



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 352 OF 2011

FREDRICK MAGERA CLAIMANT

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE CORPORATIONRESPONDENT

JUDGMENT

1. By a Memorandum of Claim dated 9th March 2011 filed on 10th March 2011, the Claimant seeks various reliefs to wit;

1. special damages in the sum of Kshs.34,979,245/= as set out in paragraph 11 of the Memorandum of Claim and in the alternative;
2. reinstatement of the Claimant to his former position with full benefits and promotions;
3. interest and costs.

Particulars of claim

2. The Claimant was seconded to the Respondent as Accounts Assistant and rose through the ranks to the position of a senior Accountant on 23rd November 1999. He stayed in that position till the 1st July 2009 when he was promoted to the position of Chief Management Accountant. He was vide letters dated 26th February 2010 and 17th May 2010, summarily dismissed from employment and an internal Appeal against the dismissal was dismissed.

3. The Claimant states that the summary dismissal was unlawful and unfair in that it was not for a justified reason and was not done in terms of a fair procedure.

At the time of the summary dismissal, he earned a basic monthly salary of Kshs.132,305/=. He was entitled to acting allowances; salary increment; annual leave allowance; house allowance; overtime and medical allowance. He also claims pension.

4. Particulars of unlawful conduct by the Respondent include;

- a. non compliance with Respondent; code of Regulations;
- b. vexing the Claimant more than twice;
- c. victimization and malicious conduct by the Eng. **P.A. Ogutu** the Respondent's Chief Executive Officer.

Response to claim

5. The Respondent filed a statement of Response to the claim dated 11th April 2011 and filed on 25th May 2011.

The Respondent denies that;

- i. it employed the Claimant
- ii. that the Claimant earned a basic salary of Kshs.132,305/= per month and states that the Claimant having been summarily dismissed from service forfeited serve benefits except;
 - a. accrued pension;
 - b. accrued leave days;
 - c. N.S.S.F. Contributions; and
 - d. Arrears salary upto and including the date prior to the dismissal;
 - e. Denies the particulars of malice; wilful default and neglect;
 - f. States that the dismissal of the Claimant was for a lawful reason being an account of gross misconduct following due process in terms of the Respondent's code of Regulations, the Labour laws, State Corporations Act and the Employment Act.

Testimony and Documentary Evidence

6. The Claimant testified as CWI in support of the particulars of claim and told the Court that he was appointed on secondment on 15th January 1990 as per Appendix 3 in the list of documents filed by the Claimant.

7. In terms of the said letter, the Claimant's permanent and pensionable status was to be treated as continuous for pension purposes during the period of secondment.

Indeed as per appendix 2, the Claimant was offered secondment by the Ministry of Water Development to the Respondent Corporation by a letter dated 22nd December 1989 which secondment was actuated as above.

8. In terms of the attached payslips the Claimant had a basic salary of Kshs.102,305/=; commuter allowance of Kshs.8,000/= and house allowance of Kshs.30,000/= making total earnings of Kshs.140,305/=.

The Claimant had worked for a continuous period of twenty (20) years with the Respondent and his grade had changed from 3A to 2C as at 26th November 1999.

His substantive position was Senior Accountant but was acting Chief management Accountant as seen in Appendix 8 dated 19th October 2004 and as per appendix 9, dated 25th July 2005, he was acting Deputy in-charge of Finance.

This was a new designation in line with the new mandate of the National Water Conservation and Pipeline Corporation.

9. On 9th October 2009 he received a letter sending him on compulsory leave pursuant to resolution of the Board of the same date. The purpose was to facilitate investigations in his area of operation.

By a letter dated 13th October 2008, he was recalled on duty on 14th and 15th October 2008 to finalise the final accounts.

10. In terms of the letter dated 15th October 2008, Appendix 12, the Inspectorate of State

Corporations was tasked to carry out an independent investigation to establish the magnitude and cause of the Respondent's debt portfolio, identify the persons responsible for the same and recommend appropriate action. The term of reference of the investigation was produced.

11. By a letter dated 31st October 2005, the Efficiency Monitoring Unit was tasked by Inspector General Corporations to carry out the investigations on “**suspected financial malfeasance**” at the Respondent which had led to a debt accumulation in the sum of Kshs. One billion. A letter by the Inspectorate dated 31st October 2008 indicated that the Respondent was no longer able to pay its suppliers due to financial difficulties.

12. By a letter a letter dated 24th November 2008, the Claimant was required to explain in writing where the vouchers amounting to Kshs.411 million were and why the debt was not disclosed to the Board in good time within 14 days. The letter was by the Managing Director **Eng. M. M. Saboke**.

