



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 541 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 2nd December, 2015)

EDWARD OKEMWA.....CLAIMANT

VERSUS

KIKUYU WATER COMPANY LIMITED.....RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed his Memorandum of Claim on 18/4/2013 through the firm of Mose Nyambega & Company Advocates. His claim is that, he was employed by the Respondent on 11/10/2007 and served Respondent on Permanent and Pensionable terms as a Procurement Officer.
2. He avers that on 23/3/2013, he was summarily dismissed by the Respondent in an unwarranted illegal and arbitrary manner. Then his gross salary was 68,000/=. It is his contention that before the dismissal, he had on 9/11/2012 received an internal memo from the Respondent's Managing Director dated 5/11/2012 asking him to explain procurement deliberations that he had taken action on. He responded to this memo the same day.
3. On 30/11/2012, he was given a warning and sent on compulsory leave. The compulsory leave was to lapse on 12/2/2013. The leave was extended to 22/3/2013. He was still waiting for communication on the leave when he received a letter summarily dismissing him.
4. The Claimant contends that the dismissal was not warranted as he had acted per the Procurement Act and implemented decision of the Procurement Committee whose minutes are at page 32 in which meeting they were three members and the minutes are signed by the Chairman Benson Njoroge and himself as the Secretary.
5. The Claimant avers that he was not given any hearing before the termination. He also contends that the Respondent never suffered any loss for his action. He contends that the Managing Director had a personal vendetta against him due to a certain tender awarded to Emmax Enterprises (page 10, 11 and 12) and this is seen from the email correspondence between him and the Managing Director at page 14. He seeks to be reinstated and in the alternative special and general damages for the dismissal plus costs of this suit.

Respondent's case

6. The Respondent filed their Memorandum of response on 19/6/2013 through the firm of Messers Wanjabo & Wanjabo Advocates. They have denied the Claimant's claim. They admit that they employed the Claimant in October 2007 as a Procurement Officer on probationary terms and later confirmed him on 19/10/2008 on Permanent and Pensionable terms. That the employment was subject to certain terms and

conditions as contained in the Respondents' Code of Conduct for Employees and the Human Resource Procedures Manual, a copy of which was availed to the Claimant.

7. The Respondents contend that on 5/11/2012, a case was reported at Kikuyu Police Station and recorded as OB 51/11/2012 that a submersible cable intended for use on the same day went missing together with other items and upon inquiry it was reported by the watchman that the claimant had taken the items and could not be traced to explain.

8. Investigations were conducted and it was revealed that the Claimant took the said cable and converted it for his personal use without authority.

9. The Claimant was asked to explain his conduct by the Managing Director on 5/11/2013. The Claimant admitted to having taken the cable but was adamant that there was no illegality in taking it out. It is Respondents' case that the Claimant failed to give a satisfactory or justifiable explanation in his response and this prompted the Managing Director to issue a further please explain letter on 9/11/2012 and also informed the Claimant that the matter had been forwarded to the Board of Directors.

10. The Respondents further contend that the Claimant failed to return the cable he had taken but replaced it with a different one whose details could not be ascertained as the records had not been taken at time of taking it out.

11. The Respondent avers that they conducted their investigations and a decision was passed by the Staff and Welfare Committee meeting held on 16/11/2012 to suspend the Plaintiff from his duties to pave way for further investigations in other actions of gross misconduct.

12. The Respondent avers that they gave the Plaintiff an opportunity to respond to the allegations against him. On 22/3/2013 an Adhoc Committee was established and presented its report which exposed serious cases of gross misconduct against the Plaintiff. Its report was adopted and it recommended termination of the Plaintiff for gross misconduct. The Claimant was therefore dismissed on 25/3/2013.

13. The Respondents deny that the process of Claimant's dismissal was premised on a personal vendetta by the Managing Director. The Respondents deny that the Claimant is entitled to any reliefs sought and want the case dismissed with costs accordingly.

14. I have considered the evidence of both parties and the issues for determination are as follows:

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether due process was followed in the circumstances.

