



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 509 OF 2012
EDGAR NDEMO MONYANYI..... CLAIMANT
VERSUS
CATERING & TOURISM DEVELOPMENT
LEVY TRUSTEES..... RESPONDENT

JUDGMENT

By a Memorandum of Claim dated 19th March 2012 and filed in court on 27th March 2012 the Claimant herein EDGAR NDEMO MOMANYI alleges that he was wrongfully dismissed by the Respondent CATERING & TOURISM DEVELOPMENT LEVY TRUSTEES. He claims compensation for loss of employment in the sum of Kshs.29,793,159 made up as follow;

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|---|-------------------|
| a. Three months' salary in lieu of notice | Kshs.262,446/= |
| b. Salary for the month of April 2011 | Kshs.87,482/= |
| c. Payments towards unpaid leave days | Kshs.116,243/= |
| d. Leave travelling allowance for the year 2011 | Kshs.108,000/= |
| e. Service gratuity for 14 years (23x14x87,482) | Kshs.28,169,204/= |
| f. 12 months Compensation for loss of | |

employment (12x87,482)	Kshs.1,049,784/=
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- g. Certificate of service

Total	Kshs.29,793,159
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He prays for the following orders.

- i. A declaration that the Claimant's dismissal was wrongful.
- ii. The claimant be paid terminal benefits as set out in paragraph 14(a-g) above hereinabove totaling Kshs.29,793,159/=.
- iii. The Respondent be ordered to compensate the claimant for wrongful dismissal at the equivalent of twelve (12) months gross salary.
- iv. General damages thereof.
- v. Loss of future earnings.
- vi. Reinstatement of employment thereof.
- vii. Costs of this claim.
- viii. Interest on the above at Court rates.
- ix. The Honourable Court do issue such Orders and give such directions as it may deem fit to meet

ends of justice.

The Respondent filed its Response to the Memorandum Claim on 29th May 2012 in which it alleges that the termination of the termination of employment of the Claimant was lawful and in compliance with law and regulations. The Respondent prays for dismissal of the Claim with costs.

The case was first mentioned before Justice Mukunya (as he then was) on 15th May 2012 when the court gave directions that the Respondent files its Response to the claim on or before 29th May 2012 and the case was fixed for hearing on 12th September 2012. On 12th September 2012 the case was not heard as the Claimant was absent. The case was rescheduled for hearing on 1st April 2013 when again the case failed to take off.

The case was eventually heard by me on 22nd May and 1st July 2013.

Mr. Masese instructed by the firm of Omwoyo Masese & Company advocates appeared for the Claimant while Mr. Bwire instructed by Messrs. Ochieng, Onyango, Kibet and Ohaga Advocates appeared for the Respondent. The Claimant testified on his behalf while the Respondent called ZAINABU MISHI MSHANGAMWE (RW1) the acting Human Resources Officer who testified on its behalf.

The facts of the case are as follows;

The Claimant was employed by the Respondent on 26th March 1997 as an Assistant Accountant. He rose through the ranks and at the time of leaving employment he was Levy Inspector II earning a salary of kshs.87,482.

On 1st April 2011 which was April Fools Day the Claimant sent a prank text message to a colleague PATRICIA TERER ONDENG to the effect that some Senior Managers of the Respondent had been picked by Kenya Anti Corruption Commission for questioning. On the same date a letter was written to him asking him to show cause why disciplinary action should not be taken against him for writing a message to members of staff of the Respondent insinuating that the Levy Manager Mr. Eden Odhiambo and the Procurement Manager Mr. Joseph Ndung'u had been arrested by the Kenya anticorruption Commission as this was injurious to the reputation of the officers and the organization and constituted an offence under section 44(d) of the Employment Act 2007. The letter required him to explain within 48 hours the circumstances that gave rise to the case before disciplinary action is taken against him.

The Claimant responded to the letter explaining that he did not intend to cause any injury to any officer. On 6th April 2011 the Claimant received a letter requiring him to appear before the disciplinary committee on 11th April 2011 at 10.00 am. Two days later he received a letter of dismissal dated 12th April 2011. He appealed against the dismissal on 15th April 2011 and received a reply on 18th April 2011 dismissing his appeal. On 2nd June 2011 the Claimant received a systems audit report highlighting several questionable issues regarding the Respondent. After reading the report he concluded that the issues raised in the report are some of the issues which caused his dismissal. The Claimant was not paid any terminal benefits. The Claimant prayed for orders as itemized in the Memorandum of claim.

