



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 69 OF 2015

(Originally Nairobi Cause No. 1601 of 2012)

(Previously Mombasa Cause No. 26 of 2013)

JOHN JOEL MUCHURA CLAIMANT

v

KENYA REVENUE AUTHORITY.....RESPONDENT

consolidated with

Nairobi Cause No. 944 of 2010

TAPHROTHER IMBULANI MWENESI..... CLAIMANT

v

KENYA REVENUE AUTHORITY..... RESPONDENT

and

Nairobi Cause No. 945 of 2010

JOSHUA OKULO.....CLAIMANT

v

KENYA REVENUE AUTHORITY.....RESPONDENT

and

Nairobi Cause No. 946 of 2010

CHRISTOHER KALIMBO MWERO..... CLAIMANT

v

KENYA REVENUE AUTHORITY..... RESPONDENT

and

Nairobi Cause No. 947 of 2010

JEREMIAH NTURIRU BARUA.....CLAIMANT

v

KENYA REVENUE AUTHORITY..... RESPONDENT

and

Nairobi Cause No. 948 of 2010

PATRICK ANYANGA OUTTA.....CLAIMANT

v

KENYA REVENUE AUTHORITY.....RESPONDENT

and

Nairobi Cause No. 949 of 2010

MICKIE NEHEMIA MWAMLANDA..... CLAIMANT

v

KENYA REVENUE AUTHORITY.....RESPONDENT

and

Nairobi Cause No. 950 of 2010

NATHAN KIPKEMOI BARAMASAI.....CLAIMANT

v

KENYA REVENUE AUTHORITY..... RESPONDENT

and

Nairobi Cause No. 951 of 2010

FATUMA FADHILI ALI..... CLAIMANT

v

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimants were employed by Kenya Revenue Authority (Respondent) on diverse dates (hereinafter the Court will refer to the Claimants respectively as 1st to 9th Claimants).
2. On 19 August 2010, the Claimants separately commenced legal proceedings against the Respondent alleging unfair/unlawful termination of employment.
3. On 23 August 2010, Rika J fixed the Cause for hearing in Mombasa on 22 October 2010. The hearing was later rescheduled to 4 October 2010.

4. On 4 October 2010 when the Cause came up for hearing, the counsel for the Respondent sought leave to file a Response and also sought consolidation of 8 other related Causes.
5. Chemmutut, Principal Judge (as he was then) appeared to have ordered consolidation on 28 October 2010. The Judge also directed that the running file be Cause No. 943 of 2010.
6. On 5 November 2010, the Respondent filed a joint Response to all the consolidated Causes.
7. By 9 December 2010, the Respondent had not filed all its documents because it had completed investigations. The Court granted it leave to file Supplementary documents. Further extensions were granted on 17 February 2011 and on 30 June 2011.
8. On 2 November 2011, Chemmutut J made a categorical order that the Causes Nos. 943 to 951 of 2010 be consolidated.
9. Parties made opening statements and the Causes proceeded for hearing daily until 4 November 2011, and resumed again on 14 February 2012. Chemmutut J left office before concluding the hearings.
10. On 22 April 2013, Makau J while dealing with Cause No. 22 of 2013, *Gibson Mwanjala v Kenya Revenue Authority* directed that the Causes be heard on 25 April 2013, together with these consolidated Causes because they raised related questions.
11. On 25 April 2013 when the Causes were mentioned before me, I directed that hearing commences afresh.
12. The hearing commenced afresh before me on 26 August 2013. It proceeded on 18 March 2014, 20 March 2014 (when parties informed the Court that the Respondent's next witness would be common to these Causes and Cause No. 22 of 2013), and on 19 May 2014.
13. I was transferred before concluding the hearings and on 2 October 2014, the parties consented to the Cause being transferred to Nakuru for me to continue with it to finalization.
14. Consequently, I heard the Cause again on 3 March 2015 and directed that judgment would be on notice.
15. Because of the similarity of questions arising for determination, the Court directed on 20 May 2014 that the evidence of the Respondent's witnesses herein would form part of the proceedings in Mombasa Cause No. 22 of 2013 (cross reference had earlier been made in the proceedings in this other Cause on 25 March 2014).
16. At the close of the hearing, the Court directed, with the agreement of the parties that the Claimant would file his submissions before 15 May 2015. The Respondent filed its submissions on 14 May 2015.
17. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as (despite Court directing parties to agree and file issues, the directive was not complied with), *whether the summary dismissals of the Claimants were unfair and appropriate remedies.*

