



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1235 OF 2010

HENRY N. BOGITACLAIMANT

VERSUS

KENYA NATIONAL TRADING CORPORATION LIMITED ...RESPONDENT

JUDGMENT

This case was filed by the Claimant through a Memorandum of Claim dated 7th October 2010 and filed in Court on 11th October 2010. The Claimant alleges that he was unlawfully summarily dismissed by the Respondent. He seeks the following orders:-

- a. Payment of terminal benefits in the sum of Shs. 1,186,164.15
- b. Costs and interest
- c. Any other or further relief the court deems appropriate.

The Respondent filed its Reply to the Memorandum of Claim on 1st February 2011 in which it denied all the allegations in the Memorandum of claim.

The case was initially heard by Justice Paul K. Kosgei (as he then was) who heard the Claimant's testimony. The case was allocated to me after this court was reconstituted in July 2012 and with the consent of the parties proceeded from where Justice Kosgei had reached.

The Claimant's case is that he was employed by the Respondent in 1992 as an Office Messenger. Due to hard work he rose through the ranks and at the time of dismissal on 12th August 2010 he was the Respondent's Personnel & Industrial Relations Officer earning a gross salary of Kshs. 46,378.

The Claimant testified that on 24th May 2010 while on annual leave he received a memo from the Managing Director stating that wealth declaration forms for 2009 had not been submitted to the Public Service Commission. The Managing Director wanted an explanation as it was the Claimant's duty to submit the forms. The Claimant cut short his leave to go back to the office where he explained to the Managing Director that he did not handle the Wealth declaration forms. On 3rd June 2010 the Claimant received a show cause letter in which the Managing Director introduced the issue of Wealth declarations forms for 2005 to 2007 yet the Public Service Commission had only asked about declarations for 2009.

The Claimant replied to the show cause letter on 4th June 2010. On 26th June 2010 while still on leave the Claimant received a letter dated 24th June 2010 requiring him to appear before the Board on 24th June

2010. He did not appear as he received the letter after the date for appearance. On 30th June 2010 he received a letter of suspension for failure to attend the Board meeting of 24th June 2010. The suspension letter also informed the Claimant that he should attend the Board Finance and Administration Committee meeting on 9th August 2010 at 9.00 am

He appeared before the Committee on 9th August and presented oral and written submissions. On 12th August 2010 the Claimant received the letter of dismissal.

The Claimant avers that the dismissal was malicious as he had satisfactorily handled the declaration exercise between 2003 and 2008 when no issues arose. His responsibilities were to collect the forms from Public Service Commission, issue them to staff, verify to ensure proper filling of forms, separate forms to be returned to Public Service Commission from those to be retained by employer and appraise the Public Service Commission accordingly.

The Claimant testified that he did not handle the 2009 forms as he was on leave from 5th October to 3rd December 2009, while the exercise was conducted from 15th to 30th October 2009. When he resumed duty the person who was acting while he was away did not hand over to him. The Claimant was heading a department with no assistant. While away on leave Miriam Wawira Ngare, RW1 was hired in acting capacity to replace the Claimant. She was infact hired to replace the Claimant after his dismissal.

The Claimant testified that his dismissal was malicious as the Managing Director had a plan to relieve him of his duties. He referred to a reorganization plan in which he was among the people to be retrenched. He further testified that the Wealth Declaration forms which were alleged to have been found in his office were never shown to him. Further that at his disciplinary hearing he had requested that the Managing Director recuses herself but she sat in and participated. The hearing was therefore not impartial. He further testified that the Managing Director knew he was alone in the department and added him more responsibility to make him fail. He was involved in administration, security and procurement.

The Claimant prayed for salary up to date of dismissal, lost contributions to NSSF and 60 days accumulated leave days. He further seeks compensation for the extra work.

The Claimant alleges he was not given a fair hearing as the Managing Director sat in the panel. He appealed against his dismissal yet his pension benefits were recalled from pension managers before the appeal was finalized. At the hearing he was not allowed to call his witness. He further stated that the 2003 to 2008 wealth declaration forms were used to fix him. Other Officers were paid ex-gratia for extra work such as Mutua , Kimulu and Kobia but he was discriminated.

