



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2490 OF 2017

LOUIS ONYANGO OWOKO.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

JUDGMENT

1. The Claimant filed an Amended Memorandum of Claim dated 25th April 2017 for wrongful demotion, wrongful surcharge, harassment and intimidation. He avers that he was employed by the Respondent on 14th June 2010 as a Treasury Manager based in Nairobi and together with three other Managers, was directly and exclusively answerable to the General Manager Finance. He further avers that those working under the Managers were Accounts Assistants whose duties included among others to prepare journals for posting into the system and that as best finance practice, the Accounts Assistant who prepares the journals was not the one to approve and post them. That one Charles Gitonga was the Accounts Assistant under the Claimant's supervision and tasked to receive and bank money from the Respondent's proceeds and further prepare receipts for the moneys received. He avers that the said Charles is also a nephew to the Respondent's Managing Director. The Claimant avers that sometime towards end of June 2016 he noted there were no receipts for Museum and neither were there moneys in the bank account or cash in the office with the amount lost being about Kshs 5.5 Million. That he thus sought via email for an explanation from Charles who responded to the email confessing to have embezzled the said funds and promising to refund the same to the Respondent. That he conducted a further audit and discovered that the fraud was widespread as over Kshs. 20 million was missing and that Charles was preparing and posting journals to circumvent the Respondent's accounts' system in an attempt to conceal his fraud. Further, that the fraud which had been going on since 2012 had also not been detected by the internal and external auditors. He avers that he also wrote a Memo to Charles asking him to explain the loss of the moneys but Charles never responded and instead deserted work never to return to the Respondent again.

2. He further averred that he consequently reported the fraud to his immediate supervisor one Alfred Matheka who went through the report and forwarded the same to the Managing Director, Atanas Maina for consideration. That the MD then unlawfully interdicted him contrary to the Respondent's Human Resource Policy Manual and that on 18th November 2016, the MD furnished him with a copy of his preliminary findings and asked for a response to the allegations. That he comprehensively responded to the charges and attached all the relevant supporting documents explaining the fraud committed by Charles Gitonga and why it could not be detected. The Claimant avers that he thereafter did not hear from the Respondent for a year until 9th October 2017 when he was invited for a disciplinary hearing before the Respondent's Board and similarly gave an explanation to the Board. He avers that Charles was never invited to a disciplinary hearing despite evidence against him as the mastermind and neither has adverse action been taken against the said Charles regarding the fraud. The Claimant averred that he returned to work on 13th November 2017 as instructed but was denied access to the Respondent's system and that on 5th December 2017 he received communication of the Board's verdict demoting him to Assistant Treasury Manager and surcharging him Kshs. 504,135/-. He contends that the said position of Assistant Treasury Manager is non-existent under the Respondent's structure and that the Respondent had no valid reasons to demote and surcharge him. The Claimant appealed against the Board's findings but avers that his demotion and surcharge were implemented despite pendency of the appeal. He avers that he was a whistle-blower who had fallen victim of the corruption network in Kenya's state corporations and that while a similar fraud was committed by the staff working under two other managers, no action was ever taken against those managers. That the Respondent therefore unfairly handled his case and he was discriminated and victimised for detecting and exposing the fraud. The Claimant gave the particulars of the collusion between or among the Respondent's staff and which aided the said fraud including the fact that the Respondent has a fidelity insurance policy with Alexander Forbes which can settle the amount stolen only after the responsible employee has been charged in Court. Further, that it is the same network in collusion that helped Charles to circumvent the system. He avers that his salary and other allowances have consequently been reduced and that the demotion and surcharge constitute double jeopardy and thus unfair punishment. The Claimant prays that the Court do order and make award for:

i. A declaration that the Claimant was not negligent at work and is not responsible for the funds stolen by Charles Gitonga;

ii. A declaration that the interdiction of the Claimant by the Respondent's Managing Director via a letter dated 22nd August 2016 was null and void and of no legal effect;

iii. Prohibiting the Respondent from implementing the decision of demotion and surcharge made by the Board on 18th October 2017;

iv. Refund to the Claimant of the money deducted as surcharge and payment of salary arrears occasioned by the demotion;

v. An order directing the Respondent to reinstate the Claimant to his original position of Treasury Manager with full pay, allowances and other benefits as well as access to the Respondent's system and other resources necessary for the Claimant's performance of his employment duties;

vii. An order restraining the Respondent from demoting or transferring the Claimant, terminating the employment contract of the Claimant or in any manner interfering with the terms of the employment contract of the Claimant as negotiated on 14th June 2010 when the Claimant was hired by the Respondent.

vii. Costs of the cause

viii. Interest on (v) above.

