



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2101 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOSPHAT SHEM OTUBA.....CLAIMANT**

**VERSUS**

**KENYA FOREST SERVICE.....RESPONDENT**

**JUDGMENT**

Vide a Memorandum of Claim filed on 30<sup>th</sup> November, 2015, the Claimant alleges that he was unlawfully terminated from employment on 23<sup>rd</sup> July, 2014 without proper notice and payment of terminal benefits. He seeks the following reliefs:

- a) That this Court finds that the termination of employment of the Claimant was unlawful and wrong.*
- b) Terminal benefits for unlawful termination of the contract of service.*
- c) That the Respondent does pay the Claimant all salary owed from time of termination until reinstatement.*

The Respondent filed a Reply to the Memorandum of Claim on 20<sup>th</sup> January, 2016 in which it avers that upon investigations the Claimant was found to have fraudulently acquired accountable documents. It avers that the Claimant admitted to this gross misconduct. It denies violating the employment law in terminating the Claimant's employment.

**Claimant's Case**

The Claimant testified that he was appointed by the Respondent in 2012 after it became a parastatal. He testified that he was placed on 6 months' probation and thereafter confirmed. He stated that his salary was KShs.33,100 and he was entitled to medical services, commuter allowance and annual leave.

He testified that on 7<sup>th</sup> May, 2014, he was issued with a suspension letter on grounds that he had stolen accountable documents. He testified that he used to receive accountable documents which he dispatched to various managers across the country.

He testified that he received the documents he was accused of stealing and that he dispatched the same. He testified that he was not informed of why he was being suspended and he was not given a hearing. He testified that he was called and told to appeal against the Respondent's decision to terminate his employment but both his appeals were dismissed. He denied stealing the documents, burning them or throwing them into the pit latrine. He further denied receiving money from Dennis Onzee and testified that he received money from various people via M-pesa.

He denied confessing to the theft and stated that he was forcefully locked into a room until midnight and forced to sign a document which he did not read. He testified that he was presented to the police with the said document but the police turned them away as there was no evidence to warrant the police to charge him. He testified that during suspension he was paid half salary without medical benefits despite him having diabetes.

He testified that he does not wish to be reinstated as he has lost his sight and therefore prays for salary in lieu of notice, pay for the period he was out of work, severance pay, unpaid leave and pension contribution.

Upon cross-examination, he testified that he was informed that the Board could not deal with his case as it was pending in Court. He denied

knowing Dennis Onzee or working with him. He testified that he was never questioned by any police officer who prepared a report on behalf of the Respondent. He testified that he was not aware of officers selling charcoal permits and keeping proceeds.

He stated that he had not informed the Court that Dennis Onzee had sent him money. He testified that Dennis Onzee was with him in a "merry-go-round" where many people contributed Kshs.2,000 per month. He testified that he made NHIF and NSSF contributions.

Upon re-examination, he testified that he was paid benefits. He testified that he was never given a hearing before suspension or before dismissal.

### **Respondent's Case**

David Moni Ichoo, the Respondent's Chief Human Resource Officer testified as RW1. He testified that the Claimant was on several occasions given the right to be heard and was issued with a show cause letter detailing the charges made against him. He testified that there is a disciplinary committee which considered the charges against the claimant. He testified that the disciplinary committee convened a hearing and arrived at the conclusion that the claimant was guilty of gross misconduct arising from forgery of letters, theft of accountable documents and sabotage by selling accountable documents.

He testified that the Chief Executive Officer approved the decision of the disciplinary committee. He testified that the Claimant appealed against the dismissal vide letter dated 6<sup>th</sup> August 2014 and that there was no Board at the time of his appeal. He testified that the Claimant was informed that the management decided to constitute a different committee comprised of senior managers who reviewed the decision and upheld the original decision.

He testified that in a letter dated 22<sup>nd</sup> August, 2014 the claimant appealed against the decision of the Committee as it was not made by the Board. He testified that the case was presented to the Board and he (RW1) invited the Claimant but did not sit at the Board meeting.

He testified that Dennis Onzee was an Inspector in Machakos and there were similar charges against him. He testified that there was transfer of money between Dennis and the claimant of Kshs.76,900 sent in tranches. He testified that Dennis corroborated the evidence and admitted sharing the proceeds with the claimant.

On cross-examination, he testified that he was part of the disciplinary committee but he did not take part in the second appeal hearing. He testified that the Respondent noted that the Claimant's conduct was unsatisfactory because of stealing and forgery. He stated that the claimant's M-pesa Statement was not submitted to Court. Further that the Claimant's statements were unsigned.

He testified that some of the lost accountable documents were recovered during investigations. He testified that the serial numbers of the documents were given but the documents never reached the destination. He testified that Emily Gatune who worked with the claimant in the same department was responsible for licences.

He testified that Emily stated that the Claimant dispatched documents and that she never received any complaints. He stated that the Claimant was diverting the documents. He testified that the Claimant was not arraigned in Court because that was a decision by management and the attorney General as he was a public officer. He contended that to the best of his knowledge, the claimant was not issued with a warning letter but Emily Gatune was issued with a warning letter.

### **Claimant's Submissions**

The Claimant submitted that the termination of his employment was unlawful and unfair in that the Respondent did not follow the mandatory procedure under Section 40, 41, 43 and 45 of the Employment Act as he was dismissed on unsubstantiated allegations and condemned unheard contrary to the rules of natural justice and doctrines of equity.

He submitted that there were no valid reasons to summarily dismiss him from employment. He argued that he adduced evidence under oath to demonstrate that there was no valid reason(s) to terminate his employment. He submitted that what constitutes a valid ground for termination was set out in **Peter Maina Kimani v Mwalimu Co-operative Society Cause No. 603 of 2009** and **Miriam Siwa v Postbank Limited Cause 837 of 2011**.

He argued that the Respondent failed to show that he was negligent in performance of his duties or was directly involved in fraudulent dealing or obtaining receipts and charcoal permits from the Respondent's Headquarters. He submitted that the Respondent failed to prove on a balance of probabilities that he committed the prohibited act of stealing from his employer.

He argued that the Respondent ignored the criminal element in this matter and proceeded with internal proceedings which address the civil element. He relied on the case of **BIFU v Sacco Society Limited Cause 1109 of 2011** where the Court held that even where the grievant was not issued with an audit report or investigations report a criminal charge should have been levelled against him.

He submitted that he was unfairly terminated and as a result of his dismissal, he suffered loss by losing his eye sight due to the negligent actions of the employer to suspend his medical cover. He argued that it is only fair for the Court to grant him maximum compensation. He argued that in deciding whether to grant the relief of the unpaid salary for the remainder of the contractual term, the Court should consider *inter alia*; whether he has as reasonably as possible attempted to get alternative job to mitigating loss; whether the employee is temporary or permanently incapacitated and whether the remaining term can be calculated through simple arithmetic.

He submitted that he attempted to get alternative job so as to mitigate his loss and that he was permanently incapacitated through the loss of his eyesight and could not get a job as records management assistant. He therefore submitted that compensation for remainder of 14 years

will not amount to unjust enrichment. He urged the Court to award him unpaid salary, salary in lieu of notice, annual leave and severance pay.

He submitted that unpaid leave is provided under Respondent's policy and his contract of employment. With respect to his pension, he submitted that the Court can require the Ministry of Forestry and Kenya Forest Service to calculate his contributions to the pension scheme from the date of employment to the termination of his employment.

In conclusion, he urged the Court to find that he has proved his case on a balance of probability in that there is adequate evidence to conclude that summary dismissal was not based on valid and fair grounds under sections 43 and 45 of the Employment Act.

### **Respondent's Case**

The Respondent submitted that the Claimant was notified of the reason for suspension through the letter 7<sup>th</sup> May, 2014 and was provided with the investigations report dated 25<sup>th</sup> April, 2014. It submitted that the Court in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** held that the duty rests upon an employer to prove that the reason (s) for termination and failure to do such termination shall be deemed to have been unfair.

It submitted that the Claimant was given an opportunity to present his case as he responded to the notice to show cause and appealed the decision of the disciplinary committee. It relied on the case of **Shankar Saklani v DHL Forwarding (K) Limited [2012] eKLR** that the power to summarily dismiss must be exercised sparingly.

It submitted that Section 41 of the Employment Act sets the test for procedural fairness in dismissing an employee. For emphasis, it cited the decision in **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**. It maintained that the Claimant was given an opportunity to defend himself.

It argued that in the investigations report dated 25<sup>th</sup> April, 2014 the Claimant confessed to having three fake letters of requisition for accountable documents purporting to have originated from Moyale and diverted five booklets of official receipts and Charcoal Movement Permits. It submitted that the Claimant purposely lied on oath as he stated that he did not know Dennis Onzee but later admitted to knowing him.

On how to deal with contradictions, he relied on the cases of **Jackson Mwanzia Musembi v Republic [2017] eKLR** and **Philip Nzoka Watu v Republic [2016] eKLR**. It submitted that the court should treat the Claimant's evidence with caution and consider the extent of discrepancies and inconsistencies brought by the evidence adduced. It submitted that the Court in **James Mulinge v Freight Wings Ltd & 3 Others [2016] eKLR** defined perjury as the crime of knowingly making a false statement which bears on the outcome of an official proceeding that is required to be testified to under oath.

It relied on the finding in **Franklin Mburu Washe v Gordon Mwatata Mwaringa [2019] eKLR** and submitted that the Claimant did not prove that he was coerced or was under duress when he signed the confession which had been reduced to writing by the investigating officer.

