



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1319 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**ALEX KHANGA NYAPOLO.....CLAIMANT**

**VERSUS**

**THE ATTORNEY GENERAL FOR MINISTRY OF FINANCE.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL FOR PUBLIC SERVICE COMMISSION...2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The claim herein is instituted by the Claimant against the Attorney General of the Republic of Kenya on behalf of Public Service Commission of Kenya and the Ministry of Finance, specifically, the Accountant General's Department.

The Claimant states that he was employed by the Public Service Commission and posted to the 1<sup>st</sup> Respondent where he served in various capacities until 10<sup>th</sup> April 2008 when his services were terminated through a letter of summary dismissal of even date. He states that at the time of dismissal he was 47 years old with his retirement date being in 2021.

The Claimant states that by letter dated 2<sup>nd</sup> October 2007 the Respondent invited him to show cause why disciplinary action should not be taken against him on allegations that he had illegally and irregularly advanced himself and other officers imprest while at Gucha District Treasury. He responded to the show cause letter by his letter of 15<sup>th</sup> October 2007 and 5<sup>th</sup> May 2008.

That without being heard and without evidence being brought against him, further without being given an opportunity to challenge and interrogate the evidence proffered against him, he was by letter dated 10<sup>th</sup> April 2008 dismissed from employment but the effective date of dismissal backdated to 2<sup>nd</sup> October 2007.

It is the averment of the Claimant that the dismissal was unfair, unlawful and carried out in a most reckless manner without due regard and consideration for the law, procedure and norm and was therefore unlawful and inhumane.

He lists the particulars of the unfairness as follows: -

- i) The imprests the Claimant was alleged to have advanced were for official duties and were advanced in the normal and expected manner and as the Government regulations provided, in the event of lack of surrender and accountability, the concerned officer was to be surcharged.
- ii) The unsurrendered and unaccounted for imprests had actually been and were in the process of being recovered by surcharge.
- iii) The complaint as raised failed to appreciate certain salient responsibilities on the part of Government, which had not been met as to enable an extra efficient working system on the part of the Claimant to enable effective follow up and recovery.
- iv) The complaint raised against the Claimant failed to appreciate that the Claimant had ensured that no government money had been lost and indeed in the period under complaint, no audit was ever carried out to ascertain if there had been any actual loss occasioned by the claimant.
- v) The claimant's explanations given were never taken into consideration. The Respondent's officials proceeded to their

predetermined verdict to summarily dismiss the Claimant.

vi) The Claimant was not given an opportunity to challenge and interrogate the evidence allegedly supporting the charge against him.

vii) All appeals against the decision have so far not been responded to.

viii) The Claimant was obviously mishandled and due process and the law were not followed in the haste to dismiss him from service.

Claimant avers that the entire process leading to his dismissal was unfair, capricious and illegal since:

i) At no point in time were any charges framed against him as to demand of him to give a defense except for letters calling for explanations on the issues of giving imprest. At no point in time was he ever called upon to give a personal explanation for the complaint laid against him. His right to face those who accused him and to challenge their position was not availed.

ii) Contrary to the provisions of the Public Service Commission Act and the Public Service Code of Regulations, no Ministerial/Departmental Human Resource Management Advisory Committee was ever constituted to consider the complainants case before dismissal.

iii) Whereas it was alleged that the decision to dismiss the Claimant was made by the Public Service Commission, the Claimant is not aware of any hearing having been undertaken at the Public Service Commission and that the Claimant never appeared before the Public Service Commission to state his case and challenge the allegations against him.

iv) The Claimant's case was not dealt with promptly and within 6 months.

v) Contrary to the Law and the Regulations in a case of a first case against an officer, the Respondents acted unfairly and maliciously and opted for the harsh and most severe penalty in spite of the fact that they had the options of other disciplinary in case a full hearing would have found the Claimant guilty, which include: -

(a) Reprimand (including severe reprimand).

(b) Deferment of salary increment.

(c) Withholding of salary increment.

(d) Stoppage of salary increment.

(e) Reduction in rank.

(f) Retirement on the ground of Public interest.

The claimant avers that the Respondents were very harsh in this case where no public funds had been lost and where no fraud or premeditated fraud had been disclosed and proved and considering the Claimant's case of long service, clean record and dedication to work they only opted for the very final and most severe punishment – dismissal from service with loss of benefits and pension.

