



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC NO.14 OF 2020

EMILY CHEPKURUI SANG.....CLAIMANT

VERSUS

THE COUNTY PUBLIC SERVICE BOARD,

KERICHO COUNTY.....1ST RESPONDENT

THE GOVERNOR KERICHO COUNTY,

PROF. PAUL K CHEPKWONY.....2ND RESPONDENT

JUDGMENT

1. The claimant sued the respondent for unlawful termination seeking to be reinstated to employment and in the alternative she be compensated for the unlawful termination.
2. The Claimant stated that she was employed by the 1st Respondent on 3rd November 2017 as the Chief Officer lands, Housing and physical planning, appointed as the acting officer, Education, culture and social services on 1st July, 2019 and appointed as the secretary, authorized officer of the County Bursary Fund board from 22nd May, 2019.
3. She stated that she served the respondent diligently with utmost professionalism earning her the various senior positions in the County Government besides her substantive office. She stated that during her service to the Respondents she was never subjected to any disciplinary process.
4. That she was always up to speed with the various departments she headed and the personnel therein and performed her duties diligently.
5. It is stated that sometime on 31st July, 2019, she received a call from Mr. Kirui, the Operations manager who was at National Bank Kericho Branch requiring him to confirm payments of some cheques numbers 1615, 1666, 1614, 1616, and 1617 to Mospen Institute of Development studies which upon visiting the Bank, she confirmed that the subject cheques were not authorized by her for payment to the said beneficiary.
6. That she summoned the accountant one Nancy Chepkorir and also perused through the bursary cheque book only to realize that the cheques emanated from the Bursary cheque book and signed by someone that had forged her signature.
7. She stated that while still at National Bank she was showed 3 other cheques being cheque number 1611, 1037 and 959 which one Mr. Mutai had authorized and which equally had her forged signature.
8. The claimant states that on 1st August, 2019 she visited Kericho police station and made a report and was asked to report the next day where she was issued with OB number OB 40/2/8/2019.
9. She stated that she was later summoned by the investigating officer to the police station and was informed that she was a suspect to the alleged Fraud and arrested and released on a Police Bond of Kshs 50,000/- and the matter was never followed up.
10. On 30th August, 2019 the Respondents issued the claimant with a show cause letter why disciplinary action should not be taken against her on the 9 cheques illegally presented for payment on account of the County Bursary Fund. Subsequently that she responded to the Show

cause letter on 4th September, 2019 denying signing the said cheques amounting to Kshs 7,958,400/- and explaining to the Respondent the steps she took as the person in charge of the Bursary funds and cheque books.

11. The Claimant averred that she was subjected to interrogation by officers in the office of the 2nd Respondent and her response recorded and later shared with the 1st Respondent.

12. That by a letter dated 28th February, 2020, she was requested to appear before County Public Service Board on 3rd March, 2020 to shade more light to the alleged fraud and was given only 3 days to prepare her response. She states that she sought for more time and when she appeared before the Board on 12th March, 2020, she noted that the chairperson and vice chairperson were not present and upon inquiry on the anomaly she was directed to defend herself.

13. That she proceeded to answer questions asked albeit by the improperly constituted board and the matter was stalled as she never received any communication of the outcome of the said meeting.

14. She stated that she was shocked to learn on 24th March, 2020 that her services were terminated by a letter signed by the 2nd Respondent on 20th March, 2020 alleging that the decision was arrived at after the disciplinary hearing of 3rd March, 2020 which was false.

15. She stated that she was terminated from employment unprocedurally and that she was not subjected to a proper disciplinary process contemplated under the Employment Act as she was not accorded an opportunity to be represented, her response to the fraud allegations were ignored, then the letter of dismissal was signed by the 2nd Respondent who is not mandated under section 45 of the County Government Act.

16. The claimant therefore prays for judgment against the Respondent for:-

1) A declaration that the termination of the Claimant by the Respondents was unlawful thus null and void and have no legal effects.

2) Reinstatement of the claimant to her position forthwith with all entitlements payable in full

3) In the alternative to prayer 2 above, damages for unlawful dismissal in the following terms;

i. Salary from the date of the unlawful termination at Kshs 199,110.00/- per month to the end of the term of contract of the Claimant on 13th September, 2022, being Kshs 5,774,190.00

ii. 3 Months' salary in lieu of Notice at Kshs 199,110/- per month totaling to Kshs 597,330/-.

iii. Gratuity accrued at 31% being Kshs 2,364,246.00

iv. Unpaid Leave days at Kshs. 10,000/-

4) Costs of this Suit and interest in prayer 3 (i-iv) above from the date of filling this suit.

