



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2203 OF 2012

(Before Hon. Lady Justice Hellen S. Wasilwa on 1st December, 2015)

TEDDY MUTUKU KISOI.....CLAIMANT

VERSUS

KENYA WILDLIFE SERVICERESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Complaint on 18/12/2007. This Complaint was initially filed at the High Court of Kenya at Nairobi through the firm of Kilonzo & Company Advocates as High Court Civil Case No. 827/2007 Teddy Mutuku Kisoï vs. Kenya Wildlife. This case was however transferred to this Court on 25/10/2012 the same relating to employment issues.
2. The Claimant's case is that he was employed by the Respondent herein on 18/12/2001 as a Ranger Grade 13. His initial salary was Kshs.7,693/= per month plus leave. Other benefits were as per the HR Policy and Procedure Manual of the Respondent.
3. He avers that he was confirmed in appointment on 23/9/2002 and became a member of the Kenya Wildlife Superannuation Scheme whereby he contributed 5% of his basic salary and the Respondent contributed 10.57 % towards his pension benefits.
4. On 25/2/2001, he was appointed as Honorary Warder which appointment the Claimant accepted. The Claimant further contends that he served the Respondent faithfully and had no record of incompetence, misconduct, poor service, or poor relation with his colleagues and his seniors and had no records of irresponsibility or conflict with his superiors at all.
5. It is the Claimant's case that he served at Respondent's main gate where visitors came in at Mt. Kenya National Park but also worked at different gates including Chogoria, by May 2006 his gross pay was 13,700/=.
6. He contends that on 9/12/2005 he was at Chogoria gate manning the gate. Visitors came in from the mountains. They were tourists who had come to the park. 3 were non-residents and they had 1 guide and 2 porters. It was around 6 pm. At the time the Claimant avers that he was about to sign off from work and was alone. The visitors gave him their receipts and he noted that they needed to pay for an extra day and so he charged them for that day cash amounting to 3,620/= which they paid in Kenya shillings. They indicated that they wanted to pay in advance as they intended to leave very early in the morning for the airport. It was 6.30 pm and as he had already closed work for the day, he filled their details in a book

REV 4 with the details for the next day. The guide signed it and he gave him a register. The guide was one Francis and he was also given receipts for the visitors and 2 for the potters.

7. The following morning, the Claimant avers that he was on duty in the morning when the Respondent's Inspector came with the guide Francis. They asked him if he had charged for the extra day at the park and he answered in the affirmative. He said he had even issued a receipt and he gave them the receipt book and they checked through. They also checked the REV 4 book and the cash in the cash box. They counted and found everything was tallying. They had come back with the guide claiming he had not given him a receipt. The guide confirmed he had paid the money but stated that he had not been issued with a receipt. After this, the Claimant was asked to write a statement which he did and continued with his work.

8. Later on, he was removed from the gate and taken to the Headquarters at Narumoru. On 13/12/2005, he was given a charge sheet with allegations that he failed to enter the date on KWS visitors list amongst other charges. He was expected to go for an inquiry on 14/12/2005. He presented himself for the inquiry and pleaded not guilty. They continued and the case was adjourned to 16/2/2006.

9. The hearing had a presiding officer and the Claimant was a friend. He was notified of the hearing on 15/2/2006. On this day, he was brought a different charge sheet from the previous one which he was given at 7.20 pm and was expected to appear for hearing at 9 am on 16/2/2006. The 1st charge sheet was not withdrawn and it was not clear which charge sheet he was defending. He also states that he didn't have ample time to prepare for his defence having been served at 7.20 pm to appear at 9 am.

10. He contends that the Respondents documents (page 3) also contain a charge sheet which is also different from the previous ones they had served him with. The charge sheet had a list of 3 witnesses – Celina Mwangangi, Gideon Kebati and Francis Njuuri Thiga all who testified. Francis had been stated to be an accomplice but he never stated that in his evidence. Francis also never stated that the Claimant had forged his signature.