Mr. Eden Odhiambo and Mr. Joseph Ndungu the subject of the text messages were among the members of the disciplinary committee which heard the Claimants case. Both Mr. Ndungu and Mr. Odhiambo were later charged in the Anti-Corruption Court and the cases against them were pending at the time of hearing of this case.

The main facts as outlined above are not contested. The only issues for determination are therefore whether of the Claimant was wrongfully dismissed by the Respondent and whether he is entitled to the prayers sought in the Claim.

It has been submitted for the Claimant that the Respondent failed to give the Claimant the right to be

heard and to give genuine reasons for arrival at the decision to dismiss him, that the officer named in the Claimants message had no reputation which was injured by the message as they were subsequently charged by Kenya Anticorruption Commission, that the officers whose reputation is alleged to have been injured did not come to court to demonstrate how their reputation was capable of being injured, that the Respondent acted ultra vires its powers, that the Claimant had legitimate expectation to be promoted to the post of Director, Performance & Efficiency Audit in job Group S, that the Respondent did not observe, the rules of natural justice that the action to terminate the Claimant's employment was unreasonable, actuated by malice and in bad faith and lacked fundamental justice.

The Claimant cited the following authorities IN SUPPORT OF HIS CASE;

1. **CAUSE NO. 246 OF 2012 ROBAI MUSINZI –VS- SAFDAR M KAHAM**
2. **MICHALE M MURUNGI –VS- KARA**
3. **MISC. APPLICATION NO. 382 OF 2006 OBED NTHIWA –VS- COMMISSIONER CO-OPERATIVE DEVELOPMENT & ANOTHER.**
4. **MISC. APPLICATION NO. 920 OF 2005 JOCYE MANYUSI –VS- EVAN GICHERU & 3 OTHERS.**

However in the submissions the following cases are relied upon;

1. DAVID ONYANGO OLOO V. THE A-G CIVIL APPEAL NO. 152/1986
2. OBED NTHIWA –VS- COMMISSIONER CO-OPERATIVE DEVELOPMENT & ANOTHER (2007) eKLR.
3. R V. THE STAFF DISCIPLINARY COMMITTEE OF MASENO UNIVERSITY & 2 OTHERS.
4. CCSU V THE MINISTER FOR CIVIL SERVICE (HL 1984) 919850 1 AC 375
5. R V COMMISSIONER OF CO-OPERATIVES EXPARTE KIRINYAGA TEA GROWERS (1999) 1 EA 245.

For the Respondent it is submitted that the Claimant admitted writing and circulating a disparaging text on Fools Day, that the Respondent complied with Sections 41 and 44(4)(d) of the Employment Act and Clause 16.3.1 (vii) and (x) of Respondents Human Resource Manual, that Mr. Eden Odhiambo and Mr. Joseph Ndungu attended the disciplinary meeting as complainants and their presence did not violate the rules of natural justice, that their presence was not to vindicate, that the decision to dismiss the Claimant was justified, is a proper valid reason for purposes of Section 43 of the Employment Act and, the process accorded with the law and no prejudice was visited upon the Claimant. That there was no malice on the part of the Respondent. It is further submitted that the Claimant is not entitled to notice as he was dismissed, that he is not entitled to salary for April as he only worked for 12 days for which he was paid, that the Claimant did not prove that he had 116 days outstanding leave and leave allowance, that the Claimant is not entitled to service gratuity as he was a member of NSSF and the Respondents Pension Scheme, that he is not entitled to compensation as he was not summarily dismissed and that he is not entitled to general damages, loss of earnings and reinstatement.

Having considered the evidence and the submissions I now look at the issues for determination.

1. Whether the dismissal of the Claimant was wrongful.

Both parties are in agreement that the only reason why the Claimant was dismissed was sending a text message to one of his workmates to the effect that the Levy Manager Mr. Eden Odhiambo and Procurement Manager Mr. Joseph Ndungu had been summoned by Kenya Anti Corruption Commission.

The letter of dismissal is reproduced herebelow.

Mr. Edgar Ndemo Momanyi P/No. 0696

Levy Inspector II

NYERI

Thro' Regional Manager – Central Kenya

SUMMARY DISMISSAL ON GROSS MISCONDUCT

Further to my letter Ref. CTDLT/CONF/7/696(32) DATED 6th April 2011, and your subsequent appearance before the Disciplinary committee on 11th April 2011, to answer to acts of Gross Misconduct, it has been established beyond doubt that you contravened sections of the Law and the Catering and Tourism Development Levy trustees Terms and Conditions of Service, warranting Summary Dismissal, as follows;

- 1. Without lawful cause, on Friday 1st april 2011 you wrote a message to some CTDLT members of staff insinuating that the Chief Executive Officer, Levy manager, Mr. Eden Odhiambo and the Procurement Officer, Mr. Joseph Ndung'u had been arrested by the Kenya anticorruption commission. This is contrary to the Employment Act 2007 Section 44.4(d).**
- 2. You acted in an irresponsible manner that demonstrated lack of thought on the likeliness of putting the name of the Trustees into disrepute; contrary to Section 16.3.1(x) of the CTDLT Terms and Conditions of Service.**

Your action caused injury to the reputation of the said officers and the Organization, and your written message, caused despondency among Staff in the Organization.

