



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 96 OF 2013

BERNARD DAMUNGA NDUNDA.....CLAIMANT

-VERSUS-

KERIO VALLEY DEVELOPMENT AUTHOR.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th September, 2013)

JUDGMENT

The claimant **Bernard Damunga Ndunda** filed the memorandum of claim on 24.04.2013 through B.M Mung'ata & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **A declaration that the summary dismissal by the respondent was unlawful.**
- b. **That the claimant be reinstated to his employment.**
- c. **That the claimant be paid damages for unlawful termination of employment.**
- d. **Costs and interest of this suit.**
- e. **Any other and further relief that this honourable court deems fit and just to grant.**

The respondent **Kerio Valley Development Authority** filed the statement of response on 31.05.2013 through Chebii and Company Advocates and prayed that the claim be dismissed with costs.

The claimant gave evidence to support his case and the respondent's witnesses were Moses Kipchumba, the respondent's internal audit manager and Elizabeth Kibenei, the respondent's head of human resource and administration.

The claimant was employed by the respondent in the capacity of a surveyor with effect from 7.11.2011. The claimant being a professional surveyor worked for the respondent till 1.11.2012 when he was served with the letter of summary dismissal. The letter being exhibit **BDN5** on the memorandum of claim and addressed to the claimant stated as follows:

“RE: SUMMARY DISMISSAL

It has been reported that you were advanced Kshs. 80,000/= to hire a total work station for use by the Authority's Survey Division.

However, the report indicates that you acquired the equipment and surrendered the cash through improper means as per the following evidence:

- i. **The cash sale receipts you provided to surrender the advanced amount No. 2982 dated 3rd July, 2012 of Kshs. 50,000/= and No. 2979 dated 6th August, 2012 of Kshs. 30,000/= from Universal Electricals sales and services a shop in Ravine which does not deal in survey equipment.**
- ii. **The above receipts were not consistently issued i.e receipt No.2979 was issued on 6th August, 2012 while receipt No. 2982 was issued on 3rd July, 2012.**
- iii. **You provided cash sale receipt instead of cash receipt documents to prove that the cash was received by the vendor.**
- iv. **When requested by the Audit Division to give an account of the anomalies, you presented an unauthenticated e-mail from one Clifford Koech who purported to own an electrical shop in Ravine and also deals with survey equipment.**

From the above reports its clear that you engaged in dishonest conduct, an offence which is contrary to the code of conduct for Public Officers part III (8) and renders one liable to summary dismissal as per KVDA Terms and Conditions of Service section 10.4.1 (h).

For the above reason, you are hereby summarily dismissed from the services of the Authority with effect from 1st November 2012.

You should clear and surrender any Authority property which may be in your possession.

David K. Kimosop

MANAGING DIRECTOR

The Audit findings and recommendations are contained in the internal memorandum dated 30.10.2012 and marked **MKK7** on the statement of response. The audit established:

- a. That the claimant who hired out the equipment is affiliated to a firm by the name **“Map Link Systems Surveying and Mapping”**.
- b. That the receipts submitted in the name of Universal Electricals Sales and Services was not for the firm owning the equipment but was a local arrangement to account for the cash received.
- c. It was not possible to ascertain whether the whole Kshs.80,000/= was paid out to the firm (Map Link Systems) since the transaction was effected in unofficial manner.

The audit recommendation was as follows:

- a. Any future hiring of equipment should be transacted through the procurement department for cost effectiveness, transparency and accountability.
- b. The officer who was involved (the claimant) in the transaction should be cautioned for engaging in informal transactions that did not follow the laid down procurement procedures.

The minutes of the meeting No.101 of the respondent’s board of directors held on 9.11.2012, considered the claimant’s case at paragraph 7.04 as attached on the respondent’s final submissions. The board upheld the decision on summary dismissal of the claimant arising from allegations leveled against him on account that the charges attributed to him were serious and deserving of the action taken and further that since the officer had not been confirmed into permanent employment terms, it was appropriate to discontinue his services to the authority.