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

15. On the 1st issue, on 30th November 2012, the Claimant was served with a warning letter due to noted misconduct. In the letter the Claimant was informed that the Staff and Welfare Committee had deliberated on his matter in their meeting of 16/11/2012 and found that though the items the Claimant took were returned, they were removed from the stores without proper authorization. It was also found that the minutes of the Procurement Committee supporting justification was overruled by the committee as the procurement committee has at least 5 members and in this case only 3 people attended.

16. This letter stated that the Staff and Welfare Committee resolved as follows:

“1. You be issued with this warning letter for the noted misconduct.

2. You proceed on a one (1) month compulsory leave and combine it with your current leave while awaiting ratification of this decision by the company's full board.

3. ***You are therefore asked to hand over all accountable documents/keys within your disposal to your head of Department and to commence your leave immediately***”.

17. In the letter summarily dismissing the Claimant, dated 22/3/2013, it was indicated that a full board meeting held on Friday 22nd March 2013 had recommended his dismissal for various reasons. The minutes of the said board meeting have however not been produced in Court for confirmation of the boards deliberations. This is an indication that the full board that was to meet to deliberate on the report of the Staff and Welfare Committee held on 16/11/2012 was attached as Respondents Appendix KWC - 11.

18. The members included Jane Wambui Ngochi – Chairperson, Ndungu Muyua - Member and Mr. J.R. Wanyoike – Member. The Respondents Managing Director Lucas Wahinya, Miss Mary W. Mbugua – Finance and Administration Manager and Mr. Justus Onkundi – HR & Administration Officer were in attendance.

19. The issue of the Claimant was dismissed and it was recommended that he be given a stern warning letter and be sent on compulsory leave. The issue of the board meeting again to confirm or otherwise this decision was never discussed. The Court notes that in the minutes of the board held on 21/12/2012, the issue was revisited again and under minute 7/SWC/004/2012(vii), it was recommended that the matter be revisited by an Adhoc Committee comprising of Committee Chairman and Corporate Management Team. The chair of Audit Committee was to chair the session. The Committee was to report back to the board. The Adhoc Committee report is Appendix KWC 4. This Committee recommended dismissal of Claimant from the service. This was however subject to the decision of the full board. The minutes are signed on 22/3/2013 but the Respondents full board never met to deliberate on the Adhoc Committees recommendation before the Claimant was dismissed on 25/3/2013.

20. From the above analysis, it is apparent that there was more than meets the eye to have Claimant dismissed before the Full Board met to endorse this position of the Adhoc Committee. It is also not clear why the Full Board meeting reversed its own decision after previously deciding to give Claimant a warning and send him on compulsory leave. They even delegated their own powers to a small Adhoc Committee apparently to reverse their previous decision.

21. Section 44(4) of Employment Act deals with cases of gross misconduct under the following grounds:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person

placed in authority over him by his employer;

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

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

22. The Claimant never committed any of these misconducts and therefore there was no valid reason to warrant his summary dismissal.

23. He was not subjected to any disciplinary hearing too as envisaged under 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.”

24. I therefore find the dismissal of the Claimant unfair and unjustified as envisaged under Section 45 of Employment Act 2007 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.*

25. In the circumstances, I find for the Claimant and award him as follows:

1. *1 month salary in lieu of notice = 68,000/=*
2. *12 months salary as compensation for unfair and*

unjustified termination = 68,000 x 12 = 816,000/=

TOTAL = 884,000/=

Less statutory deductions

26. Request for reinstatement is considered not proper in the circumstances considering provisions of

Section 49(4) of Employment Act. Given that there seems to have been bad blood between Claimant and the Managing Director, it would be improper to have the Claimant reinstated. The organization also being of the capacity it is, it would be impracticable to recommend reinstatement in the circumstances.

27. The amount awarded will attract interest at Court rates with effect from the date of this judgment.

Read in open Court this 2nd day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mwangi for Respondent

No appearance for Claimant