5) Damages for unlawful termination.

6) A certificate of service as per section 51 of the Employment Act and,

7) Any other further and better relief that the Honourable Court may deem just and fit to grant.

17. The Respondents filed a response to the Claim on the 19th October, 2020 and denied all the allegations contained therein and put the claimant into strict proof thereof.

18. The respondent conceded having appointed the claimant to the various posts stated in the memorandum of claim.

19. It is contended that the Claimant being the County Chief officer was the designated accounting officer by virtue of section 148 of the Public Finance Management Act.

20. It is stated that on the 17th June, 2019, the process of cheques writing in preparation of Bursary launch in Kericho County began and a team of staff were tasked with drawing the said cheques with the claimant as the only authorized person to sign the said cheques.

21. That in August 2019, the Respondent discovered that excess cheques had been drawn for Mospes Institute of Development Studies and one Mr. Spencer Opondo and Moses Luke Orero were in the process of cashing them when they were arrested. Later on the claimant was arrested for participating in the fraud and released on a police bail of Kshs. 50,000/- .

22. It is averred that the claimant failed to defend the allegation that her signature was forged in the cheques causing the Respondents to issue her with show cause letter on 30th August, 2019 on the origin of the 9 cheques presented for payment on account of the County Bursary Fund.

23. That the Claimant failed to supervise the writing of the cheques and instead delegated the duty to one Stephen Mutai and failed to go through the cheques by herself, affirming that she was negligent in her duties.

24. That investigations were carried out by officers from the office of the Governor where the claimant was summoned for interrogation and a report filed and handed over to the Public Service Board for investigations.

25. That in December 2019, the County Bursary Fund Special Audit Committee Report indicated that some money had been lost through fraud as a result of forged cheques under the watch of the claimant which caused the County to lose money as the claimant failed to manage the county assets and liabilities as per section 153 of the Public Finance Management Act.

26. It was stated that the summons of 28th February 2020 indicated clearly the purpose of the Summons as the claimant was to appear before the County Public Service Board on 3rd March 2020 and even sought for more time which was granted and the disciplinary hearing was held on 12th March, 2020. Also that the letter of summons did not prohibit the Claimant from seeking counsel of her choice.

27. It is stated that the allegation that the chairperson and vice chairperson must be present in a disciplinary hearing is baseless. It is contended that the Respondent considered the Claimant response before making its final decision to terminate her.

28. It is stated that the 2nd Respondent did not breach any law by signing the claimant's termination letter and stated that the governor signed the appointment letter and was therefore mandated to sign the dismissal letter.

29. It is stated that the Claimant still had a window of appeal to explore before filing this suit but she instead prematurely rushed to court without exhausting internal dispute resolution mechanisms.

30. It is contended that due procedure was followed before the claimant's service were terminated and therefore the Claim ought to be dismissed with costs.

Claimant's case.

31. The claimant case proceeded for hearing on 25th May, 2021 with the claimant, **Emily Chepkurui Sang (CW-1)** sought to adopt her witness statement of 1st April, 2020 and basically reiterated her claim.

32. On cross examination she testified that she did not sign the additional cheques and that her signature was forged. She stated that she performed her duties to the best of her ability and admitted that there were weaknesses in the system.

33. That she appeared for interrogation and was not informed that that was the disciplinary hearing. Further that she was not issued with a termination letter.

Respondents' case

34. The Respondent equally called one witness **Charles Kibet Chirchir, (RW-1)** the CEO Kericho county Public Service Board who sought to adopt his witness statement of 14th October, 2020 which reiterated the averments in the Response to the Claim together with the documents filed on 16th October, 2020.

35. On cross examination, he testified that all cheque books for bursary for Kericho County are in custody of the Claimant. He stated that once cheques are drawn the claimant was the only officer tasked with signing the said cheques. He stated that the 9 cheques were irregularly signed under the Claimant's watch showing some laxity in how the claimant was conducting her duties.

36. He stated that several persons within the claimant's docket were subjected to questioning as well as the Claimant who was subjected to disciplinary hearing. On the allegation that the investigation report was not availed to her, he testified that the board is not obligated in any way to serve the claimant with the investigation report.

Claimant's Submissions

37. The claimant submitted that she was unfairly terminated from employment since the sole reason for dismissal was for the allegedly taking cheques amounting to Kshs 4,800,000/- in a fraud which was reported to the police and issue with OB number 40/2/8/2019 and which issue is still under investigations to date.

38. She argued that the Respondent summarily dismissed the claimant without carrying out investigation. She submitted further that when the claimant requested for a copy of investigation report, the respondent declined to furnish her with one confirming that there were no investigations carried out.

39. It is submitted that to date the outcome of the alleged fraud has never been known a fact which the Respondent have not controverted therefore showing that the Claimant was dismissed based on unsubstantiated charges contrary to the requirement of sections 43 and 45 of the Employment Act.

40. The Claimant maintains that she was not subjected to disciplinary hearing as envisioned under section 76 of the County Government Act and cited the case of **Joseph Giteru Njomo & 26 others –v- Nyeri County Government & Another [2017] Eklr**. Further that section 42

of the Employment Act makes it mandatory for an employee to be subjected to disciplinary hearing before dismissal and also cited the case of **Standard Group Limited –v- Jenny Lueby [2018] eKLR**.

41. Accordingly, it was submitted that prior to the claimant appearing before the County Public Service Board, the said board invited the claimant to a meeting to shed light on the allegation and was not expressly stated that the said summons was for a disciplinary hearing. Also that she was not informed of a right to a representative and the questions posed were open ended contrary to law.

42. The claimant submitted that the Respondent failed to adduce evidence to affirm its position under section 44 (4) (c) of the Employment Act for gross misconduct and argued that the elements of willful, neglect and carelessness were not proved by the Respondent and cited the case of **Jane Samba Mukal –v- Ol Tukai Limited Industrial cause number 823 of 2010; LLR 255**.

43. The claimant submitted that as soon as she learnt of the said cheques she took a personal initiative as the person in charge of Bursary and reported the matter to the police before the Respondent was informed showing some promptness in acting in the performance of her duties.

44. The Claimant therefore submitted that she was unfairly terminated from employment and urged this Court to allow her claim as prayed.

Respondents' Submissions.

45. It was submitted that the Respondent learnt through the County executive Committee internal Memo dated 5th July, 2019 of the cheque fraud incident and immediately carried out investigation and issued a show cause letter dated 30th August, 2019 for the claimant to shed more light into the incident and it was then that the Respondent learnt that the claimant has issued series of cheques to bursary coordinator one Stephen Mutai and failed to supervise the same leading to the fraud that costed the county a colossal sum of money. He argued that the failure by the claimant to superintend the cheques was a clear act of negligence of her duties.

46. It is submitted that the 2nd Respondent constituted the County Bursary Fund Special Audit committee in August 2019 to investigate the fund management system who discovered a further Kshs 3,157,900/= had been fraudulently transferred from Kericho County Bursary Fund but intercepted during encashment and the Claimant was subjected to further interrogation by this Committee on the 3rd and 27th December, 2019 together with other persons who were suspected in the fraud.

47. He argued that after investigations were carried out the Claimant was summoned for disciplinary hearing by the letter of 28th February, 2020 which letter indicated the charges against the claimant and the date to appear before the committee which was the 3rd of March, 2020 however upon request for more time by the claimant the Respondent rescheduled the hearing to 12th March, 2020. Subsequently another board meeting was carried out on 17th March, 2020 to deliberate on the meeting held on 3rd and 12th March, 2020 and the committee resolved to dismiss the claimant from employment and her termination letter signed by the 2nd Respondent on recommendation by the 1st Respondent.

48. It is submitted that the Claimant's services were terminated in accordance with law after accorded her fair hearing and following due process and cited the case of **Walter Ogal Anuro –v- Teacher Service Commission [2013] eKLR**.

49. He argued that the termination letter was detailed on the reasons for the termination which included negligence of duty, poor management of county assets and liabilities, failure to perform duties diligently and improper delegation of duties.

50. On the prayers sought, the Respondent submitted that the Claimant has not proved her case to the required standard and prayed that the claim be dismissed with costs.

51. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

- 1. Whether there were valid reasons to warrant termination of the claimant's services.**
- 2. Whether due process was followed before claimant's termination.**
- 3. Whether the claimant is entitled to remedies sought.**

ISSUE NO. 1

52. The claimant was terminated vide a letter dated 20/3/2020 which indicated;

“You were found culpable for not discharging your duties and responsibilities diligently according to your employment contract clause 18(a), (b), (c), (d) on duties and code of conduct, the Employment Act 2007 Section 44(4) (c) & (g) and the Public Finance Management Act and hence liable for termination....”

53. The reason thus assigned to claimant's termination is negligence of duty. The claimant was employed by the 1st respondent on 3/11/2017 as Chief Officer, Lands Housing & Physical Planning and designated as Accounting Officer. She was assigned other duties as Ag Chief Officer Education, Culture & Social Services on 1/7/2019 and the Secretary of County Bursary Fund Board from 22nd May, 2019 which position she held until her termination.

54. The claimant contends that she served the respondent diligently and that is why she was assigned all the heavy duties as stated above. She also averred that she adhered to all the prescribed regulatory compliances and policies.
55. The claimant's termination emanates from issuance of cheques to Mospen Institute of Development Studies which she avers were forged and she even reported to the police (OB 40/2/8/2019).
56. After the discovery of the forged cheques, the claimant was issued with a show cause letter indicating that she had neglected her duties by not exercising due diligence during the disbursement of bursary cheques resulting in loss of public funds.
57. In her response, the claimant denied negligence explaining that she always checked the cheques issued and the ones intercepted had her forged signature. These cheques were stopped by the bank as she had not approved the payment of the 3 cheques intercepted by the bank.
58. The claimant also reported to the police the issue of the forgeries and the matter is still pending for investigation by the police.
59. She also indicated some cheques were paid by the bank directly without her knowledge and contrary to payment confirmation procedure.
60. Vide a letter dated 28/2/2020 the claimant was invited to a disciplinary hearing scheduled 3/3/2020 at 11.00am to shed light on allegation leveled against her on negligence of duty, poor management of county assets, failure to diligently perform her duties and improper delegation of responsibility involving writing of cheques to unauthorized persons.
61. The minutes of the special board held on 20/2/2020 show that the board met and members present are indicated therein but the name of the claimant is missing.
62. There is indication that claimant made her submission on 12/3/2020 and explained that the stolen cheques were in custody of Mr. Stephen Mutai and that she exercised due diligence in executing her duties and responsibilities inspite of her acting capacity in the said department for a long time.
63. She also indicated that she reported the matter to police for investigation. Minutes of the purported disciplinary hearing of the claimant have however not been produced in court as an exhibit.
64. It is not really clear how the hearing proceeded and what prompted the respondent to arrive at a finding that the claimant was found negligent. She explained the fact that the cheques were in custody of a Mr. Kirui. She also explained that her signature had been forged and she forestalled further loss by confirming this to the bank and reporting to the police.
65. Infact in the documents produced by the respondent the County Bursary Fund Special Audit Committee Report – minutes of 20th Board Meeting held on 17/3/2020;

“(5) It was observed that there was no handing over to the Ag Chief Officer Ms. Emily Sang when she took over the department of Education, Culture and Social Service.”

66. It has not been established that the cheques in question were handed over to her and she negligently handled them.
67. Section 43 of the Employment Act 2007 states as follows;

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do 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.

68. The law is clear that reasons for termination must be in existence and must be valid.
69. In the case of the claimant the validity of the negligence is not established as there is no indication that these cheques in question were handed over to the claimant and she negligently handled them.
70. It is in my finding that there were no valid reasons to warrant termination of the claimant.

ISSUE NO. 2

71. On due process, as indicated above, the claimant was not subjected to a fair hearing process and no minutes of the hearing have been submitted before this court.

ISSUE NO.3

72. Given that the claimant was not subjected to a proper hearing process and due to the fact that there were no valid reasons to terminate her services, under Section 45 (2) of the Employment Act 2007, then her termination was unfair and unjustified.

73. Section 45 (2) of the Employment Act 2007 states as follows;-

45. (1).....

(2) A termination of employment is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

74. In the circumstances the only remedy to compensate the claimant is to place her in the same position she was in before 30th March, 2020 when she was terminated.

75. In the circumstances, I find for claimant as prayed and immediately reinstate her to her position forthwith with all back pay entitlements in full.

76. The respondents will also pay the claimant compensation equivalent to 6 months salary for the unfair and unjustified termination.

1. = 199,110 x 6 = 1,194,600/=

2. Costs of this claim be paid by the respondents.

Dated and delivered virtually this 23RD day of SEPTEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Tusime holding brief for Ngania for Claimant – present

Sitati holding brief Peter Wanyama for Respondent – present

Court Assistant - Fred