Management takes exception to this gross misconduct which you willfully and knowingly committed.

In this regard, you are hereby Summarily Dismissed from the service of Catering and Tourism Development Levy Trustees in accordance with the said clauses which stat that:

Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, if an employee;

- 1. Section 44.4(d) – uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;**
- 2. 16.3.1(x) willfully by verbal utterance, written submissions or any other means brings the name of the Organization into disrepute.**

Please arrange to hand over all Organization property in your custody to your immediate supervisor and thereafter clear with all departments as per Procedure PM-7-14 with immediate effect.

Yours sincerely,

Signed

Allan W. Chenane

Chief Executive Officer

Section 41 of the Employment Act requires that an employee be informed of the charges against him before the decision to dismiss him is reached and that this should be done in the presence of a colleague or a Union Official of the employee's choice. The section further provides that where the employee is likely to be dismissed under section 44(3) or (4), then the employer must hear and consider any

representations made by the employee or the person chosen by the employee to accompany him to the disciplinary hearing.

Section 43 provides that the employer must prove the reasons for termination.

Section 45 requires that the reason for termination must be valid and the employer must prove that the termination was according to fair procedure.

The Respondent's Human Resource Policy Manual and Terms and Conditions of Service of members of staff (TOR) provides for the procedure for discipline of employees at clause 15.2.

The clause is reproduced herebelow;

15.2 Employee Sanctions

15.2.1 CTDLT recognizes that some employees will occasionally fail to meet performance requirements or will violate the provisions governing the Terms and Condition of Service. When this happens, the Head of Department shall invoke the following employee sanction procedure.

15.2.2 If an employee violates the Terms and conditions of Service, the head of Department shall immediately obtain the necessary evidence in writing from the employee and available witnesses.

15.2.3 If the alleged violation is of a minor nature, then the employees shall be served with a verbal warning without documenting the incident on file.

15.2.4 If an employee violates the Terms and condition of Service arranging official sanction(s) other than dismissal, the Head of Department shall charge the employee and require the employee to respond in writing within 48 hours.

15.2.5 In any investigation, employees are entitled to know the whole case against them and shall be given adequate opportunity to prepare their defense. No evidence shall be used against employees unless they have been given a copy of the same at least 48 hours in advance. Such an employee shall be required to appear before a disciplinary committee constituted by the Chief Executive Officer.

15.2.6 If as a result of the investigation, the employees is found at fault, the Committee shall make recommendations to the Chief Executive Officer for appropriate disciplinary measures. The Chief Executive Officer before deciding any sanction against the employee, shall consider the employee's record of performance, any previous violations of the Terms and Conditions of Service and other relevant factors.

15.2.7 Where a case is established against an employee and the nature of the violation warrants no more than a written warning, the employee shall be given a written warning by the Head of Department, setting the precise nature of the violation and the likely consequences of further violations.

15.2.8 A copy of the letter shall be placed on the employee personal file, with appropriate notations.

15.2.9 If an employee commits a second violation within a

period of 12 months he shall be given a final warning setting out the precise nature of the violation and cautioning him that if he commits a further violation of the code of conduct whin

12 months he shall be liable to separation from employment.

15.2.10 However, if an employee violates the Terms and Condition of Service, which is considered sufficiently serious to justify summary dismissal, the Head of Department shall recommend to the Chief Executive Officer that the employee be separated from employment. Such an employee will be granted a hearing before a disciplinary committee which will make recommendations to the Chief Executive Officer.

15.2.11 Decisions on employee sanctions including suspension and termination of employment may be taken against an employee charged with a criminal offence with the context of cap 226 of the Laws of Kenya.

15.2.12 In all cases, employees have the right of appeal to a more senior person than the one who administered the sanction, including the Board of Trustees. The appeal must be made within three (3) working days from the date the sanction was communicated. If the employee does not appeal against the sanction within the established time limits, the matter shall be deemed settled.

