



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 219 OF 2013

FREDRICK LANGAT.....**CLAIMANT**

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION..**RESPONDENT**

JUDGMENT

1. The Claimant filed the suit against the Respondent on 18th February 2013 seeking resolution of a dispute he framed as unlawful termination of employment. He pleaded that he was employed by the Respondent on 23rd May 2000 in the position of Accountant I and his basic pay plus house allowance was Kshs. 103,630 per month. He averred that he was confirmed in that position in April 2001 and worked until 2nd November 2009 when he received a letter sending him on compulsory leave to allow for investigations. The Claimant received a letter dated 22nd January 2010 inviting him to appear before the Human Resource and General Purpose Committee. After the hearing he subsequently received a summary dismissal letter dated 26th February 2010 from the Respondent on account of gross misconduct. The Claimant averred that the dismissal was unlawful, null and void. He thus sought for orders against the Respondent for
 - a. A declaration that the Claimant's services with the Respondent were terminated unlawfully,
 - b. An order directing that the Respondent unconditionally reinstate the Claimant to his substantive position without loss of service benefits with effect the date of purported term (sic).
 - c. The Respondent to reinstate the Claimant back to the National Water Conservation and Pipeline Corporation and pay the Claimant all dues from 26/2/2010 till reinstatement.

In the alternative, the Claimant sought the following orders:-

An Order directing the Respondent to pay the Claimant the following terminal benefits:-

- I. Thirty six months salaries being compensation for unlawful loss of employment that is Kshs. 3,730,680/- or until such time that the settlement will be made.
- II. A declaration that the purported termination of the Claimants employment was unlawful, malafides and illegal.
- III. Any other relief this Honourable Court may deem just and fit to grant.

2. The Respondent was opposed to the Claim and filed a Statement of Response on 28th June 2013. In it, the Respondent denied the Claimant's dismissal was illegal. The Respondent averred that the

Claimant's summary dismissal was procedural and lawful and was informed by the Claimant's own gross misconduct. The Respondent pleaded that the Claimant was the author of his own misfortune. The Respondent averred that the Claim failed to disclose any cause of action and was thus fit for dismissal with costs.

3. The parties called one witnesses each. The Claimant testified on 29th October 2013 and that after joining the Respondent as Accountant he worked in various sections – Auditors, imprest, cashier and finally Vote Book Contoller. He stated that his dismissal was unlawful and emanated from an incident that took place when he was cashier. He reported a matter which to him was contrary to his work. In the month of May or April he had gone to KCB Moi Avenue Branch and was told by a bank Clerk that an employee of the Respondent had deposited a payment schedule at the Bank that was to be used to pay suppliers. He suspected foul play and reported the matter to the Managing Director who called for the payment schedule. The MD instructed internal audit to carry out an audit. It was established that the payment schedule was paying LPO's and invoices which were scanned and not original. The audit report recommended full investigations by the Board. He was one of the officers interrogated by the Board and in the interrogation payment voucher No. 72 which contained the scanned documents was the focus. The MD did not appear to have knowledge of the same. After the interrogation the Claimant was sent on compulsory leave for 3 months. The reason was to enable the Respondent carry out investigations on malpractices in accounts. During the 3 months he was paid salary and he received the letter of termination in February 2010 for aiding in fraudulent payment which resulted in accumulation of pending bills. He was not charged and no court found him guilty of malpractice. At the time of his termination he was earning a gross salary of Kshs. 103,630/- plus commuter allowance of Kshs. 6,000/-.
4. The Claimant was cross-examined and stated that he had worked for 9 years 8 months with the Respondent. He had signed an employment contract. As Vote book controller he controlled the budget and used to make reconciliation reports. He admitted that he was aware of the Code of Regulations. The audit was carried out before he was suspended. He testified that someone deposited the payment voucher which was scanned without his knowledge. At the time he was cashier and said that someone else deposited the documents and it appeared that someone was doing his work behind his back. He reported to the MD verbally as he wanted urgent action taken. He was called before a committee investigating the malpractice in finance. He was taken through a series of questions. He was questioned on his duties in general. He was shown the payment voucher No. 72 which was connected to the incident at the Bank. He was given an opportunity to defend himself. He received the dismissal letter on 26th February 2010 and confirmed that he did not appeal before coming to Court for relief. In re-examination he testified that he was not the one who authorized the payment voucher. He reported to the Respondent's MD and the Respondent decided to dismiss him.
5. The Respondent called Richard Kakai Kamote the HR Manager at the Respondent. He testified the Claimant was employed by the Respondent on 14th May 2000 and investigations were carried out in 2009. The investigations were to verify some payments made and after the investigations the Claimant was sent on compulsory leave. The Claimant was suspected of being involved in fraud. Once an employee is suspected of misconduct there is a preliminary investigation and the officer is sent on compulsory leave. After the Claimant was sent on compulsory leave there were further investigations and after that the Claimant was called to come defend himself before the Board and the Claimant was given an opportunity to defend himself and subsequently he was given a summary dismissal letter on 26th February 2010. The letter stated why the Claimant was dismissed. He testified that the letter to the Claimant gave reasons for the dismissal and due process was followed before the dismissal. If one is unhappy with the decision an appeal within 6 weeks after the decision is made is permitted. From the records he could not see any appeal by the Claimant.
6. In cross-examination he testified that he was employed in October 2010 and the testimony he had given was from records held at the Respondent's office. He testified that he was aware of the procedure before dismissal and in summary, if an officer was suspected of misconduct the