13. The Claimant responded by a letter dated 5th December 2008 where he indicates that he discovered the omission whilst performing a specific exercise given to him by the Managing Director Regarding Kshs.296 million and he reported the discovery of non-disclosed debt.

14. The Financial Manager subsequently reported the matter to the Board upon it being discussed by various committees. The Claimant was at the Board meeting when the amount was reported. The list to the Board which reflected the wrong figure was not done by the Claimant as it was not part of his docket at the time.

15. On 23rd January 2009, the Claimant was called to attend a Management Executive Committee meeting as per appendix 16.

The committee accepted the explanation made to it by the Claimant and he was recalled back to work after the Board had considered the matter.

16. The Efficiency Monitoring Unit (EMU) summoned the Claimant to make a presentation to it regarding special investigation into the Financial matters. The Claimant did not see the outcome of this exercise. However the minutes of the 3rd Board meeting held on 26th June 2009, resolved at Minute P/No. 0119 – **Fredrick Mageria Githinji** as follows:

The matter of non disclosed debt of Kshs.411million and 19 million withheld cheque was discussed. The delay had denied the Board early opportunity to make a decision on the matter.

It was found that the Claimant was not involved in compiling the list of creditors. That when he became aware of the information, he disclosed the outstanding debt of Kshs.342 million on 9th September 2008. The amount was later established to be Kshs.411 million by a team constituted by the management and reported to the Board. **“SWEC therefore discharged the officer from the above allegations.”**

17. The Board resolved **“SWEC resolved that the officer, who is currently designated as Acting Chief Accountant be pardoned, warned and be redeployed appropriately to his substantive post of Senior Account.”**

18. The Claimant told the Court that he was redeployed accordingly. However on 5th November 2009, the Claimant was again sent on compulsory leave by a new managing Director **Eng. P. Ogut**. The letter reads;

“Reference is made to the on-going audit investigation in the corporation. It has been decided that you be and are hereby sent on compulsory leave with immediate effect pending further investigations in your area of operation.”

19. On 22nd January 2010 the Claimant was invited to appear before the Human Resource and General Purpose Committee on 28th January 2010. (HR & GPC) by the Ag. Managing Director. The notice did not specify the charges the Claimant was to face. The Claimant told the Court that at the disciplinary meeting he was asked about the same issue that had been previously investigated, deliberated on and concluded by the Board. He had not received any notice to show cause nor were any charges against him framed to enable him answer the same. In any event this would have amounted to double jeopardy contrary to the doctrine of legality and the rules of natural justice.

20. By a letter dated 26th February 2010 Eng. P.A. Ogut, Ag. Managing Director dismissed the Claimant summarily for;

“concealing of information and negligence of duty which contributed to accumulation of pending bills, contrary to provision of code of Regulations Section 11.22 (viii), (Xviii) and 11.34.”

21. The Claimant was informed that his defence before the board was unsatisfactory hence the dismissal for gross misconduct. He was to forfeit his service benefits.

The Claimant therefore states that the revival of charges by the Board that had been investigated, deliberated upon by the same Board and the Board had absolved him from any liability is not only unlawful and unfair but the same was actuated by malice by the Ag. Managing Director.

22. That the Court should therefore find that I was unlawful and unfair to subject the Claimant to disciplinary process on same facts twice and find in favour of the Claimant as prayed.

23. The Claimant told the Court that he is ready and willing to go back to work upon being reinstated and given full benefits and in the alternative be paid the damages as claimed in which event, he should be given a certificate of service. He has not been paid any terminal benefits upon dismissal. That he was now 52 years old with a family. He has three dependants, one child in secondary school, another in university and the other is seeking employment. He worked at the Water Ministry for 4 years and his pension from the Ministry is also due. The Ministry may also take him back as he was only seconded to the Respondent.

The retirement age is sixty (60) years and there is no impediment to an order of reinstatement.

24. The Claimant was subjected to very close cross-examination which he withstood very well as the facts of the case are well supported by the documentary evidence produced by the Claimant. The bottom line of his defence is that he was not responsible for the omission which occurred and the Board had fully exonerated him in that regard. That it was untenable therefore for the new Ag. Managing Director to revive the issue and dismiss him as happened.

Defence

25. The Respondent called RWI – **Joseph Odhiambo Ouma** in support of its case. He told the Court that he was the Chief Human Resource and Administration officer of the Respondent.