The main issues for determination in this suit include:

1. **Whether the claimant was accorded due process before dismissal.**
2. **Whether there was a valid reason for dismissal.**
3. **Whether the claimant is entitled to the remedies as prayed for.**

The court has considered the evidence on record and finds that the audit findings and recommendations amounted to a preliminary finding of contemplated misconduct against the claimant and a factual finding that the respondent's management had failed to comply with the prevailing procurement procedures. Subsequent to that preliminary finding, in the opinion of the court, it was the respondent's obligation to particularize the alleged misconduct into a show cause letter and to give the claimant a hearing as envisaged in section 41 of the Employment Act, 2007. Such due process was not invoked and the court finds that the claimant's dismissal was unfair on that account. Indeed, the board's deliberation as per the minutes produced clearly show that the claimant was dismissed on account of mere allegations which, in the court's opinion, establishes that there were no any administrative investigations in accordance with the due process that upheld rules of natural justice. The court finds that the claimant was never accorded the chance for self exculpation and was never given a notice of the details of the allegations leveled against him. The dismissal was unfair for want of procedural fairness. The court further holds that the administrative audit findings arrived at with the claimant's participation could not amount to a disciplinary process that demands due process. The court holds that in a disciplinary process, the employer must convey to the employee affected that there are allegations against the employee that may, after the hearing, conclude in imposition of a punishment and that the employee is therefore required of self-exculpating in view of the allegations. In this case, the court finds that no disciplinary process took place.

It was submitted for the claimant that in summary dismissal under section 44 of the Employment Act, 2007, the claimant had been heard during the audit process. The court finds that the audit process was not a disciplinary process under which the claimant was invited to defend himself for well-known intention of dismissal. At all material time, the claimant was not told that he was targeted for the dismissal and he was required to exculpate himself. Of the procedure in summary dismissal, the court upholds its earlier holding in **Shankar Saklani -Versus- DHL Global Forwarding (K) Limited, Industrial Court Cause No. 562 of 2012 at Nairobi** thus,

“Section 35 of the Act prescribes the period of the termination notice in various circumstances. Under Section 35(1) (a), a contract to pay wages daily is terminable by either party at the close of any day without notice. That is the only circumstance where a termination notice is not required and for the obvious reason that service of the notice would be impracticable or of little practical value. The Court holds that to be the only circumstance in which the employer can terminate a contract of service without a notice as envisaged under Section 44 (1) of the Act. Thus, Section 44(1) of the Act does not entitle the employer to terminate without notice in any other circumstance other than in a contract to pay wages daily and misconduct. In all other cases, the Court holds that Section 44 (1) of the Act only entitles the employer to terminate on account of gross misconduct with less notice than which the employee is entitled by any statutory provision or contractual term.

To answer the question if notice and hearing are mandatory in cases of summary dismissal, except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract.”

The second issue is whether the claimant was dismissed on account of a valid reason. The respondent handed to the claimant Kshs.80,000.00 to hire survey equipment known as a total work station. It is not disputed that the claimant hired the equipment and it was put to use as desired by the respondent. It is not also disputed that the respondent's action of requiring the claimant to hire the equipment and to effect the payment was in breach of the public procurement procedures and public financial management that bound the respondent as a state corporation. The court has already found that the alleged dishonesty leveled against the claimant was not investigated and established. The materials before the court show that the claimant was placed in a difficult position to source the equipment, to effect the payment and to account for the Kshs.80,000.00. The court finds that the respondent is a well established statutory body that obviously employed procurement, financial, accounting and other relevant experts and it was unfair employment practice not to apply their services in this situation that required their input and for which the

tax payer's money was employed to meet their salaries.

In a situation where the claimant was directed to perform duties of the enumerated experts including the tender or procurement committee as well as the inspection committee and subsequently to perform the duties of the supplier to provide valid evidence of the payment, an accounting function, the court finds that the claimant was entitled to do the best he was able to discharge of the assigned duties and within the best of his knowledge to achieve the respondent's desired outcomes.