In the present case, the Claimant wrote the text message on 1st April and sent it to one of his colleagues who then forwarded it to others. On the very same day the Claimant was sent a letter to explain the circumstances that gave rise to the message before disciplinary action is taken against him. He did so on 4th April 2011. By letter dated 6th April 2011 he was summoned to a disciplinary hearing to take place on 11th April 2011 and he was dismissed by letter dated 12th April 2011. All the letters were signed by the Chief Executive Officer. The letter of dismissal did not advise the Claimant of his right of appeal as provided in Clause 15.2.12 of the TOR and in section 12(1) of the Employment Act. The Claimant appealed but the appeal was rejected by the Chief Executive Officer who had dismissed him.

The Respondent did not inform the Claimant of his right to be represented by a colleague. At the Disciplinary committee hearing the persons who were alleged to have been offended by the Claimant's text message sat in as part of the disciplinary committee members as was confirmed in the testimony of RW1. The Claimant testified that Mr. Odhiambo was in charge of the committee and questioned him. RW1 did not testify that Mr. Odhiambo and Mr. Ndungu were present as complainants as alleged in the submissions of the Respondent.

From the foregoing the Respondent failed to comply with section 41 of the Act and clause 15.2 of the TOR.

The second stem is whether the reason for termination was valid.

The Claimant explained that the text message was an April Fools-Day prank. The Respondent alleges that the message **"caused injury to the reputation of the said officers and the organization, and despondency among staff of the organization"**

No evidence was adduced by the Respondent to show that the reputation of officers named in the text message was injured. The message was never circulated beyond the organization by the Claimant and no evidence was adduced to prove that any person outside the organization was aware about the message or that the organization's reputation was injured. No evidence was adduced to prove that there was despondency among the employees caused by the text message.

On the contrary the two officers were actually summoned and charged by the Kenya Anti Corruption Commission. This would mean that there was no reputation to be injured as what was contained in the message was the truth.

1st April is widely recognized as Fools Day and people compete to outwit each other with pranks on that day. The joke may have been in bad taste but the Claimant explained that it was just a joke and he meant

no harm. It was a fact that the two officers named had not been summoned by KACC and this could be proved without much difficulty and without harm to both officers. I do not find it a valid reason for summary dismissal especially taking into account the long service of the Claimant spanning 14 years, and the fact that no allegation has been made about any bad conduct or disciplinary record of the Claimant. I agree with the Claimant that the dismissal was actuated by malice as the officers felt threatened by the message which unfortunately turned prophetic. The whole disciplinary process attests to this.

I therefore find that the summary dismissal of the Claimant was wrongful and unfair both procedurally and substantively.

The Claimant has sought the following remedies;

1. Notice
2. Terminal benefits
3. Compensation
4. General damages
5. Loss of future earnings
6. Reinstatement
7. Costs
8. Interest
9. Such orders as the honourable court may deem fit to meet the ends of justice.

The Claimant testified that he cannot quantify his loss arising from his summary dismissal. He now works in the jua kali sector, His wife left him immediately he was dismissed. The Respondent did not pay his terminal dues. I agree with the Claimant that in the circumstances of his case, no amount of compensation can be attached to the suffering he has had to endure as a result of the malicious actions of the Respondent.

It was submitted for the Respondent that re-instatement is a remedy for termination and not for summary dismissal, that it can be ordered if circumstances of the parties allow for harmonious correlation, that his position has already been filled and re-instatement would necessitate termination of employment of the person presently occupying his position.

Section 49(3) of the Employment Act provides as follows;

“Where in the opinion of the Labour Officer an employee’s summary dismissal or termination of employment is found unfair, the Labour Officer may recommend to the employer to;

- a. ***Reinstate the employee.....”***

The submission that re-instatement only applies to termination and not summary dismissal is therefore not correct. In any event, summary dismissal is one of the ways in which employment may be terminated.

On the submission about harmonious correlation and filling of the Claimants position, no evidence was adduced to prove the same. The Respondent is a state corporation with branches all over the country where the Claimant can easily be deployed.

His job as Levy Inspector means he can be based in any of the Respondents stations all over the country and there would be no need of terminating any other employee because of re-instatement of the Claimant.

I have considered the Claimant’s, length of service, the fact that he had a clean record and find that the only appropriate remedy in this case would be re-instatement.

I therefore order that the Respondent re-instates the Claimant to his former position of Levy Inspector 2 and treats him in all respects as if he did not leave service within 30 days from today.

The Respondent shall also pay the Claimant's costs.

Orders accordingly.

Read in open Court this 26th day of September 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Masese _____ for Claimant

Chepkosgei h/b for Bwire _____ for Respondent