



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 2072 OF 2011

FRANCIS MANGERA KIONGA.....CLAIMANT

VS

KENYA REVENUE AUTHORITY.....RESPONDENT

AWARD

Introduction

1. Francis Mangera Kionga, the Claimant in this case worked for Kenya Revenue Authority, the Respondent herein from October 2001 until 13th October 2010 when he was retired in the Authority's interest. He therefore came to Court by way of a Memorandum of Claim dated 24th November and filed on 7th December 2011.
2. The Respondent filed a Statement of Response on 17th August 2012 and the matter was heard between 5th December 2012 and 19th July 2013 with Mr. Nyangito appearing for the Claimant and Mrs. Ngugi for the Respondent. The Claimant testified on his own behalf and then called Mercy Waruguru Kabiru and Daniel Isoe Ndubi.
3. Major (Rtd) Samuel Muraya Kariuki, a Senior Assistant Commissioner in charge of Security and Crispin Nyamweya Agata, a Senior Assistant Commissioner in charge of Human Resources testified for the Respondent. Both parties filed written submissions.

The Claimant's Case

4. The Claimant was employed by the Respondent in October 2001 initially as an Accountant and later as a Research Officer. By letter dated 13th April 2010, he was retired in the Respondent's interest on allegations of financial impropriety by some members of the public. At the time he was retired, the Claimant was earning a monthly salary of Kshs. 134,000. It was the Claimant's case that his retirement was unlawful and unfair.
5. The Claimant therefore claimed the following:
 - a. General damages for breach of contract
 - b. Loss of earnings for the period he would have worked Kshs. 36,984,000
 - c. Costs and interest
 - d. Any other relief the Court may deem just to grant

The Respondent's Case

6. In its Statement of Response, the Respondent stated that the Claimant's retirement was as a result of nefarious activities which were injurious to the Respondent's image. In particular, the Respondent had received a complaint from two members of the public namely; James Kinara and Paul Osiemo Angima that the Claimant had demanded Kshs. 478,500 purporting that he would assist them to purchase an auction motor vehicle from the Respondent. Upon receiving the money, the Claimant did not deliver the motor vehicle as promised.

7. A criminal complaint against the Claimant was lodged at Kisii Police Station on 10th April 2009. A report was also made to the Respondent's Head of Security who commenced investigations and filed a report on 11th May 2009. Upon interrogation by the Respondent's Head of Security, the Claimant admitted the allegations made against him.

8. In November 2006, another complaint was received from one Geoffrey Ogeto Omari that the Claimant had obtained Kshs. 6,500 from him on the promise that the Claimant would facilitate the transfer of motor vehicle registration number KXP 162. The transfer was however not effected until 14th February 2007 after a complaint was lodged with the Respondent's Head of Security.

9. Further, in September 2006 the Claimant obtained Kshs. 58,000 from one Daniel Ndubi being deposit towards the sale of motor vehicle registration number KAQ 002H by the Claimant to the Complainant. Again on 18th May 2007, the Claimant obtained money from one Mercy Waruguru Kabiru which he failed to pay back as promised prompting the said Mercy Waruguru Kabiru to file a complaint with the Criminal Investigations Department.

10. Following the complaints lodged against the Claimant by members of the public, he was suspended on 20th May 2009 and on 13th April 2010 he was retired in the Authority's interest. His appeal was disallowed by letter dated 2nd July 2010. It was the Respondent's case that the Claimant was given adequate opportunity to be heard and that his retirement was lawful and procedural in accordance with the Respondent's Code of Conduct.

Findings and Determination

11. The main issue for determination in this case is whether the Claimant's retirement in the Authority's interest was justifiable and lawful.

12. Section 43 of the Employment Act, 2007 provides that:

(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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

13. The Claimant was retired in the Authority's interest on allegations of financial impropriety involving members of the public. While admitting having received Kshs. 478,500 from two members of the public namely; James Kinara and Paul Osiemo Angima, the Claimant told the Court that he in fact purchased and delivered the motor vehicle in issue to the complainants who subsequently withdrew their complaint against him. The Claimant also admitted having received Kshs. 6,500 from Geoffrey Ogeto Omari for transfer of a motor vehicle, which was later effected.