The court further finds that the respondent was not entitled to visit upon the claimant the adverse consequences such as the dismissal in this case where the respondent maintained defective operational systems that contravened the public procurement and financial management procedures and whereby it was not the claimant's duty to ensure or undertake the realization of such procedures. In this case, it is the opinion of the court that the likely or possible true culprits such as the respondent's officers who assigned the claimant the duties inconsistent with his employment as a surveyor; the respondent's top officers responsible for upholding the procurement and financial management systems and appointing relevant committees; and the relevant experts in the respondent's employment were not held to account for their failures and it was unfair to victimize the claimant without good reason.

Of defective operational systems and policies, this court stated in **Grace Gacheri Muriithi –Versus-Kenya Literature Bureau (2012) eKLR** thus:

“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further, the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”

The court upholds that opinion and finds that the respondent has failed to establish a valid reason to justify the claimant's summary dismissal. For want of a valid reason for the dismissal, the court finds that the dismissal was unfair as envisaged under section 43 of the Employment Act, 2007.

The final issue for determination is whether the claimant is entitled to the remedies as prayed for.

The court has considered the prayer for reinstatement. The claimant is a public officer and the respondent is a public statutory body. The parties are subject to Article 236 of the Constitution which provides that a public officer shall not be subjected to disciplinary action or removed from office except in accordance with the due process of fairness. The respondent being a public body, the court finds that the alleged lack of cordial relationship between the parties is unfounded as the same was never shown to exist. In view of the constitutional provision, the unfairness in the summary dismissal and in absence of any good reason that would make reinstatement difficult to implement, the court finds that the claimant is entitled to reinstatement with effect from 1.11.2012, the effective date of the offensive dismissal and with full gross pay of **Kshs.1,040,589.00** at Kshs.94,599.00 per month for 11 months ending 30.09.2013 as the court finds it reasonable that the claimant reports back for assignment of duties on 1.10.2013.

The claimant has in alternative prayed for payment in view of the unfair termination. The court finds that under that prayer the claimant is entitled to the Kshs.1,040,589.00 because he was unfairly kept out of employment. Further, in lieu of the reinstatement the court finds that the claimant is entitled to a further Kshs.1,135,188.00 being 12 months gross salaries for the unfair termination. In awarding the maximum

12 months gross pay, the court has considered that the respondent breached both procedural and substantive fairness and disregarded the clear constitutional provision that entitled the claimant to due process throughout the disciplinary process.

Accordingly, the court finds that the claimant is entitled to **Kshs.2,175,777.00**. In making a finding for such award, the court upholds its opinion in Kenya Union of Printing, Publishing, Paper Manufacturing and Allied Workers – Versus – Timber Treatment International, Industrial Court Cause No. 12 of 2012 at Nakuru at pg. 10-11 where it was stated,

“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, “(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;”. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

It was submitted for the claimant that he was dismissed at the age of 46 years, he was to retire upon attaining the age of 60 years and therefore he was entitled to gross salaries for 14 years in lieu of reinstatement order. The court has considered that submission and finds that it is not justified because the claimant is energetic and capable of obtaining alternative employment as a professional surveyor. The prayer as submitted will therefore fail.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the claimant’s summary dismissal by the respondent was unfair.
- b. The claimant is reinstated to his position with full accruing benefits with effect from 1.11.2012, the effective date of the offensive dismissal and with full gross pay of **Kshs.1,040,589.00** at Kshs.94,599.00 per month for 11 months ending 30.09.2013 and the claimant to report on 1.10.2013 to the respondent’s managing director for assignment of duties accordingly.
- c. In alternative to (b), the respondent to pay the claimant **Kshs.2,175,777.00**.
- d. The respondent to pay the claimant the amount in (b) or (c), as the election shall be, by 1.11.2013, failing interest at court rates to run thereon till full payment of the amount.
- e. The respondent to file and serve by 1.10.2013 an affidavit indicating the election between (b) and (c).

f. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 20th September, 2013.**

BYRAM ONGAYA

JUDGE