



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA
(BIMA TOWERS)
CAUSE NO. 40 OF 2012
(Originally Nairobi Cause No. 859 of 2011)

ISMAIL HASSAN ABDULLAHI

CLAIMANT

v

KENYA PORTS AUTHORITY

RESPONDENT

JUDGMENT

Introduction

1. Ismail Hassan Abdullahi (Claimant) was employed by Kenya Ports Authority (Respondent) on 10 April 1997 as a utility vehicle driver grade PA9 at a salary of Kshs 80,040/- per annum. The Claimant was at some point in 1997 confirmed to permanent and pensionable status. In 1999, the Claimant was redesignated as Sergeant Grade PA 9. Through a letter dated 17 September 2001 the Claimant was promoted to the post of Detective II Grade PA 8. Following a restructuring the Claimant was translated to the post of Sergeant Grade HG 2 effective 1 September 2002.
2. On 17 January 2008, the Respondent suspended the Claimant from duty because he had been arrested and arraigned in Court for the offence of theft of motor vehicles parts from Customs motor yard 'G' Section and that he had been found vandalizing motor vehicles and loading the parts onto a taxi. The letter of suspension indicated the Claimant would not earn a salary during the suspension.
3. Through a letter dated 5 December 2008 the Respondent informed the Claimant that his suspension was being lifted and he was being dismissed with immediate effect. The letter stated that this was after considering the findings and recommendations of a Committee of Inquiry and pursuant to section K. 8(u) of the Disciplinary Handbook 2008 and section 17(c) of the Employment Act of cap 226 (now repealed).
4. The dismissal letter informed the Claimant that the salaries withheld during the suspension would be paid less any debts owed to the Respondent.

Claimant's pleadings and case

5. The Claimant did not agree with the dismissal and on 3 June 2011 he filed a Statement of Claim where he stated the issues in dispute as *unlawful/unfair termination, unpaid terminal dues, unpaid pension and unpaid salary from January to December 2008*.
6. The Claimant pleaded that the Respondent's Management Committee which inquired into the

- allegations of theft of motor vehicles spares from the customs yard cleared him of any wrongdoing and forwarded its report to the Respondent's Disciplinary Committee.
7. The Claimant further pleaded that his termination was unfair and wrongful because the Respondent did not afford him a hearing before dismissal nor wait for the conclusion of the criminal charges preferred against him in Mombasa Chief Magistrates Criminal Case No. 3363 of 2007 and of which he was acquitted under section 210 of the Criminal Procedure Code and that the allegations against him were unsubstantiated and dismissal tainted with mala fides. He was terminated while 38 years old and could not secure alternative employment.
 8. The Claimant therefore sought 3 months' salary in lieu of notice of Kshs 147,292.50, pension for 5 years and unpaid salary, house allowance and other benefits during suspension of Kshs 620,606/88, general damages and costs.
 9. In testimony in Court, the Claimant more or less reiterated what had been pleaded.
 10. In relation to the events that preceded his suspension and ultimately dismissal, the Claimant testified that on 20 October 2007, a Saturday after his shift, he was moving towards the gate when he was arrested and taken to the police station after which he was charged in court.
 11. He also stated that on 17 January 2007 he was suspended (Exh 7) without salary after which the Respondent initiated an inquiry (Res MG 8' through a committee of 4 persons. The Committee released a report (Res MG 9') recommending his reinstatement and that the withheld salary be paid. The Claimant stated that he was neither reinstated nor paid the withheld salaries and that on 5 December 2008 the Respondent wrote to him a dismissal letter. He further testified that at the time of dismissal he was earning Kshs 22,160/- basic salary and Kshs 10,470/- house allowance per month.
 12. The Claimant also testified that at the time of dismissal the criminal case had not been finalised (he was acquitted on 29 January 2009) and that he did not get alternative employment.
 13. While being cross examined, the Claimant stated that on 20 October 2007 he was on duty patrolling while a Ms Jeptoo was manning the gate at G section; he recorded a statement with Respondent's security officers; he did not know who was driving a motor vehicle registration no. KAK 671K; he was given a charge sheet on 21 October 2007 and that a union representative was present at the inquiry.
 14. The witness also stated that the Respondent's Personnel Manager wrote a Memo to the Managing Director recommending he be issued with a warning letter and be transferred to Lamu but the Managing Director had him dismissed. The Claimant also confirmed receiving part of his pension.

