



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT NAIROBI
CAUSE NO. 1203 OF 2011
FRANCIS NJERU KARIUKI.....CLAIMANT

VERSUS

KENYA INSTITUTE OF MANAGEMENT.....RESPONDENT

JUDGMENT

1. The Claimant herein filed his Claim seeking terminal dues for the unlawful termination of his services with the Respondent. He was employed as a Training Officer and was later promoted to Manager Quality Assurance earning a monthly salary of 86,000/-. He was suspended from duty on 19th January 2011 and dismissed on 8th February 2011. He attended a Disciplinary Hearing before the dismissal and he appealed the decision to dismiss and the Appeal was summarily dismissed.
2. The Respondent averred in its Response to Claim dated 5th August 2011 that the Claimant was assigned duties and responsibilities as shown in an internal memo to the Claimant dated 10th June 2010 which stated the Claimant would be assigned any duty from time to time. The Respondent had offered to pay the Claimant for days worked and leave days accrued as well as issue a Certificate of Service but the Claimant declined. The Respondent averred that the Claimant was not wrongfully dismissed.
3. The Claimant testified on 30th May 2013 and stated that he was employed in January 2009 and posted to the KIM Branch Embu. In October 2009 he was promoted to Manager Quality Assurance and posted to the KIM School of Management South C. At time of engagement he was earning a consolidated salary of 55,000/- and this rose to 86,000/- upon promotion.
4. He testified that his problems started in 2010 when he was reviewing the curriculum for the Respondent due to be submitted to the Commission for Higher Education for purposes of obtaining a charter to operate as a University. He was requested by his boss, Leah Munyao, to hand over to a stranger and he declined and instead stated that he wished to hand over to her. He, together with other managers, was assigned teaching duties to keep up his flair in anticipation of the promotion of the Respondent to a University. He received the letter to take classes between July and December 2010. He duly taught the classes and in January 2011 he was informed by Leah that he had missed a class and he told her he was not aware that he was to teach in January 2011 and he was directed to see the CEO at the South C campus. He got a letter of suspension and he was asked to explain his side and he gave his side with details. He denied that he could have insubordinated his junior Mr. Ngara. He appeared before a panel chaired by Leah and he was subsequently summarily dismissed. He appealed to the CEO and he received a reply upholding the

termination. He denied being deviant either in personal or office life. He thus sought the dues as per his Claim.

