REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 20 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2014)

SHADRACK ABRAHAM KISONGOCHI .....CLAIMANT

-VERSUS-

KENYA AIRPORTS AUTHORITY ..... RESPONDENTS

JUDGMENT

The claimant herein Shadrack Abraham Kisongochi filed his memo of claim on 10.2.2014 in person. The claimant claims that on 27.8.1997 he was employed by the respondents as a Mashaller Trainee Grade IV earning a salary of Ksh 3,453/= per month, house allowance of Ksh 6,500/= per month and leave at the rate of 21 days per annum as per his ***App 1.*** He rose through the ranks to Ground Flight Safety Officer III Grade 6 thereby earning a gross salary of Ksh 26,251/= including shift pay allowances and meal allowances as per his ***App 2*** (a) and (b).

On 19.1.2005 he was arrested at Malindi Airport and taken to Moi International Airport cells for allegedly stealing from the respondents client – Mr. Harro Trampaneu. He was later charged at the Malindi Principal Magistrates Court for stealing by person employed in public service & other six counts of fraudulent false accounting in Malindi CMCR 125/05. He was then suspended from duty on 2.5.2005 for allegations of falsifying revenue receipts for landing and parking in respect of Aircraft Reg. No. 5Y-HVT.

The respondents had informed the claimant that during the period of suspension he would be entitled to half salary for 6 months and also receive his house allowance and medical allowance. Thereafter he was not to receive any salary from the respondents as long as the criminal proceedings against him were proceeding. The proceedings in criminal case went on and on 27.7.2007, the claimant was acquitted of all charges. In the meantime, the respondents terminated claimant's services on 31.1.2006 vide a letter dated the same day. The reason for the termination was gross misconduct.

During the period of suspension, the claimant contends that he never received any salary from the respondents. After the acquittal, the claimant requested the respondents through the Managing Director to reinstate him back to work as per Clause 30.8 of the Collective Bargaining Agreement of 1st January 2004 to 31st December 2005 ***(App 8(a).*** The claimant was finally reinstated to work on 6.4.2011 but designated as Fireman Grade S4 and transferred to Kisumu Airport ***(App 9(a) & (b)).*** The claimant contends that this reinstatement was a demotion. The claimant tried to push for reinstatement to his previous position and payment of withheld accrued salary and allowances during his suspension/termination period but all this was in vain ***(App 10(a) (b) & (c)).***

The respondents through a letter dated 5.10.2012 categorically informed the claimant that he was not eligible for any salary arrears as a result of his reinstatement and further advised the claimant to treat the matter as closed ***(App 11).*** The respondents further vide a letter dated 16.7.2012 confirmed claimant's appointment to the position of Fireman with effect from 1st July 2012 thereby confirming the same as a new appointment ***(App 12)*.**

The claimant now claims against the respondents the following:-

(a) Reinstatement to the previous position held before his suspension and salary adjustment of the same.

(b) Payment of withheld accrued salary and allowances for the period the claimant was on suspension and termination of services i.e from 2nd February 2005 to 6th April 2011.

(c) Payment of accrued leave days/allowances during the period of suspension and reinstatement i.e from 2nd February 2005 to 6th April 2011.

(d) That upon reinstatement, payment of accrued under paid salary and allowances from dates of reinstatement i.e 6th February 2011 to-date.

The claimant further prays that the respondents refunds him his pension savings accrued in Kenya Airports Authority staff superannuation scheme or combining of the claimant's contributions in the respondent's Pension Scheme before termination with the claimant's current contribution in the same. Claimant also prays for transfer allowance as calculated in the claimant's payment Schedule.

The respondents on the other hand filed their memo of defence on 8.4.2014 through the firm of Lorraine Oyombe Advocates of Federation of Kenya Employers. It is their case that the claimant's services were terminated on 31.6.2006 and on 6.4.2011, he was offered a new contract of employment in the position of Fireman Grade S4 at a salary of Kshs 30,819 and house allowance of Kshs 17,000/= per month.

It is respondents case that the claimant was lawfully terminated after he was involved in some theft and was even charged with a criminal case. They aver that they even paid the claimant his terminal dues of Kshs 122,014.20 as per ***App 6*** collected by one M/s Judith Chepkor. That the claimant also collected his KAA Staff Superannuation Scheme Benefits amounting to Kshs 95,651/= on 27.7.2006 as per ***App 7***. The claimant was acquitted of the criminal charges and wrote to the respondents seeking to be reinstated. On 6.4.2011 the claimant was offered a fresh contract on humanitarian grounds. He was informed of the new position of Fireman Grade S4 and deployed to Kisumu. He was informed of his new salary as per ***App 12*** and confirmed in the new position on 16.7.2012 ***(App 14***).

