



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**ELRC CAUSE 2055 OF 2016**

**HENRY ODHIAMBO ONYANGO.....CLAIMANT**

**VERSUS**

**THE KENYA DEFENCE FORCES.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant brought this suit on 4<sup>th</sup> October, 2016 seeking the following reliefs:

**a) A declaration that the termination of the claimant's employment was unlawful, illegal null and void.**

**b) Reinstatement to employment or in the alternative;**

**i. The Respondent be ordered to pay the claimant Kshs 3,388,390/= being benefits accrued so far for 25 years.**

**ii. Compensation for the 9 years' claimant would have worked being Kshs 15,805,944 being loss of future earnings together with pending allowances.**

**iii. One-year salary which is Kshs. 1,436,904 being compensation for wrongful termination.**

**c) The Respondents to pay costs of this claim.**

2. The facts of the case, according to the claimant, are that he was employed by the Kenya Defence Forces in the year 1991 as a Service Man and rose through the rank to become Warrant officer two(WOII) earning a Gross salary of Kshs. 100,413 and an allowance of Kshs. 19,329, which is not reflected in his pay slip. He had completed all courses required for one to be promoted to the rank of Warrant Officer one (WOI) as at the time of termination. In total he served the Kenya Defence Forces for a period of 25 years without any disciplinary proceedings. Due to his good conduct he earned two medals for long service and good conduct and one for constitutional medal.

3. On 26<sup>th</sup> August, 2016, the claimant was dismissed from the Defence Forces for allegation that he had fraudulently in cahoots with other officers made payments to fictitious persons on the pretext that they were beneficiaries of officers who either died or got injured in line of duty. The Claimant, however, contended that he was acting under instructions of his superiors being Colonel Pay who instructed him to draw cheques for the various beneficiaries and the said cheques were signed by the said Colonel. He further contended that the dismissal was unfair, un-procedural and unlawful, because his name was not mentioned anywhere in the fraud saga and that he was only sacked as a sacrificial lamb to cover for his superiors who were never touched. Finally, he averred that he was unfairly dismissed from service without benefits including payment of his Pension.

4. The Respondents filed defence on 13<sup>th</sup> February, 2017 denying the alleged unfair and unlawful dismissal. They contended that the dismissal was justified and it was done after following a fair procedure. The Respondent averred that the claimant was tasked with maintaining the chief of defence forces (CDF) Central Fund Account, process all documents received from personnel office and prepare received vouchers which he was to post amount in the cashbook. It further averred that the claimant was to verify all supporting document before presenting the same for Colonel Pay's signature. They contended that the Claimant had full knowledge of the fictitious claims and intentionally defrauded the Respondent. It is further contended that the claimant was under duty to verify correctness of each claim which he failed leading to loss of funds by the Respondent arising out of payment of eight fictitious payment made to various person not being

beneficiaries and leaving out the real beneficiaries.

5. The Respondents also contended that under the provisions of the terms and conditions of service, the Claimant is not entitled to terminal benefits because he was dismissed from service for indiscipline. Therefore they urged the Court to dismiss the Claim with costs.

6. The suit went to fully hearing where both parties tendered evidence and thereafter filed written submissions.

### **Claimant's Case**

7. The Claimant testified as CW-1 and basically reiterated his averments in the Memorandum of claim and his written witness statement dated 4<sup>th</sup> October, 2016. He also produced documents filed with his Claim on 5<sup>th</sup> October, 2016 and the further list of documents filed on 30<sup>th</sup> September, 2019 and 13<sup>th</sup> December, 2019 as exhibits to support his claim. In brief he testified that he received 8 written office memos from Colonel Pay which authorized payment. Attached to the Memos were supporting documents confirming the beneficiaries'. These documents were; a copy of the beneficiaries National Identify cards, copy of their ATM and bank plate, GPA form duly signed by the beneficiaries and a letter from the District Commissioner confirming beneficiaries of the deceased officer. Each inter office Memo contained two documents being the letter from the insurance company verifying the beneficiaries and a copy of EFT showing money had moved to CDF accounts.

8. It was his testimony that, the said documents were verified by personnel in the Records department, which kept all records of the KDF, after approval the said documents were signed by commissioned officers, then sent to the pay registry and then to colonel pay which was the head pay then the same was forwarded to him with written instruction as to draw the cheque. He testified that there was no direct link between him and the Records department and that he could not access the same.