14. With regard to the complaint by David Isoe, the Claimant told the Court that he had received Kshs. 58,000 as deposit towards the purchase of motor vehicle registration number KAQ 002H. Being unable to complete the sale, David Isoe demanded his deposit back, which the Claimant later refunded.

15. On the complaint by Mercy Waruguru Kabiru, the Claimant testified that he was a guarantor to one Edwin who had borrowed money from the Complainant. Mercy Waruguru Kabiru sought to corroborate the Claimant's testimony in this regard but failed to explain the complete departure from her earlier statements to the police and the Respondent's Security Officer. The Court therefore treated her evidence with extreme caution.

16. Kenya Revenue Authority is a public body charged with responsibilities of a fiduciary nature. From the evidence on record, there is no doubt that the Claimant was involved in financial dealings with members of the public in a manner that put his position as an employee of the Authority in jeopardy.

17. The Respondent's witness, Major (Rtd) Samuel Muraya Kariuki testified that the complaints against the Claimant were made to him within a span of one year. The witness further testified that the Claimant's duties were in Research Department and had nothing to do with motor vehicles. The Court therefore finds that in spite of the fact that the complaints made against the Claimant were later withdrawn, the Respondent had a valid reason to retire the Claimant in the Authority's interest.

18. I will now examine the procedure adopted by the Respondent in effecting the retirement.

19. Section 45 (2) of the Act goes on to provide that:

(2) 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 employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

20. For a termination of employment to pass the fairness test, all the ingredients set out in Section 45(2) must be established. The procedure to be followed in effecting termination of employment on grounds of misconduct, poor performance or physical incapacity are set out in Section 41 of the Act. In the case of ***Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR***, Radido J summarised the legal fairness requirements set out in Section 41 as follows:

a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

21. The Claimant was suspended on 20th May 2009. He then wrote to the Respondent on 2nd

June and 19th November 2009 outlining his defence. He appeared before the Disciplinary Panel on 17th March 2010 and was retired in the Authority's interest on 13th April 2010. He appealed on 5th May 2010 and his appeal was disallowed on 2nd July 2010.

22. Overall, the Claimant stayed on suspension for close to a year. The Respondent's second witness, Crispin Nyamweya Agata told the Court that the suspension period was in excess of that set out in the Respondent's Code of Conduct as well as the normal suspension period in human resource practice.

23. The Respondent did not advance any reason as to why it breached its own Code of Conduct in keeping the Claimant on suspension for a longer period than it had set for itself. By its nature, suspension is not a disciplinary action but a neutral action taken to allow unfettered investigations into allegations leveled against an employee. Suspension must therefore not be prolonged so as to acquire the status of a form of termination of employment or a punishment for the suspended employee. Where an employer sets a definite period of suspension either in its internal disciplinary procedural rules or in the letter of suspension, the deadlines set must be observed and any extension must be explained to the employee in writing.

24. In the instant case, there was no explained reason why the Respondent did not observe the suspension period set out in its Code of Regulations. At any rate, the Claimant was kept on suspension for an unreasonably long period.

25. I therefore find the termination of the Claimant's employment unfair for want of due process and award him eight (8) months' salary in compensation. The claim for general damages for breach of contract was not proved and is dismissed. The claim for salary for the period the Claimant would have worked seeks relief in the nature of an order for specific performance which according to Section 49(4) (d) of the Employment Act, 2007 is to be granted in very exceptional circumstances which have not been made out in this case. This claim therefore fails and is dismissed.

26. In the final analysis I make an award in favour of the Claimant for the sum of Kshs. 1,072,000 being the equivalent of eight months' salary.

27. The Respondent will pay the costs of this case. This award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF DECEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*