The Claimant avers that the Respondents' decision was therefore wrong and unlawful and extremely harsh and pleads with this court to reverse the same and declare the dismissal as unfair and unlawful and that it was reached on the basis of unproven complaints and was in any event harsh to the extreme.

The claimant avers that in spite of appeal, demand and notice of intention to sue the Respondents have not acted to rescind their decision hence the filing of this suit.

The Claimant seeks the following remedies:

i) A declaration that the Claimant's dismissal from Government service was wrong, unfair and unlawful.

ii) A declaration that the decision to dismiss the Claimant was too harsh and extreme in the circumstances of the case and that the same be set aside.

iii) An order that the Claimant be reinstated back into his employment with the government at his proper scale and service.

iv) The Claimant to be paid all his unpaid salary and allowances for the period he has been out of service.

IN THE ALTERNATIVE

- i) The Claimant's dismissal be set aside and be substituted with a normal termination.
- ii) An order do issue that the Claimant be paid all his terminal benefits or pension and entitlements in lump sum and monthly pension as would be due to him in a normal termination under his scheme of service and age being:
- iii) Lump sum pension payment/ gratuity.
- iv) Monthly pension.
- v) The Respondents do pay the Claimant's costs of this case.

The Respondents filed a defence dated 27<sup>th</sup> September 2013 in which they state that the Claimant was employed on 18<sup>th</sup> January 1980 and rose through the ranks to the position of Accountant I job group K as at 23<sup>rd</sup> February 2005.

That in the course of the duties as District Accountant, Gucha District Treasury it was reported that the Claimant had unlawfully issued to himself and other officers imprests and IOU's totalling Kshs.450,100/=. That the Claimant was duly informed of his misconduct and issued with a show cause letter dated 2<sup>nd</sup> October 2007 which he responded to. That this was in accordance with the Code of Regulations. That the show cause letter contained particulars of the charges against the Claimant and he was given 21 days to submit his response and representations.

That the claimant had also previously been interdicted with effect from July 24<sup>th</sup> 2002 on grounds of gross violation of government financial rules, regulations and procedures while working as a Deputy District Accountant, Busia District Treasury. The claimant was however pardoned and the interdiction lifted on 21<sup>st</sup> November 2002 when he was subsequently given a firm warning to desist from engaging in similar gross misconduct/behaviour in future, failure to which a more severe disciplinary action would be taken against him.

The Respondents aver that the Claimant's case was tabled before the Ministerial Human Resource Management Advisory Committee (MHRMAC) meeting held on 28<sup>th</sup> November 2007 and vide minute No.108/2007, the committee deliberated over the Claimant's case and recommended that the Claimant be dismissed from service on grounds of gross misconduct.

The Respondents aver that the recommendations of the MHRMAC were provided to the 2<sup>nd</sup> Respondent and confirmed.

That by letter dated 2<sup>nd</sup> April 2008 the 2<sup>nd</sup> Respondent directed that the Claimant be dismissed from service with effect from 2<sup>nd</sup> October 2007 on account of gross misconduct. That the decision of the 2<sup>nd</sup> Respondent was conveyed to the Claimant vide letter dated 10<sup>th</sup> April 2008 which also informed the Claimant of his right of Appeal.

That the Claimant appealed against the dismissal but the appeal was rejected as communicated to the Claimant vide letters dated 23<sup>rd</sup> July 2009 and 6<sup>th</sup> July 2011.

The Respondents aver the dismissal was lawful and in compliance with the Code of Regulations that were applicable to the Claimant. They pray that the claim be dismissed.

On 7<sup>th</sup> February 2019 the court was informed that the Claimant had suffered a stroke and would not be able to take the witness stand. The parties therefore agreed to proceed with the matter by way of written submissions. Directions were given for the filing of documents and submissions. While the Claimant complied the Respondents did not even after they were granted more time to file documents and submissions on 14<sup>th</sup> May 2019, 27<sup>th</sup> May 2019, 23<sup>rd</sup> July 2019 and 23<sup>rd</sup> September 2019. The court on 18<sup>th</sup> November 2019, after giving the Respondents the final opportunity to comply, decided to take a date for judgment without the Respondents' documents and submissions.

The Claimant submitted that no evidence has been adduced either during the claimant's disciplinary process or in this suit that it was illegal for the claimant to issue imprests or that the imprests issued by the claimant were issued illegally.

That the imprests that the claimant was alleged to have advanced were for official duties and were advanced in the normal and expected manner as provided for by the Government regulations. To that extent the claimant's letter attached at page 11 of the memorandum of claim explicitly states that indeed upon issuance of such imprest, the specific officers who defaulted on the same were surcharged and recoveries made.

That the respondents have not laid before this court any evidence to refute the position that there were officers surcharged and monies recovered or that there were any monies lost pursuant to the imprests issued by the claimant. That in a show of handedness clearly geared towards pushing the claimant out of employment, the respondents denied the claimant a chance to explain himself through an oral hearing where he could see his accusers, and the evidence against him, if any, and challenge his accusers and any tabled evidence through cross-examination. That the respondents simply chose to summarily dismissed him from employment.

The claimant submitted that the Respondents did not comply with fair procedure as provided under Section 41 of the Employment Act which provide that –

#### **41. Notification and hearing before termination on grounds of misconduct**

**(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.**

That the Claimant despite making spirited efforts to ensure that he got an opportunity to defend himself, was not accorded this opportunity and was summarily dismissed without any of his explanations being taken into consideration. That the Claimant was equally not given any opportunity to challenge and interrogate the evidence in support of the charge against him.

That it would thus have been imperative that the claimant is presented with such report and for the makers of such report to be present at a disciplinary hearing where the claimant would then have an opportunity to interrogate what they said or tabled against him. Failure to accord the claimant such an opportunity was definitely stealing a match against him.

The claimant submitted that Section 43 of the Employment Act, 2007 provides that 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 of the Act.

That under Section 45 of the Employment Act, 2007, the employer must not only prove that the reason for termination is valid and fair but also that the employment was terminated in accordance with fair procedure. Section 45 provides that –

#### **45. Unfair Termination**

**(1) No employer shall terminate the employment of an employee unfairly.**

**(2) A termination of employment by an employer 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.**

That claimant submitted that in the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that –

*"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."*

The claimant submitted that the respondents failed to discharge their duty to ensure that the reason for termination was void. Equally, having denied the claimant an opportunity to interrogate evidence against him, the fairness test in this case was never achieved. That there was no substantive justification for the Respondent to terminate the Claimant's employment and the Claimant was not taken through a fair process before being sent home

The claimant submitted that the Respondents' actions to dismiss him with haste and without any opportunity to defend himself is also contrary to the provisions of the Public Service Commission Act and the Public Service Code of Regulations. No Ministerial/Departmental Human Resource Management Advisory Committee was ever constituted to consider the Claimant's case before his dismissal. That the respondents have not tabled any minutes of any meeting where the claimant was to appear to defend himself. The claimant never appeared before the Public Service Board to defend himself.

That the Respondents opted for the harshest and most severe penalty available at their disposal for grave offences and completely ignoring other disciplinary measures at their disposal.

The claimant submitted that fair procedure was not applied hence the dismissal was unfair and unlawful. He relied in the case of **International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR** where the Court of Appeal held that –

*"Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair."*

On the remedies the Claimant prays to be reinstated and gives the justification thereof as follows: -

- a) The Claimant had served the Respondent for a long period of time precisely 25 years without blemish.
- b) The Claimant had accumulated vast experience that is yet to be utilized fully and had served the Respondent dutifully, diligently and faithfully.
- c) The Respondent in dismissing the claimant failed to constitute a Ministerial Human Resource Management Advisory Committee to hear the claimant's case and give informed advisory to the Public Service Commission prior to the dismissal of the claimant. This was contrary to the respondents own procedure manuals as well as Article 47 of the Constitution of Kenya 2010 which provides for a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- d) The Claimant was therefore being unfairly dismissed at the age of 52 years, a time when getting alternative employment diminishes.
- e) It is the claimant's wish to be reinstated and to continue providing service to the respondent and to the people of Kenya at large.
- f) In the event that the court is persuaded not to order reinstatement, and payment of back salaries, the awards on monthly and/or lump sum pension/gratuity be paid.