That he joined the Respondent in September 2013. He filed a witness statement on 3rd February 2013 which he submitted to Court as his evidence in this matter.

He has no personal knowledge of the facts leading to the dismissal of the Claimant as he had not joined the employment of the Respondent at the time.

He told the Court that from the records in his possession the Claimant was dismissed from employment for concealing information.

He also said that the Claimant was not paid terminal dues because he did not clear. He said he was not aware of the amount of money due to the Claimant.

From the cross-examination by counsel for the Claimant it became apparent that witness had no knowledge at all regarding this matter.

Conclusions of Facts

26. The case presented by the Claimant in his testimony before Court which supports the pleadings filed by him and is augmented by the documentary evidence he produced remains wholly uncontroverted.

This is inspite that he Acting managing Director Eng. P. A. Ogotu who summarily dismissed him still remained the Managing Director of the Respondent and was available to testify in this matter but the Respondent chose not to call her at all.

27. The Court finds that the claim by the Claimant as presented in particulars of claim is fully proven on a balance of probabilities.

Therefore the Court finds as follows:

1. the Respondent had no valid reason to summarily dismiss the Claimant from the employment of the Respondent;
2. the Claimant had been fully absolved by the Board from any wrong doing;
3. it was unlawful and unfair to subject the Claimant to a 2nd disciplinary hearing on the same facts and circumstances he had been exonerated from by the Board;
4. the 2nd disciplinary process was therefore unlawful as it contravened the principles of legality and natural justice and amounted to double jeopardy.
5. Accordingly, the conduct by the Respondent was in violation of **Article 47 of the Constitution** as it constituted unfair administrative action and therefore highly prejudicial to the rights of the Claimant;
6. the conduct by the Respondent was in violation to **Sections 45(i) and (2)** of the Employment act in that the reason for the termination was not valid and the termination procedure was not fair taking into account all the circumstances of this case.

Remedy

28. The Claimant seeks to be reinstated to his employment and in the alternative be paid terminal benefits which include special damages enumerated in the memorandum of claim.

As stated earlier the Respondent failed to call the one witness who would full insight on this matter and therefore was unable to rebut the evidence adduced by the Claimant on all material particulars of this case.

This is a clear case of victimization by the managing Director of the Respondent contrary to a clear resolution of the Board.

The Claimant had served the Respondent for about twenty years and at 52 years has about eight years to serve the Respondent and / or the parent Ministry as the case may be depending on the wishes of the Respondent.

29. Under **Section 49(4)**, is listed considerations by the Court in deciding whether to reinstate the Claimant or provide an alternative remedy.

- a. This matter was filed within one year from the date of termination on 5th April 2011. There is no impediment to an order of restatement being made by this Court in that regard;

- b. The employee clearly wishes to be reinstated;
- c. The circumstances of the case shows that the Claimant had done no wrong whatsoever but was simply victimized after giving twenty (20) years service to the Respondent;
- d. The Respondent is a public entity and therefore, no personal considerations may come in the way of the Claimant in resuming to service in the position he held or any other equivalent position. No such evidence has been placed before Court.
- e. The period of twenty (20) years served by the Respondent persuade this Court to grant an order for reinstatement based on the doctrine of legitimate expectation by the Claimant to work and provide for his family until when he is due to retire.
- f. At his age, the Claimant does not have much opportunity to getting alternative employment and the value of severance payable may not adequately mitigate the loss he has suffered by fact of the wrongful and unfair dismissal.
- g. The Claimant did not in Court's view contribute to his dismissal but was a victim of new management at the work place for no justifiable cause.
- h. The Respondent has todate failed to give Claimant a Certificate of Service to enable him look for alternative employment and have compounded the matter by failing to pay him any terminal benefits, though they readily concede that they owe him such benefits.
- i. The maximum compensation payable in terms of **Section 49** of the **Employment Act**, would not adequately mitigate the loss suffered by the Claimant herein.

Accordingly in line with **Section 12** of the **Industrial Court Act** as read with **Section 49(3)(a)** of the **Employment Act**, the Court directs;

1. the Respondent to reinstate the Claimant to the substantive position he held as at 26th February 2010, when he was summarily dismissed by the Respondent and treat the Claimant in all respects as if the Claimant's employment had not been terminated;
2. all the arrear remuneration from 26th February 2010 to the date of reinstatement be paid with interest at Court rates till payment in full;
3. The sum be computed and filed with the Court within 30 days from todate;
4. the Respondent to pay costs of this suit.

Dated and Delivered at Nairobi this 1st day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE