



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 274 OF 2013

JOSEPHAT MUKHWANA WASWA.....CLAIMANT

v

MOI TEACHING & REFERRAL HOSPITAL..... RESPONDENT

JUDGMENT

1. Josephat Mukhwana Waswa (Claimant) was offered employment as a Security Guard II by Moi Teaching & Referral Hospital (Respondent) through a letter dated 5 April 2001.
2. On 2 April 2011, the Respondent issued him with a suspension/show cause letter. The letter informed the Claimant of some 4 allegations/charges and requested him to make written representations within 7 days.
3. The Claimant responded to the allegations through a letter dated 5 April 2011. He wrote another letter on 14 August 2011 to the Chairlady of the Respondent's Disciplinary Committee.
4. On 20 December 2012, the Respondent wrote to the Claimant informing him that he had been summarily dismissed with effect from 18 December 2012.
5. Consequently, the Claimant commenced legal action against the Respondent on 26 August 2013 alleging that his suspension and eventual dismissal amounted to unfair labour practices and unfair termination.
6. The Respondent filed a Response on 15 October 2013 and List of Documents on 27 March 2014.
7. The Cause was heard on 17 April 2015 and 28 April 2015 and on 12 May 2015, the Claimant filed his written submissions while the Respondent filed its submissions on 28 May 2015.
8. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the suspension of the Claimant was lawful, whether the summary dismissal was unfair and appropriate remedies.*

Whether suspension was lawful

9. Suspension of an employee must have either a contractual or statutory basis to be lawful, otherwise it would be a breach of contract (see *McKenzie v Smith* (1976) IRLR 345) and which I endorse as setting the correct legal position under the common law even in our jurisdiction).
10. The Claimant's offer of appointment provided that the appointment would be subject to terms and conditions of service which would be made available in a separate document.
11. That separate document appears to be Moi Teaching and Referral Hospital Terms and Conditions of Service Booklet which the Claimant produced as exhibit 4.
12. Part XI of the document provides for interdictions, suspensions and criminal charges.
13. Clause 16.11.2 provides for suspensions in the following terms

I) Where an employee has committed a criminal offence, the Director shall order for his suspension from the exercise of his duties, pending consideration and determination of the

case. II) While an employee is under suspension, he will not be entitled to any salary but the Director may on application, grant an allowance as he may deem appropriate.

14. The Claimant's suspension letter accused him of failing to perform his assignments properly and carefully; being involved in corrupt practices, abuse of office and being suspected of committing a criminal offence.
15. In my view, some of the allegations (abuse of office, corrupt practices), if proved would amount to criminal offences and on that account the Respondent was entitled to suspend the Claimant. The relevant provision of the Terms and Conditions of Service did not make it a requirement that the offences be proved in a Court of Law before suspension. The suspension is to allow consideration and determination of the case.
16. In the pleadings, the Claimant also challenged the suspension on the ground that it was done by an Acting Director, while the Terms and Conditions of Service envisaged a Director suspending an employee.
17. In my view, this contention is misplaced and was the Court to accede to it would be tantamount to interfering with an employer's managerial prerogative. Unless expressly barred from so acting, an Acting Director of a public institution such the Respondent can lawfully carry out the functions of the Director as far as discipline is concerned.

Whether summary dismissal was unfair

Procedural fairness

18. I have previously considered the essentials of procedural fairness as demanded by section 41 of the Employment Act, 2007.
19. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd* (2013) eKLR, I discussed what section 41 entails as follows

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

20. The process/hearing can be conducted through correspondence, face to face interaction or both (see Nairobi Civil Appeal No. 108 of 2010, *Menginya Salim v Kenya Revenue Authority*).
21. The Claimant was also a member of a Union and the disciplinary procedures agreed with the Union would also be applicable in his case but unfortunately, no copy of any collective bargaining agreement was produced.
22. The Claimant was informed of 4 allegations against him through the suspension/show cause letter. The letter requested him to make representations within 7 days which he did.
23. The Respondent appears not to have been satisfied with the written explanations and a face to face hearing was conducted.
24. According to the testimony of the Claimant, he attended a hearing in August 2012 and was told to wait for further communication which came through the dismissal letter.
25. The Respondent's witness Fredrick Kosgey stated that the Claimant was invited to a hearing on 14 August 2012 and he attended and made representations but the hearing was not concluded and was adjourned.

26. He stated that the Claimant was called on phone to attend the resumed hearing on 3 December 2012, but he did not show up. An Internal Memo dated 28 November 2012 giving instructions to the Head of Telephone Operations to call the Claimant was produced. It had names of several employees facing disciplinary action and their telephone numbers.
27. According to the Memo, the Claimant was called on number 0735 62 96 99 at 12.57 pm.
28. The minutes of the hearing on 3 December 2012 were produced. Among those present were a shop steward, Paul Athing and Chairman of KUDHEIHA, Anyona Mokuu.
29. The minutes of the hearing in August 2012 indicate that the Claimant made representations and was cross examined. The Committee again adjourned the hearing to allow further investigations and calling of other witnesses.
30. But because of the Claimant's absence, the Committee recommended that he be dismissed.
31. After the dismissal, the Claimant appealed to the wrong authority and he was advised to direct an appeal to the correct office. There was no suggestion that he made an appeal to the correct office.
32. With the versions given, the Court must determine whether the Respondent complied with both the statutory and contractual provisions on disciplinary action.
33. The Claimant was informed of the allegations. He was given 7 days to respond and he did. He appeared at a face to face hearing and made representations. The hearing was adjourned and he was notified of the new date on phone but did not attend.
34. The Court is satisfied that the Respondent complied with the statutory minimum protections granted to employees. At the adjourned hearing, 2 Union representatives were present. Also present were other employees facing disciplinary action named in the Memo given to the Head of Telephone Operations to summon.
35. The Court is satisfied that the Claimant was given an opportunity to make representations at the adjourned hearing but failed for unexplained reasons to make use of the opportunity.
36. The summary dismissal was procedurally fair.

Substantive fairness

37. It is upon the employer to prove the reasons for dismissal (section 43 of the Employment Act, 2007) and that those reasons are valid and fair (section 45 of the Act).
38. The charges against the Claimant were outlined in the suspension letter. In his rambling letter of response, the Claimant admitted the charges. He wrote,

As principles of fact, sir, I was under duress and undue influence of the other persons having knowledge that they were in a position to dominate my will and use that position to obtain an unfair advantage.

My recent confession to the hospital ISO auditors excited agreed (sic) deal of prejudice against me among my colleagues and that was the cause of great persecution all united to persecute me.....

But strange or not, so it was and it was often the cause of great sorrow to myself having suffered damage as a result partly of my own fault and partly of the fault of other persons.

39. In his letter of appeal dated 14 August 2012, the Claimant again confessed. He wrote

I can recollect that Mr. Kosgei appealed to me on some divers dated (sic) and enticed me into giving in to this scam by assuring me that I was to get Kshs 10,000/- since Mary had liaised with the supplier....

40. The Claimant made a heartfelt appeal for leniency.
41. The Claimant did not contend that he was coerced to confess by persons in authority over him. They were his colleagues who were co-conspirators. With the Claimant's confession of his role, the Court can only reach the conclusion that the summary dismissal was fair.
42. It is true the Claimant sought for clemency. The Respondent appears not to have wanted to temper its decision with mercy. That decision, the Court cannot fault.

Appropriate remedies

3 months salary in lieu of notice

43. With the conclusion reached, this head of relief is declined.

12 months compensation

44. This head of relief equally does not lie.

Salary during suspension

45. The Terms and Conditions of Service does not provide for what happens to withheld pay during suspension unlike interdiction.

46. The Court must therefore revert to the common law. Under the common law, the employer's obligation is primarily to pay wages and not provide work. During the suspension period, the employee remains under the control of the employer.

47. In this regard, the Claimant is entitled to the wages he would have earned during the suspension period. He computed the same as Kshs 170,586/- and the Court grants him the same.

Conclusion and Orders

48. The Court finds and holds that the suspension and eventual summary dismissal of the Claimant was procedurally fair and grounded on fair and valid reasons, and the Claimant is not entitled to pay in lieu of notice, or compensation under section 49(1)(c) of the Employment Act, 2007.

49. However the Claimant is entitled to wages during suspension and the Court awards him and orders the Respondent to pay him Kshs 170,586/-.

50. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 3rd day of July 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Mukira instructed by Wambua Kigamwa & Co. Advocates

For the Respondent Mr. Mbatia instructed by Mburu Maina & Co. Advocates

Court Assistant Nixon