3. The Respondent filed a Response dated 5th June 2015 in which it averred that the Claimant was responsible for the coordination of cash management and treasury function of the Corporation as outlined in his appointment letter; ensuring that revenue collection, cash disbursements and bank accounts are properly managed to minimize losses. It averred that the Claimant committed an act of gross negligence of duty resulting to monetary loss to the Respondent Corporation and that in line with finance policies and procedures, it was the Claimant's responsibility to review and approve the Accounts Assistant's work and follow up on any discrepancies on a daily basis. Further, that the Claimant deliberately and negligently failed to carry out the daily reconciliations on revenue for the last four years and failed to immediately report the fraud upon discovering the same and created room for Charles to further embezzle funds and eventually desert duty. That the Claimant only reported the incident once Charles had absconded duty and whether or not the said Charles Gitonga was a nephew to the MD is immaterial as Charles was dismissed from employment and reported to the relevant authorities for prosecution. The Respondent averred that the subject loss of funds would have been detected early and prevented if the Claimant was not negligent in performing his duties and that such theft and embezzlement of funds could only be carried out with the Claimant's knowledge and/or negligence. That it prepared a final *Audit Report Ref No. ARC/ACB/SPL/2016* which attributed the loss of funds to the Claimant's negligence of duty and that the Claimant accepted responsibility for his actions by an internal memo dated 19th August 2016. That the MD thus interdicted the Claimant in line with the express provisions of Clause L6 of the Human Resources Policy Manual, 2013 after which investigations were carried out and the Claimant given the findings for him to explain the same. The Respondent further averred that its Board was in fact lenient to the Claimant when it only demoted and surcharged him the amount of the additional revenue lost in the two months' period after his discovery of the fraud as provided in its HR Policy Manual. That the Board's decision considered the Claimant's representations and the fact that the offence of gross misconduct was proved against him and was based on the backdrop of the comprehensive Financial Policies, Procedures and Regulation Manual. It averred that the position of Assistant Treasury Manager does exist within its employment structure with specific duties as expressed to the Claimant and avers that the particulars of collusion as pleaded by the Claimant are baseless allegations not supported. It further avers that the Claimant is still in its employment and that this Honourable Court should not allow him to abuse its processes by dragging the Court into the day to day management of employees by an employer and should allow it to fairly administer its employees. Further, that the Claimant ought to have first exhausted the appellate procedure before filing the matter in Court and that therefore this Court does not have jurisdiction to hear this matter which is prematurely before it. The Respondent prays that the Claim herein is dismissed with costs.

4. The Claimant testified that there are Museum Contractors who collect money from the visitors and which monies are collected at the end of the day by an officer from Finance Department who then issues a receipt to the Museum. That the said officer then banks the money and shares the banking slips with the museum for their records and that the Claimant would then get the bank statements and do reconciliation. That Charles Gitonga of Finance Department collected money from the Museum but did not issue receipts or bank the said money and that from his records, there were no transactions from the Museum. He stated that the Museum never complained that it was not issued with receipts and neither did it inform anybody that monies were not banked. He confirmed that he was left in charge of the Finance Department in June 2016 when the GM Finance went to China/Australia and that after Charles admitted the embezzlement he asked him to bank the money within 48 hours and also told the substantive Head of Finance, who told the Claimant to continue with investigations. That he gave the said Head of Finance a report on 18th July 2016 when he came back and stated that IT and Museum were not investigated in the matter. The Claimant confirmed under cross-examination that his duties included minimising risk of losses and reconciling daily receipts and that he had two Assistants who reported directly to the General Manager. That he usually accessed his assistants' reports from the system but it was not his duty to approve their work and that he did not know how Charles Gitonga got full access of the system without authority. He stated that he was subjected to disciplinary hearing after 15 months of being in interdiction and was demoted after the said hearing and that he was not heard even after filing an appeal in November 2017, which he was later told, was rejected. He confirmed having been deducted Kshs. 5,000/- every month since May 2018 until October 2019 and did not have evidence whether the Respondent's funds were insured or whether it was paid for the lost funds. He further confirmed having been dismissed for the reasons pending in Court and which decision he has appealed and is not yet before Court. In re-examination, the Claimant stated that demotion is not listed as one of the forms of punishment under Clause L.8 and that his reconciliation involved issued receipts otherwise he could not establish how much was received. He further explained that during reconciliation in the automated environment, he checked receipts against the banking and that if receipts were not balancing reconciliation would pick up and that he would only check the bank statements in the ledgers.