Whether the summary dismissals were unfair

Procedural fairness

18. The Respondent interdicted the Claimants through letters dated 21 August 2007.
19. The reason given for the interdictions were that the Claimants had facilitated the fraudulent evasion of duty amounting to Kshs 124,720,037/- by Doshi Iron Mongers Ltd.
20. The letters also informed the Claimants that investigations to determine the extent of their involvement were on going and they should report to their heads of department once a month.
21. On 29 October 2007, the Respondent wrote to the Claimants informing them that they had been suspended because of gross misconduct and that disciplinary action was being considered and therefore they should show cause in writing within 14 days why the said disciplinary action should not be taken.
22. Each Claimant's suspension letter outlined the specific allegations against each of them.
23. On 25 April 2008, the Respondent informed the Claimants that their written responses had been considered and also invited them to appear before its Disciplinary Committee.
24. After appearances before the Disciplinary Committee, each of the Claimants was notified that they had been found guilty as charged and they were being dismissed.
25. The Claimants appealed but the appeals were not successful.

26. The Claimants in the joint submissions attacked the procedure followed prior to the dismissals as not fair.
27. The procedure was challenged on several fronts. Firstly, that the documents referred to in the Claimants interdiction/suspension letters were not provided to them nor produced in Court and therefore they did not fully know the charges they were facing.
28. Secondly, that the interdiction letters lacked sufficient details to enable the Claimants adequately prepare for disciplinary hearings.
29. Thirdly, it was submitted that the Respondent failed to call material witnesses during the disciplinary hearing (departmental officers from Kenya Ports Authority including the Chief Pilot, Kenya Police, Motaku Shipping Line, Zam Zam Ltd and Al-Amary Ltd).
30. Fourthly, that a Mr. Joseph Nduati who investigated/caused investigations to be carried out also sat as a member of the Disciplinary Committee.
31. Fifthly, that the Claimants were deprived of the right to be accompanied by a colleague.
32. Sixthly, that the provisions of clauses 5(5), 6A, 6B and 7 of the Respondent's Code of Conduct were not complied with.
33. And lastly it was contended that the Claimants' appeals were not validly rejected because a Mrs. Malinda who communicated the rejection of the appeals had no delegated authority to handle the appeals.

Sufficiency of charges

34. The Claimants were interdicted through letters dated 21 August 2007. The interdiction letters informed the Claimants that certain investigations were being conducted.
35. On 29 October 2007, each Claimant received a suspension letter. The Court has looked at the suspension letters. The allegations against each Claimant and the role each played were set out in each letter. The particulars were also laid out with details of endorsements/certifications of entry numbers, dates, description of goods and vessels against which cargo receipts were prepared and signed by each Claimant.
36. The letters also required the Claimants to make written representations within 14 days.

Opportunity to be heard

37. The Claimants made written responses.
38. After the correspondences, the Claimants were invited to face to face disciplinary hearings as required by the contractual provisions as set out in the Respondent's Code of Conduct.

Right to be accompanied

39. The Claimants also faulted the process because they were not accompanied by colleagues. The invitation letter did not inform the Claimants of a right to be accompanied by a colleague.
40. I have perused the Memorandum of Claim. The Claimants did not assert at all that they were prejudiced or suffered an injustice because of the failure to be accompanied.
41. The Claimants did also not suggest that they raised the issue of having a colleague during the hearings. They have not demonstrated any prejudice or injustice. It is also significant that in examination in chief they did not refer at all to any prejudice or injustice.
42. The Code of Conduct provided at clause 2 that it would be provided to each employee. Clause 5(8) entitled an employee facing disciplinary action to be accompanied.
43. The Claimants did not suggest that they were not issued with copies of the Code of Conduct. Therefore it can be presumed that they knew of the contractual right and should have asserted the right during the hearings. If they chose not to be accompanied they cannot complain later.

