



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1189 OF 2013

ELIJAH AGGREY ATSALI.....CLAIMANT

VERSUS

NAIROBI CITY WATER AND SEWERAGE COMPANY....RESPONDENT

JUDGMENT

1. The claimant in his memorandum of claim filed in this Court on 30th July, 2013 averred that he was an employee of the respondent from 1989 to 2011. By a letter dated 14th September, 2013 he claimed the respondent summarily dismissed him without any justified reasons.
2. The claimant therefore sought the order of the honourable Court directed to the respondent to rescind the dismissal or alternatively order maximum compensation for wrongful termination of employment. He further sought an order for payment of his terminal benefits in accordance with the Employment Act.
3. The respondent in its memorandum of response to the claim averred that the claimant was its employee but not from the year 1989 as alleged since the respondent came into existence in December, 2003.
4. According to the respondent, during the claimant's employment, it received complaints on three occasions that the claimant unlawfully and fraudulently received a sum of Kshs.9,000/= from the respondent's client namely Wilson Sakaza in exchange for which the claimant was to assist the client to obtain water meter without following due process as per the company policies.
5. The respondent contended that the claimant's action amounted to gross misconduct under clause 8.2.4 (g & m) of the respondent's Human Resource Policies and Procedures Manual which its employees were bound by. Further the claimant's conduct also amounted to gross misconduct under section 44(4) (g) of the Employment Act.
6. According to the respondent, after it received the complaint, it issued a notice to the claimant to show cause why disciplinary action ought not be taken against him. The claimant denied the allegations against him but admitted that he had received the said sum albeit for a purpose other than that which he had been alleged to have received.
7. The claimant was then suspended on 14th November, 2012 to pave way for investigations and during the suspension the claimant was entitled to house allowance, commuter allowance and medical benefits which were duly paid. After the investigations were conducted, it came to the respondent's knowledge

that the claimant had been involved in fraudulent activities in contravention of the law and to the detriment of the respondent.

8. The respondent further averred that in due fairness and in compliance with the rules of natural justice, the respondent duly gave the claimant an opportunity to be heard and defend himself in person before any action could be taken against him for gross misconduct. The claimant was summarily dismissed on 14th September, 2012, he appealed against the decision of the Disciplinary Committee on 26th September, 2012. The appeal was heard and the decision of the Corporate Disciplinary Committee was upheld and communicated to him on 9th July, 2013.

9. According to the respondent therefore, before summary dismissal the claimant was informed of the reasons why he was considered to have been guilty of gross misconduct and was also given a hearing to defend himself in full compliance with section 41 of the Employment Act. The dismissal was therefore lawful and the claimant has no other legal claim against the respondent.

10. In his oral evidence in Court, the claimant reiterated most of the averments in his memorandum of claim. He admitted that Sakaza asked him to find him a plumber. He wanted a private plumber to help with some private work. It was his evidence that he paid the plumber Kshs.6000/= leaving a balance of Kshs.3000/=. He stated that his dealings with Sakaza were private. He stated that he gave back the balance of Kshs.3000/= to Sakaza via Mpesa. He further stated that the Union representatives were present at the disciplinary hearing and that he was heard and defended himself.

11. The respondent's witness Mr. Peter Mwangi Kamau informed the Court that a customer complained to him that he gave money to the claimant for water reconnection. It was Kshs.9,000/=. It was his evidence that the claimants admitted he took the money and that he knew the complainant. He asked the claimant to refund the money severally but the claimant failed to do so.

12. He therefore asked the complainant to put his complaint in writing to the regional manager. The matter was investigated and at the conclusion the claimant was dismissed. It was his evidence that the claimant failed to explain why he took money from the complainant. He stated that the respondent did not outsource plumbers since it had a whole department of plumbing.

13. In his closing submissions, Counsel for the claimant submitted that the claimant was not given a fair hearing since he was not afforded opportunity to question his accusers. According to counsel the allegation against the claimant was that he solicited for a bribe from a customer yet there was no report by the said customer and neither was the customer called to assert his allegations. The claimant, according to Counsel, wrote a letter to the respondent affirming that his engagement with the customer was expressly to aid him get a plumber to undertake a private job at his residence in Ngara.

14. The respondents Counsel on the other hand submitted that the claimant did not deny that he received money from the complainant. It was however his defence that the money was for procuring a plumber for the complainant.

15. He however forwarded the money to an unknown plumber but did not produce any evidence of this. It was Counsel's contention that the fact that the customer came to the respondent's offices to complain showed that the money paid to the claimant was in relation to services provided by the respondent and not in pursuit of an independent plumber as alleged.

16. According to Counsel, the show cause letter showed clearly the allegations against the claimant and quoted the violated sections of the Human Resource Policies and procedures Manual as is required by section 41 of the Employment Act. The claimant responded to the said letter. The answer was found not satisfactory hence he was interdicted in line with the respondent's policy. He was subsequently subjected to a disciplinary committee hearing. At the conclusion of the hearing the claimant was found guilty of gross misconduct and summarily dismissed. He subsequently lodged an appeal which was heard and the decision of the disciplinary hearing upheld.

17. I have this far reviewed the pleadings, supporting documents oral evidence in Court as well as submission by Counsel and I am of the view that there was sufficient and justifiable reason to dismiss the claimant.

18. One of the pillars of employment relationship is trust and fidelity. The Court fails to understand that if indeed it be true that the claimant was to assist the complainant procure a plumber, why he had to receive money in advance and on behalf of the alleged plumber. In his own testimony in Court he stated that he forwarded Kshs.6000/= to the alleged plumber leaving him with a balance of Kshs.3000/= but this was not supported by evidence of the Mpesa transaction. Besides, assisting the customer to procure a private plumber when the respondent has a whole plumbing department placed the claimant in the position of conflict of interest with his employer for which the respondent was justified in disciplining the claimant.

19. Concerning the procedure followed in dismissing the claimant, the Court has reviewed the procedure evidenced in the pleadings, supporting documents and oral evidence in Court and is persuaded that the claimant was subjected to a fair procedure prior to his summary dismissal. The contention that he was never accorded a chance to question his accusers is not sustainable because the claimant could have as well called Mr. Sakaza as his witness since he did not deny receiving money from him to procure a private plumber. It was further his argument that Sakaza was from his village and his dealings with him were private. In the circumstances, Mr. Sakaza was more of the claimant's than respondent's witness hence it was in his best interest to call him.

20. Disciplinary proceedings in employment relationship are not like a Court trial where strict rules of evidence and procedure are followed. They are internal organizational processes conducted by management to ensure compliance with code of conduct and procedures. What is most important is that when carrying out the disciplinary process an organization must ensure that it adheres to its human resource disciplinary manual and policy where available and or the Employment Act.

21. The underlying requirement is that in dismissing an employee, there must be justifiable reasons for doing so and in carrying out the dismissal, due process must be followed in accordance the fundamental requirement of natural justice that a person should not be condemned unheard.

22. Once these requirements are met, this Court has not business recalling for interrogation such dismissal. The claimant herein was issued with a show cause letter to which he responded. He was subsequently interdicted and later called for a disciplinary hearing in the presence of his Union Officials. He further admitted in evidence that he was given a chance to defend himself at the disciplinary hearing. The Disciplinary Panel summarily dismissed him after hearing him. He appealed and the appeal was found unmerited and the dismissal upheld. No reasonable Court can in the face of the way the claimant's issue was handled say that due process was not followed.

23. The upshot of all this is that this claim fails and is hereby dismissed with costs.

24. It is so ordered.

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge