



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION NO. 76 OF 2019

STELLAMARIS MBITHE WAMBUA.....PETITIONER

v

THE NATIONAL TREASURY.....1st RESPONDENT

PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

HONOURABLE ATTORNEY GENERAL...3rd RESPONDENT

JUDGMENT

1. Stellamaris Mbithe Wambua (Petitioner) was offered employment through a letter dated 30 March 2010 as Accountant 1 by the Public Service Commission of Kenya (2nd Respondent) and the appointment was backdated to 20 November 2009.
2. The Petitioner was deployed to Naivasha District Treasury and served there until around 13 May 2016 when (save for intermittent deployments which will be addressed later), she was posted to Loitoktok Sub County.
3. In the course of handover around 9 September 2016, the Sub-County Accountant Naivasha established that some cash books were not balancing and further that there was missing revenue.
4. Preliminary Inquiries were held and the team recommended the carrying of in-depth audit and on 31 October 2016, the National Treasury (1st Respondent) constituted a team to conduct the audit.
5. In January 2017, the team released the *Report on In-depth Investigation on Cash Management Irregularities at Naivasha National Sub-County Treasury*. The Report established fraud/misappropriation of public funds.
6. Among the recommendations in the Report was disciplinary action against certain officers.
7. On 7 April 2017, Principal Secretary, National Treasury issued a show-cause notice to the Petitioner to respond to some 9 allegations outlined in the notice within 21 days. The Petitioner responded to the show-cause on 4 May 2017.
8. *The Ministerial Human Resource Management Advisory Committee* then met on 18 January 2018, and recommended that the Petitioner be surcharged Kshs 3,075,515/-, and also be dismissed from service.
9. On 30 April 2018, the 1st Respondent wrote to the Petitioner to notify her of dismissal from service effective 7 April 2017 upon which the Petitioner appealed to the 2nd Respondent on 7 June 2018.
10. On 11 December 2018, the *Ministerial Human Resource Management Advisory Committee* met to deliberate on the appeal and resolved that the Petitioner be invited to attend a disciplinary hearing, and the Petitioner attended an oral hearing on 29 May 2019.
11. On 8 May 2019, the Petitioner commenced these legal proceedings against the Respondents alleging *unfair, unprocedural, invalid and unconstitutional* termination of employment.
12. The 1st Respondent filed a replying affidavit sworn by its Principal Human Resource Management & Development Officer in opposition to the Petition on 30 July 2019.
13. When the Petition came up for directions on 17 September 2019, the Court directed the Respondents to file their responses to the

Petition on or before 24 September 2019.

14. On 30 September 2019, the Court directed the parties to file and exchange submissions, and in this regard, the Petitioner filed her submissions on 15 November 2019 while the Respondents filed their submissions on 12 November 2019.

15. The Petitioner identified 2 Issues in her submissions

(a) Whether the decision to terminate her was lawful, procedural and compliant with Articles 47 and 236.

(b) What orders should the Court issue?

16. The Respondents on their part identified the following Issues as arising

(a) Whether the Respondents acted on a reasonable cause while dismissing the Petitioner.

(b) Whether the Respondents acted procedurally and lawfully in dismissing the Petitioner.

(c) Whether the Petition raises any constitutional issues.

(d) Whether the Petitioner has satisfied the burden of proof.

(e) Whether the Petitioner is entitled to the remedies sought.

17. The Court has condensed the Issues as examined hereunder.

Unfair termination of employment

Procedural fairness

18. The Petitioner was notified of some 9 allegations to confront through a show-cause notice dated 7 April 2017 and she made a written response on 4 May 2017.

19. Apart from the written representations, the Petitioner was invited to make oral representations before *the Ministerial Human Resource Management Advisory Committee*, which she did.

20. Nevertheless, the Petitioner asserted that her right to fair administrative action (Article 47) and right to due process as a public officer (Article 236) were violated because she was not afforded an opportunity to be heard.

21. In support of her contention, the Petitioner cited several decisions including *Judicial Service Commission v Mbalu Mutava & Ar* (2015) eKLR, *Onyango Oloo v Attorney General* (1987), *County Assembly of Kisumu & 2 Ors v Kisumu County Assembly Service Board & 6 Ors* (2015) eKLR and *Suchan Investment Ltd v Ministry of National Heritage & Culture & 3 Ors* (2016) eKLR.

22. In the view of the Court, the cases of *Mbalu Mutava*, *County Assembly of Kisumu* and *Onyango Oloo* turned on interpretation and application of specific statutory regimes, unlike the present case which is one of ordinary employment.

23. In the case at hand, the Respondents were not exercising administrative power within the context of Article 47 of the Constitution, but their contractual power as an employer under the general law of employment (Employment Act, 2007) and the applicable statutes governing employment in the public service.

24. The Employment Act, 2007 is an offshoot of Article 41 rather than Article 47, and the Court finds it more relevant and determinative in cases of ordinary employment.

25. Sections 35(1) and 41 of the Employment Act, 2007 places a burden upon an employer to notify an employee of intended termination of employment, and to afford the employee an opportunity to be heard.

26. The Petitioner herein was notified of some 9 allegations to respond to and she did make written representations after which she was afforded an opportunity to make oral representations, albeit after dismissal (she moved Court before finalisation of appeal).

27. The Court finds that the procedures adopted were substantially in compliance with the statutory requirements on procedural fairness.

28. The Petitioner also faulted the process on the ground that the reasons for the termination had mutated to alleged flouting of *Government Financial Regulations and Procedures* leading to loss of public funds.

29. The Court finds no merit in the contention as the show-cause notice expressly notified the Petitioner that the substance of her actions was the flouting of the *Government Financial Regulations and Procedures*.

Substantive fairness

30. In asserting that the Respondents did not have valid and fair reasons to dismiss her from service, the Petitioner contended that she was not based in Naivasha at the material time(s) the misappropriation of public funds occurred.
31. The Audit covered the years 2012/2013; 2013/2014; 2014/2015 and 2015/2016.
32. On 10 November 2009, the Petitioner was deployed to Naivasha. About 5 years later, on 25 March 2014, the Petitioner was deployed to the Inter-Governmental Fiscal Relations Department, but she was only released on 5 May 2014.
33. The Court consequently finds that the Petitioner was primarily in the Naivasha station from 2009 to 5 May 2014.
34. On 25 November 2015, the Petitioner returned to Naivasha Treasury where she served until 13 May 2016 before she was transferred to Loitoktok.
35. The Court has keenly looked at the Petitioner's response to the show-cause notice. Apart from the transactions relating to (cheques payable) to the Commissioner VAT, Deputy County Commissioner in July 2015, and Dairy Training Institute for February 2015, the Petitioner did not deny that she was in post at the Sub-County Treasury.
36. The Court has also looked at a copy of the job responsibilities of the Petitioner.
37. In the view of the Court, the Petitioner, a Deputy Accountant at the Sub-County cannot run away from the irregularities. She was part of public officers who glaringly flouted *Financial Procedures*.
38. The Court finds that the Respondents had and have proved valid and fair reasons to dismiss the Petitioner from service.
39. Before concluding, the Court finds it a mere academic exercise to discuss the other issues raised by the parties in light of the finding that the dismissal of the Petitioner was not unfair, save to observe that parties should not lightly invoke the Constitution when a dispute can be determined and resolved on the basis of statutory and contractual law, without reaching the constitutional questions.

Conclusion and Orders

40. From the foregoing, the Court finds no merit in the Petition and orders it dismissed with costs to the Respondents.

Delivered, dated and signed in Nairobi on this 24th day of January 2020.

Radido Stephen

Judge

Appearances

For Petitioner	Mr. Okemwa instructed by Okemwa & Co. Advocates
For Respondents	Ms. Akuno, Litigation Counsel, Office of the Attorney General
Court Assistant	Lindsey