sewerage Company Managing Director within ninety (90) days from the date of this letter.*

*Yours faithfully,*

*Eng. Philip Gichuki*

*Ag. Managing Director”*

17. Section 43 of the Employment Act, 2007 requires an employer to demonstrate a valid reason for terminating the employment of an employee. There is now firm jurisprudence from this Court that the burden placed on an employer under Section 43 of the Act is to show, on a balance of probability, the existence of a valid reason that would move a reasonable employer to terminate the employment of an employee (see *Jessy Olukutukei Vs Feed the Children Kenya [2014] eKLR* and *Abraham Nyambane Asiago Vs Barclays Bank of Kenya Ltd [2015] eKLR*).

18. When the Court sits it does not ask itself what it would have done had it been in the position of the employer. What it asks is whether given the facts and circumstances of the particular case, the employer

acted lawfully and in a reasonable manner.

19. From the Claimant's own statement, he facilitated the removal and replacement of the water meter in issue. The Claimant further admitted having sourced the replacement metre from Western Region since the required specification was out of stock in Southern Region which was his domicile Region. He also asked George Kabiru, a Revenue Coordinator in yet another Region, Central Region to assist in reversing the disputed bill.

20. The Claimant seemed to be in a hurry to assist the customer. He stated that his action was actuated by his desire to serve the customer and to secure the Respondent's income. He added that he retained the old metre because he feared that it would be tampered with.

21. From both the investigation report and the disciplinary proceedings, the issue of the urgency with which the metre replacement and bill reversal were effected was raised. The common conclusion was that the urgency would have been in reconnecting the customer's water supply pending procedural rectification of the bill rather than change of metre and bill reversal.

22. The Court was unable to understand why the Claimant took final administrative action of metre replacement and bill reversal without reference to other internal stakeholders as required. There were too many coincidences in this case: first, there was no documented complaint from the customer; second, the replacement metre was sourced from a non domicile Region; third, the bill reversal was undertaken by a Revenue Coordinator from yet another Region and fourth, the Claimant retained the old metre which was not subjected to testing as required. In sum, I agree with the Respondent that the prudent thing to do would have been to reconnect the customer's water supply pending resolution of the disputed bill in the normal manner.

23. In view of the foregoing, the Court finds that the Respondent had a valid reason for terminating the Claimant's employment.

### **Termination Procedure**

24. I will now deal with the procedure adopted by the Respondent in handling the Claimant's dismissal. The Claimant was accused of gross misconduct. Section 41 of the Employment Act, 2007 sets out the procedure for handling cases of misconduct as follows:

a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

25. From the record, the Claimant was issued with a show cause memo on 7th February, 2011 to which he responded on 9th February 2011 on which date he also made a written statement to the Investigating Officer.

26. By letter dated 9th June 2011, the Claimant was invited to appear before the Respondent's Corporate Disciplinary Committee on 23rd June 2011. His right to be accompanied by a union representative was highlighted. In his testimony before the Court, the Claimant confirmed having appeared before the Disciplinary Committee in the company of a union official. There was no evidence of the Claimant taking issue with either the composition of the Disciplinary Committee or the manner in which the disciplinary

proceedings were conducted.

27. Consequently, the Court finds that the Respondent complied with the legal fairness requirements set out under Section 41 of the Employment Act, 2007. The result is that the Claimant's dismissal was substantively and procedurally fair. The claims for compensation for wrongful dismissal and three months' pay in lieu of notice therefore fail and are dismissed.

28. With regard to the claims for leave pay, salary arrears and acting allowance, the Claimant presented figures but led no evidence to prove these claims. As held in *Bonham Carter Vs. Hyde Park Hotel (1948) 64 T.L.R 177* it is not enough for a party to throw figures at the Court, each claim must be proved. In the absence of any evidence to prove the figures presented by the Claimant, these claims must fail. With regard to the claim for severance pay, the only thing to say is that the Claimant's termination did not fall under redundancy and there is therefore no legal basis for such a claim.

29. In the final analysis, the Claimant's entire claim is dismissed with no order for costs.

30. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 4TH DAY OF MAY 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Nyabena for the Claimant

Mr. Kioko for the Respondent