Respondent's case

15. The Respondent filed a Response on 20 June 2011 and it admitted employing the Claimant on 10 April 1997.
16. In the Response, it was pleaded that the Claimant's employment was governed by staff regulations which allowed for termination on notice of 3 months; was earning gross pay Kshs 47,109/- in 2007; received a letter from police notifying it of the Claimant's arrest; Claimant was suspended on 17 January 2008 on the basis of section G5(e) of Revised Staff Regulations 2002; Claimant was furnished with a charge sheet; denied unfairly, wrongfully and without justification dismissing the Claimant or that the dismissal was tainted with mala fides.
17. It was also pleaded that the acquittal of the Claimant did not stop the Respondent from conducting administrative proceedings against the Claimant.
18. The Respondent further denied denying the Claimant his salary during the suspension period, refusing to pay terminal benefits; that the Claimant was terminated while 38 years old and that the terminal dues payable to the Claimant were computed under the Respondent's pension Trust Deed and rules and are available for collection by the Claimant.
19. The Respondent called its Assistant Human Resources Officer, Discipline, Esther Kabura Karanja who stated that the OCPD Kilindini gave a report on the arrest of the Claimant for stealing and which led the Personnel Manager to ask the Human Resources and Administration Manager to suspend the Claimant and that the suspension was to abide the outcome of the criminal process.
20. The witness also stated that after the suspension, investigations were carried out and a report forwarded to the Personnel Manager and that the report recommended the constituting of a Committee of Inquiry. She stated that the Claimant appeared before the Committee and was

- represented by a union official a Mr. Munyao. The Committee recommended reinstatement of the Claimant because it did not find sufficient evidence beyond reasonable doubt.
21. The report of the Committee was forwarded to the Managing Director through the Personnel Manager recommending issuance of a warning letter to the Claimant and transfer to Lamu but the Managing Director indicated the evidence against the Claimant was strong and he should be dismissed.
 22. According to the witness, administrative action could be taken against the Claimant despite pending criminal proceedings pursuant to section G 5 and section K75 of the Disciplinary Handbook and that the dismissal was lawful and therefore the Claimant is not entitled to the prayers sought.
 23. In cross examination, the witness admitted that the Claimant did not earn a salary during suspension and stated that the Claimant was given an opportunity before the Committee of Inquiry to be heard and that 9 witnesses were also summoned before the Committee; that Committee did not find sufficient evidence but its recommendations were not followed by the Managing Director.
 24. On terminal dues to the Claimant, the witness stated that the dismissal letter informed the Claimant he would be paid withheld salaries but he was not paid because of a loan with Barclays Bank Ltd (Respondent counsel informed Court on 5 September 2013 that the Bank had informed the Respondent it would pursue the loan through other means).
 25. The Claimant filed written submissions on 18 September 2013 while the Respondent filed its submissions on 1 October 2013.

Questions arising for determination

26. From the pleadings, testimony and submissions the questions which the court needs to discuss are the applicable law, whether the termination of the Claimant was unfair and if so what the appropriate remedies are.

The applicable law

27. The process leading to the termination of the Claimant commenced with a suspension on 17 January 2008. At this point the Employment Act, cap 226 (repealed) was in operation. This particular statute did not have any provision on the right to a hearing before termination. An employer could terminate at will, without cause but on payment in lieu of requisite or reasonable notice.
28. At the termination of the Claimant in December 2008, the Employment Act, 2007 was now in operation and it made a fundamental shift from the previous statutory regime. It made provision for both procedural fairness (section 41) and substantive fairness (sections 43, 45 and 47(5)).

Whether the dismissal was unfair

Procedural fairness

29. The Employment Act, 2007 came into operation on 2 June 2008. Section 41 of the Act has set out some requirements which an employer is expected to comply with when it is contemplating terminating the services of an employee.
30. In this regard the conduct of the Respondent as far as the procedural fairness requirements are concerned will be tested only in as far as its conduct from 2 June 2008 is concerned. Any conduct or steps taken before 2 June 2008 must be measured only against what was provided in the Respondent's manuals, *The Revised Staff Regulations 2002* and *The Kenya Ports Authority Disciplinary Handbook 2008* which came into effect on 1 March 2008.
31. The Claimant was suspended on 17 January 2008. The suspension made reference to section G.5 of the Revised Staff Regulations 2002. The Respondent exhibited an extract of the Revised Staff Regulations 2002 (page 88, MG 4) and clause G 5(e) allowed it to suspend without pay an employee who had been charged with a criminal offence.
32. The Committee of Inquiry was appointed on 5 June 2008, just after the Employment Act had come into force. According to the Memo appointing the Committee the appointment was pursuant

- to section G. 5(f) of the Revised Staff Regulations 2002. The Claimant did not question the competence of the power to appoint the Committee. He was only unhappy with its membership.
33. The Claimant had been furnished with a charge sheet containing the allegations against him and he participated in the proceedings of the inquiry on 5th and 6th August 2008 and the minute's record a Mr. Munyao from the Dock Workers Union as representing the Claimant. Although the Claimant denied Mr. Munyao, I am satisfied that he was taking part in the proceedings on behalf of the Claimant. He asked questions of the witnesses. The minutes of the proceedings run into some 15 pages.
34. The Committee made findings, observations and recommendations. I am satisfied that the process undertaken by the Respondent was procedurally fair and substantively in compliance with the requirements of both the Revised Staff Regulations 2002 and section 41 of the Employment Act.