Respondent's Case

The Respondent called MIRIAM WAWIRA NGARE (RW1) the Respondent's current Human Resources Officer who testified that the Claimant whose duties included submission of wealth declaration forms did not submit them for 2007 to 2009. That the Managing Director became aware that the forms had not been submitted when the Claimant was on leave. He was recalled and when he came he insisted he had submitted the forms. According to the records in the office there was no evidence that the forms were submitted. This prompted the MD to issue a show cause letter to the Claimant. The Claimant was found to be negligent and was invited to appear for a hearing at a board meeting. The Claimant did not appear. As a result the board suspended him for one month. The Claimant was given a second opportunity to appear before the Board. After the Claimant presented his case to the Board it unanimously resolved to dismiss him. He was given 30 days to appeal, but did not file an appeal.

RW1 testified that the Claimant does not deserve 3 months' notice as he was dismissed. That the dismissal was not wrongful. That the Claimant does not deserve compensation. That the Claimant was paid salary up to 30th June 2010. His NSSF and Pension contributions were paid up to 30th June 2010. That the Claimant was paid all his dues up to date of suspension. The suspension was without pay. That the Claimant has not cleared or collected his dues.

After the hearing both parties filed written submissions. The Claimant framed issues for determination as follows:

- a. Whether the Claimant indeed was responsible for the Respondent's failure to submit the declaration of Income, Assets and liabilities forms before the period ended 31st December 2009 as communicated to the Claimant vide letter from the Respondent's Managing Director dated 24th May 2010.
- b. Whether the decision to summarily dismiss the Claimant from employment was self serving driven by malice as pleaded in the Memorandum of claim and whether the Claimant has provided prima facie evidence of malice and deprivation of the right to.
- c. Whether the Claimant was deprived of his right to a free, fair, and independent hearing.
- d. Whether the Claimant is entitled to compensation for the additional duties and responsibilities assigned in addition to his employment roles by the Respondent.
- e. Whether the Claimant is entitled to the relief demanded in the Memorandum of Claim and if so, quantum of compensation.
- f. Who is to bear the costs of the suit and interests.

The Respondent also framed issues for determination as follows:-

- i. Whether the Respondent lawfully terminated the Claimant's services.
- ii. Whether Claimant was accorded a fair hearing.
- iii. Whether the Claimant is entitled to the prayers sought.

I will collapse the issues as follows:-

- 1. Whether there was valid reason for dismissal of the Claimant?**
- 2. Whether the Respondent complied with fair procedure?**
- 3. Whether dismissal of the Claimant was unfair?**
- 4. Whether the Claimant is entitled to his prayers?**

- 1. Whether there was valid reason for dismissal of the Claimant?**

The Claimant's summary dismissal letter gives the reason for his dismissal as follows:-

"You improperly represented the corporation by failing to submit the income, assets, and liabilities declaration forms as required by law which was your responsibility as the duly appointed link person."

For above reason the Claimant was summarily dismissed under Section 44(4) (c) of the Employment Act. The Section makes it a ground of summary dismissal if -

"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."

The Claimant's show cause letter referred to wealth declaration forms for 2009, 2007 and 2005. The letter inviting the Claimant for disciplinary hearing gave the charges against the Claimant as:-

- i. Carelessly and improperly performing your duty.
- ii. Content of your letter to the Managing Director dated 4th June 2010.

The Claimant stated in his responses dated 4th June 2010 and 9th August 2010 that there was no set procedure or guidelines for submission of Wealth Declaration Forms until 2009, and that he was on leave between 9th October 2009 and 3rd December 2009. He was therefore not present during the period that the Wealth Declaration Forms were to be filled in and submitted. He testified that the Managing Director

appointed the Claimant's Secretary and the person relieving him to handle the forms, and that there was no handing over to him when he resumed duty from leave.

RW1 admitted that the Claimant was on leave and she did not do any handing over to him.

From the foregoing it is clear that the Claimant was not responsible for the submission of Wealth declaration forms for 2009 as he was on leave and there were other persons, his Secretary and RW2, who were responsible for the submission of the forms to Public Service Commission (PSC). It has also not been denied by the Respondent that there were no guidelines for submissions of forms to PSC prior to 2009 for which the Claimant could be held on account.

The reasons for which he was dismissed were not the same as those in the show cause letter or in the charges he responded to at the disciplinary hearing.

For the foregoing reasons I find that there was no valid reason for the termination of the Claimant's employment.

2. Whether the Respondent complied with fair procedure?

Fair procedure is provided for in Section 41 of the Employment Act. An employee has to be informed of the charges against him in the presence of a fellow employee or a Shop floor Official. The employee must be given an opportunity to defend himself.

In the present case, the Claimant testified that he was not allowed to call his witness. The Managing Director whom he felt was his accuser sat in the penal against his protestations and that he did not receive an impartial hearing.

Section 12 of the Employment Act requires every employer with a minimum of 50 employees to have a statement of disciplinary rules applicable to its employees. The Respondent has not produced any such procedure. It avers that fair procedure was followed but does not state what that fair procedure entailed. The Respondent did not adduce evidence to controvert the testimony of the Claimant to the effect that he was not allowed to call a witness or that the Managing Director was part of the disciplinary panel against his protestations. No proceedings of the disciplinary hearing have been produced in court.

Section 45 of the Employment Act requires that an employer proves that employment was terminated in accordance with fair procedure.

I find that the Respondent has not proved that the Claimant was summarily dismissed in accordance with fair procedure.

3. Was the summary dismissal of the Claimant unfair?

Having found that there was no valid reason and the Respondent did not comply with fair procedure, I find that the summary dismissal of the Claimant was unfair

4. Is the Claimant entitled to his prayers?

I will consider the Claimants prayers in the order in which they were made.

i. Unpaid salary and allowances up to date of termination.

The Respondent stated in the letter of dismissal that the Claimant would be paid salary and allowances up to the 30th June 2010. The letter of dismissal was dated 11th August 2010.

The reason is that the Claimant was on suspension without salary from 1st July 2010.

The Respondent has not submitted any authorization for suspension without salary. The Employment Act does not provide for suspension and therefore for suspension to be legal, it must be provided for in the Claimants terms of employment or in the Respondent disciplinary procedure. The Claimants letter of appointment does not provide for the same. The Respondent did not produce any terms and conditions of service that provide for suspension without pay.

Even if suspension was as a result of failure to attend a disciplinary hearing called while the Claimant was on leave, there was no proof of notification or sufficient notification to enable him attend.

For these reasons the Claimant is entitled to full employment benefits upto and including 11th August 2010.

I therefore award the Claimant the unpaid salary and allowances of Shs. 65,434/- as claimed.

ii. 60 days accumulated leave.

RW1 admitted during her testimony that there may have been an error in the tabulation of the Claimants annual leave. She did not contest that the Claimant's accumulated leave was 60 days.

I therefore award the Claimant Shs. 60,712.35 in lieu of annual leave not taken as prayed.

iii. 3 months' salary in lieu of leave

The Claimant was the Head of Department being the Personnel & Industrial Relations Officer, a position he was appointed to in acting capacity on 22nd June 2004 and confirmed on 19th January 2006. He reported directly to the Managing Director.

Having been unfairly terminated, he is entitled to notice in accordance with Section 49 (1) (a) of Employment Act and the Respondents Staff Regulations (Revised July 1982) at Chapter 11 (5) (b).

I therefore award the Claimant Shs. 140,214 being 3 months' salary in lieu of notice.

iv. 12 months compensation.

Having been unfairly terminated the Claimant is entitled to compensation as provided under Section 49 (1) (c) of Employment Act. I have considered the circumstances under which he was terminated and his length of service and in my opinion he is entitled to maximum compensation of 12 months gross salary.

I therefore award him Shs. 560,856 being 12 months gross salary.

v. Unpaid compensation for Additional Work.

The Claimant prayed for compensation for additional work. Although there is proof that the Claimant performed additional work of administration, procurement and security, the Claimant has not proved that there was any provision entitling him to such compensation. He cannot benefit from the provisions of the Code of Regulations as he is not an employee of the Public Service Commission to whom the Regulations apply, and he has not submitted any evidence of authority to apply the regulations to him.

I therefore dismiss the claim for unpaid compensation for additional work.

vi. NSSF and Pension Contributions.

Having confirmed that it did not pay the Claimant's contributions for the period during which the Claimant was on suspension the Respondent is directed to remit the unpaid contributions to NSSF and the Respondents Pension Scheme up to 31st August 2010 within 30 days from date of judgment. Should the

Claimant have withdrawn from any or both schemes, the same should be paid to the Claimant together with interest at court rates from the due date to the date of payment.

vii.Costs and Interest

The Respondent shall pay Claimants costs as assessed by the Deputy Registrar.

The Claimant shall also be entitled to interest at court rates from date of judgment save for unpaid NSSF and Pension Contributions whose interest shall be from date due as stated in (vi) above.

viii.Certificate of Service

The Respondent shall issue a certificate of Service to the Claimant as provided in Section 51 of Employment Act.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of May 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Osoro Jacob holding brief for Simon Wekesa for Respondent

Bogita for Claimant present in person