



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE 258 OF 2015

ECKLA JESANG KIROP.....1st CLAIMANT

KEN OBALA OAGA.....2nd CLAIMANT

FAITH WALEGWA KWANYA.....3rd CLAIMANT

RICHARD ATANDI JOHN.....4th CLAIMANT

VERSUS

KENYA PORTS AUTHORITYRESPONDENT

JUDGMENT

Introduction

1 The first claimant brought this suit on 22.4.2015 seeking the following orders:

a) A declaration that the respondent's intended dismissal of the claimant conveyed in the letter of show -cause dated the 17th February 2015 is unfair, und procedural and against the law governing employment and breach of the Constitutional rights of a fair hearing.

b) An order of permanent injunction restraining the respondent whether by itself, its servants or agents from continuing with the disciplinary action commenced against the claimant and future case from continuing to threaten the Employment and livelihood a of the claimant without following due process and laid down law.

c) In the alternative a prohibitory order directed at the respondent by itself, their servants, agents or any one acting on its behalf however from dismissing the claimant from employment.

d) Costs of the suit.

2 The second claimant brought suit ELRCC 302 of 2015 on 8.5.2015 and the Third and fourth claimants brought suit number ELRCC 319 of 2015 and 320 of 2015 respectively on 14.5.2015. The facts and the reliefs sought in the said suits are similar to the ones in this suit as such the parties agreed to the four suits being consolidated under this file. In addition the parties agreed to dispose the suits on the basis of the pleadings and written submissions.

Claimant's Case

3 The claimants are all employees of the respondent for a long time. They were employed at lowest ranks serving as casual workers then elevated to contract workers and finally confirmed on permanent and pensionable terms. That the reason for such systematic promotion, according to the claimants, is attributable to their capacity to work, acquired from experience and training.

4 In April 2015, the claimant were served with show cause letter dated 17.2.2-015 giving them 72 hours to show cause why they should not be dismissed from their employment for presenting forged academic certificates to the respondent for purposes of employment and career advancement. That the said letter was as a result of an alleged investigations which did not involve the claimant. In addition the said show cause letters were issued under section 10 of the KPA Disciplinary Hand book 2015 which had not yet come into force.

5 The claimants denied the alleged offence of presenting forged documents to the respondent and contended that the intended disciplinary process is unfair and it should be stopped permanently by injunction because it infringes on the claimant's right to hearing, fair labour practice, right to be presumed innocent, right to reasonable and fair procedure and the right to protection from retrospective application of the respondent's regulations.

Respondent's Case

6 On the other hand, the respondent denies any wrong doing in serving the claimants with the show cause dated 17.2.2015. She avers that she did investigations into the academic certificates presented to her by the claimants for purposes securing employment or promotion, and confirmed from the Kenya National Examination Council (KNEC) that the certificate were forged. That the first claimant, ECLA KIPROP neither registered nor sat for KCSE at Chaptulon Secondary school. That the code number for Cheptulon secondary school is 520108 and not 58038 reflected on the KCSE certificate presented by the 1st claimant. That there never existed examination centre number 58038 in 1995.

7 The 2nd claimant, Ben Oballa registered and did KCE in 1981 at Thika Technical school and scored a Division IV. He however altered all the subject grades to make the overall result to be a Division II. Likewise the 3rd claimant, Faith Kwanya Walegwa registered and did KCSE in 1992 and altered subject grades for English, Kiswahili, History and Government, Geography, Mathematics and Biology. Consequently the overall mean Grade was altered from D+ (plus) to C (Plain). Lastly the 4th claimant, Richard Atandi John, neither registered nor sat KCSE in 1990 at Subukia secondary school whose examination center number in 1990 was 52023 as opposed to 11004 indicated in the KCSE certificate presented by the 4th claimant. That the code number 11004 was for Dr. Aggrey High School. Consequently, the respondent avers that the claimants must undergo disciplinary proceedings and she has filed a counter claim seeking declaration that the claimants be subjected to the Disciplinary procedure as provided in the Disciplinary Handbook. That even if the Disciplinary Handbook 2015 has not come into force, the claimants should be punished for misconduct.

