



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 344 of 2012

MR. MAGOA ANDREW MOIRORECLAIMANT

VERSUS

KENYA BUREAU OF STANDARDS..... RESPONDENT

JUDGMENT

The Claimant Mogoia Andrew Moirore filed the memorandum of claim on 1st March, 2012. He prayed for judgment against the Respondent for:

1. Salary for the days he's out of employment to date being 37,746/= per month.
2. The respondents to pay the claimant his final dues being a sum of Ksh.772,285.60.
3. The Respondent to pay the costs of the suit.

The Respondent's statement of Response was filed on 4th April, 2012 through Nyachae & Ashitiva Advocates. The claimant counter claimed for Ksh.30,283 being unpaid part-value of a laptop that the claimant agreed to pay following loss of the Respondent's laptop valued at Ksh.120,000/=. The loss of the laptop was attributable to the claimant's recklessness. The Respondent denied liability on its part as submitted in the memorandum of claim and prayed that the claimant's case be dismissed with costs.

The claimant was employed in writing by the offer of appointment dated 18th August, 2008. The letter of offer is appendix I on the memorandum of claim. He was employed to the position of Assistant Technician on grade KS 8. By the letter dated 9th May, 2011 the claimant was addressed a show cause letter in the following terms:

"Dear Sir,

RE: UNPROCEDURAL RELEASE OF GOODS WITHOUT COC – LE

2011 MSA 2713587

It has come to the attention of this office that on 23rd February, 2011 during the cause of your duties at the Kilindini Port you irregularly and illegally released goods belonging to Retreat Freight Forwarders Ltd without collecting the penalty due to KEBS yet the goods were not accompanied by CoC. Furthermore, the consignment you released was neither stamped (by the Clerk) or entered in KEBS station register.

Release of goods without proper documentation and levies is contrary to your work requirements. This action is viewed as values and ethics not consistent with the expectation of an officer in public office in general and KEBS in particular.

There are strong suspicions that you have committed a criminal offence against or to substantial detriment of KEBS and the country. Similarly, it has portrayed you as a dishonest person whose conduct has brought disrepute to the organization in the eyes of the state and public.

Dishonesty or committing acts of misconduct as to prejudice the standing of KEBS and being suspected of having committed criminal offence against or to the substantial detriment of KEBS or the Republic of Kenya are serious offences under Human Resource Policy Section M 4 (d) and (e) as well as Employment Act, 2007 Section 44 (4) (g).

Accordingly disciplinary action is intended to be meted against you on the above grounds. However, before any action is taken, you are hereby given a chance to show cause why disciplinary action should not be taken against you for the offences.

Your written representation, if any should reach within 7 days from date of this letter failure to which dismissal from the service of Kenya Bureau of Standards will be taken without further reference to you.

Meanwhile you will be suspended from duty with effect from the date of this letter to pave way for further investigation.

Yours faithfully,

SIGNED

S. Cheruiyot

For: MANAGING DIRECTOR

The Claimant by the letter dated 16th May, 2011 being annexure III on the memorandum of claim wrote to make representations and was invited to a disciplinary committee meeting on 27th and 9th September 2011. The minutes are at folio 9 on the Respondent's statement of Response. The Committee heard the claimant and also heard the claimant's supervisor. The relevant proceedings of the Committee were documented as follows:

"Meeting of 9th September 2011

Former RM Coast appeared before the Committee for assistance/clarification and he submitted specimen signatures for Mogoja as indicated in the staff allocation/issue register for issuing stamps to the officers INS/WB/14/2008/1.

He also brought the original documents used by him to release the consignments.

All officers are provided with specific stamps with a letter explaining how the stamp will be handled.

Remarks by the officer

Officer admitted that he was on duty on 23rd February, 2011, and denied that he released the consignment in question as the signature used to release the goods in question was an imitation and that he did not know the stamp. He told the committee that he had two stamps previously i.e. 816H issued on 19th November, 2008 and he used a short version of his signature and U16W issued on 26th February, 2010 being the latest stamp. He said he changed his signature to along version.

Observation by the Committee

The Committee noted the officer's dishonest denial of his own signature on the face of the Committee.

A specimen signature of his own letter of defence was copied and presented to him for verification which he denied as his. The Committee confirmed that it was possible to cancel a release stamp based on an error. However, the officer denied such circumstances citing that this does not arise.

