



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 974 OF 2011

CHRISPINUS OUMA OKIYA CLAIMANT

VERSUS

THE CITY COUNCIL OF NAIROBI 1ST RESPONDENT

THE HON. ATTORNEY GENERAL FOR

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

Mr. Namada for the Claimant

Mr. Waititu for the 1st Respondent

Mr. Maina for the 2nd Respondent

JUDGMENT

1. The Claimant was employed by The City Council of Nairobi the 1st Respondent as a watchman on 25th June 1987. He worked continuously until 1997 and was deployed as a driver in the Department of Health.
2. The Claimant was summarily dismissed on 19th September 2005 on allegations of siphoning fuel unlawfully from the motor vehicle he was assigned to drive.
3. Prior to the dismissal, the Claimant was suspended on 30th July 2003, on allegations of theft by servant. The Claimant was arrested and charged in Court in **Criminal Case No. 1270/2003** together with a co-worker.
4. The Claimant and his co-accused were acquitted due to lack of concrete evidence linking them to the offence.

The Claimant was subsequently summarily dismissed from service based on the same allegation of theft of fuel. The co-accused was not dismissed from work, but was allowed to retire and was paid his terminal benefits.

5. The Claimant sought to get himself reinstated to his work in vain. This was in spite of a decision by The Joint Staff Committee on 17th November 2006- under minute 117/11 based on the facts given by the Union and the acquittal by the Magistrate Court.
6. The Appeal against the dismissal and a review by the Public Service Commission confirmed the summary dismissal.
7. The Claimant states that he was summarily dismissed unlawfully and unfairly in that the summary

- dismissal was not for a valid reason and the summary dismissal was not effected in terms of a fair procedure.
8. The Claimant explained to the Court in his sworn testimony that on the material day, the 23rd May 2003 he drove motor vehicle Reg. No. G.K. 996 in Industrial Area, Nairobi.
 9. At around 11 a.m. the motor vehicle got spoilt in that fuel was not flowing and he drove it to the nearest garage. While at the garage, Council Askaris appeared and accused the Claimant of siphoning fuel from the motor vehicle. The Claimant was arrested and taken to Court together with the mechanics who were inspecting the motor vehicle.
 10. In the motor vehicle was found, twenty (20) litres of petrol, which the Claimant stated was taking to his colleague at the City Hall to help jump start his car. The colleague's name was Mr. George Kahuno. His motor vehicle was grounded and parked in the under ground parking of City Hall. The Claimant produced a gate pass to allow him carry fuel in a jerrican. The gate pass was given by the Chief Engineer. The Claimant also produced a letter requesting purchase of the fuel. It was not stolen fuel therefore.
 11. The Claimant made a written explanation to the employer on 9th October 2003. He was not called to a hearing to defend himself until he was summarily dismissed. The Claimant told the Court that he was acquitted under **Section 210** of the Criminal Procedure Code. He was not put on his defence. A *prima facie* case was therefore not made against him.
 12. It is the Claimant's case that the Council should not have summarily dismissed him after the acquittal and having not conducted a disciplinary hearing against him, hence the plea by the Public Complaints Standing Committee to have the Claimant reinstated on 14th November 2008. This was however refused by a letter dated 2nd December 2008.
 13. The Claimant seeks the following orders;
 - i. declaration that the summary dismissal was wrong, unfair and unlawful;
 - ii. declaration that the summary dismissal was too harsh and extreme and the same be set aside;
 - iii. that the claimant be re-instated to his job at his then scale and service;
 - iv. the Claimant be paid all his unpaid salary and allowances for the period he has been out of service.

14. In the alternative;

- i. An order to issue that the Claimant be paid all his terminal benefits computed as follows;
 - a. Compensation equivalent to twelve (12) months salary (12 x 8,427) – 101,124.
 - b. Salary for the month of May 2003 to September 2005 (16 months when he was under suspension and interdiction) while the Criminal case was on-going in the sum of Kshs.134,832.00.
 - c. Retirement benefits he would have been entitled to had he worked and retired normally as computed under the law.
- i. Cost of the suit;
- ii. Interest on (i) and (ii)

Statement of Response

15. The 1st Respondent filed an Amended Memorandum of Reply on 17th July 2012 together with supporting documents.
16. The Respondent also adduced oral testimony of RW1, Mr. Tom Nyabisa, Nyatika, Principal Administration Officer in-charge of Employee Relations and RW2 Harrold Avisa Kicuhi, Public Management Officer, Public Service Commission.
17. RW1, testified that the Claimant was lawfully summarily dismissed because he was caught siphoning fuel from a Government car he was assigned to drive. He was interdicted on 27th July 2003 and he responded to the charges on 9th October 2003. A disciplinary hearing was held and a decision to summarily dismiss the Claimant for gross misconduct and neglect of duty was reached.
18. RW2, testified on the Appeal process.

