



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 936 OF 2012

BRAMWEL DIBONDO MUSUNDI.....**CLAIMANT**

VERSUS

KENYA REVENUE AUTHORITY.....**RESPONDENT**

JUDGMENT

1. The Claimant filed the suit seeking resolution of a dispute between him and the Respondent his erstwhile employer. He was dismissed by letter 7th July 2004 backdating his dismissal to 7th July 2003. He claimed loss of earnings for 16 years, house allowance for 16 years, transport allowance for 16 years and medical allowance for 16 years, salary incremental credits for 16 years and payment of all terminal benefits. He also sought general and exemplary damages, interest on the sums claimed as well as costs of the Claim.
2. The Respondent denied the Claim and in its response filed on 9th July 2012 stated that the Claimant was dismissed for lack of integrity as a result of the theft of USD 73,973 equivalent to Kshs. 5,878,899.40. The Respondent averred that the claims for payment of various sums for 16 years were misplaced as only serving employees were entitled to those sums. The Respondent prayed that the Claimant's suit be dismissed with costs.
3. The Claimant testified that he was employed in 1978 at the time he was 18 and was terminated in 2003 having served the Respondent for 24 years. At termination his net pay was Kshs. 39,175.60 a month. He was arraigned in Court to face criminal charges on 30th May 2003. He was acquitted on 4th February 2011. He stated that he appealed his dismissal in 2004. He claimed the person who could dismiss him was the Commissioner General and not the HR Manager. He claimed that he was not given the reasons for dismissal and that there was no response to his appeal. He testified that he did not secure any other employment and was thus entitled to reinstatement. In cross exam he admitted that he had been given a letter of suspension bearing the reasons for the suspension, namely gross misconduct.
4. The Respondent called Mr. Chrispin Nyamwaya Agata as Senior Assistant Commissioner working in the Employee Relations Unit. He testified that KRA code of conduct was clear on gross misconduct and that where an employee conceals, hides or compounds an attempt to steal, defraud or commit any act contrary to the interest of Kenya Revenue Authority that is gross misconduct. He stated that the Claimant was dismissed when a pilot sought clearance to fly and it was

discovered that the figures on the receipt varied and after investigations the Claimant and his colleague was asked to explain as they were on duty during the shifts in question. They were suspended and then dismissed.

5. In cross examination the witness testified that the Claimant was suspended on account of the criminal case that landed the Claimant in Court and the outcome was that the Claimant was acquitted as he had no case to answer. After acquittal the Claimant was not reinstated and it was apparent he was not paid for the period between suspension and dismissal. He testified further that the disciplinary procedure and investigations placed the Claimant at the place the incident occurred. He relied on the procedure in KRA which could permit a suspension without pay. He testified that the outcome in the criminal case does not determine the outcome of the internal process within the Respondent.
6. That marked the end of the testimony and the parties filed their respective submissions and in these submissions they have reiterated their opposing positions. The Claimant's Submissions were to the effect that he was suspended for 1 year without pay as a result of a criminal trial that was pending and consequently the criminal court acquitted the Claimant and his co-accused. After the acquittal the Respondent declined to retain the Claimant to his employment. The Claimant submits that he was not given a fair trial and the provisions of the law were not followed and that the termination of the Claimant was unlawful and unfair. It was submitted that Section 45(2) of Employment Act provides for unfair termination where employer fails to give valid reason for termination and that the reason given for termination was not a valid reason. Only gross misconduct is given as reason and the particulars of that gross misconduct are not given anywhere. The Claimant relied on the cases of **Walter Ogal Onuro v. TSC** Cause No. 955 of 2011 and **Lawrence Oyatsi v. Nzoia Sugar Company Ltd.** Cause No. 361 of 2009. On the basis of these findings Mr. Khalwale urged the Court to find in favour of the Claimant and enter judgment accordingly and award the damages sought, costs and interest.
7. The Respondent submitted that Section 45 provides that a person should not be dismissed except for unlawful conduct and the conditions are set out. The employment is to be terminated with fair procedure and it is the Respondent's case that there are very valid reasons why the Claimant was dismissed. The Respondent relied on Section 43 (2) of the Employment Act and submitted that sub-section 43(2) qualifies it that there should be reasons the employer at the time genuinely believed to exist and these should relate to the employee's conduct. It was submitted that evidence had been provided in the Respondent's list of documents which show why the Claimant had to be terminated. Among these are the investigations report compiled by the police officers, the Respondent who found him guilty of the charges and also memos from the commissioners who lost confidence in Claimant and whom they found lacked integrity. The Respondent submitted that the Claimant was given a fair hearing at every stage of the procedure used to remove him from employment, the suspension letter gave him 14 days regardless of the process going on at Anti-Corruption Court. It was submitted that at no time was the Claimant promised that the outcome of the criminal court would determine whether he would be reinstated or not and the reasons for termination were based on the contract and the terms of the contract include the KRA Code of Conduct which is binding on all employees of the Respondent. It was submitted that on the basis of the Court of Appeal case of **KRA v. Mengiya Morgani** that even if a criminal court absolves the employee the employer could still find employee liable for termination because the standard the employer holds which is performance governed by contract cannot be determined by criminal process which is inquiring into conduct within the Criminal Procedure Code. It was submitted that even if a contract of employment is wrongfully terminated that would just amount to a breach of contract and in this case if at all the Claimant was wrongfully terminated he would only be entitled to 3 months' notice according to the contract. Miss Lavuna on that basis urged that the Court dismisses the suit with costs.
8. I have considered the pleadings, the evidence and the submissions of the learned counsel appearing in the matter in coming to this decision. The evidence adduced was that the Claimant was suspended then dismissed on account of the loss of revenue while he was serving at Jomo

