



**Gesare v Attorney General (Cause 1323 of 2016)  
[2024] KEELRC 2514 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2514 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1323 OF 2016  
L NDOLO, J  
OCTOBER 17, 2024**

**BETWEEN**

**ISAAC G GESARE ..... CLAIMANT**

**AND**

**THE ATTORNEY GENERAL ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By his Statement of Claim as amended on October 5, 2018, the Claimant challenges the decision to terminate his employment, by way of dismissal for gross misconduct.
2. The Attorney General is named as Respondent by virtue of being the Chief Government Legal Advisor. The Respondent’s defence is contained in a Reply dated 20<sup>th</sup> February 2017 and amended on 28<sup>th</sup> June 2019.
3. At the trial, the Claimant testified on his own behalf and the Respondent called John Kimani Nyario, an Assistant Director, Human Resource Development at the Public Service Commission. Both parties also filed written submissions.

**The Claimant’s Case**

4. The Claimant was an employee of the National Treasury, deployed as District Accountant at Bondo Treasury. Sometime in 2012, the District Treasury drew three cheques being; cheque number 001157 for Kshs. 292,430 dated 3<sup>rd</sup> July 2012, cheque number 001015 for Kshs. 154,000 dated 7<sup>th</sup> August 2012, and cheque number 001101 for Kshs. 90,000 dated 3<sup>rd</sup> July 2012. The Claimant states that he did not sign and/or authorise any of the said cheques. He claims to have later learnt that the subject cheques had been altered through collusion by the signatories and paid to third parties unknown to him.



5. The Claimant was interdicted pending investigations into the matter. He states that he was not involved in any investigations nor was he allowed an opportunity to defend himself. He adds that he was not heard on appeal.
6. On 20<sup>th</sup> November 2015, the Claimant received a letter lifting his interdiction, while retiring him in the public interest. He avers that upon filing the present claim, he was dismissed on the grounds of gross misconduct and misappropriation of huge sums of public funds. The Claimant terms the latter ground as a fresh complaint to which he was not given an opportunity to respond.
7. The Claimant's case is that his dismissal was wrongful and unfair. He therefore seeks reinstatement or in the alternative:
  - a. Unpaid half salary for 35 months.....Kshs. 868,000
  - b. 1 month's salary for each year worked for 26 years.....1,289,600
  - c. 1 month's salary in lieu of notice.....49,800
  - d. 12 months' salary in compensation.....595,200
  - e. Salary for July 2016 to date or till payment in full.....1,339,200
  - f. Leave allowance @ Kshs. 6,000 for 6 years.....36,000
  - g. Salary/allowance increments to be determined by the Court
  - h. Costs of the case

### **The Respondent's Case**

8. In the Reply as amended on 18<sup>th</sup> June 2019, the Respondent admits the Claimant's employment history, as pleaded in the Memorandum of Claim but denies the allegation of wrongful and unfair dismissal.
9. The Respondent defends the Claimant's dismissal, accusing him of flouting government financial regulations and procedures, while serving as an Accountant at Bondo District Treasury. It is alleged that the Claimant colluded with two cashiers, Augustine O. Aila and Prisca Auma, to make withdrawals from the Bondo Estates Deposit account, totalling Kshs. 1,434,182.
10. The Respondent states that the Claimant was issued with a show cause letter dated 8<sup>th</sup> August 2013 to which he duly responded. The show cause letter placed the Claimant on interdiction effective 1<sup>st</sup> August 2013.
11. The Respondent further states that an audit team was constituted to carry out an investigation at the Bondo District Treasury. The audit report was presented to the Principal Secretary, Treasury on 17<sup>th</sup> December 2013.
12. The matter was escalated to the Ministerial Human Resource Management Advisory Committee, which recommended appointment of a sub-committee to undertake further investigations. The sub-committee recommended that the Claimant's interdiction be lifted, that Kshs. 717,091 be recovered from him and that he be retired in the public interest, with effect from 30<sup>th</sup> July 2015.
13. The Claimant appealed the decision by his letter dated 1<sup>st</sup> December 2015. The Respondent states that the Claimant's appeal was presented to the Public Service Commission, which recommended that the Claimant be dismissed from service on account of gross misconduct.