The Appeals then were referred to the Public Service Commission. The 1st Respondent relied on delegated powers in terms of **Clause 32(1)** of the Public Service Commission Local Service Officers Regulations.

19. The Appeal and Review were dismissed on the basis of evidence.
20. RW2 stated that; the Claimant was not duty bound to drive a faulty vehicle. If the motor vehicle broke on the way as he alleges, the Claimant ought to have reported to the Chief Administrative Officer of the Department. The Claimant did not report. If a report was made, The Chief Administrative Officer would have prepared the necessary documents to have the vehicle taken to The City Council Central Garage where all Council vehicles are examined for repair. What the Claimant did was irregular.
21. RW2, stated that disciplinary proceedings are separate and distinct from criminal prosecution. The Standard of prove is different. An acquittal does not necessarily exonerate the Claimant in the disciplinary proceedings.
22. RW2, denied that George Kaugo, the co-accused of the Claimant was retired and paid retirement benefits. RW2 explained that a Retirement notice had been made in error but the same was subsequently rescinded.
23. RW2, further stated that the Claimant, upon summary dismissal was not entitled to any terminal benefits. The Claimant was a member of the Local Authority Pension Fund and he is entitled to payment of retirement benefits from the Pension Fund and not from the Respondents. That the Claimant should demand the pension through the Nairobi City Council, now the Nairobi County Government.
24. The Claimant must initiate the process which involves the clearance with all departments and Kenya Revenue Authority.
25. RW2, stated that the Claimant was owed 19^{1/2} leave days and he was paid salary up to 31st July 2003.
26. RW2, concluded that the Claimant was dismissed for a valid reason and in terms of a fair procedure and the suit be dismissed.

27. Determination

The Court is not satisfied with the explanation given by the Claimant regarding the happenings of 23rd May 2003, when he diverted a Government motor vehicle to a private garage allegedly for repair.

28. The Court accepts the evidence by RW1 that if the vehicle had broken down as alleged by the Claimant, then he ought to have initiated the process to get the motor vehicle to an authorized garage for the repair of Government motor vehicles.
29. No Government driver has the discretion to take a broken motor vehicle to a garage of choice as the Claimant did the material day. To make it worse, the Claimant was found with a jerrican full of petrol. The explanation the Claimant gave to the Court is not satisfactory.
30. The 1st Respondent had a valid reason to summarily dismiss the Claimant from employment.
31. The 1st Respondent followed the laid down procedure in disciplining the Claimant.
32. The Claimant was allowed a 1st and 2nd Appeal to the Public Service Commission, who confirmed the decision to summarily dismiss the Claimant.
33. The Claimant is entitled to payment of pension from an independent institution from the 1st Respondent. The Claimant should therefore initiate the clearance process to enable him access his retirement benefits from the pension fund.
34. The Court restates that the fact that an employee has been acquitted by the Court in a criminal trial does not automatically exonerate him / her from a finding of guilt in a disciplinary hearing conducted before or after the conclusion of the criminal trial.
35. These are two separate processes. The standard of proof in a criminal trial is much higher and is beyond reasonable doubt whereas the standard of proof in a disciplinary hearing is on a balance of probabilities. This is a settled legal position in most jurisdictions including ours.
36. However, since the Respondent kept the Claimant under suspension pending the hearing and

determination of the Criminal case, from May 2003 to September 2005, the Claimant is entitled to payment of Kshs.134,832.00 being salary payable to him during the period. The Court therefore awards the Claimant accordingly.

37.The Claim for compensation for unlawful dismissal is dismissed.

38.The Award of Kshs.134,832.00 is payable with interest at Court rates from to date until payment in full.

39.The Claimant being partly successful is entitled to the costs of the suit.

Dated and Delivered at Nairobi this 3rd day of July, 2015.

MATHEWS NDUMA NDERI

PRINCIPAL JUDGE