Substantive fairness

35. Section 43 of the Employment Act requires an employer to prove the reasons for a termination; section 45(2) of the Act requires it to prove that the reasons for termination are valid and fair reasons while section 45(4) of the Act requires an employer to act in accordance with justice and equity in terminating an employee; section 47(5) of the Act obliges an employer to justify the grounds for terminating an employee. These four sections/subsections deal with substantive fairness of a termination and I must now evaluate whether the Respondent has proved and justified the reasons for dismissing the Claimant and that those reasons were valid and fair.
36. The Claimant was suspended because he had been charged in a court of law for stealing motor vehicle parts from a customs yard. It was further alleged in the suspension letter that the Claimant had been found vandalizing motor vehicle parts which were loaded onto a taxi. This was in accord with section G.5 (e) of the Revised Staff Regulations 2002. The Claimant was informed in the suspension letter that the suspension was pending the outcome of the case in court.
37. On 5 December 2008, the Claimant's suspension was lifted and he was dismissed. The dismissal letter stated that the Claimant had appeared before the Committee of Inquiry and he was found guilty as charged. The dismissal was stated as being pursuant to section K. 8(u) of the Disciplinary Handbook and section 17 (c) of the Employment Act (I take this to refer to the repealed Employment Act, cap 226).
38. Section 17(c) of the Employment Act (repealed) dealt with summary dismissal where an employee had willfully neglected to perform his work or carelessly and improperly performed his work which he should have performed properly and carefully.
39. The Claimant was not charged with willful neglect to perform his work or for carelessly and improperly performing his work and therefore it was not legal to be dismissed pursuant to section 17(c) of the Employment Act (repealed). The reference to the section must have been inadvertent. In any event at the time of dismissal the Employment Act, 2007 was the applicable law (section 17 of the Employment Act, 2007 deals with payment of wages and not dismissals).
40. The charge laid against the Claimant was that *'you're charged that on 20/10/07 while assigned to patrol G Section you conspired with suspects to steal vehicle parts. Show cause why severe disciplinary* The minutes indicate there was a third charge of assisting a taxi to enter the port.
41. After inquiries in which 9 witnesses were called the Committee found and observed that either the Claimant or his colleague who was on duty with him one, Rose Jeptoo was lying and recommended that both Jeptoo and the Claimant should be reprimanded and that the Claimant be reinstated and withheld salaries be paid back.
42. The report went to the Personnel Manager who in a Memo dated 21 November 2008 found that the evidence on record contained the minimum threshold required to sustain a charge against the Claimant and recommended that the Claimant be issued with a warning letter and be transferred to Lamu jetty.
43. The Managing Director did not take the recommendations of either the Committee of Inquiry or the Personnel Manager but directed that the Claimant should be dismissed because the evidence was too strong.
44. The Respondent called only one witness to discharge the burden placed upon it by the provisions of the Employment Act, 2007. The testimony of this witness was majorly based on the records kept by the various officers of the Respondent who carried out inquiries or wrote memos but none

- of the persons who saw what happened or carried out the investigations were called.
45. I have gone through the voluminous documentation produced by the Respondent and putting into consideration the fact that the suspension letter of the Claimant represented to him that the suspension would await conclusion of the criminal trial against him and that he was dismissed before the criminal trial was concluded and that he was eventually acquitted; the recommendations of the Committee of Inquiry to reprimand and reinstate the Claimant and that of the Personnel Manager to warn and transfer the Claimant, I reach the conclusion that the dismissal of the Claimant was not in accordance with justice and equity pursuant to section 45(4)(b) of the Employment Act because no basis was laid for the Respondent's Managing Director to ignore the findings and recommendations of the fact finders.

Parallel disciplinary process and criminal proceedings

46. Section G. 5(f) of the Respondent's Revised Staff Regulations 2002 provide that the fact that an employee has a criminal case pending in a court of law does not prohibit or restrict the Respondent from instituting administrative action against the employee in accordance with the Respondent's disciplinary procedures.
47. The Claimant submitted that initiating parallel disciplinary processes was grossly unfair and reference was made to the decision of *Patrick Njuguna Kariuki v Del Monte (K) Ltd*, Cause No. 9523 of 2011 and *Mathew Kipchumba Kosgei v Baringo Teachers SACCO*, Cause No. 37 of 2013.
48. In my view the purposes of a disciplinary process is to inquire into allegations relating to the breach of obligations as between an employer and an employee with a view to terminating the employment contract while the criminal process has its own different purposes and objectives, and its own momentum.
49. The legal principles applicable in a criminal process are different from the legal principles applicable in a disciplinary process. Mutual trust and confidence is one such principle which is crucial in an employment relationship but which is not a principle which would be considered in a criminal process.
50. In the one the outcome could be separation between employee and employer and in the other conviction and sentence by an independent and impartial court. In a disciplinary process it is the employer who is in charge while in a criminal trial it is the Republic and the judiciary. Therefore the outcome of a disciplinary process need not depend on the outcome of a criminal process.