The Committee for a fact concurred that the signature and stamp appearing on the release order were Moirore's but which for lack of sincerity he denied.

Recommendation

"The Committee recommends that officer's employment contract be terminated".

Accordingly, the claimant was served with the letter of termination of service dated 16th September, 2011 being appendix II (b) on the Memorandum of claim.

The court notes that the Committee did not address the specific issue raised by the claimant in his replying letter of 16th May, 2011 being annexure III on the Memorandum of claim. That letter addressed to the Managing Director of the Respondent stated as follows:

***"Dear Sir,
RE: KEBS/HR/CONF/1536***

I refer to the above subject contained in your letter to me dated 9th day of May, 2011 which was delivered to me on 11th day of May, 2011 through the RM Coast at 5 p.m.

I have read through it and understood the contents which have surprised me for the following reasons.

(a) I never dealt with the documents attached to the said letter on 23rd February, 2011 as alleged in the letter under reply. As alleged in paragraph 1 of the said letter, I could not know of the existence of the records since they were not documented in our system.

The accusations contained in paragraph 2, 3, and 4 cannot therefore be attributed to me. I deny totally the allegations of impropriety being attributed to me.

(b) My signature had been forged and later cancelled as shown by form No. 029488. The fact that my signature was later appended raises suspicion and I wish to assert that the same parties must have been behind manufacturing it.

(c) On the merits of the NTSC (Notice To Show Cause) I wish to state as follows:

(i) The same has violated my rights protected by KEBS HRP manual 2008.

(ii) My rights under M.S.1 require that I be given ten working days notice within which I should show cause. I have been given seven (7) days contrary to policy.

(iii) By AD signing the NTSC letter, he has usurped the powers reserved for the director alone as M.S.8

(iv) AD is a member of the discipline committee on which the Director does not sit and by reason for his signing the letter he has become the accuser, the prosecutor and Judge in his own cause hence it is impossible to hold a fair disciplinary session in this matter.

(v) The letter had not emanated from the director's desk as is required by M S.1 which means

that he is not aware of the complaint or that he is not properly briefed.

(vi) Finally the report was not made by the departmental head as required by M.S. 1 which means that the complaint and the NISC are not based on facts known to the department.

In the result there is suspicion of high handedness the way the issue has been handled to date.

For these reasons I kindly request that the NTSC be reviewed and rescinded to allow me resume my duties. I beg to remain yours,

Yours faithfully,

SIGNED

ANDREW MOGOA”

The case came up for hearing on 4th October, 2012 and on 13th December 2012. The claimant gave evidence to support his case. The claimant was shown the stamps on folio 3 of the additional list and bundle of copies of documents for the Respondent filed on 2nd November 2012. He denied that the stamps represented the one he had been issued with being annexure NMN 1 B on the witness statement of Nicholas Mulwa Nzesya. He also denied the signatures endorsed thereon. He also testified that he was denied due process as set out in his response letter to the show cause notice. He prayed for judgment against the Respondent.

The respondent called two witnesses. The first witness Nicholas Mulwa Nzesya gave evidence as per his witness statement filed in court on 7th November, 2011, confirming issuance of a stamp as per the specimen No. 6 of NMN 1B on his statement. He referred to an audit in May, 2011 which disclosed that goods being entry No. 2713587 were supposed not to have been released. The investigations revealed that the goods covered by the release order had been released by the claimant. The entries were in NMN 2 on his statement for Jamtex Enterprises. He stated he did not doubt that the stamp and signature releasing the goods belonged to the claimant because he was the Claimant's supervisor. The witness was the Respondent's Manager for Container Freight Stations (CFS) deployed at the Port of Mombasa.

The Respondent's second witness was Mary Mutunga, a Human Resource Manager of the Respondent Corporation. She testified that she prepared the claimant's last pay certificate as per folio 13 on the statement of response which shows the computation. The claimant owed the Respondent 30,283.10/= being unrecovered cost of a laptop belonging to the respondent and which the claimant had accepted liability for its loss. She stated that the disciplinary process had been followed in deciding the claimant's case.