5. The Respondent's witness stated in Court that the Corporation uses the Disciplinary Manual for Public Service 2016 together with other HR Policies & Procedures. He confirmed that the Claimant is no longer employed by the Respondent as his services were terminated in October 2019 but not in relation to the case in court. He further stated that the Claimant was directly responsible for the loss being the office directly responsible for the function. He stated under cross-examination that he does not work in the Finance department and that he is a HR Manager and that he leaves the issues of money received and not banked to the GM Finance. With regards to the system, he stated that the GM Finance is the one who allows certain levels of access while the ICT Manager has full rights and that only the authorised persons can access the system. He could not confirm whether or not both the GM Finance and ICT Manager were interrogated and stated that the staff collecting cash were not interrogated at disciplinary level. He confirmed that Mr. Gitonga took responsibility for some and not all the money

lost and that the Respondent reported to the police. The Respondent's witness further confirmed that demotion is provided for and guided as per PSC Section 4 Guidelines and that section 4.7(f) calls for demotion in part. Further, that the Claimant's appeal has not been heard and that Mr. Gitonga was only interrogated through written letters and did not participate in the disciplinary process because he had already been dismissed.

6. The Claimant submits that the appellate mechanism provided under Section 74 of the Public Service Act does not render the suit defective because firstly, it refers to officers appointed by the PSC and does not include members of State Corporations Boards like the Respondent's Managing Director who are appointed by either the President or the Cabinet Secretary and there is also no evidence that the Respondent is a department under the Public Service Commission. Secondly, the provision is not an ouster clause to take away the jurisdiction of this Court to hear and determine any dispute relating to the employment of a public officer. Thirdly, the provision is not couched in mandatory terms as the phrase '*may appeal to the Commission...*' gives an employee governed by the provision the option of electing whether or not to appeal. It is the Claimant's submission that Section 74 of the Public Service Commission Act does not apply to the current dispute and the suit is properly before this Honourable Court. The Claimant submitted that under clause L.9.1 of the Respondent's Financial Policies, Procedures and Regulations Manual which provided for a mechanism for reporting financial irregularity, he was required to report the theft either to the Head of Finance department or the Managing Director or a member of the Board. The Claimant submitted that RW1 confirmed in his testimony that the Claimant complied with this policy as he officially reported the matter to his head of department after the return of the said head of department from official duty. That the Respondent has failed to answer in its defence why the Museum Manager did not report the irregularity before the same was detected by the Claimant; why the ICT Manager allowed Mr. Gitonga to post and pass journals; how was the Claimant expected to unearth fraud that both the internal and external auditors could not unearth; and the fact that he detected the fraud when he was acting as the GM Finance giving him a wider view of the operations and no action was taken against the GM Finance who never spotted the anomaly. It is the Claimant's submission therefore that the Respondent did not call key witness whose testimonies and cross-examination would have been crucial in the just determination of the issues. He relies on the decision of the Court in **Pelecia Olum v Export Processing Zones Authority [2014] eKLR** where the Court faulted the respondent for failing to invite a witness for questioning by the claimant during the disciplinary hearing or appearing in court as a witness and went on to find that the respondent failed to establish a valid reason for summarily dismissing the claimant. The Claimant submitted that the Respondent has failed to demonstrate negligence on the part of the Claimant and that even the RW1 did not prove the causative link between the Claimant and the loss. That RW1 was consequently not a credible witness and his evidence was of no probative value and the Respondent failed to interrogate or call the following critical witnesses: ICT Manager, Museum Manager, museum staff including the revenue accountant, General Manager Finance and the Managing Director, despite the serious allegations made against them. The Claimant further submitted that he only took departmental responsibility though the actual head of the department was the General Manager Finance and that the leniency he asked was based on the fact that a decision was going to be made at the end of the hearing whether or not he agreed with it. That loss of the subject funds was an institutional failure rather than an individual's mistake and there was no way he would have exercised a greater supervisory control to avoid the fraud. The Claimant submitted that as per Clause L.6 of the HR Policy Manual only the Board could exercise powers to interdict him and that as per Clause L.4.i and ii the preliminary investigations which are done at the departmental level were to be initiated by his supervisor (GM Finance). That Clause L.7.1.i empowers the Managing Director to institute disciplinary proceedings only after the preliminary investigations have been concluded and charges framed against the employee. It is the Claimant's submission that the Managing Director did not therefore have the powers to either initiate the preliminary investigations or interdict him but hurriedly did so because the investigations would have implicated his cronies. That the elaborate disciplinary process outlined in the HR Policy Manual formed part of the Claimant's employment contract and ought to be as such been religiously observed and urged the Court to invalidate the interdiction and consequential processes. He relied on the case of **Augustus Wafula Wambati v Moi Teaching & Referral Hospital [2014] eKLR** where the Court found the suspension of the claimant unlawful having been sanctioned by an acting director who had no powers to do issue the suspension. The Claimant submitted that he has demonstrated the unfairness of the process that led to his demotion and surcharge as well as the absence of negligence on his part. He submitted that the two penalties cannot stand because demotion is not listed as a penalty under Clause L.8 of the HRM Policy and was thus an invention and imposition of the Respondent contrary to the terms of the contract. That the Respondent's argument that the same is provided for in other policies governing public officers cannot hold water as such policies were not brought to the attention of the Claimant and further, do not have a blanket application on all public officers. The Claimant further submits that he suffered double jeopardy as demotion and surcharge are two penalties imposition.

7. The Claimant submitted that RW1 did not give any evidence on his allegation that the Claimant's contract had been terminated and that when RW1 was cross-examined, he confirmed that the Claimant had been advised to wait at home for the outcome of this case. He urges the court to consider Sections 107 and 109 of the Evidence Act which provide that whoever asserts a fact must prove existence of those facts to the Court for the court to give judgment as to any legal right or liability, unless it is provided by any law that the proof of that fact shall lie on any particular person. That if it is true that the determination of such appeal against his alleged termination was suspended pending the decision of the Court, it means no such termination has been effected and the Respondent (erroneously though) is waiting for the outcome of the dispute herein before it can decide to either overturn or uphold the termination, if any. It is the Claimant's submission that the Respondent secretly terminated his contract to render impractical/pre-empt his reinstatement and that this Honourable Court should stamp its authority and thwart such unfair, unjust and illegal schemes. The Claimant urged the Court to award him Kshs. 1,140,000/- being the loss he has suffered from the reduction of his salary as a result of the impugned demotion and that he also seeks a refund of the surcharged amount of Kshs. 504,135/- as the same was not based on a valid reason. He further submitted that the Court should condemn the Respondent to bear the costs of this suit plus interest thereof since the Respondent decided to frustrate an employee who unearthed the fraud that was going on at the institution.

8. The Respondent submitted that the Claimant is largely challenging the punishment given to him which he considers unfair and unlawful and notes that the Claimant was not truthful in his testimony since the Court had to remind him in many instances during his cross examination, of his oath and the letters and statements he had written which were in conflict with the line of evidence he was trying to put across. The Respondent submitted that Section 2 of the Public Service Commission Act defines a public body to include any corporation relating to the undertaking of a public utility and statutory public bodies while Section 3 of the Public Service Commission Act provides that the Act shall apply to all public bodies and persons holding office in the public service subject to Articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 254(1) of the Constitution and Section 28 of the Kenya Defence Forces Act. It submits that the Respondent is thus a statutory public body and corporation with powers to act under the Kenya Railways Corporation Act, Chapter 397 of the Laws of Kenya. Further, that the Claimant by virtue of his employment with the Respondent was therefore a public officer holding a public office within a public body and in the public service within the meaning of Article 260 of the Constitution as read together with Section 2 of the Public Service Commission Act. The Respondent urged the Court to look at Section 74 of the Public Service Commission Act which expressly requires the Claimant to appeal the decision of his employer to the Public Service Commission and find that the said Commission has the requisite

authority to address such administrative disputes arising from public employment. It submits that Section 9(2) of the Fair Administrative Actions Act provides that parties should exhaust internal appeal mechanisms before proceeding to Court and which makes the appeal to the PSC the most appropriate mechanism. The Respondent urged the Court to apply the reasoning applied in **Nyeri ELRC Case No. 94 of 2017 - Dr. Samuel Gitau Kinyanjui v County Government of Kirinyaga & Another [2020] eKLR** on the need to exhaust internal remedies and similarly dismiss this suit for being premature. That it is for similar reasons that this Court lacks the requisite jurisdiction to entertain and determine this Claim and that even if the Court finds it had jurisdiction, the Honourable Court should invoke the principle of constitutional restraint and give opportunity to the constitutional mandated bodies to deal with the issue (see **Stephen Nyarangi Onsomu & Another v George Magoha & 7 Others [2014] eKLR**). The Respondent submitted that subsequently and without prejudice, the Claimant confirmed during trial that he was negligent in performing his duties. It referred the Court to the Claimant's admission of negligence in his response to his line manager as contained in his letter (internal memo) dated 19th August 2015 and submits that based on the evidence before Court, the Claimant's negligence contributed to the loss and embezzlement of the Respondent's public funds. The Respondent cited the case of **Sammy Kipyego Barchok & Another v Postal Corporation of Kenya [2017] eKLR** where the Court found the dismissal to have been justified and lawful after holding that the claimant's conduct in failing to detect and prevent fraud amounted to gross misconduct and violated the trust the respondent had bestowed upon them. The Respondent submits that in the instant case the buck stopped with the Claimant and it was his sole responsibility to ensure that no fraud whatsoever occurred under his watch.

9. The Respondent submitted that the Claimant was given a fair hearing, which process was conducted lawfully and without any ill will or bad faith and that it had a valid reason to subject him to a disciplinary proceeding. That the Claimant was deserving of the punishment given to him and should be happy that he was only demoted and his employment preserved at that time. It submits that the Respondent's HR Policy Manual incorporates other guidelines such the Discipline Manual for Public Service by the PSC and that Clause 4.7 (f) of the said Manual expressly provides for reduction in rank or seniority as a form of punishment and which empowers the Respondent to demote an employee as a disciplinary measure. That the only commensurate punishment would have been those set out at Clause L.8(5-9) but which would not be fair in the circumstances of this case and that it thus applied the PSC Manual and reduced the Claimant's rank in addition to surcharging him. Further, that Clause L.8(1) provides that an employee may receive one or more punishments while L.8(4) as read together with L.9 provides that an employee may be surcharged in the absence of a satisfactory explanation if found personally responsible for any deficiency in, or additional expenditure or liability being incurred by the Corporation, damage or loss of any corporation property for which he has personal charge. The Respondent submitted that the Claimant has failed to prove his case and is thus not deserving of the prayers sought in in light of the evidence before Court and the admission by the Claimant of his negligence. That prayer (ii) was long overtaken by events since the Claimant fully served the interdiction and received pay during the same time as investigations were being carried out on his conduct and that though the separation of the Claimant from the Respondent is not before Court, the same is a material issue for consideration in light of the remedies sought by the Claimant. That the Claimant's refusal to amend his claim to align with the obtaining circumstances is a miscalculation on his part and the Court must not aid him in his attempted dishonesty and wasting of judicial time. The Respondent urges the Court to safeguard the integrity of the justice system and dismiss the instant Claim.

10. The Claimant sought relief for the surcharge that he suffered as a result of a fraud that was discovered at the Respondent. The Claimant asserts that he ought not have been punished for the same as the culprit was one Charles Gitonga. The Respondent asserts on its part that the Claimant was responsible as the manager and was unable to detect the loss and failure to bank the collections as expected and that the surcharge was within the procedures for discipline in its manual. It also asserts that the Claimant ought to have appealed to the Public Service Commission before approaching Court for relief.

11. In cases where an employee is disciplined by the employer, the Court would only be concerned with the process and upon ascertaining the veracity of the complaint against the employer award damages where appropriate. In this case, it was the Claimant's responsibility to coordinate the cash management and treasury function of the Corporation as outlined in his appointment letter. He was to ensure that revenue collection, cash disbursements and bank accounts were properly managed to minimize losses. It is apparent that he failed in his duty to discharge this mandate as a sum of close to 20 million was stolen from funds collected at the Respondent's Railway Museum. The Claimant was thereafter placed on interdiction. The audit undertaken by the Respondent attributed the loss of funds to the Claimant's negligence of duty. The Claimant admitted through the internal memo dated 19th August 2016 responsibility for his actions which resulted in the loss under investigation. He was interdicted by the Respondent's Managing Director and surcharged. He paid a considerable part of the surcharge and by the time he left employment with the Respondent this was the only blot on his career with the Respondent. As an employer, the Respondent availed the Claimant all his rights to fairness as he was given an opportunity to explain the loss but he failed to do so to the satisfaction of the employer. There was no evidence of malice on the part of the Respondent as it undertook the audit and consequent punishment of the Claimant in accordance with the internal policies and procedures manuals the Claimant was bound by. In the premises the Claimant's claim was misplaced. As regards the first port of call, the Claimant ought to have appealed to the Public Service Commission but he instead rushed to Court. He ought to have exhausted the process under the rubric of the Public Service Commission complaints procedure as has been held by courts both in the Employment and Labour Relations Court and the High Court on the exhaustion doctrine. He failed to exhaust the internal mechanisms and for that he will have to meet the costs of this suit since it was filed prematurely and prior to appeal or review by the Public Service Commission. In the final analysis the suit is dismissed with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2021

NZIOKI WA MAKAU

JUDGE