Analysis and Determination.

8 There is no dispute that the claimants are employed by the respondent. That they presented academic certificate to the respondent for purposes of security employment and promotions. That the respondent has done investigations on the academic certificates presented by the claimants and verified from the KNEC that the form four certificates (KCE and KCSE) presented were not genuine but forged. That the 1st and 4th claimants neither registered nor sat for the KCSE as per the respective KCSE certificate they presented to the respondent. That the 3rd and 4th claimants registered and sat for KCE and KCSE in 1981 and 1992 respectively but they altered the Subject Grades leading to overall alteration of their mean Grades from Division IV to Division II and from D+ (plus) to C (Plaint) respectively. Lastly, it is a fact that the disciplinary process under review has been initiated by the respondent under the respondent's Disciplinary handbook of 2015. The issue for determination are:

- a) whether the KPA Disciplinary Handbook 2015 has become effective.

- b) whether the respondent is entitled to take disciplinary action against the claimants.
- c) whether the court should interfere with the said disciplinary process.
- d) whether the counter claim should be allowed.

Disciplinary Handbook (2015)

9 Mr Akanga, learned counsel for the claimants submitted that the respondents Disciplinary Handbook (2015) has not yet come into effect and relied on the documents filed on 8.7.2015 to support the forgoing contentions. He maintained that only disciplinary Handbook (2008) was applicable to the case of the claimant's disciplinary process.

10 In response, Mr Sangoro, learned counsel for the respondent submitted that the Disciplinary handbook (2015) was passed by respondent's 306th regular Board meeting which was held on 2.2.2015 and it was issued pursuant to special notice No.2 of 2015 and published through the internet and website. That the members of staff were to download it and familiarize themselves with it pending printing of hard copy after the completion of the Human Recourses manual in order for the two documents to be merged. In the alternative, the defence counsel submitted that, even if the disciplinary handbook (2015) was not yet in force, the employees were still subject to disciplinary action and investigations for presenting forged academic certificates to the respondent to secure employment.

11 The special notice No.2 of 2015 was addressed to General Managers Head of Department, and all the Principal Officers and the Pensions Administration in Kenya, Uganda, Rwanda and Burundi. The Notice is repeated below:

"RE DISCIPLINARY HAND BOOK 2015

During the 306th regular meeting of the Board held on 2nd February 2015, the Board approved amendments and adopted the KPA Disciplinary Handbook of 2015.

Attached find the soft copy of the handbook for your implementation.

Plan are underway to merge the handbook with the HR Manual whose review is ongoing. Once approved, printed copies of the merged manual will be made available.

It is therefore important for you to familiarize yourselves with the provisions of this Handbook.

Kindly bring the contents of this circular and the attached Handbook to the attention of all staff working under you.

Amani Y Komora

Head of Human Resources

FOR: GENERAL MANAGER

HUMAN RESOURCES & ADMINISTRATION

10th February 2015".

12 In this court's view, the Disciplinary Handbook 2015 came into effect on 2.2.2015 when it was approved

by the respondents 306th Regular Board. The notice was an instruction to the persons to whom it was addressed, to notify all the staff working under them about the new Disciplinary handbook and to implement it. There is no ambiguity in the wording and the meaning of contents of the notice. Consequently, the court finds and holds that the Disciplinary Handbook was already in force when the respondent wrote and served the show cause letter dated 17.2.2015 on the claimants. It is therefore applicable in conducting disciplinary hearing in respect of the claimant's alleged misconduct. The said Handbook is capable of being applied independently and does not depend on the intended new HR manual for its applications.

13 In view of the foregoing finding that the Disciplinary Handbook 2015 is operational, the court finds no merits in the claimant's suit. The suit was brought on the basis that the disciplinary process against the claimants was founded on a non-existent Disciplinary Handbook. That if the Disciplinary Handbook 2015 was in force, the claimants would have submitted themselves to the process. Their counsel submitted as follows while concluding his oral submissions on 23.9.2015:

“The reason why we are here is because the court will independently determine whether the 2015 Handbook is in force. If the court decides that the Handbook is in force, the claimants will go back to the employer for internal process.”