Appropriate remedies

3 Months salary in lieu of Notice

51. I have reached the conclusion that the dismissal of the Claimant was not in accordance with justice and equity. The Claimant's letter of appointment made provision for termination by the giving of three months notice or payment of one month's salary in lieu of notice.
52. At the time of dismissal the Claimant was earning Kshs 32,630/- (basic and house allowance). I would award him the equivalent of one month's pay in lieu of notice.

Pension

53. Pension is regulated through Trust Deeds and is managed and held by bodies capable of being sued. Such a body was not a party to this suit and the Claimant did not compute or tabulate the amount of pension he was seeking. The head of claim is declined.

Withheld salaries/house allowance during suspension

54. Under section K.7 (d) of the Respondent's Disciplinary Handbook 2008 which came into force on 1 March 2008 an employee on suspension is entitled to house allowance while under section K. 7(f) the employee is entitled to withheld basic salary on termination of services. At paragraph 9 of its submissions, the Respondent indicated that it is the Claimant who has failed to collect the salaries and house allowance withheld during suspension.

55. The Claimant under this head of claim sought a total of Kshs 620,606/88 (Kshs 51,717/24 × 12). The Claimant used his gross monthly pay at time of suspension. A look at the pay slip of the Claimant for June 2007 indicates that this sum includes overtime. Overtime can vary from month to month depending on the needs of an employer.
56. The correct approach in my view is to use the basic pay and house allowance to get the correct figure. The Claimant's basic pay and house allowance totaled Kshs 32,630 and considering that the Claimant was dismissed on 5 December 2008 he can only legitimately claim withheld salaries for 11 months and 5 days based on the basic pay and house allowance.
57. My assessment comes to a figure of Kshs 365,205/-

General damages for unfair dismissal

58. In submissions, the Claimant sought an award of maximum damages as allowed by law. Section 49(1)(c) of the Employment Act has provided the equivalent of a number of months pay not exceeding twelve months gross wages as one of the primary remedies for unfair termination and wrongful dismissal. The section has not explicitly called the award damages or compensation but the practice and procedure of employment courts from other jurisdictions has been to refer to the award as compensation. The award of compensation is discretionary and it is discretion to be exercised within the parameters of any, some or all of the thirteen factors set out in section 49(4) of the Employment Act.
59. A Claimant who desires an award under section 49(4) of the Employment Act should lay a foundation through evidence of which of the factors the court should consider. It was pleaded that the Claimant served the Respondent for some 11 years, has not secured alternative employment and was 38 years old at time of termination. All these are relevant factors. My view is that this is not a fit case to make any award under this head.

Costs and Interest

60. Costs do not follow the event in the Industrial Court unlike in proceedings under the civil procedure regime. The Court is given a discretion to make a costs order it considers just.
61. In the instant case I would award the Claimant costs of the cause with interest on the decretal sum at the usual court rates from the time of filing the Claim.

Certificate of Service

62. A certificate of service upon termination of employment is a right of an employee pursuant to section 51 of the Employment Act. The Respondent is under a legal duty to issue one to the Claimant and I direct it to issue him with one.

Section 66 of the Kenya Ports Authority Act

63. The Respondent despite raising the issue of section 66 of the Kenya Ports Authority Act in the Response did not raise it either in evidence or submissions and I make no order on the issue.

Conclusion and Orders

64. In conclusion I do find and hold that the dismissal of the Claimant was not in accordance with justice and equity and therefore unfair and award the Claimant

- a. One month salary in lieu of Notice Kshs 32,630/-
b. Withheld salaries for 11 months 5 days Kshs 365,205/-

TOTAL

Kshs 397,835/-

65. The Claimant to have costs and interest on decretal sum from time of filing Claim.
66. The Claim for general damages is declined

Delivered, dated and signed in open Court in Mombasa on this 11th day of October 2013.

Justice Radido Stephen

Judge

Appearances

Mr. Mucoki instructed by

Ahmednassir, Abdikadir & Co. Advocates for Claimant

Mr. Kyandih instructed

By Muthoni Gatere Advocate for Respondent