Right and consideration of appeal

44. The dismissal letters informed the Claimants of a right of appeal. They appealed but the appeals were rejected. They contended that the appeals were not valid because the letters by Mrs. Malinda and Mr. Munuhe informing them of the rejection of the appeals did not amount to a decision by

- the Commissioner General.
45. Mrs. Malinda was the Respondent's Senior Deputy Commissioner, Human Resources and both she and Mr. Munuhe signed the letters on behalf of the Commissioner General.
46. The contention by the Claimants is not valid. The parties were in a contractual relationship underpinned by statute. The Respondent is a big organisation with professionals engaged to carry out particular tasks. Those tasks include communication with employees. It cannot be that a communication in the name of and for the Commissioner was invalid or not authorised.
47. Unless there is an express bar, I do not see any basis for impugning the letters dismissing the appeals because the Commissioner General did not personally sign the letters unless there was proof that it was not part of these 2 officers' duties to communicate for and on behalf of the Commissioner General.

Failing to call witnesses and to provide records

48. An employer is not required to hold a mini-court in the name of conducting a disciplinary hearing. It would be asking for too much to expect an employer to call or summon all persons even remotely connected to an issue to testify during a disciplinary hearing.
49. Further, the Claimants had served the Respondent for many years. They knew the documents and records which might have assisted them in their cases. They did not ask for any documents either when making written explanations or before the hearing.

Role of Mr. Nduati

50. Mr. Nduati was in charge of the Respondent's Investigations Department. Officers directly under him carried out the investigations and prepared a report which was used against the Claimants.
51. He also sat in the Disciplinary Committee which heard the Claimants representations.
52. For these multiple roles, the Claimants contested the fairness of the hearings.
53. These multiple roles do not without more taint the disciplinary process although technically Mr. Nduati was the owner of the investigations.
54. The Claimants did not demonstrate how the mere presence of Mr. Nduati occasioned them injustice or unfairness. In employment relationships, many are and will be the times that the employer or controlling mind of the employer sits and decides on the fate of an employee. The fairness of such should be determined on the facts and circumstances of each case.
55. Clause 11 of the Respondent's Code of Code expressly provided for the composition of the Disciplinary Committee and one of the members is Head of Investigations and Enforcement Department.

Code of Conduct clause 5(5), 6A, 6B and 7

56. These clauses require an employee's departmental head to comment on an employee's defence, interdiction pending investigations on allegations involving misconduct or where criminal proceedings are instituted and entitlements during interdiction/suspension and penalties.
57. The Claimants did not demonstrate how these contractual provisions on discipline were breached or what prejudice was caused.
58. In my view the interdiction and suspension letters met the contractual as well as the statutory threshold/standard outlined in section 41 of the Employment Act, 2007 and *audi* requirement of informing an employee of the reasons contemplated for taking disciplinary action.
59. The letters were not general or vague. They had sufficient particulars to put the Claimants on notice as to what to respond to. The Claimants were further afforded an opportunity to appear at oral hearings and did not seek any documents or object to the process at the time.
60. The Court in the final analysis finds that the Respondent complied with the requirements of procedural fairness.

Substantive fairness

61. Pursuant to section 43 of the Employment Act, 2007, an employer has a duty to prove the reasons

- for dismissing an employee. But the statute does not leave it at that. Under section 45 of the Act, the employer has the added burden of showing that the reasons were fair and valid.
- 62.The burden on the employers is an onerous one. In fact so onerous is the burden, that by dint of section 45(4) of the Act, an employer should demonstrate it acted in accordance with justice and equity in the dismissal, considering the circumstances of the particular case. Under the Civil procedure normal evidential provisions, defendants do not have to do so much.
- 63.Each Claimant had distinct but though related charges. The Court will briefly examine the role allegedly played by each Claimant and the evidence produced to determine whether the Respondent has satisfied the statutory obligation placed on employers.