The Claimant further prays for costs and interest.

As I have already stated, the Respondent did not file submissions even after being given several opportunities to do so.

**Analysis and Determination:**

I have considered the pleadings and the submissions on record. The facts of this case are not contested and have been well captured in the pleadings by both parties. In brief the Claimant who was District Accountant Gucha District Treasury, advanced to both himself and other officers imprests which the Respondents aver was done illegally and unprocedurally. The Claimant did not deny the accusations. By his letter dated 15<sup>th</sup> October 2007, he admitted the same in the following terms:

*"15<sup>th</sup> October 2007*

*The Accountant General*

*The Treasury*

*P. O Box 30007'*

*NAIROBI*

*RE: DISCIPLINE*

*Your letter of Re No. 1980077281(10) of 2nd October 20071 am in receipt of above reference letter concerning the above subject.*

*I wish to state that when I was in Gucha District it is true that I gave out some imprest for official use.*

*There are some officers who defaulted and by the time I was leaving the District, the names of those officers were submitted to their respective Ministries for recoveries which have already been effected.*

*I regret my action and request for forgiveness and promise never to repeat that again.*

*I beg to remain yours faithfully*

*SIGNED*

*ALEX K. NYAPOLA*

*P/NO. 80077281"*

He again admitted the same in his letter (presumably his appeal) dated 5<sup>th</sup> May 2008 as follows:

*" Alex K. Nyapola*

*Box 2252 – 50100*

*Kakamega*

5<sup>th</sup> May 2008

The Chairman

Public Service Commission of Kenya

Box 30095

Nairobi

Thro'

The Permanent Secretary - Treasury

P. O Box 30007

Nairobi.

Dear Sir

REF; NO. CONF/TE. 1980077281 (14) – DISCIPLINE CASE Reference is made to yours dated April 10, 2008.

I humbly concede that when in Gucha District Office, I had an imprest, the same is under recovery.

That in the course of my work, I advanced some officers the said imprest for official purposes which was unfortunately not surrendered. However, details of the same were sent to the head office for recoveries, many of which have been recovered fully.

I honestly submitted a reply to your letter dated Oct 2, 2007 (Ref: No. TEP: 1980077281(10) which regrettably did not reach my file. I'm truly sorry, but I did not ignore it.

I am kindly requesting you to rescind your decision to dismiss me from service for:-

- i) I gave out the imprest in good faith and did not expect default of the same.
- ii) I have school fees to pay for my children and dependants whose education would suffer.
- iii) I am servicing loans through my employment

Sir, kindly pardon and give me another chance and I promise to strictly follow the regulations to the letter.

I beg to remain yours faithfully

Alex K. Nyapola

P/No. 80077281"

In both letters, the Claimant does not deny that the imprests were not irregular. He further does not make any reference to the accusation that he also advanced to himself imprests irregularly. Indeed by the penultimate paragraph of the letter dated 5<sup>th</sup> May 2008, the Claimant seeks pardon when he states:

*“Sir, kindly pardon and give me another chance and I promise to strictly follow the regulations to the letter.”*

This is an express admission that he was not following regulations “to the letter”.

From the foregoing it is evident that the Respondent had valid reason to take disciplinary action against the Claimant and to dismiss him for gross misconduct which he had admitted.

The Claimant avers that the Respondents did not give him a hearing as provided under section 41 of the Employment Act 2007.

The Act came into force on 2<sup>nd</sup> June 2008, after the Claimant’s case had been heard and finalised as he was dismissed by letter dated 10<sup>th</sup> April 2008. Under the repealed Employment Act there was no requirement for hearing. In any event, as admitted by the Claimant, he was issued with a show cause letter inviting him to respond to the charges before disciplinary action was taken against him. In the letter responding to the show cause letter he admitted the charges against him thus there was no reason to subject him to any further disciplinary process.

I thus find that the dismissal of the Claimant was regular and within the provisions of both the repealed Employment Act and the Code of Regulations applicable at the time in respect of employees of the Public Service Commission.

For the foregoing reasons the Claimant is not entitled to the remedies sought in his Memorandum of Claim.

The result is that the entire claim is dismissed. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF MARCH 2020**

**MAUREEN ONYANGO**

**JUDGE**