



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT UASIN GISHU**

**COURT NAME: ELDORET LAW COURT**

**CASE NUMBER: ELRC.PET/5/2019**

**CITATION: MOSES MULONGO AND 22 OTHERS VS UASIN GISHU COUNTY GOVERNMENT**

**JUDGMENT**

**ON 2021-11-05 BEFORE HON. JUSTICE J. N. ABUODHA**

1. Through a Petition dated 16th July, 2019 the petitioner sought from this Court orders among others.

- (i) A declaration that the decision of the respondent contained in the dismissal letter dated 26th February, 2018 is unprocedural/unlawful/unfair and/or unjust.
- (ii) An Order to call the said suspension letter to this honorable court and quash the same.
- (iii) A mandatory order compelling the respondents to have the petitioners herein compensated for their wrongful termination from duty.
- (iv) In alternative and without prejudice to the prayers above, Costs and General Damages for pain and suffering and compensation for the violations

2. The petition was based on facts inter alia:

- (i) That on or about 26th February, 2018 the petitioners were served with letter of dismissal from their respective positions and were requested to respond to the said letter within a period of 90 days.
- (ii) That the said letter of dismissal expressly stated that the petitioners had been terminated from duty on 30th November 2017 vide a unanimous board decision.
- (iii) That the petitioners wrote to the secretary and/or Chief Executive Officer of the Public Service Commission, appealing on the board's unlawful/unprocedural/unfair actions.
- (iv) The petitioners were neither given a chance to be heard and/or defend themselves nor were they allowed to present a witness as required by the law.
- (v) That unless the orders sought herein are granted the petitioners are on the verge of irreparable financial paralysis.
- (vi) That before the petitioners were dismissed, they were never charged with any misconduct and in fact the dismissal letter in itself was ill conceived.
- (vii) That the respondents are trying to illegally terminate the employment of the petitioners who are on permanent and pensionable terms without following the due process of the law.

3. The respondents filed a response to the Petition and averred in the main that:

- (i) THE 2nd Respondent constituted a committee to deliberate on the financial impropriety and embezzlements by the Petitioners which committee sat and recommended by a unanimous decision that the Petitioners be subjected to disciplinary action for theft and

embezzlement of public funds following the overwhelming evidence of financial impropriety by the Petitioners presented before it.

(ii) THE Petitioners were issued with letters on 26th February, 2019 asking them to respond to the contents therein within 90 days pursuant to the principle of fair administrative action and fair hearing espoused in Article 47 and 50 of the Constitution respectively.

(iii) AT no time were the Petitioners refused to appear before the 2nd Respondent to plead their case. In fact, in the letters sent out on 26th February, 2019 by the Respondents, the Petitioners were asked to respond to the contents of the letters within 90 days.

(iv) THE Petitioners however failed neglected and/or refused to exercise their constitutionally provided rights and made no attempts at all to rebut the allegations of mismanagement and or theft of public resources.

(v) THE 2nd Respondent having received no rebuttal to the allegations against the Petitioners dismissed the Petitioners summarily for misconduct contrary to the Public Service Code of Ethics.

(vi) THE Respondents aver that the Petitioners were therefore not unfairly terminated as asserted in the Petition.

(vii) THE Respondents further aver that if indeed that were the case the Petitioners were given a chance to refute the claims of embezzlement and theft of public funds but knowing the allegations to be true, they chose to not respond to the letters issued by the Disciplinary Committee.

4. The 2nd respondent filed a replying affidavit through one William Koech who deponed in the main that:

(i) THAT I am the Secretary, County Public Service Board Uasin Gishu County hence competent to make and swear this affidavit.

(ii) THAT section 59(1), (4) and (5) of the County Government Act states the functions and powers of the 2nd Respondent which includes to exercise disciplinary control over, and remove, persons holding or acting in those offices on behalf of the County Government.

(iii) THAT the 1st Respondent is accountable to the people of Uasin Gishu County with regards to the collection and expenditure of the revenue.

(iv) THAT any use of the monies collected by the County Officials contrary the provisions of Article 201 (d) and 232 (1) and (2) of the Constitution of Kenya 2010 offends the public interest.

(v) THAT the 2nd Respondent constituted committee to deliberate on the financial impropriety and embezzlements by the petitioners.

(vi) THAT committee sat and recommended by unanimous decision that the petitioners be subjected to disciplinary action for theft and financial embezzlement or public funds following the overwhelming evidence of financial impropriety by the petitioners presented before it.

(vii) THAT the Petitioners were served with a notice to show cause.

(viii) THAT the petitioners were invited for a disciplinary hearing vide a letter and were accordingly advised to have a union representative of their choice to appear on the said date.

(ix) THAT the disciplinary hearing was held the minutes were duly taken.

(x) THAT the committee found that the petitioners were guilty of financial embezzlement.

(xi) THAT the petitioners were issued with letters on 26th February, 2019 asking them to respond to the contents thereof within 90 days pursuant to the principles of fair hearing and fair administrative actions.

(xii) THAT the petitioners failed, neglected and/or refused to exercise their constitutionally provided rights and made no attempt to rebut the allegations of mismanagement and theft of public resources as per the contents of the letter.

(xiii) THAT upon the failure of the petitioners to rebut the allegations against them, the Respondents dismissed the Petitioners summarily pursuant to section 44 of the Employment Act, 2007.

(xiv) THAT the petitioners were therefore not unfairly terminated as asserted in the petition.

(xv) THAT the petitioners failed to respond to the letter issued by the committee because they knew that the allegations against them were true.

(xvi) THAT the petitioners were further granted to appeal the decision of the Public Service Commission.

(xvii) THAT it is in the interest of the public that rogue county workers who embezzle county revenue be stopped from stealing such crucial revenue that is much needed to drive service delivery.

(xviii) THAT the decision to dismiss the Petitioners summarily was not arbitrary as the 2nd Respondent constituted a committee to probe the impropriety by the petitioners and on ascertaining that such embezzlement took place wrote letters to the petitioners asking them to respond within 90 days.

5. In submission in support of the Petition, Mr Oburu submitted inter alia that the petitioners were indeed respondents' employees on permanent and pensionable basis some were previously working for Eldoret Town Council and were absorbed by the Uasin Gishu County Government.

6. Counsel further submitted that the petitioners were unlawfully terminated in that they were not given opportunity to defend themselves at the disciplinary stage as required by the Employment Act. According to Counsel, the petitioner upon their invitation to disciplinary meeting, only one of them was called from the crowd and the rest told to go back home and await the Board's decision and were further asked to appeal if they were not satisfied with the decision of the Board.

7. The petitioner appealed to the Secretary/CEO Public Service Commission in Nairobi against the dismissal but the respondents never considered the appeal and as such the petitioner remained dismissed.

8. According to Mr. Oburu, the respondents totally failed to provide any evidence to show that indeed the petitioners stole money from the respondent by presenting the alleged fake bank pay slips. The alleged bank pay slips were not produced during the disciplinary stage for comparison with the correct and genuine bank pay slips. Counsel thus submitted that the allegations against the petitioners were not true and the decision to dismiss them from employment was unfair considering the number of years majority of the petitioners had been in service without any warning over loss of money as maliciously alleged by the respondent.

9. Mr. Oburu further submitted that it was difficult to believe that it could take the respondents a whole three months before they could discover that money had been stolen from them.

10. Further since the alleged actions by the petitioners amounted to crime, one expected police investigation reports to have been produced in Court to confirm that indeed the respondent's money was lost and that it was the petitioners who stole the said money.

11. Mr. Yego on his part for the respondent submitted among others that the petitioners being public servants were found guilty of embezzlement of public revenue collected by them as parking fees.

12. The respondents hold the monies collected from the public in trust for the public and the same is utilized to drive crucial projects to the benefit of the people of Uasin Gishu County. The Claimants misappropriated these monies collected as parking fees. Upon coming to the attention of the respondent who investigated and found that indeed the Petitioners mismanaged the funds, the petitioners were summoned and asked to show cause why disciplinary measures should not be taken against them. The Petitioners responded to the show cause letters and were thereafter invited for a disciplinary hearing but never appeared before the disciplinary committee. This necessitated a meeting in which the Public Service Board resolved to summarily dismiss the Claimants. The Claimants were given an opportunity to appeal within 90 days but never bothered to exercise that right.

13. Mr. Yego therefore submitted that the termination of the Petitioner service was fair and the same complied with the procedure required by the Employment Act as they were served with notice to Show Cause, they responded to the same and were invited for disciplinary hearing but never appeared. The termination therefore complied with both substantive and procedural justice as they were given sufficient opportunity of being heard.

14. Mr. Yego further submitted that the principles of public finance as enshrined in the constitution of Kenya applies to the petitioners because they were public servants tasked with responsibilities of collecting revenue from parking lots within Uasin Gishu County. After collecting the said funds, the petitioners chose not to remit them in accordance with the procedure that had been adopted by the respondents and the contract of service which they signed. According to Counsel, it was in the interest of the public that such rogue workers be dismissed from their positions as such corrupt practices and activities should not be condoned at all cost.

15. Having been found guilty of embezzlement of public funds and having been accorded a fair procedure to rebut the allegations against them before dismissal and further being given three months to respond to the contents of the dismissal letter, such a party does not deserve any award by the Court.

16. The dispute herein although presented as a constitutional petition seems to me to be an ordinary employment dispute which ought to have been presented as an ordinary claim under the rules of the Court.

17. The petitioners were accused of embezzling respondent's funds which came into their possession as parking attendants. They were issued with Show Cause letters and suspended from duty pending further investigations. The Claimants were in the meantime asked to respond to the Show Cause letter within 21 days.

18. On 23rd January, 2018 they were called for disciplinary hearing which was scheduled for 31st January. The petitioners were notified of their right to be accompanied by a representative of their choice.

19. According to the respondent the petitioners did not attend the disciplinary hearing prompting the public service Board to recommend their dismissal from service. The Petitioners counsel on the other hand alleged that only one of them was called during the disciplinary

hearing and the rest were told to go home and wait for the outcome of the proceedings.

20. The petitioners were subsequently dismissed from service and asked to appeal to public service commission if not satisfied, which they did.

21. Allegations of theft and or embezzlement of funds are serious and constitute valid grounds for summary dismissal.

22. The allegations need not be proved beyond reasonable doubt. That is to say the evidence in possession of the employer need not be sufficient to sustain a conviction in a criminal charge for the employer to act on the same.

23. The petitioners were accused of presenting banking deposit slips which did not reflect in the respondent's revenue accounts with various Banks. As a consequence, the respondent lost revenue totaling to Kshs. 5,573,720. They were called upon to Show Cause why disciplinary action should not be taken against them. They responded to the Show Cause letters denying knowledge of such loss. The respondent did not find their responses satisfactory and invited them for disciplinary hearing which they failed to attend to defend themselves as required.

24. The respondent's public service board proceeded to dismiss the petitioners and informed them of their right of appeal to public service Commission. No evidence was tabled before the Court showing such appeal was ever filed.

25. As stated earlier the evidence or facts upon which a termination of service is based need not be such evidence that can sustain a criminal conviction. It should be such evidence that shows that it is more probable than not that the employee committed the offence charged. It is not for the Court to evaluate and interrogate the probative value of such evidence or the allegations.

26. In this particular case the Court is satisfied that there existed valid reasons to terminate the petitioners service and that due procedure in tandem with Employment Act was followed.

27. In the circumstance the petition is found without merit and is hereby dismissed with costs.

28. It is so ordered.

**GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON 2021-11-27 10:35:35**

**SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)**