The court has considered the pleadings, the evidence, submissions by the parties, and makes the following findings:

1. The Claimant was accused of unprocedural release of goods without following the laid down procedure and by stamping and endorsing his signature. His defence was that the stamp was a forgery and the signature did not belong to him. The investigation report or audit findings that attributed the release of the goods to the claimant were not produced in court. There was no any expert investigation to verify as per the claimant's case that it was a case of forgery. The court finds that the Respondent's disciplinary committee sitting in a boardroom without assistance of expert on the allegations leveled against the claimant lacked competence to resolve and make a finding on the allegations. At the time of the dismissal decision, the court finds that the Respondent had no genuine grounds to believe that the claimant had engaged in the misconduct as alleged. If such reasonable suspicion existed, nothing stopped the Respondent from making a criminal complaint for prosecution of the claimant. The court finds that the termination of the claimant was unfair under Section 43 of the Employment Act, 2007 because the Respondent has failed to prove that the reasons for the termination did exist.

2. The court further finds that it is unfair Labour practice for the employer to fail to address alleged or real procedural impropriety in a disciplinary process as it happened in the instant case.

The claimant in self defence stated that he had not been given due notice of ten days, that he had not been issued a notice to show cause by the Respondent's Managing Director as required and that the Respondent's officer who issued the show cause letter was thereby disqualified from attending and participating in the disciplinary committee proceedings. All these concerns were not addressed by the Respondent. It is noted that the Respondent failed to consider and determine the claimant's appeal. The court finds that the claimant was not accorded due process of justice and the disciplinary decision was actuated with breach of due process. It is notable that the Respondent failed to produce to the court the human resource manual which was crucial in determining the claimant's case. Thus, in the opinion of the court, the process leading to the termination did not uphold the due process and it denied the claimant fair labour practices as protected under Article 41 of the Constitution. The termination was not only unfair but also unconstitutional. In particular, the claimant being a public officer, he could not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law as provided for in Article 236 (b) of the Constitution.

3. In view of the unfair dismissal the court finds that the claimant is entitled to Ksh.529,152/= being the twelve gross monthly salaries at the rate of Ksh.44,096/= per month.

4. The claimant had served for three complete years from 18th August, 2008 to 16th September 2011. Under Section 35(1) (c) he was entitled to at least one month termination notice. The court finds that the claimant was entitled to Ksh.22,746/= being one month basic salary in lieu of notice.

5. The respondent's 1st witness admitted that he had cancelled the claimant's annual leave. The court finds that the claimant is entitled to Ksh.36,741.60/= being payment for leave due and not taken.

6. The claimant is not entitled to severance pay as claimed because it was not a case of redundancy and the court finds that the claim was not justified.

7. In view of the award for unfair termination and want of justification, the court finds that the claim for days out of employment of Ksh.37,746/= per month would be justified on the ground that the period the claimant was on suspension he did not work and the same would be attributable to the Respondent because the dismissal has been found to have been unfair. If the dismissal were found fair, then it would be justified that the claimant is not paid for the period of suspension. The suspension was effective 9th May, 2011 and the decision was made on 9th September 2011 and conveyed by the letter dated 16th September, 2011. There is no evidence that the claimant was paid his monthly dues during the period of suspension. The court finds that he is entitled to the monthly remuneration for the four months he was on suspension and not paid because the failure to work in this case was attributable to the Respondent. The court addressed this issue in the case of Grace Gacheri Muriithi Vs Kenya Literature Bureau, Industrial Court Cause No.44 of 2011 at Nairobi. At page 23 – 24 of the court's judgment, it was stated,

“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable”.

In this case the court has found that the employment of the claimant was terminated unfairly and the claimant is entitled to be paid Ksh.150,984/= for the four months that the suspension was in force. The court has considered that during the suspension the claimant would not have engaged in any other

employment and he is entitled as prayed.

8. The court finds that the respondent has proved the counterclaim of Ksh.30,283.10/= being money not paid by the claimant with respect to a surcharge for loss of the Respondent's laptop and admitted by the claimant in his evidence. This amount has been deducted by the court from the dues the claimant is entitled to.

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

- (a) the respondent to pay the claimant a sum of Ksh.709,313.50/=;
- (b) interest on (a) at court rates till full payment; and
- (c) the respondent to pay 75% of the costs of the cause.

Signed, dated and delivered at Nairobi this 16th day of November, 2012.

Byram Ongaya

JUDGE