14. The Respondent asserts that due process was followed in the steps leading to the Claimant's dismissal. The Respondent terms the action taken against the Claimant as lawful and reasonable in the circumstances.

### **Findings and Determination**

15. There are two (2) issues for determination in this case:
  - a. Whether the Claimant's dismissal was lawful and fair;
  - b. Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

16. Prior to his dismissal from the public service, the Claimant was subjected to a long winding disciplinary process. By letter dated 8<sup>th</sup> August 2013, he was interdicted on half pay effective 1<sup>st</sup> August 2013, pending determination of his case.
17. The interdiction letter accused the Claimant of flouting government financial regulations and procedures, by colluding with cashiers at Bondo District Treasury, to make unauthorised withdrawals aggregating to Kshs. 1,434,182. The Claimant was further accused of failing to implement control systems, thereby allowing encashment of cheque number 001015 for Kshs. 154,300 and cheque number 001101 for Kshs. 90,000, both of which were said to have been manipulated.
18. The interdiction letter also served as a show cause notice to the Claimant and he offered a detailed response by his letter dated 20<sup>th</sup> August 2013. In his response, the Claimant denied all the allegations levelled against him, asserting that upon his deployment at Bondo Treasury, he had instituted internal financial controls, for which he faced backlash from persons who were benefiting from weak controls.
19. The Claimant further pointed out that the District Commissioner, who was the Authority to Incur Expenditure (AIE) holder was aware of long outstanding imprests from the Estate Deposit account but had not assisted towards their surrender.
20. In addition, the Claimant stated that all transactions in the Estate Deposit account originated from and were approved by the District Commissioner's office.
21. With particular reference to the two cheques said to have been manipulated, the Claimant explained that the subject cheques were issued in his absence, when the Deputy District Accountant, Kenneth Okumu was in charge of the station.
22. An internal audit report was released in December 2013, revealing a long history of financial impropriety at the Bondo Treasury; ranging from unaccounted funds, irregular payments, un-procedural alteration of cash withdrawal documents to un-surrendered imprests. Significantly, most of these irregularities took place ahead of the Claimant's tenure.
23. The recommendations in the audit report were as follows:
  - a. Appropriate disciplinary action needs to be taken on the officers who misappropriated the funds;
  - b. The IDP funds which were misappropriated by officials in the Deputy County Commissioner's office need to be recovered from those involved for onward transmission to the Department of Special Programmes;



- c. Imprest/IOUs held by deceased officers need to be recommended to The National Treasury for write off while the ones held by transferred officers be followed up with their respective ministries for recovery;
  - d. Stringent financial control measures need to be instituted into the operation of the deposit fund with a monthly reconciliation in order to avoid occurrence of financial mismanagement.
24. On 12<sup>th</sup> November 2015, the National Treasury issued the following letter to the Claimant:

“Dear Sir

Retirement In The Public Interest

It has been noted that your general conduct and work performance as an Accountant at Bondo Sub-County Treasury has fallen below the expected standards. You flouted Government Financial Regulations and procedures by colluding with Mr. Augustine Aila and Mrs. Prisca Ouma to make unauthorized withdrawals from Bondo Estates Deposit Account totalling to Kshs. 1,434,182.00.

This is therefore to convey to you the decision of the Authorized Officer that your interdiction be lifted, Kshs. 717,091.00 be recovered from your salary and you be retired in the Public Interest with effect from July 30, 2015. This is in accordance with the Code of Regulation Section R. 23 and the Public Service Commission regulation 2005, CAP 185 Section 36. However, before this is done, you are hereby required to make written representation to this office, if any, as to why you should not be retired in the Public Interest.

Your representation should reach this office within twenty one (21) days from the date of this letter, failure to which the contemplated action will be taken against you without further reference to you.

(signed)

M.M. Ngugi (Mrs)

For: Principal Secretary”

25. The Public Service Commission rejected the recommendation that the Claimant be retired in the public interest and instead directed that he be summarily dismissed. Pursuant to this decision, the following letter was issued to the Claimant on 30<sup>th</sup> May 2016:

“Dismissal From The Service

This is to convey to you the decision of the Public Service Commission vide their letter PSC/D/GE/21/(4) of May 18, 2015 that:

- i. The recommendation to retire you from the Service in the public interest with effect from July 30, 2015 be disallowed; and
- ii. That you be dismissed from the service on account of Gross Misconduct as your conduct and negligence on duty led to misappropriation of huge amounts of public funds.

Upon dismissal you automatically forfeit any claims towards pension and other related benefits in accordance with the [Pensions Act](#) Cap 189 Laws of Kenya.



Enclosed herewith, please find [official Secrets Act](#) Declaration Form for your completion and return to this office on leaving Government Service.

You should also surrender the Identification Cards both for Civil Service and the Treasury Staff having ceased to be a bonafide Civil Servant.

Further note that you have a right of appeal against the decision to the Public Service Commission through this office within a period of six (6) weeks from the date of this letter.

(signed)

K.A. Odhiambo

For: Principal Secretary”

26. This letter accuses the Claimant of gross misconduct and negligence of duty, leading to misappropriation of huge amounts of public funds. The letter did not however assign any particular loss to the Claimant nor did it indicate whether the Claimant’s representations in the course of the long disciplinary process were ever taken into account.
27. The Claimant was categorical and the Respondent did not deny that cheque number 001015 for Kshs. 154,300 and cheque number 001101 for Kshs. 90,000, said to have been manipulated, were issued in his absence.
28. In addition, a report dated 17<sup>th</sup> December 2018, issued by the Internal Auditor General Department indicated that out of a total cash Kshs. 12,489,707.05 said to have been unaccounted for, only Kshs. 28,025 was lost between January 2011 and August 2013, when the Claimant was in office.
29. A cumulative reading of the documents tendered in evidence by the parties reveals that the charges levelled against the Claimant were not only unclear but also kept mutating in the course of the long drawn disciplinary process. As held in *Thomas Joseph O. Onyango v State & another* [2014] eKLR, variation of charges in the course of a disciplinary process amounts to violation of the right to due process.
30. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2015] eKLR this Court held that:

“...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”
31. Further, there was no explanation on the inordinate delay in concluding the disciplinary proceedings against the Claimant. In the *Rebecca Ann Maina Case* (supra) this Court stated the following:

“...To have disciplinary proceedings hanging over the head of an employee for close to a year much like the sword of Damocles or the tongue of an unforgiving spouse, amounts to an unfair labour practice within the meaning of Article 41(1) of *the Constitution*. Disciplinary proceedings should not be allowed to persist so as to acquire the character of an employer’s core business. They must be dealt with expeditiously to allow both the employer and the employee to move on.”



32. In the present case, the intervening period from the date of the Claimant's interdiction in August 2013 to the date of dismissal in May 2016, was a record three years. The Claimant also complained that he was not allowed access to the resultant reports, in order to defend himself effectively.
33. What is more, there is no evidence that the Claimant's complaint of witch-hunt by persons said to have been beneficiaries of weak systems at the Bondo Treasury, was ever investigated. Instead, the Claimant was subjected to a blanket condemnation by virtue of the office he held, without assigning any significance to the systemic failures flagged in the internal audit reports.
34. Overall, I find and hold that the Respondent did not discharge the burden of proof of a valid reason for dismissal as required under Section 43 of the *Employment Act* and that in executing the dismissal, the Respondent did not comply with the procedural fairness requirements set under Section 41 of the Act. The dismissal was therefore wrongful and unfair.

### Remedies

35. The Claimant seeks reinstatement as a primary remedy. However, in view of the time lapse post separation, I find that reinstatement would not be an appropriate remedy.
36. I therefore award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have considered the Claimant's long service and the finding that he did not contribute to the dismissal. I have further taken into account the slim chances of his securing alternative employment, and the mishandling of his case with particular focus on the prolonged interdiction on half pay.
37. I also award the Claimant one (1) month's salary in lieu of notice and the withheld salary during the period of interdiction.
38. No basis was established for the claims for 1 month's salary for 26 years, salary for July 2016 to date, leave allowance for 6 years and salary increments. These claims therefore fail and are disallowed.
39. Finally, I enter judgment in favour of the Claimant as follows:
  - a. 12 months' salary in compensation.....Kshs. 597,600
  - b. 1 month's salary in lieu of notice.....49,800
  - c. Unpaid half salary for 35 months.....868,000
  - Total.....1,515,400
40. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant will have the costs of the case.
42. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyaberi for the Claimant

Mr. Odukenya for the Respondent