11. The Claimant avers that after the hearing, he was given a bundle of documents to sign. He explained that he needed to read them before signing but the request was rejected.

12. On 7/4/2006, a signal message was send summoning him to Headquarters on 11/4/2006. He came as summoned and was asked by the presiding officer if he was guilty and he said no. He told him that according to evidence given, he had been found guilty and had been dismissed from the service with effect from 11/4/2005 that same day.

13. He appealed against this decision on 19/4/2006 as per his appeal documents at page 8 of his list of documents. The appeal was heard on August 2006 but he has never received the decision from the appeal.

14. It is the Claimant's case that he was not treated fairly and he has not been given any terminal benefits. He wants this Court to order that termination was illegal, void and of no effect and that he be paid damages for the breach, payment of his pension and gratuity plus costs of this suit.

15. The Respondents filed their defence on 18/3/2008 through the firm of Lutta & Company Advocates. They admit that the Plaintiff was its employee but avers that he was properly charged, prosecuted and convicted pursuant to Orderly Room Proceedings Conducted under the KWS (Armed Wing) Disciplinary Code 1990 which were applicable to him. That the Plaintiff fully participated in the proceedings and defended himself. They deny any malice and breach of contract.

16. On payment of Plaintiff's benefits, they aver that this can only be paid upon the Plaintiff clearing and handing over of the Defendants property which the Plaintiff has failed to do. They ask Court to dismiss the Plaintiff's case accordingly.

17. The Respondents called 2 witnesses and RW1 stated that he is the one who found the mistakes that

the Plaintiff had committed having failed to enter details of payments made in the REV 4. He then escalated the matter that led to the Plaintiff's dismissal. In cross examination however, RW1 stated that in his statement he had indicated that the entry marched payments purported to be made by the group. He also stated that the cash tallied with amounts expected from the sales. It is this witness's evidence that the Plaintiff was planning to steal from the deductions. He contends that he checked the receipts and found the counter foil not stamped and this is a serious omission. He admits that KWS never lost any money.

18. RW2 stated that the Plaintiff appeal was heard by KWS Disciplinary Advisory Board where he is the Secretary. The Plaintiff was subjected to the KWS Armed Wing Disciplinary Code 1990 and went through orderly proceedings and found guilty by the presiding officer. The charge sheet was forwarded to an empowered officer who upon going through, the Plaintiff was dismissed and given a right to appeal.

19. The appeals board confirmed the charge indicating that signatures on charge sheet were of the Claimant. The Plaintiff was then dismissed from the service. He was to be paid 21,105/= benefits and 44,618.07 pension deferred until he attains 50 years. The amount payable is subject to clearance which he has not done to date.

20. In cross examination by Counsel for Plaintiff RW2 states that the board's declaration at page 65 shows that they recommended that documents be submitted to a document examiner and the board also noted that proceedings were not properly handled.

21. Having considered the evidence from both parties, the issues for determination are as follows:

1. Whether there were valid reasons to dismiss the Claimant from the service.

2. Whether due process was followed before Plaintiff was dismissed.

3. What remedies if any the Plaintiff is entitled to.

22. On the 1st issue, the reason given for Plaintiff's dismissal as contained in his Notice of Disciplinary Inquiry (page 3 of Claimant's list of documents) is as follows:

“Failed to enter the date on KWS Visitors list in REV 4, forged an entry of a Mountain guide's signature on REV 4 No. 19946, failed to send DVS report of 6 visitors, failed to stamp counter foils and tickets and forged the entry of Mountain guide in exit (n) (cc), (o) which the charge sheet states is an offence contrary to Regulation 5 paragraph (n) (cc) and (o) of the KWS Armed Wing Disciplinary Code 1990”.

23. This charge sheet was served on the Plaintiff on 13/12/2005. He was invited to a disciplinary hearing on 14/12/2005. The Plaintiff's evidence is that the inquiry was on or 14/12/2005 and was adjourned to 16/2/2006.