John Joel Michura

- 64.He was a Senior Preventive Guard in charge of escorting cargo from bonded warehouse no. 204 to the port. He stated that he would supervise loading of cargo in covered trucks and escort the same (under seal) to the port for loading onto ships after which his work ended. He also stated that documents such as cargo receipts were kept.
- 65.He recorded an initial statement on 29 June 2007 and a second statement on 11 July 2007. In the second statement he admitted that no exports actually took place. He also narrated the involvement of a Mr. Khalid who was an agent of Doshi Iron Mongers Ltd in the scheme. He sought for leniency in the confession.
- 66.Mr. Michura swore an affidavit on 16 July 2007 in which he swore that the first statement was recorded under duress and that the second statement of 16 July 2007 was the correct one.
- 67.In Court, he stated that he was forced to confess by Mr. Mwaura Chege (One of the officers who carried out investigations), and because he did not want to lose his benefits as he had only 1 year to retirement, and reiterated that the first statement was the correct one.
- 68.Mr. Chege, in his testimony denied coercing this Claimant to swear the affidavit admitting that there were no exports.
- 69.The affidavit was sworn before David Ashioya, Commissioner for Oaths on 16 July 2007.
- 70.The Court has looked at the record of proceedings before Chemmutut Principal Judge (as he then was) and the notes taken when the hearing commenced *de novo*.
- 71.This Claimant did not reveal or disclose who sent him to the Commissioner for Oaths to swear the affidavit disowning the first statement. Although he stated that he was kept without water or lunch when recording the first statement, he wants the Court to believe that statement was the correct one.
- 72.By failing to disclose or reveal what prompted him (inducement/coercion or duress) to go and swear the affidavit, the Court finds that this Claimant has not demonstrated that he was forced to swear the affidavit and the only logical conclusion which can be drawn is that the second statement was voluntary and is corroborated by the affidavit.
- 73.On the basis of the admission by this Claimant that no export of goods took place, the Court finds that the Respondent had valid and fair reasons to dismiss him, and has satisfied the statutory burden in sections 43 and 45 of the Employment Act, 2007.

Taphrother Imbulani Mwenesi

- 74.She was a Preventive Officer based at Bonded Warehouse no. 204. It was alleged that she prepared cargo receipts showing goods had been removed from the warehouse. It was also alleged that some of the registration numbers of vehicles she had declared in the cargo receipts belonged to tuktuks and tractors.
- 75.She stated that her duties included guarding, supervision of loading and escorting goods to the port but not signing of documents and that the signing was the responsibility of her bosses, Mr. Mwero or his reliever.
- 76.She recorded 2 statements (29 June 2007 and 12 July 2007) with the Respondent's investigators and swore an affidavit on 17 July 2007 before F.M. Vanani, Commissioner for Oaths.
- 77.In her further statement she confessed that no exports actually took place.
- 78.In the affidavit she deposed that no goods left the country.
- 79.This Claimant also stated that she was forced by the Respondent's investigating team to record the

statements and that it was Mr. Nduati, the Officer in Charge of Investigations who called her and asked her to swear an affidavit after which she went to look for an advocate in town to swear the affidavit.

80. Considering the confession by Mr. Michura which the Court has accepted, this Claimant cannot feign ignorance or non complicity in what was going on. If no exports took place, she could not have supervised the loading onto trucks enroute to the port.
81. The Court also finds that her affidavit was sworn voluntarily and that the Respondent had and has proved valid and fair reasons to dismiss her.

Joshua Okulo Adui

82. He was a Revenue Officer stationed at Kilindini Port and accused of endorsing entries to show cargo had been loaded into certain vessels when no such goods were loaded occasioning a loss of Kshs 41,466,412/-.
83. According to the Respondent's second witness, this Claimant's duties included seeing the goods for export and confirming loading. One of the vessels, vessel MV Noor, according to the witness did not dock at the Port but only gave a notification/booking though this Claimant endorsed entries goods had been loaded onto it.
84. Considering the evidence, the Court is convinced that Mr. Adui could not have confirmed loading on a vessel which did not dock and in any case the Court has found no export took place. Non-existent goods could not have been loaded onto a vessel which had not docked.
85. The Court finds that the Respondent had and has proved valid and fair reasons to dismiss him.

Christopher Kalimbo Mwero

86. He was the Bond Officer in charge of Warehouse no. 204 except from February to April 2006 when Jeremiah Nturibi relieved him.
87. The Respondent alleged that he signed and stamped cargo receipts indicating goods had been removed from bonded warehouse 204 when no such goods had been removed leading to loss of Kshs 102,089,943/-.
88. The cargo receipts he signed and stamped were produced (page 631) and copies of export documents prepared by Al Amary Ltd to support the same also produced.
89. The evidence that Zam Zam Ltd/Motaku Agencies Ltd and not Al Amary Ltd were the official agents of the vessels was not challenged or controverted. The export documents therefore must have been falsified to suggest exportation of non-existent goods.
90. The Court is satisfied that the Respondent had and has proved valid and fair reasons to dismiss Mr. Mwero.