The respondents contend that the claimant is not entitled to any payments as claimed as he was offered a new contract purely on humanitarian grounds which he accepted. They also contend that the claimant is not entitled to reinstatement to his previous position and even all other claims. They ask court to dismiss this claim for lack of merit and award.

Having considered evidence of the parties, the issues for determination are:-

1. **Whether claimant's termination was fair, lawful and procedural.**
2. **Whether claimant's appointment of 2011 was a new appointment or a reinstatement.**
3. **If it was a reinstatement, whether claimant could be reinstated in a junior position to the one he previously occupied**
4. **Whether the claimant is eligible for prayers sought.**

On 1st issue the claimant was charged with a criminal case and following this charges, the respondents wrote to claimant informing him that he was going to be on ½ salary for 6 months and thereafter no salary until the case is over. This was as provided for under Clause 30.8 of the Collective

Bargaining Agreement between the respondents and the claimants union signed on 15.2.2005 and effective from 1st January 2004 for the duration of 2 years. This is the Collective Bargaining Agreement that was in place at the time the claimant was arrested and charged and which was to affect their relationship. Clause 30.8 states as follows:-

"Pending the determination of such criminal charges by the court of law, the employee shall be on half pay for a period of six 6 months. Thereafter, he shall be on suspension without pay until the case is finalized. If eventually found not guilty, the suspension shall be lifted and the pay withheld paid."

From the provision of this Clause, the claimant could not be dismissed when the criminal charges were pending. Further, if the termination had to be effected then the claimant was to, be subjected to due process which includes a hearing. The claimant was never given any hearing. The provision of S. 41 of the Employment Act 2007 were not adhered to. It therefore follows that the termination of the claimant was unlawful and therefore null and void.

On 14.11.2007, the claimant wrote to respondent asking to be reinstated following his acquittal by the court in the criminal case. He made a further appeal for reinstatement on 3.8.2010. Following this letter, on 4.6.2011 the respondent wrote a letter to claimant informing him as follows:-

"Reference is made to your letter dated August 3, 2010. Your request has been considered and approved.

You have therefore been reinstated back into service as a Fireman Grade S4 and subsequently deployed to Kisumu Airport with immediate effect. This reinstatement is subject to assessment of your performance at the end of one year.

Following this, you are required to report to the Airport Manager – Kisumu for allocation of duties. The Airport Manager Kisumu is requested to let us know the date you report on duty.

Yours sincerely

Signed

Ken V. Kaunda

General Manager

Human Resources Development."

Definitely the reading of this letter shows that the claimant was reinstated on duty. The respondents contend that the claimant was offered a fresh appointment. However, this is not true as the letter read that he was being reinstated into service. Any assertion that the claimant was offered a fresh appointment is wrong. Treating the claimant as a new employee was therefore not in line with the letter of 6.4.2011.

Since the claimant was reinstated, he could therefore not be reinstated to a junior position to the one he previously occupied. He could be redeployed to a similar position but not an entirely new on junior position. S. 49(3) of Employment Act 2007 states that:-

"**Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to;**

(a) Reinstate the employee, treat the employee in all respects as if the employee's employment had not been terminated or

(b) Re – engage the employee in work comparable to that in which the employee was

employed prior to his dismissal or other reasonably suitable work, <u>at the same wage</u> ." (emphasis is mine).

For respondents to purport to reinstate the claimant in employment and proceed to re-engage him in a position junior and at a different wage is therefore an illegality which I declare null and void.

Since the respondents chose to reinstate the claimant, they can re-engage him but not demote him. He is also to be reinstated without loss of benefits and promotion or increaments.

Having been reinstated, the claimant was also entitled to payment of all his withheld salaries and allowances. In the premise I find that the claim by the claimant has merit and I award him as follows:-

> **1. An order that he be reinstated to his previous position held before his suspension. In the alternative he be re-engaged without loss of benefits at the same wage held before the suspension.**
>
> **2. That all withheld salary and allowances for the period of suspension and after termination of services with effect from 2.2.2005 to 6th April 2011 be paid to claimant as per his schedule of payment annexed as *App 13* – of Kshs 4,831,652.00/=.**
>
> **3. Upon reinstatement/re-engagement the claimant be paid his under paid salary and allowances from the dates of reinstatement i.e 6th February 2011 to-date.**
>
> **4. The pension savings of claimant before suspension be included in the claimant's current contributions if he has not collected them.**

The respondents will meet costs of this suit.

HELLEN S. WASILWA

JUDGE

<u>17/9/2014</u>

<u>Appearances:-</u>

Claimant present in person

Angu h/b Oyombe for respondent present

CC. Wamache