24. On 15/2/2006 at 19.20 pm however the Plaintiff (as per his Appendix 4) was served with a different charge sheet stating that he connived with Francis Njuuri to defraud KWS, failed to enter the date on KWS visitors list in REV 4, forged the signature of the Mountain guide on REV 4 No. 19946, failed to send DVS report of 6 visitors, failed to stamp counter foils of tickets and forged the entry of the Mountain guide signature. These offences were contrary to Regulation 5 paragraph (bb) (n) (cc) of the KWS Armed Wing Disciplinary Code 1990.

25. It is not clear whether this new charge sheet was an amended charge sheet or a fresh charge sheet as on 16/2/2006 the proceedings as at page 10 of Defendants list of documents just indicate that the proceedings resumed at 10.15 and accused was reminded of the charges and he maintained his plea of not guilty.

26. It is therefore apparent that the offence the Plaintiff was facing was not clear to him and this definitely prejudiced his ability to offer a suitable defence. The Respondents failed to produce before court their

(Armed Wing) Disciplinary Code 1990 which was also outlining the offences in question and this court did not have a chance to compare the charge sheet plus the Disciplinary Code.

27. The Plaintiff has averred that he was not sure of what charge he was facing and this is definitely the position. The Plaintiff was also served with the notification hours before to the disciplinary hearing and therefore he did not have adequate time to prepare for his case.

28. The Plaintiff filed an appeal on the dismissal on 19/4/2006. The appeal was heard by the KWS Disciplinary Appeals Advisory Board (DAAB) on 31/8/2006. Disciplinary Appeals Advisory Board (DAAB) at page 65 of Respondents documents indicate that: ***“Based on the above observation, the Board unanimously recommended that the case be deferred and directed Investigations Department to take the REV 4 and Visitors Register to a documents examiner so as to establish if the signature belongs to the Mountain guide, Francis Njuuri Thiga or was forged by the Applicant”***.

29. The Board then reviewed its case on 6/8/2008 and recommended the dismissal of the Plaintiff. This recommendation was however not given to the Plaintiff and there is no indication that it has been transmitted to date.

30. The Respondents have submitted that the course of action occurred in 2006 and so the Employment Act 2007 does not apply. I have considered the sequence of events and I note that the Employment Act 2007 came into force on 20/12/2007. However by 6/8/2008, the Respondents were still sitting on Defendant’s appeal and it is on 6/8/2008 that they confirmed his dismissal from service. It is therefore this Court’s position that he was dismissed during the operation of the Employment Act 2007.

31. Under Section 43 of the employment Act 2007, it provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

32. It is apparent that proper reasons for dismissal or termination must be proved by the Defendant. In this case however, even proving the reasons is not easy as the complaint or charge is vague. This is because the Plaintiff was subjected to two different charge sheets without the presiding officer explaining to him what offence he had really committed. This in itself offends the provisions of Article 50(2) of the Constitution which states that:

“Every accused person has a right to a fair trial, which includes the right:

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

.....”

33. In the Plaintiff’s case, he was denied adequate time to prepare his defence and the charge(s) against him were not adequately explained to him.

34. It is this Court’s finding that the Respondent did not have valid reasons to dismiss the Plaintiff and

even if they had, the charges were vague to enable him discern that he was actually accused of having committed.

35. On the 2nd issue, my analysis above have also addressed the issue of due process. The process as envisaged under Section 41 of Employment Act was flouted as the offence was not adequately explained to him. Section 41 of Employment Act 2007 states as follows:

“(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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

36. Having found as above, it is this Court’s finding that the dismissal of the Plaintiff was unfair and unjustified in terms of Section 45 (1) and (2) of Employment Act which states as follows:

(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 employee’s 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.

37. I therefore award the Plaintiff as follows:

1. Damages for loss of employment and breach of contract – Kshs.1 million.

2. Payment of his terminal dues.

3. Costs of this suit.

4. The amount awarded attracts interest at court rates with effect from the date of this judgment.

Read in open Court this 1st day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mongare holding brief for Makobu for Claimant

Miss Kavagi holding brief for Lutta for Respondent