employer would look into the matter and if satisfied there was basis the employee would be asked to step aside. He testified that the Claimant was not given a show cause letter in terms of the Code of Regulations. He was not aware of the content of the investigation report and confirmed that he was not aware of the content of the investigation report and could not comment much on it as he did not conduct it. He was not aware of the finding of the Board but based on the summary dismissal of the Claimant the explanation was unsatisfactory hence the dismissal. He testified that he was not aware if the Claimant was charged in court with fraud. He stood by his statement before the Court that the Claimant made some fraudulent payments. He was not aware that it was the Claimant who had sought to stop the voucher for the payment of Kshs. 2,046,800/- in respect of the duplicate copy of voucher 72. He was also not aware that Elbourgon Stores Limited had paid back a sum of Kshs. 1.5 million in October 2009 because of the Claimant.

7. In re-exam he testified that the clause on fraud referred to in his cross-examination spoke of minor offence and he did not think fraud was a minor offence. A reprimand letter would not have worked in the circumstances. He testified that the Claimant was guilty of willful neglect or careless performance of work. That marked the end of the respective testimonies for the parties.
8. The parties thereafter filed submissions reiterating their position. The Claimant did not attach any authorities but the Respondent cited the case of **Douglas Odhiambo Apei & Anor. v Telkom Kenya Ltd Civil Appeal 115 of 2006** in support of the position that the Court should not place any weight on the evidence adduced by the Claimant in his submissions.
9. The Claimant's case was for the resolution of the dispute he framed as unlawful termination. He testified that he was informed by a Bank clerk on the submission of a payment schedule which information the Claimant shared with the Managing Director of the Respondent. That precipitated an inquiry and internal audit. The Claimant was sent on compulsory leave and after a hearing by the Board the Claimant was dismissed for misconduct. The Respondent's witness testified that the Claimant was found culpable in the fraud and thus termination was justified. The Claimant admitted that he was given a letter requiring him to appear before the committee which interrogated him and subsequently made the decision to terminate his services.

10. Section 44(4) of the Employment Act makes provision on the termination of an employee as follows:-

44(4) 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 justifiable matters not mentioned in this section, constitute or lawful grounds for the dismissal if:-

(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.

11. Section 41 of the Employment Act makes provision on the termination of an employee as follows:-

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.

(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.

12. It is amply clear that in cases where there is suspected fraud the employee is to be notified of the allegation of misconduct made an opportunity availed to the employee to explain. The Claimant herein was given an opportunity to do so. Section 41 provides that before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) the employer should hear and consider any representations which the employee may make against the grounds of misconduct or poor performance raised. The Claimant was accorded that chance but that is not where it all ends.

13. The Respondent is required under Section 43 of the Employment Act to prove the reasons for the termination were proper.

43.(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.

14. The Respondent was required to prove the reasons for the termination. There was an allegation made by the witness for the Respondent that the Claimant was culpable in the fraud. Unfortunately, the Respondent failed to avail the minutes of the Board deliberations, the investigation report or any subsequent findings made in relation to the fraud. The letter of invitation to attend the hearing was woefully deficient in particulars of the alleged misconduct. On the letter of termination there is no definite reason why the Claimant was dismissed. Either he was involved or he failed to stop the fraud. Which was it? When investigations were undertaken what was the outcome? In short, the Respondent failed to prove there was justification for the termination of the Claimant for gross misconduct. I agree with the Respondent's counsel that claims of fraud are not minor. It is a major accusation and the law accords it an elevated position under Section 43. In the premises, since the Respondent failed to provide cogent evidence that the reasons for the termination were valid I find that the termination of the Claimant was unlawful in terms of Section 45.

15. What remedies is the Claimant entitled to? Under Section 12 of the Industrial Court Act the Claimant is only entitled to the reliefs set out under the Section. Section 12 sets them out as follows:-

12 (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' organisation and a trade union;

- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and
- (j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

- (i) interim preservation orders including injunctions in cases of urgency;
- (ii) a prohibitory order;
- (iii) an order for specific performance;
- (iv) a declaratory order;
- (v) an award of compensation in any circumstances contemplated under this Act or any written law;
- (vi) an award of damages in any circumstances contemplated under this Act or any written law;
- (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
- (viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

16. The Court cannot grant any relief that is not provided for in this Act or under any written law. The Claimant received a summary dismissal that perhaps may have been warranted. We cannot tell whether it was or not. The Court finds that the dismissal was unlawful and because the Court is not minded to grant a reinstatement the Court will order that the Respondent pays compensation to the Claimant for 6 months. The Claimant is also entitled to his service benefits denied to him at time of dismissal. He will also have costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 12th day of May 2014

Nzioki wa Makau

JUDGE