



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1439 OF 2010

CHARLES OYUNGE ONKWARE CLAIMANT

VERSUS

TELKOM KENYA LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute is the unfair termination of employment and refusal to reinstate or payment of terminal dues to the claimant.
2. The claim is that the Claimant was employed by the Respondent on 4th March 1991 as a Supplies Officer and was governed by the Service Regulations which were in force from time to time. The Claimant was entitled to a leave allowance of kshs.800.00; housing at subsidised rent or an allowance of kshs.2, 800.00per month. The Claimant served diligently and earned promotions and salary increases to kshs.78, 556.00 when he was terminated on 13th October 2009. The reasons given for termination were that the Claimant was negligent and dishonest. The Claimant was given 48 hours to defend himself and was never heard by the board as required under the Respondent regulations. The Claimant was threatened with disciplinary action if he failed to submit his defence as directed. This was contrary to procedure, as the Claimant being a senior officer of the Respondent should have been heard by the Board but was directed to Anne Mariuki for Head of Human Resources. The termination was therefore unlawful as the Claimant was not heard in accordance with the regulations set by the Respondent as the letter of termination was signed by Mary Kita Nalinya for the Chief Executive officer instead of being signed by the board and thus it was unlawful.
3. Upon termination, the Claimant lodged an appeal to the board but contrary to regulations the matter was handed to the Appeals Committee instead of the aboard and thus the procedure was unlawful. In his appeal the Claimant defended himself and noted that his termination on the grounds of negligence arose from bad blood between him and his boss after working for 19 years without any bad record. Where there was misreporting of figures this was used as an excuse for termination as in the past such matters were resolved.The noted errors had been made by the Storeman and were excusable. There was no loss of Kshs. 30 million as alleged.
4. That the appeal was dismissed and the termination confirmed. Due to the illegalities of not following the internal regulations, the Claimant was unlawfully terminated. The Claimant is seeking to be reinstated back to his position and payment of his dues for one month notice; salary for 13 days worked in October 2009; 28 leave days; compensation; service pay; and all amounting to kshs.1, 492,564.00. The Claimant is also seeking a certificate of service that was not issued to him; pension benefits and any other lawful dues owing to him.

5. In evidence, the Claimant supported his claim and relied on his witness statement filed on 30th September 2015.

Defence

6. The defence is that the Respondent admit that they had employed the Claimant and his service was regulated under the Service Regulations. Due process was followed in terminating the claimant's employment and on grounds of negligence and dishonesty. He was given sufficient time to be heard and he made presentations to the Respondent management Board of directors but was not sufficient. The issue as to who signed the termination letter is a non-issue and the law was followed. The Respondent incurred losses as a result of claimant's actions and thus his appeal was rejected.

7. That the claim for a reinstatement does not arise and no dues are owing. The suit should be dismissed with costs.

8. The Respondent did not file any witness statement and also opted not to call any witness.

Submissions.

9. Both parties agreed to file their written submissions. Only the Claimant filed their written submissions.

10. The Claimant thus submitted that under section 43 of the Employment act, the burden to prove reasons for termination is upon the employer and where such reasons do not exist, the termination is unfair. Before termination and employee must be heard in their defence which was not the case for the claimant. He was never given a hearing by the board as under his position was so required.

Determination

11. Internal regulations are precisely that. To regulate internal affair between employer and employee. Such internal regulations and or policies are allowed under section 8 of the Employment Act to ensure that parties in an employment relationship had internal mechanism to address any issue that may arise particularly in addressing disputes. However such regulations must conform to the law. In this case, both parties agree that the Claimant employment was to be governed by the Respondent Service Regulations. The Claimant produced the Respondent Human Resource Policy Manual which has a Code of Conduct and a Disciplinary Policy set out under chapters 1 and 17 respectively. Under chapter 17 at clause 1 (a) (xi) and (xxvi) the policy sets out instances of dishonesty and gross negligence of duty resulting in loss of Respondent property in the category of **serious offences**. Upon a finding of negligence of duty and dishonesty, an employee is liable for dismissal. An appeal is also allowed.

12. The Respondent policy document also sets out the schedule of *delegated disciplinary powers* to address various categories of staff in the disciplinary process. In the category where the Claimant was at *Super Scale* based on the offence, he was to get 3 warning before dismissal which was to be imposed by the managing Director or the board and the appeal was to be heard by the Board. However, as under the policy, this was a discretionary procedure.

13. The schedule for hearing of cases under the Respondent policy document is discretionary as the same is not set in mandatory terms. The substantive policy guidelines are set out in the various clauses of the policy document. The Respondent had the right to direct on how hearing proceedings would be conducted upon recognition of the claimant's right to a hearing and being accorded his right to appeal. However, such proceedings and appeal must confirm to the applicable law. In this case, on 6th October 2009, the Claimant was issued with notice that he had been negligent in duty and was dishonest. That such actions were in gross misconduct liable for summary dismissal and the Claimant was given the Respondent had the right to direct on how hearing proceedings would be conducted upon recognition of the claimant's right to a hearing and being accorded his right to appeal. However, such proceedings and appeal must confirm to the applicable law. In this case, on 6th October 2009, the Claimant was issued

with notice that he had been negligent in duty and was dishonest. That such actions were in gross misconduct liable for summary dismissal and the Claimant was given 48 hours to give his defence. The Claimant gave his written defence but on 13th October 2009 he was terminated from employment on the grounds that his defence and explanation was not acceptable. The Claimant appealed but his appeal against termination was dismissed.

14. As noted above, an employer is allowed to have a work place policy addressing how internal disciplinary procedures are to be carried out. However where such procedures may result into the loss of employment, an action adverse to the employee, such procedures must meet the legal threshold for the same to be sanctioned by the court, an employer can therefore have a workplace policy that cover more issues over and above the legal minimum but cannot go before such legal basics. In this regards even where an employer has a reason that may amount to gross misconduct, due process demands that an employee be called and given a chance to defend themselves. The legal minimum in this regard is set out in section 41 of the Employment Act thus

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity 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.

15. These are mandatory procedures that every employee should be subjected to once faced with allegations of misconduct. Such an employee must be heard upon the employer setting out the reasons for which they intend to terminate the employee and at such a hearing, the employer must be present together with another employee of his choice and be allowed to present his defence. Such are procedures that would allow the subject employee to state his case in the presence of an employer representative and his own representative.

16. In this case, the Claimant was issued with notice of misconduct on 6th October 2009. On 9th October 2009 he gave his written defence. On 13th October he was terminated from employment. It is not stated in defence when his hearing was conducted and who assessed his written defence so as to find in *unacceptable*. The Respondent did not call any defence or offer any submissions so as to be assessed as to the procedures undertaken once the Claimant received notice of misconduct. I take it that such was not available to controvert what the Claimant has stated. Therefore, failure to accord the Claimant due process in terms of mandatory provisions of the law, such I find amounted to procedural unfairness.

45. (1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

[Emphasis added].

17. Under the provisions of section 45 of the Employment Act, where a termination of employment is made without according the employee fair procedure, the same is unfair. Such was the case for the claimant.

Remedies

18. The Claimant is seeking a reinstatement back to his employment. However he was terminated on 13th October 2009 and it has been over 3 years since. Despite the Respondent not offering any evidence to challenge the defence, I take it that within such a long absence, there have been many changes within the Respondent and to allow a reinstatement would not be appropriate. Section 12 of the Employment and Labour Relations Court Act also guide the Court in this regard that the order for a reinstatement should sparingly be considered after the lapse of 3 years since the termination took effect. Such will not be awarded but shall be put into account in the final orders.

19. The Claimant is seeking in the alternative to be paid his terminal dues and compensation. Upon the finding that his termination was procedurally unfair, such should not have arisen in the first place had the Respondent accorded him fair hearing. Upon the Court decline to allow a reinstatement, noting the Claimant had served for over 19 years before his unprocedural termination, compensation is awarded at 12 months' salary based on his last salary at Kshs.78, 556.00 all being Kshs.942,672.00.

20. Notice pay is due in all cases of termination without due process. The Claimant was not given notice prior to his termination and despite being allowed to appeal against his termination, such was arrived at before he was accorded fair hearing. Notice pay is due for one month as under section 35 of the Employment Act, such is awarded at kshs.78, 556.00.

21. The claim for salary for 13 days worked in October 2009 was not challenged in any material way. Such is due as the Claimant worked until 13th October 2009. Kshs.39, 041.00 is awarded.

22. Leave pay is claimed. However, the Claimant does not set out as to how such leave pay arose. This is his claim and he ought to have set out how and when such leave was due. This is declined.

23. Service pay is claimed. The Claimant does not offer any submissions as to how his claim for service pay arises. In the Policy of the Respondent noted above, several benefits were due to senior officers. For the Claimant to therefore seek service pay, this must be clearly set out in due regard to the provisions of section 35 of the Employment Act and in terms of the set policy benefit. Such will not be awarded.

24. A Certificate of Service is due to every employee upon termination and in terms of section 51 of the Employment Act. Such a certificate should be issued unconditionally.

Conclusion

25. I note the half-hearted efforts made by the Respondent to defend the suit herein. There was apparent lethargy and sheer waste of time to stall the hearing process. This led to the lapse of 3 years, a time that ended compromising the Claimant right to a reinstatement. The Respondent ended up not offering any defence or submissions despite seeking ample time to do so. These are instances where I find costs and interest appropriate. The Claimant shall be paid costs and interest on his terminal dues.

Judgement is hereby entered for the Claimant against the Respondent in the following terms;

- a. **A declaration that the termination of employment was procedurally unfair;**
- b. **An award of compensation at Kshs.942,672.00;**
- c. **Notice pay at kshs.78.556.00;**
- d. **Salary for 13 days at Kshs.39,041.00;**
- e. **Interest on (c) and (d) above;**
- f. **Costs of the suit;**
- g. **Certificate of service be issued within 7 days.**

Orders accordingly.

Delivered in open court at Nairobi this 16th day of December 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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