



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 664 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**EPHANTUS GITHUI.....CLAIMANT**

*VERSUS*

**KENYA RAILWAYS STAFF RETIREMENT SCHEME...RESPONDENT**

**JUDGMENT**

On 29<sup>th</sup> May 2017, the Claimant filed his Amended Memorandum of Claim dated 28<sup>th</sup> February 2018 and is suing the Respondent for unlawful and unfair dismissal of employment and seeks the following reliefs:

- a..... A declaration that the Scheme’s termination of Claimant employment was unfair and unlawful.
- b..... Certificate of service.
- c..... Twelve month’s salary and allowances in compensation for unlawful termination which is Kshs.191,996.60 x 12 months..... Kshs.2,303,959.20
- d..... An order to award the Claimant the sum of Kshs.12,193,301.60 tabulated as follows:
  - i... Pension being 16% of the basic pay at Kshs.27,040  
for 54 months..... Kshs.1,460,160
  - ii.. Accumulation of 76 leave days’ pay at Kshs.5,988.90  
per day..... Kshs.455,155.40
  - iii. Salary while on suspension with effect from 1<sup>st</sup> November  
2011 to 20<sup>th</sup> May 2016 for 54 months and 20 days.....Kshs.9,701,996.40
  - iv. 3 months’ salary in lieu of notice..... Kshs.575,989.80
- e..... Interest on the sums claimed above from the date of filing this cause.
- f. Costs of the case and other costs incurred in pursuit of justice as the Court is by law enabled.
- g. Any other relief that the Honourable Court finds suitable to grant in the circumstances.

The Respondent in its Amended Answer to Amended Memorandum of Claim dated 19<sup>th</sup> February 2018 and filed on 20<sup>th</sup> February 2018, denied the allegations set out in Amended Memorandum of Claim and prays that:

- a. The Claimant's claim be dismissed with costs together with interest thereon for such period as at such rate as the court may determine.
- b. A declaration that the Claimant was rightfully terminated from employment for being in gross violation of the Respondent's regulations and terms of employment and in accordance with the Employment Act.
- c. Costs of this suit.

### **Claimant's Case**

The Claimant was an employee of the Scheme from 12<sup>th</sup> October 2006 to 6<sup>th</sup> February 2012 and was employed as a Finance Manager.

It is the Claimant's case that he was never warned of any matter of discipline and had never been found culpable of professional negligence or poor performance. However, he was issued with a letter for suspension on 21<sup>st</sup> November 2011 pending the conclusion of **Criminal Case No. 1395 of 2011** where he was charged with the offence of stealing by servant despite the auditors absolving him from any wrongdoing on his part. The Claimant avers that the sum of Kshs.1,200,000 was lawfully requested for by the Board through the immediate past chairperson to deal with Muthurwa Relocation Project.

The Claimant's employment was terminated on 6<sup>th</sup> February 2012 and it is the Claimant's case that the termination letter was silent on the reasons for his termination.

During trial, the Claimant relied on his Amended Claim dated 28<sup>th</sup> February 2017, Bundle of Documents and Statement dated 18<sup>th</sup> July 2017 as his evidence in chief.

Upon cross examination, it was the Claimant's testimony that his suspension has never been lifted to date. He also confirmed that the Staff Regulations Terms and Conditions regulated his employment. It was his testimony that his letter of termination was communicated within 3 months after his suspension. The Claimant confirmed that up to the time his salary was paid, his pension was forwarded to Jubilee Insurance.

It was the Claimant's testimony that before one was paid, they had to be cleared by the scheme. He admitted to not being cleared. The Claimant denied having knowledge of any loss of funds or the reason for his termination. However, he admitted that he had been charged for theft by servant. It was his assertion that he did not fail in his duties as a finance manager.

It was the Claimant's evidence that for him to carry forward his leave, he needed approval but he did not have in court, any document showing such approval.

It was the Claimant's testimony that he appealed against his termination on 21<sup>st</sup> March 2012 and filed the cause herein on 20<sup>th</sup> April 2012, barely one month after he appealed against his termination. He conceded that the Board which was to hear his appeal was disbanded.

The Claimant admitted that he was aware that an employee on suspension forfeited their salary.

During re-exam, the Claimant asserted that his letter of termination was written before 3 months lapsed from the date of suspension and that there was no allegation for the reason for termination. Further, between the time of the suspension and termination, he was never summoned by the Board for a disciplinary hearing. He also clarified that he was seeking his employer's pension contribution.

It was the Claimant's testimony that he had not been paid 3 months' notice.

The Claimant asserted that he cleared but that the clearance document remained with the Respondent.

### **Respondent's Case**

It is the Respondent's case that the Claimant's contract of employment was subject to the terms and conditions of service for management staff.

The Respondent avers that the Claimant was guilty of gross misconduct which he was well warned of, granted a chance to explain the same, failed to do so and his services terminated.

It is the Respondent's case that the Claimant's suspension letter was issued rightfully in accordance with Clause 9.13.3.1 of the Scheme Terms and conditions of service and in accordance with the Employment Act.

The Respondent avers that it only made a complaint to the police who carried out their own independent investigations and charge the Claimant.

It is the Respondent's case that the appropriate cheque and/or cash requisition form was not filled and duly approved for the Claimant to release the 1,200,000.00. The Respondent denies there being an audit investigation report that absolved the Claimant from any wrongdoing on his part.

RW1, **Nicholas Kikuvi**, explained that when a management staff has a disciplinary case, the CEO has the mandate to punish the staff and if they are not satisfied with the decision of CEO, they appeal to the Chairman of the Board, if not satisfied with his decision they appeal to the Sub-Committee of the Board, if not satisfied with its decision they appeal to the Full Board which is the final decision making authority.

