



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 74 OF 2013 CONSOLIDATED WITH CAUSE 104 OF 2013

MICHAEL MUCHOKI MWANGI.....1ST CLAIMANT

AND

STEPHEN GACHUGI MUTHOGA.....2ND CLAIMANT

VERSUS

OTHAYA MUKURWE-INI WATER SERVICES COMPANY LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 9th October, 2015)

JUDGMENT

The 1st claimant filed the memorandum of claim on 11.07.2013 through Karweru & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the plaintiff's dismissal was unlawful, discriminatory, malicious and lacked bonafides.
- b. One year salary being Kshs.1,100,040.00 being general damages.
- c. Payment of 15 days worked, gratuity for 1.05.2012 to 15.11.2012 at 16% basic salary, 150 leave days, and one month in lieu of notice.
- d. Costs plus interest.

The amended memorandum of claim was filed on 11.09.2013 introducing a further prayer for payment of salary from November 2012 to June 2013 at Kshs. 91,670.00.

The respondent filed on 16.09.2013 the response to the amended memorandum of claim through Kahari & Kiai Advocates. The respondent prayed that the 1st respondent's case be dismissed with costs.

The 2nd claimant filed the memorandum of claim on 23.09.2013 through Karweru and Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the plaintiff's dismissal was unlawful, discriminatory, malicious and lacked bonafides.
- b. One year salary being Kshs.782,040 being general damages.
- c. 58 leave days not taken, arrears in pension contributions Kshs. 216, 112.00, prorate pension contribution Kshs.63,199.00 and Kshs. 126,241.00 for July 2011 to May 2013 for employee and

employer respectively, and salary arrears from November 2012 to June 2013 at Kshs.52,990.00.
d. Costs plus interest.

The response to the 2nd claimant's memorandum of claim was filed on 06.11.2013 through Kahari & Kiai Advocates. The respondent prayed that the suit be dismissed with costs.

The suits were consolidated on 14.11.2013.

The respondent employed the 1st claimant as an accounts assistant in March 2007. The respondent promoted the 1st claimant to commercial manager in May 2007. His last gross monthly salary was Kshs. 91, 750.00. The 2nd claimant was employed by the respondent as an accountant on permanent basis effective sometimes in 2010.

The respondent's case was that in August 2012 internal auditors discovered some irregularities on payments concerning motor vehicle maintenance, servicing and fuelling. The auditors discovered irregularities concerning gross misuse of fuel through improper procurement and payments amounting to loss of Kshs.870,962.00. Two members of staff from procurement department and two members of staff from accounts section were implicated. The claimants were the two members of staff from the accounts section.

The audit report was given to the four officers. They were invited to make their written representation. The report together with the claimants' responses was tabled before the respondent's audit and governance committee meeting held on 9.11.2012. The committee recommended that the four officers be summarily dismissed and they be surcharged in view of the losses incurred by the respondent. The respondent's board meeting of 14.11.2012 upheld the committees' recommendations. The claimants then received the letter of summary dismissal dated 15.11.2012.

Being dissatisfied with the turn of events, the claimants appealed against the summary dismissal. The respondent's board invited them to a hearing of the appeal and subsequently lifted the summary dismissal and substituted it with the dismissal.

The **1st issue** for determination is whether the termination was unfair. The court has considered the evidence and the flow of events. It is obvious that the initial summary dismissal had been imposed without affording the claimants a hearing as envisaged in section 41 of the Employment Act, 2007. Subsequently and upon the appeal, the respondent gave the claimants a hearing. The court finds that the respondent corrected the procedural unfairness when the summary dismissal was set aside with full release of the withheld pay and substituted with the dismissal after hearing the claimants. The court finds that the need for notice and a hearing as provided for in section 41 of the Act was complied with.

The next consideration is whether the reason for termination was valid as envisaged in section 43 of the Act. The accusation as levelled was that the claimants as accountants and their accounts department failed to authenticate the correctness and genuineness of payment vouchers leading or contributing to the loss in issue. The claimants' defence in that regard was that fuel orders were issued by procurement department, request for payment was forwarded to the managing director's office for approval and, once approved the accounts department processed the payment voucher as per approved cash. Thus, it was the claimants' case that control measures be instituted in the procurement department as the accounts department was not to blame.

The court has perused the record and there is no reason or explanation to doubt the claimants' defence. Accordingly, the court finds that as at the time of the termination, the respondent failed to establish a valid reason for termination and the termination was unfair for want of a valid reason. The court has considered the previous record of service which shows grievances against the claimants. The court has considered that the termination was otherwise procedurally fair. Thus the court awards each claimant 6 months' gross salaries for unfair termination being **Kshs.550, 020.00** for 1st claimant at Kshs.91,670.00 per month and, **Kshs.317, 940.00** at Kshs.52,990.00 per month for 2nd claimant.

The court finds that 1st claimant is further entitled as follows:

- a. One month pay in lieu of termination notice **Kshs.91,670.00**.
- b. 15 days worked in November 2012 and not paid **Kshs.45,835.00**.
- c. Salary for November 2012 to May 2013 during which the summary dismissal imposed was lifted making **Kshs.614, 690.00**.
- d. At time of summary dismissal the 1st claimant was on annual leave and there was no evidence that he had pending leave days as claimed and the prayer for pay of leave days will fail. In particular the claimant served on renewable term contracts and he claimed leave beginning 2007 and with respect to term contracts that had already lapsed. The court finds that such claims for leave days were unfounded.
- e. As termination was unfair the 1st claimant is entitled to gratuity at 16% basic salary for 1st May 2012 to 15th November 2012 as prayed for being $16\% \times 6.5 \times 37,713$ making **Kshs.39,221.52**.
- f. Less paid amount of **Kshs.158,824.00**.

The court finds that 2nd claimant is further entitled as follows:

- a. The 2nd claimant showed in his evidence that he did not take 58 leave days and the respondent failed to rebut that testimony and the claimant is entitled to **Kshs.102,447.00** as claimed and submitted for him.
- b. The 2nd claimant is entitled to **Kshs.288,141.00** being salary arrears for November 2012 to May 2013, the period of lifted summary dismissal.
- c. He is entitled to **Kshs.52,990.00** being one month pay in lieu of the termination notice.
- d. Less paid amount of **Kshs.95,557.00**.

For avoidance of doubt, the court finds that the imposition of the surcharge against the claimants with respect to the lost money was unjustified because, in the court's findings, the loss was not attributable to the claimants.

In conclusion judgment is entered for the claimants against the respondent for:

1. The declaration that the termination of the employment of the 1st and 2nd claimants by the respondent was unfair.
2. The respondent to pay the 1st claimant **Kshs.1,182,612.52** and the 2nd claimant **Kshs.665,961.00** by 1.12.2015 failing interest at court rates to be payable thereon till full payment.
3. The respondent to pay claimants' costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 9th October, 2015.

BYRAM ONGAYA

JUDGE