Kenyatta International Airport at the control tower where charges for Air Navigation are collected. From the records before Court, a sum of USD 73,973 among other revenue was lost during a period the Claimant was on duty. Internal investigations carried out pointed a finger at the Claimant and consequently he was charged before the Anti-Corruption Court after investigations. His trial took a long time and he was acquitted as evinced by the Ruling by the Trial Magistrate. His acquittal came years after he had been terminated. Prior to his termination, the Respondent had given the Claimant a notice to show cause and undertook a disciplinary process that led to his dismissal from the service of the Respondent.

9. In the case of **Francis Lawrence Oyatsi v Nzoia Sugar Company** cited in support by Mr. Khalwale it was held that the Claimant in that case was entitled to a judgment against the Respondent and to compensation as the Respondent did not serve any notice on the Claimant asking him to explain. At page 42 of the Award, Judge Madzayo held “The Board of Directors should have sought a written explanation to the accusation from the Chairman. If his written defence or explanation was found to be unsatisfactory by the Board of Directors then a decision to terminate his contract of employment would have been appropriate. This would have been after the Claimant had been given an opportunity to defend himself against the seven serious allegations.” In this case, the contrary holds. Mr. Bramwell Dibondo was granted opportunity to defend himself.
10. The provisions of the KRA Code of conduct were cited through the letters to the Claimant. Contrary to spirited allegations by the Claimant that he was not aware of the reasons for his dismissal, the Claimant defended himself against the accusations contained in his show cause letter. He also preferred appeals against his dismissal. In each of the letters he gave a detailed response to the accusations. He therefore cannot claim he was unaware of the reasons for his termination. He was fully aware of the reasons and he was informed of the areas of the code of conduct he was in breach of. He was given letters inviting him to attend and defend himself in the disciplinary procedure the Respondent was undertaking. I find that he was given an ample hearing. The Claimant was accused of dishonesty, lack of integrity and failure to execute his duties to the required standards leading to loss of revenue by the Respondent. The reason given for dismissal was gross misconduct per section 3.7 of the KRA Code of Conduct. Under the Code if the Respondent conducts investigations and finds that an employee committed the offence and was negligent it can proceed to terminate.
11. It was submitted that on the basis of the case of **KRA v. Menginya Salim Murgani** this Court should find that the dismissal was proper. In the **Menginya** case, it was held at page 14 of that decision that “It is axiomatic that contracts of service have a mutuality of rights and obligations for both parties because a contract of service is not a yoke of slavery or a contract of servitude. This is the reason why either party is allowed to terminate the contract by giving the stipulated notice or a reasonable notice if not specifically stipulated in the contract or alternatively, tender equivalent salary in lieu of notice. This applies whether or not the contract is permanent or pensionable and this right vests in both the employee and the employer. The superior court, in our view, ought to have examined the Code of Conduct and if as it finally found it was silent on the period of notice it had the power to award salary in lieu of notice and also determine a reasonable period of notice.....Indeed, a contracting party does not have to rely on misconduct to terminate a contract of service and a party can terminate such a contract without giving any reason! In the circumstances of this case and on the basis of the recorded evidence, if the reasons for dismissal were wrongful the measure of damages should have been in respect of the period of notice specified in the contract, and if not specified a reasonable notice”
12. In this case, I am presented with reasons for termination. The Claimant says these were not valid reasons. I disagree. The Court of Appeal has stated rather plainly that a dismissal can even be for no reason! Provided the contracting parties adhere to the provisions of the contract. Of course a Court will examine the circumstances surrounding any disputed termination and determine if indeed the termination was in accordance with the contract and the law. In this case, the termination was for good cause. Loss of revenue and the attendant loss of trust due to suspected or

apparent lack of integrity are surely valid reasons for termination. I agree with counsel for the Respondent that the threshold for proof of wrongdoing for purposes of the contractual obligation differs markedly from the proof in a criminal case. The Claimant's case is therefore not one that will result in the success he wished for. He could be suspended without pay in terms of the Code of Conduct that was binding on him. This Court, and indeed no court can rewrite a contract for parties. He did not prove any mistake or fraud to vitiate the contract and revert to common law. From the foregoing and on the basis of the provisions of the contract, the code of conduct and the law applicable dismiss the Claim with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of July 2014

Nzioki wa Makau

JUDGE