



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 453 of 2012

DAVID O. OWINO.....CLAIMANT

VS

KENYA INSTITUTE OF SPECIAL EDUCATION.....RESPONDENT

AWARD

1. By a Memorandum of Claim dated 16th March and filed in Court on 19th March 2012 the Claimant sued the Respondent for unlawful termination of employment and wrongful computation of terminal benefits.

2. The Respondent filed a Reply on 4th June 2012 and the matter was heard on 6th February 2013, with Mr. Rakoro instructed by Rakoro & Co Advocates appearing for the Claimant and Mrs. Okwara instructed by the Attorney General appearing for the Respondent.

The Claimant' s Case

3. The Claimant was employed by the Respondent on 1st August 1991 as a Groundsman rising through the ranks to the position of Cook, a position he held until 6th November 2008 (letters of appointment and upgrading are marked Appendix 1 (a) & (b) in the Claimant's documents).

4. On 8th November 2007, the Claimant was interdicted on allegations of stealing 2 kilo grammes of maize meal and 1 litre of milk from the Respondent's kitchen. The Claimant testified that he was forced by the Respondent's Security Officer to sign an admission to these allegations (letter of interdiction is marked Appendix 3 in the Claimant's documents).

5. On 5th November 2007, the Claimant was arrested and subsequently charged with the offence of Stealing by Servant contrary to Section 281 of the Penal Code (Charge Sheet is marked Appendix 4 in the Claimant's documents). On 23rd March 2008, the case was withdrawn under Section 87(A) of the Criminal Procedure Code (court proceedings are marked Appendix 5 in the Claimant's documents).

6. On 4th November 2008, the Respondent wrote to the Claimant reinstating him back to his position and asking him to report to work on 5th November 2008 at 8.00 am (letter of reinstatement is marked Appendix 6 in the Claimant's documents).

7. On reporting for duty on 5th November 2008, the Claimant was issued with a letter of termination of employment effective 6th November 2008 (termination letter is marked Appendix 7 in the Claimant's documents). On 7th November 2008, the Claimant wrote to the Respondent appealing against the termination of his employment (letter of appeal is marked Appendix 10 in the Claimant's documents).

8. The Respondent did not respond to the Claimant's appeal but instead wrote to him on 13th November 2008 computing the Claimant's terminal benefits which were transferred to the Cooperative Bank of Kenya, Githurai Branch in settlement of an outstanding loan owed to the Bank by the Claimant. On 9th January 2009, the Claimant wrote to the Respondent again renewing his appeal against the termination of his employment and disputing the computation of his terminal benefits.

9. The Claimant's Advocates wrote a demand letter to the Respondent on 14th July 2009, seeking compensation for unfair termination of employment, salary arrears and pay in lieu of leave. Thereafter, the Respondent wrote to the Claimant on 27th July 2009, inviting him to meet the Claimant's Council on 30th July 2009. On 31st December 2009, the Respondent wrote to the Claimant again, this time notifying the Claimant that his termination of 6th November 2008 had been upheld by the Respondent's Council. The letter stated in part:

“THE KISE COUNCIL UPHOLDS THE TERMINATION OF SERVICES VIDE OUR LETTER REF. KISE/CONF/184/18 DATED 4TH NOVEMBER 2008. HOWEVER, WE NOTE THE PROCEDURE USED AMOUNTED TO UNFAIR TERMINATION OF SERVICES UNDER THE LAW.

CONSEQUENTLY, THE COUNCIL RESOLVED TO GRANT YOU REMEDIES ACCORDINGLY. YOU WILL BE PAID SALARY EQUIVALENT TO 14 MONTHS LESS THE EXISTING DEDUCTIONS ON THE PAYROLL.

THEREFORE YOU WILL BE PAID AS FOLLOWS:

- **OCTOBER 2007 TO OCTOBER 2008 - HALF SALARY FOR THE PERIOD WHEN YOU WERE INTERDICTED.**
- **NOVEMBER 2008 TO DECEMBER 2009 – YOUR FULL SALARY AND ALLOWANCES**

(SIGNED)

E.K. LAGATT

DIRECTOR/SECRETARY KISE COUNCIL”

10. By letter dated 25th January 2010, the Claimant disputed the tabulation of his benefits and asked for revocation of his termination. The Respondent replied that it stood by its decision to terminate the Claimant's employment.

11. The Claimant therefore claimed the following:

- a) A declaration that the termination of his employment was unlawful and unfair
- b) 12 months' compensation.....Kshs. 189,744.00
- c) 1 month's salary in lieu of notice.....15,812.00
- d) Service charge.....142,306.20
- e) Leave allowance.....27,763.50
- f) ½ salary during interdiction.....99,872.00
- g) Amount unlawfully remitted to the Bank.....223,072.00
- h) Arrears on the bank loan.....36,982.05

730,551.75

Less amount paid to the Claimant.....118,077.00

BALANCE DUE.....612,474.75

The Respondent's Case

12. In its Memorandum of Reply, the Respondent stated that the Claimant's position at appointment was permanent but not pensionable. The Claimant's terms became permanent and pensionable effective 1st January 2006.

13. In response to the Claimant's claim for money remitted to the Cooperative Bank of Kenya, the Respondent's witness number 1, Kipsang Elkana Langat testified that the payment was made pursuant to a special scheme entered into between the Bank and the Respondent. The Claimant had given his authority by appending his signature on the application form and he was therefore bound by the terms and conditions of the Memorandum of Understanding (Appendix A in the Claimant's documents).

14. It was the Respondent's case that the termination of the Claimant's employment was undertaken within the law and the Code of Regulations (Revised 2006). In particular, the Claimant was given the opportunity to appear before the Respondent's Finance and General Purposes Committee on 18th November and 8th December 2009, after which a decision was taken to refer the matter to the Full Council. The Claimant was invited to appear before the Full Council on 22nd December 2009 (invitation letter is marked Appendix E2 in the Respondent's documents).

15. The Respondent further stated that the procedure of terminating the Claimant's employment was corrected by the Respondent's Council by affording the Claimant an opportunity to be heard. After hearing the Claimant, the Council upheld the termination of the Claimant's employment. The Claimant was fully compensated for the mistake occasioned in his earlier termination. The Claimant's case was therefore duly closed and he was issued with a Certificate of Service (Appendix G in the Respondent's documents).

16. The Respondent went on to state that prior to the circumstances leading to the Claimant's termination, he had been issued with several warning and caution letters (Appendices Ia, Ib, Ic, Id & Ie in the Respondent's documents).

Findings and Determination

17. The first issue for determination has to do with the effective date of termination of the Claimant's employment. According to evidence rendered in Court, the Claimant was terminated on 6th November 2008, soon after reinstatement on 4th November 2008.

18. Following several letters from the Claimant and his Advocates, the Respondent instituted some form of disciplinary proceedings on 30th July 2009, culminating with a decision of the Respondent's Council on 31st December 2009, upholding the Claimant's termination. In communicating its decision to the Claimant, the Respondent acknowledged that the procedure employed in the termination was unfair and undertook to pay the Claimant the equivalent of 14 months' salary in compensation which was particularised as the Claimant's full salary for November 2008 to December 2009. This then is the crux of this case. On the face of it, it seems as if the Respondent, having realised its mistake, went ahead to remedy the mistake by paying the Claimant even more than the maximum compensation set in law for unfair termination of employment.

19. In its Reply to the Memorandum of Claim the Respondent referred to the 14 months' salary payment made to the Claimant as compensation for the mistake made in his earlier termination. On the other hand, the Respondent's witness number 2, Anthony Charles Mwangi testified that the payment

constituted 13 months ex gratia payment and 1 month's salary in lieu of notice. The letter dated 31st December 2009 which upheld the Claimant's termination referred to this payment as full salary for November 2008 to December 2009.

