



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 693 of 2005

FLORA NJOKI NJERU.....PLAINTIFF

VERSUS

CONTROLLER & AUDITOR GENERAL.....1ST DEFENDANT

PUBLIC SERVICE COMMISSION.....2ND DEFENDANT

RULING

I have before me an application by way of Notice of Motion expressed to be brought under Order LIII Rule 3(1) and Order XLIX Rule 3A of the Civil Procedure Rules pursuant to the leave of the court granted on 16th May 2005 seeking an Order of Certiorari quashing the decision to disallow the applicant's second appeal against dismissal from the public service; that the applicant be reinstated to her employment and resume her normal duties with the public Service Commission. The applicant also seeks costs of this application.

The applicant was employed by the Public Service Commission as an Auditor II in the ministry of Finance and Planning, Department of Auditor General with effect from 3rd July 1997 under a contract of employment, which expressly included the Public Service Staff Regulations. The regulations contained a Code of Practice setting out disciplinary procedure to be followed where misconduct was alleged against an employee. Under that procedure the Public Service Commission had to give an employee an opportunity to explain his conduct in writing before dismissing him for misconduct. On the 18th December 2002, the applicant received a letter from the Controller and Auditor General through the Assistant Director of Audit

Suspending her from her duties. The letter read:

MS FLORA NJOKI NJERU

AUDITOR II

BRANCH "A"

NAIROBI.

Thro'

Assistant Director of Audit

Anniversary Towers

NAIROBI

RE: SUSPENSION

It has been reported to the Controller and Auditor General that on diverse dates between September 1999 and December 2001 you were paid Sh.4,000/= by the cashier of the Kenya Sugar Board to cover your audit inspections of the field officer belonging to the Board. It is the policy of the office of the Controller and Auditor General to finance its audit activities in the audit of Government and parastatal organizations through issuance of temporary imprest which must be surrendered forty eight (48) hours on return from the journeys.

At no time would staff of this office be allowed to take imprest or any other payment from parastatal organizations as they are charged audit fees for audit services rendered. The payments received by you are therefore regarded as fraudulently obtained. It has further been reported that you have disowned the signature appearing against your name when collecting the money.

Under the circumstances it has been decided to hand over the matter to the Criminal Investigation Department to investigate and confirm or dispel the accusation levelled against you. In the meantime you have been suspended from duty with effect from the date of this letter.

During the period of your suspension you will not be entitled to any salary in accordance with Section 24 (3) of the Public Service Commission Act Cap 185.

WINSTON J.O. OREGA

Deputy Auditor General

For: Controller and Auditor General

c.c. Personnel Division

Ministry of Finance and Planning Treasury

NAIROBI (Copy of the letter for confidential file and stoppage of Salary.)

On receipt of the above letter the applicant wrote the following letter requesting to be paid **ALIMENTARY ALLOWANCE**

The letter read:

The Controller and Auditor General

P.O. Box 30084

NAIROBI.

Thro'

Assistant Director of Audit

Anniversary Towers

NAIROBI.

Dear Sir,

RE: ALIMENTARY ALLOWANCE

Your letter Ref. N0.SB 272/CONF./104 of 18th December 2002 suspending me from duty for allegedly obtaining Shs.4000/= from Kenya Sugar Board refers:-

I wish to state here that I did not obtain any money from the Board and that I have not been assigned any duties to the Board since 1998.

I am hereby requesting your office to grant me an alimentary allowance in accordance with Section 24(3) of the Public Service Commission Act Cap 185 to enable me pay house rent as I await clearance from the Criminal Investigation Department.

I hope my request meets your kind consideration.

Yours sincerely

F. NJOKI

P NO.97032153

The applicant never got any response. She wrote yet another letter on 15th July 2003 a reminder though she did not indicate so. It read as follows:

To the Controller and

Auditor General

Thro'

Deputy Auditor General

Attention: J.O. OREGGE

P.O. BOX 30084, 00100

NAIROBI.

Dear Sir,

RE: ALIMENTARY ALLOWANCE APPEAL

I refer to your letter Ref. NO.SB.272/CONF./104 of 18th December 2003 by which I was suspended from duty for allegedly being paid Shs.4000/= by the cashier of Kenya Sugar Board to cover audit inspection of field offices belonging to the Board and disowning the signature appearing against my name.

The case was handed over to the criminal Investigating Department to investigate and confirm or dispel the accusations levelled against me. It is now over six months since the suspension was instituted and no action has been taken so far. I have written two letters (copies attached) requesting to be considered for payment of Alimentary allowance according to Section 24 (3) of the Public Service Commission Act Cap 185. The reply to the first letter was to wait for the Criminal Investigating Department to complete their investigations. The second has not so far been replied.

Sir, I feel that six months is long enough period for any person to stay without any pay and at the same time be expected to stay at the job station. I have suffered so much under the circumstances and I am humbly appealing to you to consider me for payment of alimentary allowance to enable me stay at my job station.

Further since I was not accorded a chance to defend myself before the suspension was enforced, I wish to bring to your attention that the letter came to me as a big surprise for I had not been assigned any duties to the Kenya Sugar Board during the period mentioned in the letter neither had I received any payment or denied any signature as alleged. I therefore strongly feel that I have been wrongly accused of a crime I did not commit and made to suffer unjustifiably.

Sir I am hereby requesting you to reconsider your decision and have me reinstated as I am innocent and have suffered long enough or consider paying me alimentary allowance as I wait for the CID to complete their investigations.

I hope my request meets your kind consideration.

Yours faithfully

F. NJOKI

P NO.1997032153

Instead of receiving a reply to her above letter as she expected on 14th August 2003 she received **DISCIPLINE: SHOW CAUSE LETTER** which read as follows:

MS FLORA NJOKI NJERU

Thro'

Assistant Director of Audit

Division IV

Anniversary Towers

NAIROBI

RE: DISCIPLINE – SHOW CAUSE LETTER

Information available to the office indicates that on diverse dates between September 1999 and December 2001, you obtained money from the cashier at the Kenya Sugar Board purportedly to cover your audit inspections of the field offices belonging to the Board. You are, no doubt aware that it is the policy of the office to finance its audit activities in the Audit of Government and parastatal organizations through issuance of temporary imprests which must be surrendered within forty eight (48) hours on return from the inspections. At no time are staff of this office allowed to take imprest or even "I OWE YOU" (ious) from our auditees as to do so would compromise their objectivity. In your case it was reported that you obtained cash totalling Shs.4000/= from the Board. Since the Board was charged audit fees and you were given the imprest by the office this payment is regarded as fraudulent and would invariably compromise your objectivity as an audit officer.

I have therefore been directed to inform you that it is the intention of the office to dismiss you on account of gross misconduct but before that is done you should show cause why severe disciplinary action which may include dismissal should not be taken against you.

Your representations if any should be received on or before 19th September 2003.

WINSTON J.O. OREGI

DEPUTY AUDITOR GENERAL

FOR: CONTROLER AND AUDITOR GENERAL

In reply to the above “**to show cause**” letter she wrote the following letter:-

The Controller and Auditor General

P.O. Box 30084, 00100

NAIROBI.

Thro’

Assistant Director of Audit

Division IV

Anniversary Towers

NAIROBI.

Dear Sir,

RE: SUSPENSION FROM DUTY

Sir, I refer to the suspension and show cause letters Ref: NO. SB 272/CONF./104 and CONF/TEP/97032153/11 dated December 2002 and 14th August 2003 respectively for alleged gross misconduct.

Sir, I am grateful for the opportunity accorded to me to give my representation on the said allegations which are as follows:

1. It is alleged that I obtained a total of Sh.4000/= on diverse dates between September 1999 and December 2001 from the cashier at the Kenya Sugar Board purportedly to cover audit inspections of the field offices belonging to the Board. This is not true because I was neither assigned any duties to the Board during the said period nor did I visit the Boards premises. The last time I worked there was May 1998. On 1997/1998 systems audit. I have never gone for any audit inspection of the field offices belonging to the Board hence did not obtain any imprest. I owe you (IOU) or payment in any other form from the Board. This can be confirmed from the Auditor programme from the Branch.

2. It was further alleged that I disowned the signature appearing against my name when collecting the money. This is also not true for I could not have signed for money which I did not receive and if my signature appears anywhere, I would be glad to see it so as to confirm that it is mine.

Sir I do strongly believe that I am innocent and the suspension from duty accorded to me was unjustified. At no time have I ever defrauded or intended to defraud any parastatal or been compromised in any form while performing my duties.

Sir, I have suffered a lot both socially and financially during the period of suspension and I do hope and pray that my representations will meet your kind consideration and relief me of this untold suffering. Meanwhile, I look forward to quick conclusion of the case and thereafter reinstatement and resumption of duties.

Thank you.

Yours sincerely

Flora Njoki

P. NO.97032153

And instead of getting clarification on the issues she raised in her representations in her above stated letter, what does the applicant get a rude dismissal letter. I call it rude because the writer the same J.O. Orege who has featured in most, if not all the correspondences in these proceedings does not state who this authorized officer who has authorized him to convey his dismissal is.

The letter read as follows:

Ms Flora Njoki Njeru

Thro”

Director of Audit

Special Assignment

Anniversary Towers

NAIROBI.

RE: DISMISSAL

I have been directed to convey the decision of the Authorised Officer that you be dismissed from service on account of gross misconduct. You are however informed of your right of appeal in accordance with Regulations 33 of the Service Commission Act Cap 185.

Winston J.O. Orege

Deputy Auditor General

c.c.:

Principal Auditor

Headquarters Services

She appealed but her appeal was dismissed. The letter dated 1st November 2004 read as follows:

The letter was written on Letter Head of **KENYA NATIONAL AUDIT OFFICE**

Miss Flora Njoki Njeri

P.O. Box 49384

NAIROBI.

Thro’

The Director of Audit

Corporations Department

Anniversary Towers

NAIROBI.

RE: SECOND APPEAL AGAINST DISMISSAL FROM THE SERVICE

I am directed to inform you that the Public Service Commission considered but disallowed your second appeal against dismissal from service on account of gross misconduct. The commission also decided that the case be closed.

P.N. KOMORA

Deputy Auditor General

FOR: CONTROLLER AND AUDITOR GENERAL

To my mind the matter with which this case is concerned is governed by Regulation 34 of the Regulations made under Section 13 of the Service Commission Cap 185.

I quote below the relevant portion of regulation 34:

“34” where an authorized officer considers it necessary to institute disciplinary proceedings against a public officer to whom this regulation applies, on the ground of misconduct which if proved, would in his opinion justify dismissal from the public service, he shall, after such preliminary investigations as he considers and after consultation with the Attorney General, if he considers it necessary, or desirably to do so as to the items of the charge or charges forward to the public officer a statement of the charge or charges framed against him together with a brief statement of the allegations in so far as they are not clear from the charges themselves on which each charge is based, and shall invite the public officer to state in writing should he so desire before a day to be specified and ground on which he relies to exculpate himself.”

According to regulation 2(1) of the Public Service Act Cap 185, an authorized officer means the Permanent Secretary who exercises supervision over the department concerned and includes a public officer authorized to act on behalf of such Permanent Secretary, head of department, or Controller Auditor General as the case may be.

In these proceedings the letter of suspension dated 18th December, 2002 was written by Winston J.O. Orege. The one of

“**Show Cause**” dated 14th August 2003 was written by Winston J.O. Orege. And the dismissal letter dated 9th October 2003 was written by the same Winston J.O. Orege while the one dated 1st November 2004 dismissing the second appeal of the applicant was written by P.N. Komora.

There is no evidence that there was written authority given to the said officers to act as such. Lack of such authority renders the proceedings a nullity.

Before dismissal the authorized officer must take the following steps:

- (i) He must consider every report in his possession concerning the public officer.
- (ii) Having done so, he must consider whether prima facie it is desirable that the officer should be dismissed.

- (iii) He must inform the public officer of the accusations or charges in writing.
- (iv) He should afford the public officer an opportunity to rebut any charges against him.

The accusations against the applicant were that the applicant had taken Shs.4000/= from the cashier of Kenya Sugar Board on diverse dates between September 1999 and December 2001 to cover her audit inspections of the field offices belonging to the Board and she signed for it. The applicant having denied ever visiting those offices of the Board, the authorized officer ought to have revealed the name of the cashier who allegedly gave out the cash to the applicant so that that cashier could explain the reason why she gave out that money and the actual dates she did so.

Further there is no evidence that the Board ever lost any money or if it did it did not lodge a complaint. Further the letter to the applicant by the authorized officer dated 18th December 2002 informed her that the matter had been referred to the CID to investigate and confirm or dispel the accusation leveled against her. But before the CID could investigate to confirm or dispel the alleged accusations, she was suspended without salary.

Obviously the findings of the CID could have formed part of the proceedings, but there was not mention about the outcome of the alleged investigations nor was the same made available to the applicant.

The only accusation against the applicant was that it had been

reported to the Controller and Auditor General that on diverse dates between September 1999 and December 2001 the applicant was paid a total of Shs.4000/= by the cashier of Kenya Sugar Board to cover their auditor inspections belonging to the Board and she signed for it. The name of the person who made the report was undisclosed. This alone did not constitute sufficient material to warrant a dismissal. There was an inadequate and prejudiced enquiry by the authorized officer and tainted with malice and the manner in which the proceedings were conducted was contrary to the Principles of Natural Justice.

I come to the conclusion that the contents of the report, which triggered these proceedings, were blatantly dishonest and there was no evidence to prove the accusations against the applicant.

The applicant's motion therefore succeeds and her dismissal from service is declared invalid and is quashed.

Accordingly, I order that the applicant be reinstated to her employment and resume her normal duties with immediate effect. She should be paid her salary from the date of suspension to date.

The applicant is also entitled to costs of this suit and it is so ordered.

Dated and delivered at Nairobi this 12th day of September 2006.

J.L.A. OSIEMO

JUDGE