



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1310 OF 2016

PATROBAS OWITI OGUMA.....CLAIMANT

VERSUS

THE MINISTRY OF EDUCATION.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

1. The claim before me was instituted by the claimant vide a Memorandum of Claim dated 24th June 2016 and filed in court on 1st July 2016. The Memorandum of Claim was filed alongside the claimant's witness statement and list of documents, both dated 24th June 2016.
2. The 2nd and 3rd Respondents entered appearance on 20th July 2016 through the Hon Attorney General (the 3rd Respondent). Subsequently the 1st, 2nd, and 3rd Respondents filed a joint reply to the Memorandum of Claim, dated 16th August 2016 and filed in court on 17th August 2016 annexing thereto their documents, tagged as Appendix 1 to Appendix 4.
3. The Claimant filed a Response to the Respondents' reply to Memorandum of Claim on 8th September 2016. The same is dated 31st August 2016. On 22nd September 2016, the Claimant filed a Further List of Documents dated 21st September 2016 and on 16th October 2016 filed a document titled witness statement and part Response.
4. The Respondents filed a List of witnesses and a witness statement on 27th November 2017.
5. On 24th January 2019, the Claimant filed an Amended Memorandum of Claim dated/amended on 23rd January 2019 and an Additional List of Documents dated the same date. On 1st February 2019, the Claimant filed yet another witness statement by himself.
6. When the matter came up for pre-trial directions on 14th February, 2019 counsel for claimant sought to have the Amended Memorandum of Claim admitted. The same was admitted and Respondents were put at liberty to file an amended response to the Amended Memorandum of Claim within 21 days of the said date. The Respondents do not seem to have filed any amended response(s) to the Claimant's Memorandum of Claim as amended.
7. Briefly the Claimant pleaded in his Amended Memorandum of Claim:-

a) That he (the Claimant) was employed by the Ministry of Education (the 1st Respondent) on probationary terms and was on 21/7/2010 posted to Rachuonyo North District before being transferred to the Ministry Headquarters on 21/12/2011; and was confirmed to permanent and pensionable establishment with effect from 25/1/2011; earning a monthly salary of ksh.21,020.

b) That the Claimant joined Ardhi Sacco in January 2011 whereby ksh.1,000 was being deducted from his salary per month as his shares, but withdrew his membership from the Sacco on 18/4/2013 with instructions that his loan of ksh.28,000 be deducted from his shares, but there was no communication from the Sacco. The claimant joined Hazina Sacco in July 2013.

c) That on 24/10/2014, the 1st Respondent's agents wrote to the Claimant alleging gross misconduct in that the claimant had colluded with an unnamed colleague and tampered with the IPPD system, while at the salaries section, for personal gain, by formatting the system to reflect no loans against him from Ardhi Sacco in his payslip; and thereby intentionally accessing

deductions from his guarantors. The Claimant was required to show cause within 2 days and verbally instructed not to be seen around the employment office – Jogoo House B. He nevertheless reported to work on 27/10/2014 whereupon his supervisor told him not to stay at the Salaries Section. The claimant opted to report to Central Registry awaiting further directions.

d) The Claimant responded to the show cause letter on 28/10/2014 (as 24/10/2014 was a Friday) and showed good cause why disciplinary actions could not be taken against him by explaining that he did not tamper with the said system for personal gain but only got the help of a colleague to stop unlawful Sacco deductions in 2014 from Ardhi Sacco from which he had withdrawn in April 2013. That the colleague deleted the loan from the payroll.

e) That to the Claimant's dismay, his salary was stopped on 28/10/2014 on allegation that he had not responded to the show cause letter of 24/10/2014 and had not reported on duty from 24/10/2014, which allegations were untrue.

f) That on 4/11/2014, the Claimant was suspended from duty on the said allegation that in July 2014, he had gained access to the IPPD system using another officer's password to stop loan recoveries from the claimant's salary and fraudulently posted salaries of Daniel Kamau Kahiro to account No. 0009761489926 at Equity Bank, which the said person denied operating. That he also fraudulently posted the salaries of Tom Mboya Odheche amounting to ksh.52,010.95 to Equity bank while the account was not operated by the said person.

g) That the Claimant had responded on the issue of the IPPD system on 28/10/2014. That on the two issue of fraudulent posting of salaries, his Response was that he did not post the salaries, but was advised and/or compelled by his bosses and/or supervisors to repay the salary of Mr. Kahiro, which was about ksh.21,000. That he (the Claimant) refused to repay the salary of Mr. Odheche.

h) That the Claimant was dismissed from service vide a letter dated 12/5/2015, with effect from 29/1/2015, on account of gross misconduct and fraud in the discharge of his duties. The right to appeal against the dismissal to the Secretary Public Service Commission within 42 days was duly explained.

i) That the claimant appealed on 9/6/2015, but the appeal was disallowed by the Public Service Commission on 9/9/2015 on ground that the Claimant had admitted that he caused his Sacco loan to be deleted from the payroll without proper procedures.

j) The Claimant was advised on his right to apply for review of the Public Service Commission's decision vide a letter dated 24/9/2015, and applied for review on 9/10/2015. That the outcome of the review application is unknown to the Claimant todate.

8. The Claimant pleaded breach of various provisions of the law by the Respondents, including Sections 41,43,45,46,49,40 and 51 of the Employment Act 2007 as a result of which he alleged to have suffered loss and damage, and sets out particulars of his claim against the Respondents in paragraph 19 of the Amended Memorandum of Claim.

9. The Claimant sought the following reliefs against the Respondent's, jointly and severally:-

a) **A declaration that the dismissal of the claimant on 12/5/2015 was unfair and unlawful.**

b) **An order directing that the Claimant be reinstated back to service without any loss of benefits like salary increment and promotions, with payment of his salary during suspension period from 4/11/2014 to 12/5/2015 and unpaid salary from May 2015 till date of reinstatement at ksh.27,442 per month excluding any salary increments during this period, OR**

c) **Incase the Claimant cannot be reinstated, then he be paid his terminal benefits amounting to ksh.270,783.38 and compensation for unfair termination amounting to ksh.329,304, a total of ksh.600,087.38.**

d) **Costs of the cause and interest.**

10. As already indicated in paragraph 6 of this judgment, the Respondents do not appear to have filed an Amended Response and/or responses to the Amended Memorandum of Claim referred to in paragraph 7 of this judgment. In their Reply to Memorandum of Claim referred to in paragraph 2 of this judgment (dated 16/8/2016), the Respondents denied the Claimant's claim and pleaded, *inter alia*, that:-

a) *The claimant had not denied corrupting the (IPPD) system, and had accepted liability and committed himself to refunding the money...*

b) *There were sufficient grounds to suspend the claimant from service and the decision was communicated to the Claimant vide a letter dated 4th November 2014.*

c) *The claimant's appeal was disallowed because the Claimant had admitted wrong doing.*

d) *The Claimant's Application for review was disallowed as the Claimant had not raised any new and sufficient grounds to warrant a review and the decision was communicated to the Cabinet Secretary of the 1st Respondent vide a letter dated 29/6/2016.*

11. When the matter came up for hearing on 29/7/2021, counsel for the Respondents sought to have counsel for Claimant tell the court which witness statement the Claimant would be relying on, as there were three statements on record. Counsel for Claimant told the Court that the Claimant would rely on his witness statement filed in court on 1/2/2019. The Claimant adopted that statement (filed on 1/2/2019) as his

evidence in chief, and produced as exhibits the documents listed in the claimant's list of documents dated 24/6/2016 and filed in court on 1/7/2016, which were marked as Claimant's exhibit number 1-10. He also produced the documents listed in the Claimant's Further List of Documents dated 21/9/2017 and filed in court on 22/9/2017, which were marked as the Claimant's exhibits number 11-13. The claimant was then cross-examined and re-examined.

12. The Claimant testified both in chief and under cross examination that he was dismissed on 12/5/2015 without notice or payment in lieu of notice, and had worked without salary from November 2014 to May 2015, and had not received salary increment upto May 2015. That at the time of dismissal on 12/5/2015, he had 31 days (accrued) leave, and was not paid in lieu of that leave. It was the claimant's testimony that he had been unfairly and unlawfully dismissed, and for this he asked to be paid the equivalent of twelve (12) months salary as compensation for unfair dismissal, which he had stated in his witness statement did not follow the laid down disciplinary procedure.

13. The Claimant admitted under cross examination that his letter to the 1st Respondent dated 28/10/2014 responding to the show cause letter dated 24/10/2014 contains admission by him of wrong doing and a request for forgiveness. In his witness statement, the Claimant admits to having refunded a salary (Ksh.21,000) which he was accused in the suspension letter dated 4/11/2014 of having fraudulently posted to a bank account not operated by the officer concerned. Although the Claimant maintained that he was compelled by a senior officer to make the refund, no evidence was tendered in proof of that allegation.

14. The Claimant further told the court that his letter of dismissal accused him of gross misconduct whereas the show cause letter accused him of colluding with a colleague to tamper with the IPPD system to delete a loan for personal gain. That in his Response to the show case letter, he did not admit what is written in the suspension letter. That the letter of suspension contains charges that are different from those in the show cause letter.

15. The Claimant testified that he was not taken through any disciplinary proceedings before dismissal.

16. On their part, the Respondents called one (1) witness, Harrison Mwangi Kuiru, his witness statement (dated 15/11/2017) having been filed on 27/11/2017. He adopted his said witness statement as his evidence in chief and testified that in 2013 to 2017, he was working in the Ministry of Education and the Claimant was working in the salaries section where he was operating the IPPD system in the Ministry's headquarters. That the Claimant was accused of deleting his loan from the IPPD system and posting or transferring the salaries of two Ministry officers to different bank accounts unprocedurally.

17. The Respondent's witness further testified that the procedures of clearing an employee's loan from the IPPD system includes visiting the Sacco to determine the loan balance and if paid in full, obtaining a clearance letter addressed to the Ministry's Salaries Section, preparation by the Ministry of an IPPD data sheet which is then amended and authorized, followed by updating of the IPPD system. The court heard that the Claimant did not follow that procedure.

18. The witness further told the court that the IPPD system is able to identify any person who logs into the system and to indicate whatever action that was taken, and it revealed that the Claimant and a colleague had logged into the system and effected the changes, a fact that the Claimant admitted when he was confronted by his supervisors. That paragraph 4 of the Claimant's Response to the show cause letter contains an admissions and a request for forgiveness. That the Claimant was also responsible for posting of the salaries of two Ministry officials (Daniel kamau Kahira and Tom Mboya Odheche) from the designated bank accounts to other bank accounts. That the fraud was discovered when the two officers complained of not having received their salaries and the claimant was identified as having made the alterations.

19. That the Claimant was issued with a show cause letter which he received and responded to. The case was investigated and a report forwarded to the Ministerial Human Resource Advisory Committee for discussions and determination and the committee recommended dismissal of the officer (Claimant) for gross misconduct. The Claimant was suspended and thereafter dismissed with effect from 29/1/2015. It was the Respondent's further evidence that the Public Service Act had by then not been amended to provide for half salary for those under suspension and under interdiction.

20. The witness told the court that the Claimant was notified of the decision and he appealed. His appeal was dismissed by the Public Service Commission, and so was his application for review. That due process was followed, and the Claimant's case was properly handled.

21. The Respondent's said witness further told the court that the Claimant's actions listed in the (show cause letter) dated 24/10/2014 amount to gross misconduct, and that the show cause letter stated as much.

22. Upon hearing evidence by both parties and considering the pleadings, as well as submissions filed by counsel, issues for determination appear to me to be as follows:-

a) Whether the procedure followed by the Respondents in dismissing the claimant was fair and lawful.

b) Whether the Respondents had lawful and valid reasons to dismiss the Claimant.

c) Whether the Claimant is entitled to the reliefs sought.

23. On the first issue I have noted that in his letter dated 28/10/2014 responding to the show cause letter dated 24/10/2014, vide which the Claimant was accused of engaging in illegal and dishonest acts by tampering with the IPPD system for his personal gain and formatting the system to reflect no loans against himself from Ardhi Sacco in his payslip and thereby accessing his guarantor's deductions, the Claimant stated as follows:-

“...I talked to a colleague who deleted the loan from the payroll knowing that I was going to clear the following day of which it was without following proper procedures and ask for forgiveness..., I hereby promise to work without being involved in any malpractice.”

24. Both the show cause letter dated 24/10/2014 and the claimant's said Response thereto were produced in court by the Claimant. On the allegation of fraudulent posting of other employees' salaries to other bank accounts, there is an admission by the Claimant of having refunded the same. Indeed, among the documents produced by the Claimant is a letter by the Claimant (dated 9/6/2015) admitting to have made such refund. This amounts to admission by the Claimant of the charge of fraudulent posting of salaries to undesignated bank accounts.

25. Under the foregoing circumstances, due procedure need not include disciplinary hearings and proceedings as the Claimant appeared to suggest in his evidence.

26. The Court of Appeal in the case of **Jacob Oriando Ochenda –vs- Kenya Hospital Association t/a Nairobi Hospital [2019] eKLR** stated as follows:-

“...in the light of the foregoing, we do not understand the Appellant's arguments that there was no oral hearing. But even if this was true, the court has repeatedly stated that the right to be heard does not necessarily entail an oral hearing only.”

The Court of Appeal cited with approval the opinion of the English Court of **Appeal in R-vs- Immigration Appeal Tribunal ex-parte Jones [1988] WLR 477,481** where it was held:-

“The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.....whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made...”

27. In view of the admission of wrong doing by the Claimant, refund by him of salaries and/or salary he was accused to have fraudulently posted to bank accounts other than the designated ones, and request by him for forgiveness, I find and hold that oral disciplinary hearings were not necessary. The issue of whether or not to forgive the Claimant was in the Respondents' discretion, and they appear to have decided not to forgive the Claimant, hence the letter of dismissal dated 12/5/2015 and subsequent dismissal of the Claimant's appeal against dismissal and refusal to review that decision.

28. On the second issue, the law obligates an employer to demonstrate that the reasons relied on in dismissing an employee were reasonable. Section 43 of the Employment Act provides as follows:

“ (1) in any claim arising out of termination of contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

Before terminating the Claimant's services, the Ministry of Education (1st Respondent) issued a show cause letter to the Claimant, making specific accusations of gross misconduct against the Claimant. The claimant admitted wrong doing and asked for forgiveness vide his letter dated 28/10/2014. Likewise, the Claimant refunded salaries and/or salary that he had been accused by the 1st Respondent of fraudulently posting to different bank accounts. This amounts to constructive admission of wrong doing. The validity of reasons for termination of the Claimant's contract has thus been demonstrated.

29. On the third issue, the Claimant has set out a raft of reliefs that he seeks. These are set out in paragraph 19 of the Amended Memorandum of Claim. The Claimant was suspended on 4/11/2014 and was subsequently dismissed vide a dismissal letter dated 12/5/2015, but which indicated that dismissal was effective from 29/1/2015. The claimant pleaded and testified that he did not receive any salary from the date of suspension to the date of dismissal, that is from November 2014 to May 2015. This fact was not disputed by the Respondent who submitted that if any salaries are to be paid to the Claimant, the same should be for two months as dismissal took effect on 29/1/2015. The court was not told why the effective date of dismissal in the dismissal letter dated 12/5/2015 was backdated to 29/1/2015, and why it took the Respondents over three months to issue the dismissal letter.

30. The Employment Act 2007 has no specific provision on suspension of an employee. Section 12 of the Act however provides that any employer with more than fifty employee must have a statement on disciplinary rules. This is how suspension of employees finds its way into the Kenyan Labour Practices as it is usually provided for in some employer's statements on disciplinary rules.

31. Ordinarily, suspension of an employee will be invoked by an employer when there is need for investigation and/or enquiries to determine whether or not the employee should be dismissed, depending on the allegations levelled against the employee. For suspension to be lawful, it must be anchored on the employer's statement on disciplinary rules and/or policies. An employee on suspension is, however, entitled to his full salary, whether the same is paid during or after completion of a disciplinary process and/or investigation.

32. The Claimant was on suspension until 12/5/2015 when he received the dismissal letter, for a total of six months and twelve days. His monthly salary at the time of suspension is pleaded by him to have been ksh.21,020. The Claimant is entitled to payment of salary for the

said period of six months and twelve days.

33. The Claimant's claim for unpaid salary increment from August 2014 to October 2015 was not proved and is declined. As stated by the Court of Appeal in **Civil Appeal No. 164 of 2001 – Nelson Mwangi Kibe –vs- Hon. Attorney General of Kenya**, a claim for non-payment of salary is in the nature of special damages. It follows that the same must be specifically pleaded and proved.

34. On the claim for unpaid leave days, the Respondents have submitted and demonstrated that the Claimant was entitled to thirty (30) days annual leave for the year 2014 and disputed the 45 days set out by the Claimant. Having found that the Claimant's dismissal took effect on 12/5/2015. I find and hold that the Claimant is entitled to 9¹/₂ leave days for the year 2015, pursuant to Section 28(b) of the Employment Act 2007. This is for the five months completed in the year 2015 before termination of his contract of employment vide a dismissal letter dated 12/5/2015.

35. The remedy of reinstatement is not available to the Claimant in view of the fact that his dismissal was not irregular, and the Claimant was dismissed in May 2015, which is well over three (3) years ago.

36. The claim for twelve months salary as compensation for unfair termination fails, in view of the finding that termination was not unfair.

37. Likewise the claim for 1 month salary in lieu of notice fails as the Claimant was duly notified of the allegations against him and he duly responded to them.

38. Consequently, I hereby enter judgment in favour of the Claimant against the Respondents jointly and severally as follows:-

a) Unpaid salary for six (6) months and twelve(12) days at the rate of ksh.21,020 per month..... ksh.134,528

b) 39 ½ unpaid leave daysksh.27,676

Totalksh.162,294

39. The Claimant is also awarded costs of the claim and interest at court rates from the date of this judgment.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY of SEPTEMBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions on physical court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

Miss Okeyo h/b for Mr. Rakoro for the Claimant

Miss Oyugi for the Respondents