It invited the Court to consider whether a question of fraudulent acquisition and abuse of accounting documents including receipts and charcoal movement permits was a valid or genuine reason for the Respondent to terminate the Claimant's employment. It relied on **Andrew Wafula Amutalla v Kenyatta University [2019] eKLR** that the test for reason is premised on a reasonable employer and the court would not interfere if a reasonable employer would uphold the dismissal.

With respect to the allegations that the Claimant was never formally charged in court, it relied on the case of **Patrick Njuguna Kariuki v Delmonte (K) Ltd cause 95 of 2011** that where in the opinion of the employer, the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant justice agency.

It therefore submitted that the procedure employed in terminating the Claimant's employment was both procedurally and substantially fair.

It submitted that the Claimant did not suffer economic injuries on account of unfair termination and should not use this case for unjust enrichment as illustrated in **D. K. Marete v Teachers Service Commission [2013] eKLR**.

It submitted that the issue of losing his eyesight was not pleaded and therefore the Court should not give due regard to the issue and the implications thereof. It relied on the Court of Appeal decision in **Galaxy Paints Company Limited v Falcon Guards Limited** that issues for determination in a suit should flow from pleadings unless the pleadings are amended. The Respondent urged the Court to dismiss the claim.

### **Determination**

The issues for determination:

1. Whether the Claimant's termination was lawful.
2. Whether the Claimant is entitled to the reliefs sought.

For termination to be fair, the Respondent must prove that there was valid reason in terms of Section 43 of the Employment Act and fair

procedure in terms of Section 41 of the Act. Where there is an internal disciplinary process, the employer must in addition prove that it complied with its own internal disciplinary process.

In the instant case the reason for dismissal of the claimant as set out in the letter of dismissal dated 23<sup>rd</sup> July 2014 is “being involved in fraudulent activity of accountable documents.”

i. On or about 31/10/2013 in Nairobi County, without authority you made a false document namely a letter of requisition for accountable documents dated 31/10/2013 referenced MYL/KFS/2/3/001.11/57 purporting it to have been made by Moyale County office requesting to be issued with the following accountable documents, 5 copies of Charcoal Movement permits, 5 Copies of Official Receipts, 5 copies of Goods Received Notes, 5 copies of Stores Issue Notes with an intent to defraud your employer.

ii. On or about 8/11/2013 in Nairobi County, jointly with KFS0385, you stole 5 booklets of Charcoal Movement Permits serial numbers D069101-069150; D004401-004450; D156801-156850; D156851-156900; D156901-156950, and 5 booklets of Official Receipts serial numbers B1268851-1268900; B1268901-1268950; B126895.1-1269000; B1269001-1269050; B1269051-1269100 being the property of your employer.

iii. On or about 15/11/2013 in Nairobi County, without authority you made a false document namely a letter of requisition for accountable documents dated 15/11/2013 referenced MDR/KFS/2/1/VOL138 purporting it to have been made by Mandera County office requesting to be issued with the following accountable documents, 5 copies of Official Receipts, 5 copies of Charcoal Movement Permits, 5 copies of Goods Received Notes, 5 copies of Stores Issue notes, with an intent to defraud your employer.

iv. On or about 21/11/2013 in Nairobi County, jointly with KFS0385 you stole 5 booklets of Charcoal Movement Permits serial numbers D157351-157400; D157451-157500; D001601-001650; D001651-001700; D001701-001750 and 5 booklets of Official Receipts serial numbers B1282601-1282650; B1282651- 1282700; B1282701-1282750; B1282751-1282800; B1282801-1282850 being the property of your employer.

v. On or about 21/11/2013 in Nairobi County, without authority you made a false document namely a letter of requisition for accountable documents dated 21/11/2013 referenced TK/4/3/VOL.3/186, purporting it to have been made by Turkana County office requesting to be issued with the following accountable documents, 16 copies of Charcoal Movement Permit for a value of Kshs.1,000 with an intent to defraud your employer.

vi. On or about 27/11/2013 in Nairobi County, jointly with KFS0385 you stole 6 booklets of Charcoal Movement Permits serial numbers D144751-144800; D156751-156800; D156701-D156750; D156651-156700; D156601-156650; D156551-156600, and 6 booklets of official Receipts serial numbers B1286401-1286450; B1286451-1286500; B1286501-1286550; B1286551-1286600; B1286601 -1286650; B1286651 -1286700 being the property of your employer.

vii. On the 19/3/2014 at Karura, known that assorted types of accountable documents unlawfully in your possession namely, Official receipt booklets and Charcoal Movement Permit booklets would be required in evidence against you for the offence of stealing the said documents, you undertook to dispose the said documents by destroying and throwing them into a pit latrine.”

