



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1047 of 2001

RAPHAEL KURIA KIWARA.....PLAINTIFF

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

The plaintiff was a Civil Servant working with the ministry of Agriculture as an Under Secretary. He was appointed to that position by letter dated 5th November 1990 and his salary was indicated to be Sh.18,855/= exclusive of house allowance and medical allowance. His duties were to work out the estimates of monies to be spent by various departments of the Ministry. He was doing the budget for the Ministry and allocate money to various departments of the Ministry. On 19th August 1996 he received a verbal order to proceed on compulsory leave but was not informed of the reason. But was later given the reasons by a letter dated 26th January 2000 signed by J.W. NDEGWA for the Permanent Secretary.

The letter read as follows:

Mr. Raphael K. Kiwara,

P.O. Box 788,

KIKUYU.

Dear Sir,

DISCIPLINE

It has been noted that sometimes between 15th May 1996 and 25th June 1996 you processed and participated in the issue of several A.I.Es to five Districts i.e. Kirinyaga, Kiambu, Embu, Machakos and Makueni Districts, amounting to Kshs.1,267,080 after suspension of NEP II.

During the same period you processed and were a party to the issue of several A.I.Es in Development Vote, Items 100, 101, 152, 194, 295 among others, all amounting to K£3,546,614. You were aware that it was contrary to the laid down accounting procedures and regulations to issue A.I.Es where there were no funds in approved estimates. It is evident that you did not seek Accounting Officer's authority to issue the A.I.Es after the suspension of NEP II on 16th May 1996. In view of the foregoing, it is intended to surcharge you substantial amount of money to offset the unbudgeted expenditure the Ministry incurred as a result of your deliberate violation of laid down accounting procedures and regulations. However, before this is done, you are required to show cause within twenty (21) days from the date hereof why the intended action should not be taken.

Yours faithfully,

J.W. NDEGWA

For: PERMANENT SECRETARY

On 31st January 2000 the plaintiff responded to the said letter as follows:

Raphael K. Kiwara

P.O. Box 788

KIKUYU

31st January 2000

The Permanent Secretary,

Ministry of Agriculture and

Rural Development,

Kilimo House,

P.O. Box 30028,

NAIROBI. (Attn: Mr. J.W. Ndegwa – SPPO)

Dear Sir,

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RE: DISCIPLINE

Reference is made to your letter Ref.No.MOARD/M.11/1/2a.vol.1/16 DATED 28TH January 2000, on the above subject. I am surprised that it has taken nine months for you to give me a show cause letter after the Nairobi Chief Magistrate's Court entered its judgment and acquitted me on all the three charges on 7th May 1999. Indeed this is after I personally handed over copies of the charge sheet, proceedings and judgment of the case number CR.C.2458/97 to your office. Your letter seems to take the matter back to square one, as if with intent to start it afresh, as I had received another letter from the then Permanent

Secretary, Prof. Edward Karega Mutahi on the same issue. It was after had replied to that letter that I was sent on compulsory leave, interdicted and then charged in court. Kindly do gain sight of the following copies of letters on this subject copies of which are attached for ease of your reference:

- i. Unreferenced copy of a letter dated 19th August 1996 on the subject to report for duty and had an audience with the Permanent Secretary.
- ii. Copy of a letter Ref.No.105467 dated 19th August 1996 on the subject of issuance of AIEs. I was then sent on compulsory leave.
- iii. Copy of a letter Ref.No.C/105467/5 dated 5th March 1997 which placed me under interdiction.

It should be noted that the issues raised in these letters from the basis of the three charges that were brought before the court against me and my colleagues. Indeed your letter of 26th January 2000 dwells with issues related to the two of the charges. A copy of the charge sheet is hereby enclosed for ease of your reference i.e.

- i. CHARGE II – Issuing and signing Excess AIEs without matching budgetary provision.
- ii. CHARGE III – Issuing and signing AIEs for the second NEP II Project while the World Bank has suspended the Project.

In court the following notable Prosecution witnesses gave evidence:

PW1 – Prof. Edward Karega Mutahi, the then Permanent Secretary in the ministry – see page 5 of the proceedings.

PW2 – Mr. Meshack Mwebi Tiampati, and auditor with the Ministry of Finance at the Treasury, see page 8 of the proceedings.

PW3 – Mr. Robert Opondo Oduor, the then Financial Controller of the second NEP II Project, see page 15 of the proceedings.

PW4 – Mr. Bildad Makhoha Maased, an auditor of the Controller and Auditor General, see page 21 of the proceedings.

PW6 – Mr. Aurecious Kanyungu Muchira, the then Principal Accounts Controller in the Ministry, see page 24 of the proceedings.

After the prosecution closed its case all the six accused persons including myself were put on their own defence. We were put on our own defence not because we had a case to answer but because we had not paid our lawyers who refused to make submissions. (See page 13 of the judgment and pages 37 onwards of the proceedings). The court within its own jurisdiction and wisdom acquitted me and all the other accused persons under Section 215 of the CPC, see pages JI to J6 of the judgment. On page J6 of the Judgment last paragraph, the Chief Magistrate made the following order:

“All the accused persons are set at liberty unless further held in custody for another lawful cause. I so order.”

It is not within the Law to backtrack on a court decision unless one appeals against the Judgment in a higher court.

In this case the Legal time allowed for such an appeal has already lapsed. To do otherwise will be challenging a court decision contrary to Section 77(5) of the Kenya Constitution. To ignore or contravene a decision of the court will be viewed as contempt of court. The Permanent Secretary as the Accounting

Officer has the power to lift the interdiction and reinstate me back to duty. This is what should have already been done and is long overdue. It is my prayer that it should be done.

On the issue of surcharge, certain basic rules of procedure are pre-requisite before any action can be taken. For a surcharge to have Locus Standi, there must be a loss. This loss must be clearly identified and documented. Also for a surcharge to be sustained there must be a complainant or an aggrieved party. In this matter I want to point out the following:-

- i. The funds that are supposed to have been issued irregularly, if any, were not used at the Ministries Headquarters by me and my colleague, but by the AIE holders in the field. Surcharge if any should be directed at the spending points where the loss if any could have occurred. I could not incur a loss if I was not spending any funds. Logic dictates that I cannot therefore be surcharged.
- ii. Who is the complainant? It appears to me that there is none. Treasury had expressed their satisfaction with the way the AIEs were issued under the second NEP II Project and lifted the suspension as early as 17th June 1996 vide their letter Ref. No.AG.3/018/5, a copy which is attached for your case of reference. It should also be noted that Treasury did continue to reimburse the District Treasuries all the money spent from AIEs issued under NEP II Project. This Treasury reimbursement to Districts is a watch dog arrangement. Treasury could not have reimbursed if there was any irregular issuance of funds. The final audited accounts of the Government of Kenya for 1995/1996 Financial Year do not show any specific Loss attributable to either issuance of AIEs for funds for the second NEP II Project during the period when the World Bank had suspended the project or for issuance of any excess funds that were issued without matching budgetary provision. The court case was instituted before the Final Audited Accounts were prepared. The figures of the funds in the charge sheet were maliciously prepared and were not supported by any evidence in court, hence the resultant acquittal of the accused persons by the court. Even the figures quoted in your letter of 26th January 2000 are suspect because they are not from the 1995/96 Final Accounts. You may wish to cross check these figures with the Accountant General in Treasury. The World Bank on its part expressed satisfaction with the way in which the second NEP II Project was managed, lifted the suspension and reimbursed all the funds – see their letter dated 14th November 1996 a copy of which is attached. This puts all the issues related to second NEP II Project to rest. In other words there was no loss, no complainant and as such no surcharged can be sustained.
- iii. On issuing of funds without matching budgeted provision, this matter was like all other issues being raised settled in court. The defence gave the evidence, which was accepted in court that the Principal Accounts Controller issued wrong budgetary codes to the field officers without reference to the Finance Officers who issued the AIEs. This resulted in accounting errors. If there was ‘good blood’ between the two sections the issue would have been sorted out before going to court by normal ‘journal entries’. Furthermore such imagined errors have not come out in the Final Accounts for year 1995/96. Again there is no complainant, no loss and therefore no surcharge can be sustained.
- iv. I am surprised to see in your letter that you intend to surcharge me a substantial amount of money. As far as I am aware, an intention or decision to surcharge is the realm of the Ministry’s surcharge committee. My enquiries have revealed that this matter has not been placed before any meeting of the surcharge committee. This therefore automatically points a finger at premeditated bias in handling the intended surcharge. I do maintain as shown above that there was no loss and hence no reasonable cause to institute surcharge proceedings. Furthermore the general principle of surcharge is being violated. A surcharge is not a compensation for loss, it is not meant to drain the resources of an officer so as to cripple him financially, and therefore punish him excessively. A surcharge is a token payment charged to make an officer feel responsible for a loss.

The issue of surcharge should be linked to the lifting of interdiction, to which you have conveniently remained silent. Infact it is unfair to surcharge an officer who is under interdiction, as this will add more problems to the officer leading to what amounts to double punishment. There is no fair play in contemplating surcharge before lifting the interdiction. It appears to be a game of ‘changing goal posts’ when main issues have been finalized by a court of law. The

whole issue is now unprocedural and contrary to Civil Service Regulations. Indeed Section 3 of the Constitution of Kenya provides that no Law or Civil/Administrate Regulations shall be applied while it conflicts with the constitution. The court of Law has finalized this issue and it ends there.

Finally, I was in the Ministry for a period of only six months when these problems started. I can see a dark hand in the way these matters are being handled. It appears there is a game of “settling old scores” between some officers who have been in the Ministry for a long timer who see to have recruited accomplices and some of my accused colleagues who were also in the Ministry for a long time. Unless the problem is identified and sorted out, we shall continue to enjoy a game of “shadow boxing”. The interdicted officers will continue to suffer and the Government will incur losses by paying the officers salaries and accumulate pension and other related benefit costs to officers who are on the pay roll but not working.

In the foregoing I do maintain that I did nothing wrong during the course of my duties between 15th May and 25th June 1996. Therefore no surcharge proceedings should be preferred against me by any office or the surcharge committee for that matter. I would like to request that this matter be handled expeditiously and humanly to finalise it as soon as possible.

Yours faithfully

Raphael K. Kiwara

Under Secretary

P/No. 105467/740233575

Encls.

1. Unreferenced letter dated 19/8/1996. Instructions to report on duty
2. Letter Ref.No.105467 dated 19/8/1996 on issue of AIEs
3. Charge Sheet-court file No. 2458/97 dated 30/9/97
4. Treasury letter Ref. No.AG.3/018/5 dated 17/6/96 on lifting of suspension of reimbursement of Expenditure.
5. World Bank letter dated 14/11/96 on lifting of suspension of disbursements.

c.c. noo – Prof. Shem Migot Adholla

Permanent Secretary

Ministry of Agriculture and Livestock Development

(For information: Kindly do hasten the finalization of this matter. It has taken nine months to date since the court case in which me and my colleagues were charged. The court acquitted us under Section 215 of the CPC).

In his letter to show cause he stated that he had been charged in a court of law with 3 counts namely:

COUNT 1: Issuing and signing Excessive AIE’s without matching budgetary provision.

COUNT 2: Issuing and signing AIE’s for the second NEP II Project while the World Bank had

suspended the project.

He was acquitted of all the charges and therefore the dismissal based on the same charges was not warranted.

On 20th April 2006 the Permanent Secretary responded to the plaintiff:

Mr. Raphael K. Kiwara

P.O. Box 788

KIKUYU.

Dear Sir,

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DISCIPLINE/SUSPENSION

I am making reference to your letter dated 31st January 2000 which was in response to our show cause letter No. MOARD/MII/1/2A/VOL.1/16 dated 26th January 2000. Your defence was considered but it was not found satisfactory, as you did not adequately address the issues that were contained in the show cause letter.

I have therefore decided to give you another opportunity to submit a satisfactory defence to the earlier charges including the following:-

1. You will recall that you were sent on compulsory leave on 19th August 1996 when the Accounting Officer observed several irregularities relating to the authorization of AIEs. As an Under Secretary (Finance) you were expected to follow the instructions of the Accounting Officer in matters relating to Finance besides following the laid down accounting regulations including Treasury circulars that were then in force. You are aware that it was grossly irregular for you to issue AIEs under items that had no budgetary provisions. It was also irregular to issue AIEs over and above what was contained in approved estimates for the financial 1995/96. In particular Treasury Circular No. 14 dated 30th October 1995 had clear and precise instructions to the Accounting Officer that commitments and expenditures must be limited on budget provisions. You deliberately violated these instructions and also, without making any reference to the Accounting Officer, proceeded to issue several AIEs both in excess of budgeted provisions and also issued AIEs to various stations on items that had no budgetary provisions.

2. It is a standard accounting expenditure control measure that issues of AIEs should be reflected in Ministry's computer printouts. For reasons best known to you, you issued several AIEs between September 1995 and June 1996 without reflecting them in computer printouts solely because you knew the AIE issues were irregular.

The following were some of the AIEs that you irregularly authorized in this category:-

AIE NO.	DATE	AMOUNT
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£

038461	16/6/96	21000
038454	16/6/96	31000
038475	13/6/96	25000
037661	23/5/96	50000
033867	30/4/96	40000
033103	25/3/96	2000
027164	16/1/96	40941
038017	20/6/96	30000
038497	16/6/96	16000
038974	13/6/96	23000
038044	13/6/96	25000
033655	10/5/96	30000
037886	7/5/96	95000
032141	16/1/96	5809

3. A.I.E.S ISSUED AFTER SUSPENSION OF NEP II

You were given specific instructions by the Accounting Officer not to incur any expenditure on various items after suspension of NEP II on 16th May 1996. The instruction was issued following an earlier Treasury directive that any further financial commitments made after suspension would adversely affect our operations in the field as District Treasuries had specific instructions not to accept or reimburse any expenditure based on such A.I.E. issues. However, inspite of the Treasury's and the Accounting Officer's instructions, you proceeded to issue A.I.E.s after suspension of the NEP II programme.

The following are some of the A.I.E.s that you authorized after 16th May 1996:-

A.I.E. NO.	STATION	DATE	AMOUNT
			K£
038013	DLPO-KISII	24/5/96	16000
037518	DLPO-NYAMIRA	20/5/96	12000
037607	DAO-MURANGA	23/5/96	41500
037827	DAO-KISUMU	24/5/96	11500
038031	DAO-KISUMU	20/6/96	20000
038141	DAO-THARAKA	16/6/96	32000

NITHI

038017	DVO-MAKUENI	20/6/96	30000
037566	PDA-NAKURU	30/5/96	10000
037601	PDA-NAKURU	23/5/96	47000
037799	DVO-MERU	30/5.96	20000
037765	PDA-EMBU	23/5/96	44000
037617	DVO-EMBU	20/5/96	30500
037798	DDA-EMBU	30/5/96	25000
037817	PDA-CENTRAL	31/5/96	18000
038462	DAO-KIAMBU	16/6/96	7000
038457	DAO-KIAMBU	16/6/96	32000
037774	DAO-KIAMBU	3/6/96	12500
037680	DAO-KIAMBU	16/5/96	20000
037626	DAO-KIAMBU	22/5/96	22000
037766	DLPO-MACHAKOS	23/5/96	7500
036451	DLPO-MURANGA	16/6/96	25500
038029	DLPO-MACHAKOS	19/6/96	7000
038469	DVO-KITUI	16/6/96	14000
037561	DAO-KITUI	30/5/96	8000
038092	DVO-KITUI	20/6/96	25000
037658	DAO-SAMBURU	23/5/96	38000
038093	DAO-SAMBURU	20/6/96	15000
037758	DAO-SAMBURU	21/5/96	5580
037819	DAO-MURANGA	30/5/96	20000
038015	DLPO-MAKUENI	20/6/96	35000
038455	DLPO-MAKUENI	16/6/96	32000
038497	DVO-MAKUENI	16/6/96	16000
038456	DVO-KIAMBU	16/6/96	21000

037783	DVO-KIAMBU	24/5/96	10000
037603	DVO-KIAMBU	23/5/96	21000
037602	DVO-KIAMBU	23/5/96	6000
038462	DAO-KIAMBU	16/6/96	7000
037618	DLPO-NYERI	20/5/96	20000
038463	DVO-KIAMBU	16/6/96	12000
037778	DVO-MURANGA	28/5/96	30000
037819	DAO-MURANGA	30/5/96	20000
038465	DVO-MURANGA	12/6/96	13000
038004	MURANGA19/6/96	19/6/96	15000
037781	DAO-NYANDARUA	30/5/96	27000
038488	DLPO-KIRINYAGA	16/6/96	15000
038468	DVO-KIRINYAGA	16/6/96	28000
038472	DAO-KIRINYAGA	13/6/96	14000
038049	DAO-KIRINYAGA	12/6/96	55000
038050	DLPO-KIRINYAGA	12/6/96	50000
038094	DAO-KIRINYAGA	20/6/96	22000
037800	DVO-KIRINYAGA	30/5/96	20000
037574	DVO-KIRINYAGA	28/5/96	8000
037816	DAO-KIRINYAGA	31/5/96	26000
037614	DVO-KIRINYAGA	20/5/96	30000
033979	DLPO-MAKUENI	22/5/96	20000
038044	DVO-MAKUENI	13/6/96	25000
038017	DVO-MAKUENI	20/6/96	30000
038028	DVO-KAKAMEGA	12/6/96	20000
038470	DVO-KAKAMEGA	16/6/96	16500
037784	DAO-MERU	24/5/96	79000
037553	DAO-EMBU	31/5/96	35000

038048	DVO-MURANGA	12/6/96	30000
037667	DVO-MWINGI	17/5/96	9000
037552	DVO-MWINGI	31/5/96	42000
038018	DAO-MWINGI	20/6/96	30000
038460	DAO-MWINGI	16/6/96	23000
038459	DVO-MWINGI	16/6/96	20000
037790	DLPO-NYANDARUA	21/5/96	35000
037572	DLPO-MACHAKOS	30/6/96	9500
037824	DVO-MACHAKOS	24/5/96	12500
038452	DLPO-MACHAKOS	21/6/96	18000
038040	DLPO-MACHAKOS	13/6/96	25000
033978	DLPO-TRANSMARA	22/5/96	15000
037521	DAO-TRANSMARA	21/5/96	25000

You, among other officers in Finance Division, issued several A.I.Es which were in excess of K£34 million to Districts where no projects activities existed. I.D.A. did not reimburse this amount and it was therefore paid by the Ministry but it was not budgeted for. This amounted to misappropriation of public funds.

Your actions as indicated above were deliberate violation of laid down accounting regulations and procedures. You also defied lawful instructions from the Accounting Officer as you did not obtain his authority to issue A.I.E.s either after suspension of NEP II or items for which there were not budget provisions or external funding. These actions amounted to gross misconduct for which I intend to recommend your dismissal from the service on this ground besides levying of surcharge of the misappropriated funds at the discretion of the Government.

However, before this is done, you are required to show cause, within fourteen (14) days, why this should not be done. Note that if nothing is received from you within the specified period, I shall proceed with the intended action without further reference to you.

In the meantime, you are hereby suspended from the exercise of the powers and functions of your office from the date of this letter.

During the period of suspension, you will not be entitled to any salary until the case is determined.

Yours faithfully,

PROF. SHEM. E. MIGOT-ADHOLLA

PERMANENT SECRETARY

On 15th August 2000 he received a letter from the Permanent Secretary which informed him about the decision of the public dismissing him from the service with effect from 20th April 2000 on account of gross misconduct.

The letter read:

Mr. Raphael K. Kiwara

P.O. Box 788

KIKUYU.

Dear Sir,

DISCIPLINE

I wish to convey the decision of the Public Service Commission of Kenya that you be dismissed from the service on account of gross misconduct with effect from 20th April 2000. You will further forfeit the withheld salary and other allowances for the period between 5th March 1997 and 20th April 2000. On dismissal you have forfeited all claims for retirement benefits which you would have been entitled to had left the service under other circumstances.

Note that you have a right of appeal against the Commission's decision, through this office, within six (6) weeks from the date of this letter. Meanwhile complete the attached Official Secrets Act Declaration on leaving the service and return it to me as soon as possible.

Yours faithfully,

PROF. SHEM E. MIGOT-ADHOLLA

PERMANENT SECREARY

Encs

He appealed but his appeal was dismissed. He told the court that as a result of his dismissal, he was subjected to great hardship and pain. His children had to be sent away from University because he could not afford to pay school fees for them. He concluded that his dismissal was unlawful and urged the court to enter judgment in his favour as prayed in the plaint.

The defence called two witnesses to testify. SARAH LUTI who is the Human Resource Officer and Michael Bwire who is the Chief Accountant.

DW1 SARAH LUTI in her evidence told the court that the plaintiff was dismissed because of issuing and signing Authority to Incur Expenses without matching budgetary provision and also issuing and signing Authority to Incur Expenses for the second NEP Project while the World Bank had suspended the project.

As a result of this the Ministry incurred a huge amount of money to the tune of Shs.4,813,694/= which was not supported by budgetary provision.

The plaintiff was not supposed to do so and therefore he acted without authority which amounted to gross misconduct. The plaintiff was informed of the charges against him by the Permanent Secretary in his letter dated 20th April 2000 and was asked to show cause why he should not be dismissed from public

service. He wrote giving an explanation but which explanation was not satisfactory.

The letter containing the charges against the plaintiff and his letter in response were forwarded to the Public Service Commission for action. The Public Service Commission decided to dismiss him from service. This decision was communicated to him vide letter date 15th August 2000. The plaintiff appealed but his appeal was dismissed.

DW2 MICHAEL BWIRE in his evidence told the court that he is the Chief Accountant with the Ministry and has 20 years experience. He told the court that the plaintiff was accused of issuing flying Authority to Incur Expenditure that were not supported by budgetary provision. He and others used their office to issue wrong AIEs to various Districts which were not supposed to be issued. This amounted to gross misconduct. The same were never reflected in the computer printouts which was contrary to a standard accounting expenditure control measure. They also issued Authority to Incur Expenditure to various Districts after suspension of NEP II by the World Bank. This affected the operations in the field as District Treasuries had specific instructions not to accept or reimburse any expenditure based on such AIE's issues. This was after the suspension of the NEP II Programme.

The total amount issued without authority was Kshs.34,000,000/= to the Districts where no project activities existed. IDA did not reimburse this amount and it was therefore paid by the Ministry but it was not budgeted for. This amounted to misappropriation of public funds.