20. In its letter dated 31st December 2009, the Respondent admitted that there was at least a procedural injustice visited on the Claimant when the initial decision to terminate his employment was taken. In fact, the Respondent was forthright that "the procedure used amounted to unfair termination of services under the law." Having found as much, the Respondent could not then compensate the Claimant by paying him his salary for November 2008 to December 2009 only.

21. Since the initial termination was admittedly unfair and the Claimant was actually recalled for disciplinary proceedings, the Court deems him to have been an employee of the Respondent up to the date the final decision on his case was made. I have therefore applied the 14 months' salary payment made to the Claimant as his salary for the period between November 2008 when the first unfair termination was effected and December 2009 when the final decision was taken.

22. I will now deal with the ultimate termination of the Claimant's employment. It was the Claimant's case that his termination, looked at cumulatively was unfair because no reason was given and the correct procedure was not followed. The Claimant also found ground in his acquittal of the offence of Stealing by Servant as a justification of his innocence.

23. In the case of **Kibe Vs Attorney General (Civil Appeal No 164 of 2000)** the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.

24. In reaching my decision, in this case, I will examine the internal disciplinary process adopted by the Respondent. The Claimant told the Court that his termination was unfair because no reason was given and the procedure adopted went against the law and the Code of Regulations (Revised 2006).

25. Section 43 (1) of the Employment Act, 2007 provides that:

(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.

26. Section 45 (2) of the Act provides that:

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 employee's 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

27. Section 41 sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

(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 the 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

28. Regulation G 33(5) of the Code of Regulations provides as follows:

Where an Authorised Officer considers it necessary to institute disciplinary proceedings against an officer to whom this regulation applies on the grounds of misconduct which if proved would, in his opinion, justify any of the punishments in regulation 25(1) of the Public Service Commission Regulations, he shall, after such preliminary investigation and consultation as to the terms of charge or charges as he considers necessary, forward to the public officer a statement of the charge or charges framed against him together with a brief statement of the allegations in so far as they are clear from the charges themselves, on which each charge is based, and shall invite the public officer to state in writing, should he so desire before a day to be specified, any grounds on which he relies to exculpate himself.

29. The law which is in tandem with the Code of Regulations clearly requires that an employer who is considering adverse action against an employee must, before taking such action, afford the employee an opportunity to be heard.

30. The Respondent admitted that the termination procedure adopted initially was manifestly unfair and there is therefore no need for further argument on this part of the process. Thereafter, the Respondent set in motion a process of correcting the mistakes made. However, the Respondent failed to demonstrate any serious effort towards reviewing the Claimant's case giving the impression that the meetings held with the Claimant were simply meant to satisfy the letter of the law rather than to render justice to the Claimant.

31. In the case of **Japheth Mudogo Vs Master Fabricators Limited (Industrial Court Cause No. 742 of 2011)** this Court stated that:

Hearing of an employee facing disciplinary action must be real and authentic.

32. In view of the foregoing, I find the termination of the Claimant's employment to have been unfair within the meaning of Section 45 of the Employment Act, 2007 and award the Claimant's the equivalent of 10 months' salary as compensation. I also award him 1 month's salary in lieu of notice.

33. In computing this award, the gross monthly pay of Kshs. 15,812 contained in the computation produced by the Respondent will apply. The Claims for service charge and leave allowance were not proved and are therefore dismissed. With regard to the claims for money remitted to the Cooperative Bank and arrears on the bank loan, the Court found that this was a debt lawfully owed to the Bank by the Claimant and liability could not therefore be shifted to the Respondent.

34. The cumulative effect of this Award is as follows:

a) 10 months' salary in compensation for unfair termination...Kshs.158,120

b) 1 month's salary in lieu of notice.....15,812

Total.....173,932

35. The Respondent will pay the costs of this case.

Orders accordingly.

DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY OF APRIL 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**