



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

CAUSE NO 2 OF 2015

DOMINIC NDWIGA NGURE.....CLAIMANT

-VERSUS-

KENYA MEDICAL TRAINING COLLEGE

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS

1.

JUDGMENT

Introduction

1. The claimant was employed by the 1st respondent earning a basic salary of Kshs 65103 per month after review. He was dismissed from service on ground that he had embezzled public funds. He denies the alleged misconduct and brings this suit seeking reinstatement to his employment with full benefits.
2. The respondents have denied liability for unfair termination and avers that the claimant was dismissed for his serious mistakes and misconduct in the performance of his duty including forgery and un explained expenditures.
3. The suit was heard on 16.7.2015 when the claimant testified as CW 1 but the respondents called no witnesses. After the hearing however both parties filed written submissions.

Analysis and Determination

4. There is no dispute that the claimant was employed by the 1st respondent as Accountant 1 until 16.5.2013 when he was dismissed for alleged serious mistakes and misconduct. The issues for determination are whether the dismissal of the claimant was unfair and whether the reliefs sought should be granted

Unfair termination

5. The burden of proving unfair determination is vested on the employee under section 47(5) of the Employment Act (E A). The burden is discharged if the employee alleges in evidence that there was no valid and fair reason for his dismissal and that the procedure followed in dismissing him was not fair. With such denial in evidence the burden of proof shifts to the employer to justify the reason for the

dismissal and the procedure followed. Under section 45(2) of the E A, termination of employment of an employee is unfair if the employer fails to prove that there was a valid and fair reason for the termination and that it was done after following fair procedure. A fair procedure under section 45(5) of the E A includes according the employee a fair hearing under section 41 of the E A before dismissing him, and also giving him a certificate of service after the termination as required under section 51 of the Act.

6. In this case CW 1 told the Court that the Chief Internal Auditor of the 1st respondent audited the books of account for the Mombasa Campus between 18.1.2011 and 8.2.2011 and raised queries on some items which were transacted by him while he was stationed at the said campus. CW 1 contended that the queries should not have been raised before first calling him to clarify any issues to the Auditor. He blamed the breach of procedure on the Chief Internal Auditor's malice because they had a sour relationship. That he explained the audit queries to the last coin. That on 30.8.2011 he was invited to the Senior Management Committee to explain the initial query of Kshs 179635 and new queries for Kshs 1,383,558.50 and Kshs 152,667.55. That he attended and explained every details and the committee was satisfied and send him back to work.

7. On 2.9.2011 and 17.11.2011 CW 1 received queries to explain the same figures, which he did in writing as before. On 29.2.2012, he was interdicted on half salary and on 2.5.2012 a new audit query for a further Kshs 4,813,318.85 was served on him while on interdiction. He was never interviewed by the Auditor before all the said queries. That the Chief Internal Auditor stated in her Report that she interviewed all the persons except CW 1 and the principal on allegation that they were not available. That later he received dismissal letter dated 16.5.2013 from the HR manager stating that the HR advisory and training committee meeting held on 11.3.2013 had decided that CW 1 should be dismissed for gross misconduct in the form of embezzlement of public funds. CW 1 contended that he was never invited to the said committee meeting for hearing nor was he heard by the Board of management for the respondents before the dismissal. He denied the alleged misconduct of embezzlement of public funds.

8. As earlier observed the respondent did not tender any evidence. No witnesses' statements were filed and no witness attended the hearing to testify. The burden of proving the substantive as well as procedural fairness under section 45 of the E A was not discharged by the 1st respondent. She did not prove that the claimant did embezzle public funds as alleged. She also did not prove that she complied with section 41 of the E A before dismissing the claimant for the misconduct. She also did not prove that she gave the claimant a certificate of service.

9. Section 41 of the E A provides that before dismissing an employee for misconduct under section 44(3) and (4) of that Act, the employer shall first explain the reason for the intended dismissal to the employee in a language he understands. That during the said explanation, the employee shall have the right of being accompanied by a fellow employee or shop floor union representative of his choice. That after the explanation both the employee and his companied must be invited to air their views which must be considered before the decision to dismiss is reached. In this case CW 1 was never heard by the committee which resolved that he be dismissed. Consequently on a balance of probability the Court finds and holds that the dismissal of the claimant was unfair within the meaning of section 45 of the Employment Act.

RELIEFS

10. The claimant prays that the dismissal letter dated 15.5.2013 and interdiction letter dated 29.2.2012 be revoked or cancelled and that he be reinstated to his employment unconditionally. He further prays for payment of his salary arrears from the time he was interdicted to the date of this judgment. He also prays for compensation for unfair dismissal, reimbursement of out of pocket expenses, salary in lieu of notice plus severance pay.

11. Under section 12(3) (vii) of the Employment and Labour Relations Court Act (ELRCA) this court has the jurisdiction to order for reinstatement of any employee provided that it is within 3 years from the date of dismissal and subject to any condition that the court may deem fit to impose. In this case, the claimant was dismissed on 16.5.2013 and the 3 years limitation period has not lapsed. However under section 49 (4) of the EA, the court is enjoined to take into account several matter while deciding whether or not to

order reinstatement and award damages to an unfairly dismissed employee.

12. In this case the court has considered the wishes of the employee to be reinstated, circumstances under which the terminal occurred, the practicability of reinstatement, common law principle that specific performance should not be ordered in a contract of service except in exceptional circumstances, the claimant's length of service to the respondent, the claimant's reasonable expectation to serve the respondent till retirement and the claimant's conduct in relation to his dismissal. The court is of the view that although Cw1 wishes to be reinstated, the circumstances surrounding his termination may render his reinstatement impractical. That he did not have good relationship with his Senior, the Chief Internal Auditor. Consequently the court will not order his reinstatement.

13. The claimant will however be awarded damages under section 49 (1) of the EA including kshs 65,103 being one month salary in lieu of notice and kshs 361,200 being salary arrears during interdiction for 14 months from 29.2.2012 as prayed. He is also awarded kshs.221,050 being the out of pocket travelling expenses *per diem* used when the claimant travelled from Nyeri and Nakuru to answer to various audit queries before and during his interdiction. He is also awarded kshs 781,236 being the maximum compensation of 12 months' salary for unfair dismissal. The reason for the maximum award is that the claimant had served the respondent for a long time. In addition, he may not have the chance to work in the public sector again because of the circumstances surrounding his dismissal. In his evidence, Cw1 stated that he has so far lost several interviews on ground that he was dismissed.

14. The claim for severance pay is however dismissed because the claimant was not declared redundant. In addition, the claimant was a member of the respondent's staff Retirement Benefit Scheme and therefore disqualified from claiming service pay under section 35 (6) of the EA. Likewise the claim for salary after the date of the dismissal is dismissed for lack of merits. The same would only have been possible had the court ordered for reinstatement.

15. The claimant further prayed for a certificate of costs but the Counsel submitted for a certificate of service. That seems like a genuine mistake on the part of the counsel. The claimant must have intended to claim a certificate of service. The same is a right for every employee after termination. He does not even need to sue for it. Consequently the respondent is directed to issue a certificate of service to the claimant as provided under section 51 of the EA.

Disposition

16 For the reasons stated above, judgment is entered for the claimant declaring his dismissal unfair and awarding him **kshs 1,428,589/=**, Certificate of service plus costs and interest.

Signed, Dated and Delivered this 4th day of December, 2015.

ONESMUS MAKAU

JUDGE