The dismissal of the plaintiff was done by the Public Service Commission. At this stage it is appropriate to outline the establishment of the Public Service Commission, its powers, function and procedure applied and the role of the Permanent Secretary in the whole exercise. The Public Service Commission is a creature of the Constitution. The provision for its creation and its composition is made under Section 106 of the Constitution. Sub-Section 12 of that Section provides that subject to the constitution the Commission in the exercise of its Constitutional function shall not be subject to any person or authority and sub-section 13 authorizes it to regulate its own procedure and with the consent of the President, to confer powers or impose duties on any public officer or authority for the discharge of its functions. The functions of the commission are set out under Section 107. Section 107 of the Constitution gives the commission the power to appoint persons to hold or act in offices in the public service and in the service of the Local Authorities (including the power to confirm appointments) the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those person from office.

By the Service Commission Act (Cap 185) the staffing of the Commission is provided for and Section 13 enables the commission to make regulations for presenting anything which by the virtue of this Act or the Constitution is to be or may be prescribed and generally for the better carrying out of the purposes of such commission.

Pursuant to that Section Regulations were made. In those Regulations reference is made to "**an authorized Officer**" to whom is delegated some of the powers of the commission as provided for in Section 106(13) of the Constitution. The "**authorized Officer**" according to Regulation 2(1) "**means the Permanent Secretary**" who exercises supervision over the department concerned or over the department in which the Public Officer concerned holds a post as the case may be".... In the instant case the Permanent Secretary Ministry of Agriculture is the authorized Officer.

This case is governed by Regulation 40 which so far as it is relevant reads as follows:

***“40 (1) If an authorized Officer, after having considered every report in his possession with regard to a public officer, is of the opinion that it is desirable in the public interest that the service of the public officer should be terminated on the grounds which cannot suitably be dealt with under any other provisions of those Regulations, he shall notify the public officer, in writing specifying the complaints by reason his dismissal is contemplated together with the substance of any report or part thereof that is detrimental to the public officer.*”**

(2) If after giving the public officer an opportunity of showing cause why he should not be dismissed from public service, he shall forward to the commission the report or the case, the public officer's reply and his own recommendation and the commission shall decide whether the public officer should be dismissed."

The authorized officer is required to take the following steps:-

1. Before taking any other action he should consider every report in his possession concerning the public officer in an open mind.
2. Having done so, he must consider whether prima facie, it is “**desirable**” that the public officer should be dismissed.
3. He should also afford the public officer an opportunity to rebut any complaints by notifying the public officer in writing of them, specifying the complaints by reason of which his dismissal is contemplated. In addition he should inform the public officer of the substance of any report or part thereof that is detrimental to him.
4. Consider the reports in his possession in the light of the public officer's reply.
5. Having decided if, having regard to all that is before him, it is desirable that the public officer should be dismissed.

In the instant case, the plaintiff was informed by the letter dated 20th April 2000 about his contemplated dismissal.

He was also in that letter informed of all the complaints against him which necessitated that he shows cause why he should not be dismissed. He was given an opportunity to reply to those charges against him and he replied denying the charges. The authorized officer having decided that the plaintiff should be dismissed forwarded to the commission the charges against the plaintiff, the plaintiff's reply and his recommendation.

From the correspondences between the public officer and his authorized officer and all the materials before me, I am satisfied that there was compliance and observation of Regulation 40as required by the Act and the plaintiff was afforded opportunity to reply to the complaints against him.

As I had stated earlier, the decision to dismiss the plaintiff lies with the commission and the commission in the exercise of its functions under the Constitution shall not be subject to the direction or control of any other person or authority. Its decision can only be challenged if the authorized officer, when forwarding the report on the case, the public officer's reply and his own recommendations fails to observe the correct procedure as provided for under Regulation 40 as laid down in the act. The Commission had reached the decision to dismiss the plaintiff independently and its decision was communicated to the plaintiff. This was after the Commission had considered the charges against the plaintiff, his reply and the recommendations of the authorized officer as well as materials availed together with the report.

For the above reasons I find that the plaintiffs claim cannot be sustained and therefore the suit is dismissed with costs.

Dated and delivered at Nairobi this 20th day of June, 2006.

J.L.A. OSIEMO

JUDGE