Jeremiah Nturibi Barua

91. He was also a Bond Officer and he was accused of signing and stamping cargo receipts to confirm goods had been removed from bonded warehouse no. 204 when the goods had not been removed leading to loss of Kshs 20,745,010/-.
92. He did not deny signing and stamping the cargo receipts and considering the finding that no exportation took place, his action was fraudulent.
93. The Court finds the dismissal substantively fair.

Patrick Anyanga Outta

94. His duties included escorting trucks from bonded warehouse 204 to Kilindini and old Ports. He was charged with falsely indicating that he escorted the goods and witnessed/supervised the loading into ships leading to loss of Kshs 55,852,337/-.
95. Considering that the finding that no goods were removed from the bonded warehouse no. 204, he could not have escorted non-existent goods. The dismissal was substantively fair.

Mickie Nehemiah Mwamlanda Abekah

96. He was a Customs Preventive Officer and was accused of making entries into Loading memo registers at the Old Port to show goods from Doshi Ironmongers Ltd had been received when no corresponding entries were made in registers maintained by Kenya Port Authorities and the Police leading to loss of Kshs 19,738,037/-.
97. His duties included maintaining of a bond register at the Old Port and he entered into the register that goods from Doshi Iron Mongers Ltd had been loaded onto MV Al Rowdha, MV Al Qaclery and MV Takrim. According to the investigations, these vessels did not dock as alleged in the records.
98. The Court has found no goods were exported and further finds that these vessels did not dock and the Court finds the Respondent had and has proved valid and fair reasons to dismiss him.

Nathan Kipkemboi Barmasai

99. He was a Senior Revenue Officer based at the Old Port. The Respondent accused him of falsifying cargo receipts by stamping and signing the receipts to indicate the goods had been received at the Old Port and shipped out leading to cancellation of security bonds and leading to loss of Kshs 15,990,261/-.
100. Considering no goods left warehouse no. 204, this Claimant falsified records and the Court finds the dismissal substantively fair.

Fatuma Fadhil Ali

101. She was an Assistant Revenue Officer at Kilindini Port export section and was charged with falsifying cargo receipts by stamping and signing that the same had been received and shipped out leading to loss of Kshs 15,425,568/-.
102. The Respondent's witness stated that she was expected to physically see the export goods/trucks before endorsing the receipts/entries. The Court finds that the vessel MV Noor which she endorsed did not dock at the port and therefore she falsified records.
103. The Court finds the dismissal was substantively fair.

Appropriate remedies

Reinstatement

104. The Claimants sought reinstatement in the pleadings. With the conclusion that the dismissals were substantively fair, this head of relief does not lie.

Salary withheld during interdiction

105. Clause 9 of the Code of Conduct provides that dismissal would be effective from date of interdiction/suspension where an employee is found guilty.
106. The Claimants therefore cannot claim withheld salary during interdiction on the basis of contract. No statutory foundation was placed before Court for an award under this head.

Lost income to retirement

107. For this head of claim, the Claimants cited the authorities of *Silas Njiru Catholic Diocese of Meru v Andrew Kiruja* (2010) eKLR, *Beatrice Achieng Osir v Board of Trustees Teleposta Pension Scheme* (2012) eKLR, *James Mwathi Nguri v Egerton University* (2013) eKLR and *Johnson Kimuu Karani v EA Portland Cement Company Ltd* (2006) eKLR as the legal basis.
108. With the conclusion reached on fairness of dismissal, this relief does not lie.

Full retirement benefits

109. The Court having found the dismissals fair, full retirement benefits or balances thereof do not lie in law.

Compensation

110. Compensation is only available where the Court finds unfair termination of employment or wrongful dismissal.

Conclusion and Orders

111. From the foregoing discussion, the Court finds and holds that the dismissal of the Claimants was both procedurally and substantively fair and dismisses the Claims.

112. Principles for grant of costs in the Employment and Labour Relations Court differ from those obtaining under the Civil Procedure framework. Each party to bear own costs.

113. These consolidated Causes/files herein to be transmitted to Employment and Labour Relations Court in Mombasa after delivery of this judgment.

Delivered, dated and signed in Nakuru on this 31st day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mogaka instructed by Mogaka Omwenga & Mabeya Advocates

For Respondent Mr. Ado/ Mr. Munyalo instructed by Waweru Gatonye & Co. Advocates

Court Assistants Mugao, Ms. Midian & Nixon