14 A counsel is presumed to be acting on his client's instructions when he addresses the court. Consequently, the court takes the submissions by the counsel to mean an undertaking from the claimants that they are ready to face disciplinary hearing before the employer if the court declares that the Disciplinary Handbook 2015 is in force. That is what they should prepare to do because the handbook is in force.

Respondent's Right to Discipline the Claimant.

15 The claimants never challenged their employer's right to discipline them. Their quarrel was only about the applicable Disciplinary Handbook between the one for 2008 or 2015. Even if the claimants were still objecting to the disciplinary hearing by the employer, this court would still have declared that the respondent as their employer has the right to subject them to disciplinary process. The right of the employer to discipline their employees for misconduct is underpinned in Section 44 of the Employment Act (EA) and the contract of employment. In addition, the procedure for carrying out the disciplinary process is also provided for under section 41 of the EA and the regulations published by the employer in the form of the HR manual and Disciplinary handbooks.

16 Section 41(1) of the EA requires that before an employer dismisses his employee on ground of misconduct, poor performance or physical incapacity he must explain, to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. Section 41 (2) of the EA then provides that:

“ (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee under section 44 (3) or (4) hear and consider any representation which the employee, and the person, if any, chosen, by the employee within subsection (1) make”

17 The reason upon which the respondent is considering dismissing the claimants is that they presented a forged academic certificate for purposes of securing employment or promotion. That is obviously a crime against the employer within the meaning of section 44 (4) (g) of the EA. Section 44(4) provides for matters which amount to gross misconduct and which justify summary dismissal including if:

(g) an employee commits or on reasonable sufficient grounds is suspected to have committed, a criminal offence against or to the substantial determinant of his employer or his employer's property.”

18 In view of the legal provisions above, the court finds and hold that the employer has the unfettered right to discipline his employees provided that he adheres to the rules of fairness established under the rules of natural justice and the Law.

Jurisdiction to stop or interfere with the disciplinary process.

19 Under section 12 of the ELRCA this court enjoys unlimited original and appellet jurisdiction in all disputes related to employment and labour relations. It can therefore stop and even interfere with disciplinary process if the employee or his union demonstrates a good reason for that. This reasoning was shared by Radido J in **ELRC No.24 of 2015 Kenya Plantation and Agricultural workers Union Vs Finlays Horticulture Kenya Ltd (2015) e KLR** when he held that:

“from the authorities, it is clear that the court has the jurisdiction to intervene in a disciplinary process, but such intervention must be in very exceptional cases where compelling reasons have been given to justify the court’s intervention. The compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee had no alternative means of attaining justice or remedies.”

20 In the present case, the claimants were only served with a letter to show cause why they should not be dismissed for presenting forged documents to the respondent for purposes of securing employment or promotion. They were to do so by writing a reply within 72 hours after receipt of the show cause letter. The letter provided for a space for the claimants to acknowledge receipt and date of the receipt. That was just the starting part of the claimant’s disciplinary process. Therefore no compelling reason to warrant the orders sought by the claimants in their suit was demonstrated. There is no injustice done yet or shown to be likely to be done in the disciplinary process for the claimants. Consequently, the court finds and holds that the suits have been brought prematurely. The claimant are therefore at liberty to subject themself to the disciplinary process initiated by the respondent and if they find the outcome unfair, they can sue the respondent.

Counter Claim

21 The court has already declined to grant the claimant’s reliefs and given them the liberty to subject themselves to the disciplinary process. The court does not think that it is necessary to compel the claimants to subject themselves to the disciplinary process as prayed in the counter claim. They have the liberty to choose whether or not to comply with the show cause letter within 3 days of this judgment if all they had not done so already. They should however know that choices have consequences.

Disposition

22 For the reasons stated above, both the suit and the counter claim are dismissed. Each party to bear his or her own costs.

Signed, Dated and Delivered at Mombasa this 18th day of November 2015.

ONESMUS MAKAU

JUDGE