The claimant responded to the letter of suspension by his letter dated 23<sup>rd</sup> May 2014 in which he denied all the charges. Specifically, he stated that he received requisitions for the accountable documents through EMS speed post and stamped them and that he also dispatched the accountable documents through speed post. He denied destroying evidence by throwing accountable documents into a pit latrine as alleged.

The claimant further stated that he was interviewed by the Investigating Officer, Mr. Humphrey Ogutu in his mother tongue (Luhya) but did not read the translation into English. That when it was presented to him for signature, Mr. Ogutu declined his request to read it and threatened to take him to the police if he did not sign.

According to the statement by the Claimant which was part of the investigation report filed by the Respondent in the List of Bundle of Documents dated 6<sup>th</sup> May 2019, the Claimant confessed to having authored a requisition letter dated 30<sup>th</sup> October 2013 from Moyale Zonal Manager requesting for 5 copies of Charcoal movement permits, 5 official receipt books, 5 Goods Received Notes and 5 Stores Issue Notes which he sent to John Ekomwa of Turkana.

In his further statement, he states he voluntarily submitted his Safaricom Mpesa statement which reflected he had received a total of Kshs.76,900/- between 10<sup>th</sup> November 2013 and 1<sup>st</sup> March 2014 broken down as follows –

1. 20,500/= received on 10/11/2013.
2. 10,500/= received on 18/11/2013.
3. 10,500/= received on 20/12/2013.
4. 10,200/= received on 6/1/2014.
5. 10.200/= received on 19/2/2014.
6. 15,000/= received on 1/3/2014.

The investigation report further has a statement of DENNIS ONZE, an Inspector at the Respondent's Machakos County Office in which he stated in detail how the claimant issued him with charcoal movement permits and receipt books and how he sent the claimant proceeds for the issuance of the same via Mpesa. This is at pages 31 to 33 of the Respondent's List and Bundle of Documents dated 6<sup>th</sup> May 2019.

The other statements in the investigation report corroborate the statements by the claimant and Dennis Onze.

At the hearing, the claimant at first denied knowing Denis Onze but later admitted that Onze was with him in a merry-go-round and that the money he received from Onze was contributions for the Chama where they contributed Kshs.2,000/- per month.

From the evidence on record, it is clear that the Respondent had valid reason to dismiss the claimant. The evidence as set out in the investigation report is overwhelming.

On the procedure, the evidence on record is that the Claimant was first interrogated by the investigation officer, Mr. Humphreys Ogutu, the Respondent's Head of Investigations. The Claimant was thereafter suspended from duty and by the suspension letter, asked to respond to the charges set out therein. The claimant responded and his response was considered by the Respondent's Disciplinary Committee in a meeting held on 4<sup>th</sup> July 2014 which recommended his dismissal. The claimant appealed against the dismissal by letter dated 6<sup>th</sup> August 2014. By a response dated 22<sup>nd</sup> August 2014 the claimant was informed that his appeal was dismissed and the dismissal upheld. The claimant filed a second appeal by letter dated 16<sup>th</sup> March 2015, his reason being that he was not satisfied by the decision in the first appeal which was constituted by Management and wished to Appeal to the Chairman of the Board.

The newly constituted Board of the Respondent declined to consider the second appeal on grounds that the matter was pending before this court.

From the foregoing it is clear that the Respondent did not conduct the disciplinary procedure in accordance with Section 41 of the Employment Act which specifically provides for a physical hearing of the employee in the presence of either a shop floor union official or a fellow employee of his choice.

The claimant was not invited to the disciplinary hearing and only his response to the suspension letter was considered by the Disciplinary Committee.

I therefor find that there was no compliance with the requirements of Section 41 of the Act on fair procedure.

Section 45(2) provides that for termination of employment to be fair, both elements, fair procedure and valid reason, must be proved. In the instant case, although there was valid reason, the termination was unfair due to want of fair procedure. I thus find the termination unprocedural and therefore unfair.

### **Remedies**

Having found the termination unfair, the claimant is entitled to notice which I award him at **Kshs.33,100/-**.

He is not entitled to salary for the period July 2014 to date of retirement as this is not recognised under the law.

Having found the reason for termination valid, the claimant is granted only one month's salary as compensation for the unfair procedure which I award him at **Kshs.33,100/-**.

The prayer for annual leave is declined as it was not proved and not specifically prayed for.

The claimant is not entitled to severance pay as this is only payable upon redundancy and the claimant was not declared redundant.

The prayer for unpaid leave allowance fails because it was neither sought nor proved.

The contributions to the pension scheme were also not prayed for

and not proved.

**In conclusion judgment is entered in favour of the claimant against the respondent in the total sum of Kshs.66,200/-.**

The Respondent shall pay claimant's costs and interest shall accrue on decretal sum at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**