



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 131 OF 2012

SAMSON OWILICLAIMANT

VERSUS

KENYA PORTS AUTHORITYRESPONDENT

JUDGMENT

On 31/5/2012, the Claimant brought suit against his former employer and Respondent. The gravamen of his case was that he was unlawfully and unfairly dismissed from his employment by the Respondent on 29.6.2011 and now seeks for his terminal dues. The dues sought amount to Ksh.12,457,285.83 and are particularized in paragraph 12 of the claim.

In her response, the respondent has denied any wrong doing and contended that the claimant summary dismissal was based on reasonable and sufficient grounds that is, soliciting and accepting bribes. The matter was heard on 14/3/2013 and 11/4/2013 after several adjournments. The claimant testified as CW1 while the respondent called Silvester Kudu Ndogoli and Maco Mulwa Ngolya as RW1 and RW2 respectively.

CW1 told the Court that he was employed by the respondent on 10/10/1988 and rose to the rank of Internal Auditor in job group HM3. His last salary was ksh.168,320.07 per month. He relied on Annexure F .to prove his salary. That he was also paid bonus depending on the respondent's performance.

On the dismissal, he told the court that a Mr. Okhako, the respondents security officer and in the presence of a Mr. Makanda forced him to sign a document titled "Settlement Agreement" that he did not sign voluntarily.

According to him the issue was about money he had borrowed from Mr. Makanda. That after the signing he continued to work until 2/6/2011 when he was served with a show cause letter by the Human Resource and Administration Manager saying that on 26/4/2011 I had admitted soliciting bribes from Mr. Makanda and asking him to to cause within 72 hours why he should not be dismissed for soliciting and receiving bribe from Mr. Makanda.

He denied the charges of bribery or ever being charged or summoned by the police on the matter. He denied that having been accorded a disciplinary hearing on the alleged bribery. He also claimed loss of income for 10 years he would have worked until retirement but for the summary dismissal. He also claimed interest accrued on his loan with Equity bank after dismissal from work.

He also claimed for goods allowance for transport of his belongings and family after the dismissal. He further claimed accrued bonus for 2009/2010 of ksh.217,790/- and referred to his annexure J and defence annexure dated 4/1/2012 to support the claim. He also prayed for pension he would have earned for the 10 years before retirement but the dismissal. He also prayed for tax relief of ksh.1,162/- per month for 10 years he would have worked before retirement but for the dismissal.

On cross-examination by Mr. Kinyanjui counsel for the respondent, claimant confirmed that he was in middle management grade 3. That he was forced to sign the Settlement Agreement by Mr. Okhako. He denied ever apologizing but only for the incidence of an outsider intruding the KPA premises to demand his loan.

RW1 told the Court that as security officer in charge, he got letter from Personnel Manager complaining that a Mr. Makanda had been cheated out of his money by CW2 on promise of a job at KPA. That he called Mr. Makanda in his office and interviewed him in the presence of his deputy Mr. Okhako. That he also called the claimant to the meeting wherein he admitted knowledge of Mr. Makanda. He however denied receiving money from Mr. Makanda which made the latter to start crying

When the RW1 sent Makanda to the receptionist, the claimant admitted receiving the money for purposes of assisting Makanda to get a job at pipeline. He then agreed to repay the money and he left the claimant with Mr. Okhako and went away. That when he returned in April, he found that the matter had been settled in writing after the money was paid in the presence of Mr. Okhako.

The RW1 then made a report about the matter and recommended for an appropriate action to be taken against the claimant or he be removed from the Audit department for integrity issues. The report was produced as Exhibit DW1. The gist of his report was that the claimant's integrity was in question. In his view, the money was obtained through false pretense by the claimant.

RW2 is the Human Resource Officer for the respondent. He received the Settlement Agreement dated 26/4/2011 between claimant and Mr. Makanda from the RW1 vide a memo dated 9/5/2011. He then wrote another memo to the Managing Director (MD) seeking his approval for a Show Cause letter to issue to the claimant. The Managing Director gave the approval and the show cause letter was done on 2/6/2011 by the Human Resource and Administration Manager Mr. Chingabwi. The letter was produced as exhibit DW2 charging the claimant with gross misconduct of receiving a bribe.

That the claimant responded on 13/5/2011 admitting that he received ksh.100,000/- from Mr. Makanda and apologizing for the incidence. The letter was produced as Exhibit DW3.

Thereafter on 23/6/2011 approval was sought for dismissal of the claimant through a memo to the Managing Director. The letter approved the dismissal by memo dated 23/6/2011 which was produced as Exhibit DW4. Hence the dismissal letter dated 29/6/2011 which was produced as exhibit DW5. The reason for dismissal was receiving a bribe. DW2 told the Court that the procedure in KPA Disciplinary Handbook produced as Exh DW6 was followed. That Section K4 A Xiii classifies the offence committed by the claimant as gross misconduct whose penalty is summary dismissal. That Section K 8(h) provides that summary dismissal is to be done by the Human Resource and Administration Manager with the approval of the Managing Director. He contended that the memo dated 23/6/2011 complied with Section K8(h) of the handbook.

On the terminal dues, he produced Exh DW7 to show that the claimant was entitled to Ksh.17500/ only for repatriation allowance. He also produced exhibit DW8 to prove that the claimant was paid his pension of ksh.1,579,914.53. He also produced clearance certificate as Exhibit DW9. He however, confirmed that performance bonus for 2009 – 2010 was not paid as per letter marked Exhibit DW10 but explained that Section K10 and K12 (c) of the disciplinary handbook barred him from getting the Bonus salary and notice pay.

He produced certificate of confirmation of pension and service gratuity payment as Exhibit DW11. He concluded by contenting that the claimant was not entitled to certificate of service because he left on

disciplinary reasons.

On cross-examination, he confirmed that he drafted all the Human Resource documents but did not sign them. He told the Court that the report by RW1 (DW1) did not say that the Ksh.100,000/- was to secure a job at KPA but the show cause letter referred to a job at Kenya Port Authority. Similarly, he said that the settlement agreement did not say the money was to secure a job at Kenya Ports Authority. He also said that the reply to the show cause letter did not say that the money was to secure a job at Kenya Ports Authority.

On further cross-examination he said that they relied on other documents not before the court to find the claimant guilty. That the investigations report DW1 could not be interpreted alone but with other documents not produced in court. That he was not aware whether claimant was ever charged in court with criminal offence. Finally he contended that the claimant did not request for hearing before termination after receiving the show cause letter.

After the close of the hearing both parties filed written submissions urging the court to find in their favour.

I have carefully gone through the pleadings and considered the evidence and the submission filed. The issue of jurisdiction and the employment relationship between the parties to the suit are not in dispute. The issues for determination in my view are:

- a. **whether the dismissal of the claimant from employment by the Respondent was unlawful and unfair.**
- b. **Whether the relief sought by the claimant ought to issue**

To answer the first issue, I have evaluated the evidence to consider whether each party has discharged his or her respective burden of prove under Section 47 of the Employment Act. The claimant is duty bound to prove that he has been unfairly dismissed while the respondent must prove that the termination was justifiable and that was reached upon a fair procedure.

The claimant believes that the reason for his termination was not proved and that he was denied his right to fair hearing under the Employment Act. In his evidence he argues that he never received any bribe from Mr. Makanda as alleged by the respondent and that what he received was a loan which he has since paid. He denied signing a settlement agreement with Mr. Makanda voluntarily and blames it on the force extended on him by Mr. Okhako, the Deputy Security Manager for the respondent. He contends that he was never charged with the criminal offence of receiving bribe or obtaining money by false pretences. He also contended that the said Mr. Okhako and Makanda did not testify to prove the alleged offence or dispute that he was forced to sign the settlement agreement.

In addition to the foregoing, he contended that he was not given his right under Section 41 of the Employment Act before dismissal being denied an opportunity of being heard in a disciplinary committee of the respondent before dismissal. To that extend he believes has discharged his burden of proof that the termination was substantially and procedurally unfair.

On the other hand the respondent has argued that the reason for dismissal was justifiable because the claimant had by signing the settlement agreement on 26/4/2011 admitted the offence of receiving a bribe. That the said act amounted to gross misconduct under the respondent's disciplinary Handbook which attracted a summary dismissal.

On the issue of procedure, the respondent maintained that the claimant was accorded an opportunity to defend himself through a show cause letter. That he indeed responded thereto and did not request for a disciplinary hearing by a committee of the respondent.

Section 43 and 45 of the Employment Act provides that no employer shall terminate the employment of an employee unfairly. The yard stick for fairness being proof of the reason for termination and the

procedure followed. Section 41 is like a poison pill in that it provided for a special procedure to dismissal for the reason of gross misconduct, poor performance or incompetency. In fact the said provisions require that before dismissing the employee for gross misconduct under Section 44 of the Act the employer must first explain to the employee in a language he understands, the reason for which he intends to dismiss him and that during such explanation the employee is allowed to be accompanied by a workmate or shop floor union representative of his choice. That before the dismissal, the employee and the companion of his choice shall be given an opportunity to make representations which must be considered in the decision for dismissal.

Consequently, in this case, the respondent was firstly supposed to prove that he has a valid and justifiable reason for dismissing the claimant. Secondly, she was required to prove that she accorded the claimant all his rights to fair hearing by inviting him in company of a workmate of his choice to an occasion for explaining the reason for his intended dismissal and then allow him and his companion to make their representations before the termination.

In my view the procedure under Section 41 of the Act was not followed. The respondent admitted that after sending a show cause letter, the claimant did not request for a disciplinary hearing. The respondent then found no merit in the explanation made under the claimant reply to the show cause letter and recommended to his dismissal.

That procedure denied the claimant his rights under Section 41, 43 and 45 of the said Act. The said Act did not give employers the option for serving a show cause letter before termination.

As regards prove of the reason for the dismissal, the claimant was denied the opportunity to challenge the Settlement Agreement which he maintains was not voluntarily signed by him. That without the said Settlement Agreement the defence by the respondent has no legs to stand on. The evidence by the claimant of coercion was not challenged by any person who was present when it was signed on 26/4/2011. RW1 was not present nor was RW2. They could not completely challenge the claimant on the allegations of coercion, the scenario is made worse by the fact that the Mr. Makanda who allegedly gave the bribe did not use the Settlement Agreement to institute Criminal proceedings against the claimant nor was he willing to attend court to testify on the matter. In my view even if Makanda testified the fact that the claimant denied that allegation of bribery and only changed his mind after Makanda kept him in the hands of the two security officers suggests that the admission was probably not voluntary but through coercion as alleged by the claimant.

Consequently, this finds that, the claimant has discharged his burden of proof under Section 47 of the Act which the Respondent did not. In my considered view, even if the Respondent was to be found to have had a valid and justifiable reason for dismissing the claimant, the dismissal would still be unfair considering the statutory procedure provided for under Section 41 and 45 of the Employment Act.

The question in my mind is whether the disciplinary procedure under Section K8 of the Respondent Disciplinary Handbook 2008 can surpass the express provisions of the Employment Act. The answer is in the negative. Sections 3,7 and 8 provide that all employment contracts in Kenya shall comply with the Employment Act. It followed that any employment contract made in contravention of the Act is invalid and cannot be allowed to take away a statutory right or obligation. To that extent the procedure under Section K8 of the Respondents Handbook is invalid and the same should be modified to accord with the express provisions of the Act.

As regards the second issue being the relief sought, I dismiss the claim for loss of income, loss of year by average salary increments, loss of transport allowance on retirement, accrued loan interest, loss of monthly pension contribution by the employer and monthly tax relief. In my view the said claims are over ambitious and unfounded both in law and the contract of employment.

The contract of employment presupposes the freedom to terminate the contract upon the terms set out by the parties in their agreement. One of the terms of a valid contract must be the right to terminate the contract upon service of the agreed or reasonable notice failure to which the breaching party pay

damages equivalent to the salary for the notice period.

Consequently, a party to the contract should have in mind that the damages from termination without notice is only equal to the salary for the notice period in addition to any statutory provisions.

In this case the only damages payable are provided by Section 49 of the Employment Act. They include notice pay, unpaid salary, service pay, leave pay and 12 months salary for unfair termination.

As regards the 12 months salary for unfair termination, I do not need much evidence except to multiply the gross monthly salary by the 12 months. The undisputed salary for the claimant was ksh.168,380.07/- and which multiplied by 12 months total to ksh.2,020,560.84.

On the notice pay, the claimant prayed for 3 months. He did not produce any appointment letter to prove the same. The Respondent did not contrast the claim for 3 months notice pay but only disputes the claimants entitlement to that relief because he was dismissed on grounds of misconduct.

The respondent Human Resource Manual 2008, Clause B4 provides that every employee of the Respondent shall receive an Appointment letter. The same entitlement is provided for under Sections 9 and 10 of the Employment Act. The latter provision then puts the burden of disproving a term of employment contract alleged by the employee on the employer if no written contract exists.

In this case the employee has alleged that he was entitled to 3 months termination notice. The Respondent did nothing to disprove that allegation.

I will grant the prayer for 3 months salary in lieu of notice. This position is fortified by the fact that the claimant had worked for many years and he was already 50 years, enough age to warrant a retirement at his will. I award Ksh.505,140.21 under this heading.

I will also award the prayer for unpaid bonus for the year 2009/20`0 and 2010/2011 financial years being Ksh.217,290 as prayed. The respondent did not challenge the claimants' calculations but only the right to claim after dismissal under the Disciplinary Handbook. The foregoing reliefs are based on the fact that the dismissal was, unfair under Section 45 and 49 of the Employment Act and Section 20 of the Industrial Court Act. .

The upshot of this judgment is that the dismissal of the claimant by the respondent is declared unfair and the claimant is awarded

- I. 3 months salary in lieu of notice505,140.21**
 - (ii) 12 moths salary for unfair termination.....2,020.560.84**
 - (iii) Bonus/performance allowance for year**
 - 2009/2010 and 2010/2011217,290.00**
- 2,742,991.05**

The claimant will have costs and interest.

Orders accordingly.

Dated signed and delivered this 28th June 2013.

ONESMUS MAKAU

JUDGE