5. In cross exam by Miss Muendo for the Respondent the witness testified that the memo of 10th December 2010 stated that the teaching would be as per job description. The semester was to begin in July and was called July/December 2010. He testified he did not attend class on 19th January 2011. He was given the timetable and went to seek clarification. He testified that the report of the disciplinary committee reported what the committee wanted and not what necessarily was said. He was the Quality Assurance Manager and that he taught from July to December with dedication. He denied that he was absent from work.
6. The Respondent called Augustine Nzioki who was Head of Human Resources at the Respondent. He testified that he knew the Claimant who was employed as a training officer and was thereafter promoted to Quality Assurance Officer. He testified the memo of 10th June 2010 did not specify any period. The Claimant was suspended for intentional absenteeism from lecturing a class. The Respondent held a disciplinary hearing before a Disciplinary Hearing Committee and the Claimant gave the reasons for his failure. The minutes show the Claimant was busy writing the objectives for 2011 and that is why he was absent. In the written statement the Claimant stated that he had written to Mr. Ngala to freeze teaching. The Committee made a decision to summarily dismiss the Claimant from employment. The Claimant was entitled to days worked, leave untaken and pension contributions as per the trust deed. The Claimant never collected his final dues.
7. In cross examination by Mrs. Wambugu for the Claimant the witness testified that the disciplinary meeting was conducted on 7th February. He was shown an email addressed to Leah Munyao by the Claimant and copied to the Director of the Respondent and he denied that the Claimant communicated that he wanted to be away in year 2011. He testified that if one does not attend for good reason one is dismissed. He testified that the Claimant was given a show cause letter.
8. Parties filed submissions and in his Written Submission the Claimant submitted that he was requested to lecture some diploma classes on a part time basis. The teaching was to take effect from July 2010 during the July-December semester. It was submitted that he wrote an email on 22nd December 2010 indicating to Leah his supervisor that he would be unable to take up teaching in 2011 but could do so at a later time. He was summoned to the Human Resource Office and was given a suspension letter. He was summoned by phone to attend the disciplinary hearing on 7th February 2011. He submitted that he was denied an opportunity to be accompanied by an employee of his choice contrary to the Respondent's HR Manual. The Claimant submitted further that the composition and partiality of the staff disciplinary committee was raised during his appeal against the summary dismissal. He thus submitted that the process was unfair and that the dismissal was not warranted. He sought payment of the damages sought and a certificate of service as well as costs and interest.
9. In the Respondent's submission it was submitted that the Claimant chose to disobey lawful orders from his superiors. The Respondent submitted that the Claimant chose to plan for himself without regard to the job description and consideration of the job need. The Claimant did not attend classes in January 2011 and the suspension letter clearly stated the Claimant was notified of his mistake in that letter and that he was permitted to be accompanied by a person of his choice but he chose not to exercise that right, the Committee heard him and considered his representations and made a determination. It was submitted that the Employment Act does not demand for a show cause letter to be issued. It was submitted the dismissal was not unlawful or unprocedural. The Respondent submitted that the rules of natural justice are not applicable to a contract of service and relied on the cases of **Rift Valley Textiles Ltd v Edward Onyango Oganda Nakuru CA No. 27 of 1992** for this proposition. The Respondent also relied on the case of **Kenya Revenue Authority v Mengiya Salim Murgani Civil Appeal Nai. No. 108 of 2010**. The Respondent urged the Court to dismiss the suit and find that the dismissal was fair and for a valid reason, the procedure followed was fair per Section 41 and 42 of the Act and that he had knowingly refused to attend 2 lessons.

10. The issues in the main for determination are whether the dismissal of the Claimant was fair within the meaning of Section 45 of the Employment Act and whether the procedure adopted in the process of termination of service was in compliance with Section 41 and 42 of the Employment Act. The provisions of Section 45 are as follows:-

45.(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 employees 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.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee .

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

11. This Section speaks of the procedural requirements under Section 41. Section 41 of the Employment Act provides 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. The Claimant was called to a disciplinary meeting on 7th February 2011. There is no record of the summons to the meeting and from all accounts it was the Respondent's witness who summoned the Claimant for the crucial meeting by phone. There is no evidence that the procedural safeguards under Section 41 were complied with. The Respondent has submitted two cases from the Court of Appeal which were in the era prior to the enactment of the new labour laws and which of course do not take cognisance of Section 45 of the Employment Act. The pertinent portion of Section 45 of the Employment Act provides as follows:-

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee .

(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the Industrial Court shall consider-

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

(underline mine)

13. It is clear these statutory provisions were ignored with abandon by the Respondent who now seeks refuge in cases determined under the old regime of law. The cases have absolutely not bearing on the case and were made in disregard of existing decisions of the predecessor to the Court of Appeal. In the case of **D'Souza v. Tanga County Council [1961] E.A. 377** it was settled that the law requires that prescribed disciplinary procedures would in the circumstances have to be followed and even if no procedure were prescribed, some form of inquiry would have to be conducted and any tribunal set up must endeavour to attain fair determination. The person accused

must know the nature of the accusation and be given a fair hearing. A hearing where one of the accusers is presiding cannot be said to be a fair hearing even in the most uncivilized states.

14. From the foregoing, the evidence adduced by both sides demonstrates the manifest failure to follow the law on termination for misconduct. In the premises I find that the termination was unfair within the meaning of Section 45 and thus unlawful. The Claimant is entitled to the following:-

- a. pay for days worked in January and February 2011
- b. leave days earned and not taken
- c. 3 months salary in lieu of notice Kshs. 258,000/-
- d. 6 months compensation for unlawful termination. Ksh. 516,000/-
- e. costs of the suit
- f. interest on c) and d) from the date of judgment until payment in full

Orders accordingly.

Dated and delivered at Nairobi this 24th day of June 2014

Nzioki wa Makau

JUDGE