9. He testified further that Major Onyamo carried out investigation on the movement of the loss of the said funds, the investigation was carried out on his bank accounts and M-pesa transaction however that no money was traced on him neither was he mentioned in the said investigations.

10. He testified also that he was supervised by Colonel Pay who was a commissioned officer and that he could not question any instructions given to him by his supervisor. He testified that he was found guilty of the charges of indiscipline, he applied for a review which was rejected for lacking merit. Also that the beneficiaries of the said monies were arrested but the Respondent choose not to prosecute them and released them unconditionally. He then indicated that his termination was unlawful in the circumstances and prayed to be reinstated back to employment in the alternative he be compensated for the unfair termination and paid his terminal dues and plus pension.

11. Upon cross examination he confirmed that he was investigated by Major Onyamo on the fraud allegations but he was not aware of any investigation by EACC. He testified that he was subject to hearing by his commanding officers who found him quilt of the 8 charges though he stated that the said fraud did not occur in his office. He testified that he was charged alongside senior sergeant Omucheyi in personnel department and sergeant Wepukhulu who was from the Records department. He confirmed that Sergeant Wepukhulu implicated him in his confession but that he retracted the entire confession during hearing. He stated that he normally received all documents from records department through his supervisor the Colonel Pay, which he would confirm whether all the attached documents are there before acting on the instructions of the colonel pay and draw the cheques. He contended that it was not his duty to verify the authenticity of the said documents as the same was done by records department.

12. On further cross examination, he testified that when he was posted to RTS station, he was informed that his successor had found GPA claim form for Senior Private Mungai Muriu on his desk which were not paid out and instead the claim for the said officer was fraudulently paid to Private Omondi who was not eligible to GPA pay. He admitted that some cheques that he drew with instruction were paid to different person who were not the real beneficiaries.

13. In re-examination he maintained that the fraud occurred in the Records department and not his department

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

14. The Respondents called **Major Andrew Onyamo**, as their witness, who testified as RW-1. He is the Commanding Officer Special Unit at the 1<sup>st</sup> Respondent and in his testimony, he basically adopted his witness statement dated 2<sup>nd</sup> June, 2016 as his evidence in chief. He also produced the documents marked "D1- 108 and the supplementary list of documents filed on 29.10.2019 and marked as D-109 as the Respondents 'exhibits. In brief, he testified that the claimant was investigated alongside 2 other colleagues who had made GPA claim payments to fictitious persons. That after concluding his investigation he served the claimant with a copy of Abstract of evidence together with charges against him on 5.2.2014 as per section 121 of the Kenya Defence Forces (KDF) Act. Hearing was conducted and the claimant was found guilty of all the 8 charges. He stated that the claimant was a clerk in Central Accounts Department (CAD) who was tasked with receiving the claims and books of accounts, verify the correctness of the claim and then prepare payments and present before Colonel Pay for approval and signature. Thereafter he was bound to balance the books of accounts.

15. According to RW-1 he discovered during his investigation that payments were made to undeserving persons after alteration of documents leaving out the genuine cases. That the said fraud was conducted by three officers being the claimant, Wepukhulu and Omucheyi who were all dismissed from service.

16. On cross examination by Were Advocate, the witness testified that he was tasked with investigation on 17<sup>th</sup> March, 2016. He testified that the claimant was the one that prepared payment and entered them in the books of account. He affirmed that the claimant was not the one who made the forged the documents as he was only in charge of Payments and the person between the Colonel Pay and the Master Chief Clerk. He stated that as much as the claimant did not have documents to verify with he could have done due diligence and affirm genuineness

of the documents that raised question with the records department. He also testified that the claimant received the proceeds of the said fraud as per confession by Sergeant Omucheyi produced in Court, however he has no other documentary evidence to prove the same as the claimant's bank account and phone had no details of any transaction in relation to the said fraud.

17. On further cross examination, he testified that he is not aware whether the public service commission was consulted before the claimant was denied his terminal dues as provided for under the law. He also testified that he did not investigate on the claimants call to establish whether he was in talks with Omucheyi and Wepukhulu.

18. In re-examination, he stated that Omucheyi statement was recorded in English and later he signed it also that the said officer pleaded guilty to the offense and was dismissed.

#### **Claimant's submissions.**

19. The claimant submitted that he was not involved in any fraudulent activities and that the fraudulent activities were confirmed to have been carried out at the Records and personnel department. It was argued that the claimant was merely acting on the instruction of his supervision who is the Colonel Pay to draw the cheques and that he was never supposed to verify the authenticity of the supporting documents since the authentication of the supporting documents were done at the records department. He argued further that the only evidence adduce by the Respondent was Sargent Omucheyi confession which was retracted. He argued further that retracted confession ought not to be relied by court only on instances when the same was corroborated. In this they cited the case of **Wilson Kinyua and another V Republic [1980] eKLR.**

20. The claimant submitted that the Respondent instead of carrying out investigation to ascertain the fraudulent activities, merely arrested the beneficiaries of the fraud and opted not to prosecute them to unearth the person behind the fraud. It was his submissions that the claimant did not sign any of documents and cheques and that all the said documents were signed by the Respondents' senior officers and that none of them was questioned.

21. The claimant also submitted that he was not linked to any other activities that led to loss of money and that the confession by Sergeant Omucheyi was never subjected to cross examination rendering the reliance of the said documents unfair as was held by Justice Odunga in **Republic V Joseph Mutua Kimanzi & 2 others [2019] eKLR.**

22. It is further submitted that the petitioner never benefited from the fraudulent payment as affirmed by RW-1 Major Onyamo who carried investigation and submitted finding to the effect that there was no evidence showing that the claimant received any money from the beneficiaries of the fraudulent payments.

23. On whether the claimant was unfairly terminated, it was submitted that the claimant's service was terminated on unsubstantiated grounds contrary to the law. Further that under section 124(1) of the Kenya Defence Forces Act as read with Standing Order Chapter 19 Rule(c) removes the jurisdiction of the commanding officer from dealing with an issue involving civilian property where civilian have been mentioned as accomplices and places jurisdiction on civil Court. It was thus argued that the Commanding officer acted out of the law in dealing with the issue when the beneficiaries of the said fraudulent act were civilians.

24. It was then submitted for the Claimant that, the claimant was not subjected to a fair hearing process as the only incriminating evidence was a confession by sergeant Omucheyi who was never called for cross examination, therefore his termination was unjustified and he prayed for the reliefs to be granted as prayed.

#### **Respondent's Submissions**

25 The Respondent on the hand submitted that that the claimant's dismissal from service was based on fair grounds. The Respondent maintained that the claimant was under duty to verify and authenticate the correctness of the documents submitted to him before presenting the same to colonel pay a duty which he failed leading to loss of funds. It was also submitted that the fact that Senior Sergeant Pande discovered the unpaid GPA for senior Private Mungai at the Claimants desk when he had been re-deployed showed that the claimant was aware of the fraud and indeed participating in perpetuating it.

26. The Respondents submitted that the claimant the confession of sergeant Winston Omucheyi further implicated the claimant which evidence were not retracted as alleged as no evidence was brought before Court to affirm the same. The Respondents opined that the claimant ought to have called Sergeant Omucheyi as his witness to support his case.

27. On whether the right procedure was followed in the dismissal of the claimant, it was submitted that the claimant appeared before a commanding officer on the 1<sup>st</sup> July, 2016 in line with Kenya Defence Forces Act and was informed of his rights under section 152(1) (c) to choose whether to proceed with trial with the commanding officer or the Court martial which he opted for the former and his right under section 151 of the Act to choose a nominee which he opted not to. Also that the entire process was conducted fairly in compliance with the law.

28. The Respondent then submitted that the claimant has failed to prove to the required standard that he was unfairly terminated and therefore is not deserving of the Orders sought.

#### **Analysis and determination**

29. The issue that commend themselves for determination before me are as follows;

a) Whether the termination of the Claimant's employment was fair both procedurally and substantively,

b) Whether the claimant is entitled to the reliefs sought.

**Was the disciplinary process conducted in a fair manner?**

30. Section 151 and 152 of the Kenya Defence Forces Act provides for the procedure to follow when an officer is being subjected to summary trial. There is evidence before the court that the respondents followed the procedure set out by the said provisions. The claimant was informed of his rights as evidence by the proceedings before the commanding officer.

31. The claimant submitted that the witness, Sergeant Omucheyi, who had allegedly implicated him in the confession was not called during the summary trial for cross examination. However, a perusal of the evidence before this court lead me to a document filed as the Respondent additional document duped, the record of proceedings before the commanding officer, Question 2 of the said proceedings read as follows;

**“Have you agreed that the witness against you need not give evidence in person?”**

And the response was

**“Yes sir”**

32. From the Claimant's Response, it's evident that the claimant elected not to cross examine the Respondent's witnesses when he had been offered an opportunity. There is no evidence to suggest that the claimant was coerced to proceed with the said hearing the way he did. Infact it is him who opted for the summary trial by the commanding officer and not the Court martial. From the foregoing I am satisfied that the Claimant was subjected to fair disciplinary procedure before the summary dismissal.

33. The next issue that I must determine is whether the Respondent had demonstrated a valid reasons for terminating the claimant.

34. In the present case, it is not denied that there were some fraudulent acts that caused the Respondent loss of colossal sum of money. What the claimant denies is being linked to the fraudulent acts. The claimant argued first of all that he is not the one in charge of verifying and authenticating documents therefore could not be in a position to affirm the genuineness of the supporting documents attached to the claim. He argued that it is the Records department that verify the said document before forwarding them to him who in turn only confirms that the documents tally then submits the same to his supervisor who authorizes him to draw the cheques and the supervisor then signs the same.

35. The Respondent on the other hand argued that the claimant ought to have checked any abnormalities before presenting the same to Colonel pay and cited an issue where an IOM for authorizing payment was received first on 2<sup>nd</sup> July, 2015 before the IOM notifying that central accounts had been credited which was received later on 7<sup>th</sup> July, 2015 contrary to the normal procedure, nevertheless the claimant instead of raising questions went ahead and processed payments. The claimant admitted having noticed the anomaly and never raised it with his superiors. Also the fact that GPA compensation for one Spte Simon Mungai Muriu was at the claimant desk unattended to when payment had already been preferred to some unqualified officer, raised questions on the innocence of the claimant.

36. Matters were made even worse by the fact that Sergeant Winston Omucheyi adversely mentioned the Claimant to have been his partner in the fraud. Although the claimant alleged that sergent Omucheyi retracted the said confession nothing was tabled before this court to corroborate the said allegation. Further, the claimant did not call sergent Omuchenyi as a witness in this case to retract his statement or show that the statement was not written voluntarily.

37. I appreciate that the claimant was at the tail end of the said transaction and probably did not have the capacity to verify the genuineness of the Compensation supporting documents. However, I am concerned with the fact that the claimant received two IOMs in unconventional order and proceeded to process payments without alerting his superiors which payment went to fictitious beneficiary and the GPA form of the deserving officer later found in his desk. He could not give any plausible explanation of said action. This smacks of negligence or recklessness on his part.

38. The foregoing conduct is made worse by the confession by Sergeant Omucheyi that the claimant was part of the cahoots that conspired to pay out the said fictitious claims from the respondent's bank account. The said confession was not retracted as alleged and therefore it placed the claimant at the center of the alleged fraud against the employer's bank account.

39. For the reason that the claimant acted negligently and was also suspected on the basis of a confession by his accomplice to have committed the crime of fraud against his employer, I find that there was sufficient and justifiable cause for the Respondent to take disciplinary action against the Claimant.

**Reliefs**

40. The claimant prayed for reinstatement and in the alternative he be compensated for the unfair termination and for payment of pension as per paragraph 14 of his claim. However, I decline to grant either of the said relief in view of the foregoing finding that the claimant was dismissed for a valid reason and after following a fair procedure.

41. For the same reason, I decline to make declaration that the dismissal was unfair, unlawful, null and void.

42. I further decline to award the claim for loss of benefits accrued for 25 years, compensation for the 9 years he could have worked and compensation for unfair dismissal.

43. Similarly, I decline to make any order for the claim for pension and gratuity because the court has no jurisdiction to determine those issues under Kenya defence Forces (Pension and Gratuities) (Officers and Service Members) Regulations, 2017. I therefore leave the same for determination by the relevant Boards under the KDF Regulations.

44. In the end I find that the claimant has not proved his claim on a balance of probability and the same is dismissed. Each party to bear own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29 DAY OF MARCH, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

Order

**In view of the declaration of measures, restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**