It was RW1's testimony that the Claimant was sent on leave, then suspended and thereafter his employment was terminated. The Claimant appealed the decision and RW1 (the acting CEO at the time) wrote to the Claimant informing him that the full board was not operational because several members had resigned and that he should wait until the full board was reconstituted but the Claimant chose to go to court instead.

However, upon cross examination RW1 admitted that the disciplinary procedure as outlined under the Respondent's Staff Regulations required the issuance of a show cause letter and then suspension. He also admitted that the Claimant was not issued with a show cause letter and further conceded that the Respondent did not have a record of any disciplinary hearing.

It was RW1's testimony that the reason money had not been accounted for was because the former CEO had been holding the vouchers. He conceded that by October 2011, they had been advised on what had happened. However, he rejected the assertion that the Respondent had been aware of what had happened to the money.

RW1 admitted that the reason for the Claimant's termination was not stated and confirmed the Claimant's assertion that his appeal had never been heard. He also admitted that the Claimant's dues had never been paid.

During re-examination, RW1 asserted that the reason there was no show cause letter was because the issue was one of gross misconduct and there are some obvious cases where the Board can take action without a show cause letter. Further, that the reason for there being no minutes of the disciplinary hearing was because they have a chairman of appeal in their structure.

It was RW1's testimony that the Claimant's responsibility entailed keeping safe, all documents which duty he delegated to a junior staff yet there were cheques not accounted for. He rejected the idea that the letter dated 21<sup>st</sup> May 2010 was an approval and further denied participating in the criminal case.

## **Submissions**

The Claimant in his submissions dated 12<sup>th</sup> October 2018 and filed on 15<sup>th</sup> October 2018, submits that in terminating the Claimant's employment for gross misconduct, the Respondent did not comply with section 41 of the Employment Act as well as its terms and conditions of service. The Claimant relied on the case of **Patrick Kariuki vs. Del Monte (K) Limited [2012] eKLR** where the Court opined that employers' discretion to terminate contracts of service on account of gross misconduct stood on a thin line and it was safer for the employer to follow due process as stipulated in section 41 of the Act to avoid the price of unfair termination just in case the reasons for removal did not crystalize into gross misconduct.

The Claimant relied on sections 43 and 45 of the Act to submit that in the absence of evidence of impropriety on the part of the Claimant, there was no sufficient and justifiable cause for the Respondent to terminate the Claimant.

It is the Claimant's submissions that he is entitled to Kshs.9,701,996.40 being pay from the date he was suspended to the date he was acquitted. The Claimant relied on the case of **Grace Gacheru Muriithi vs. Kenya Literature Bureau [2012] eKLR** where the Court found that a clause which denies an employee payment even in instances where they exculpate themselves at the end of the disciplinary process amounts to unfair labour practices and offends the provisions of article 41 (1) of the Constitution. The Claimant's letter indicated that his suspension would remain until the criminal case was determined as was the opinion of the court in **Paul Ng'eno vs. Pyrethrum Board of Kenya Limited [2013]**.

It is the Claimant's submissions that he is entitled to Kshs.1,460,160 being 16% of what the Respondent pension contribution as his letter of appointment indicated that he was entitled to contributory pension. Further, he is entitled to accumulated leave of 76 days since the Respondent failed to provide records relating to the Claimant's leave as provided in section 74 of the Act. It is also the Claimant's submission that he is entitled to salary in lieu of notice since his employment was terminated without giving the requisite 3 months' notice.

The Respondent in its written submissions dated 16<sup>th</sup> October 2018 and filed on even date, submits that where one has squandered the internal grievance handling mechanisms provided by an employer, they cannot seek to be paid on alleged unlawful termination. Further, the exhaustion doctrine should always be upheld even where the authority of the organ before whom the dispute is placed is being challenged. The Respondent relied on the case of **Ronald Wamalwa & Another vs. Masinde Muliro University [2018] eKLR**.

The Respondent submitted that the failure of the Claimant to keep valid records as required was a valid reason for termination. To support this assertion, he relied on the case of **Francis Nyongesa Kweya vs. Eldoret Water and Sanitation Company Limited [2017] eKLR**. The Respondent further submitted that the employer's disciplinary procedures are not dependent of the outcome of the criminal trial process arising from the same set of circumstances that the employee is being terminated. The case of **Teachers Service Commission vs. Joseph Wambugu Nderitu [2016] eKLR** was relied upon.

It is the Respondent's submission that an employee notice is not blanketly applicable in all termination, but is applicable when the reason is specifically on grounds of misconduct, poor performance or physical incapacity.

The Respondent submits that as long as the employee is aware of the reason for termination and is allowed to challenge the same through a due process then the termination shall not be considered unfair.

It is also the Respondent's submissions that the Claimant having been summarily dismissed for gross violation of the employment contract and gross misconduct, he was undeserving of a hearing, as was held in the case of *Nation Media Group Limited vs. Onesmus Kilonzo [2017] eKLR*.

The Respondent submits that the Claimant did not prove his defamation claim.

It is the Respondent's submissions that there is no valid reason for the declaration that the termination was unlawful as the Claimant abandoned the appeal process mid-way. Further, the Claimant was issued with a certificate of service.

The Respondent also submits that the Claimant was not entitled to 12 months compensation as he has not proved that there was unfair termination and did not mitigate the loss occasioned to the Respondent. Further, the Claimant is not entitled to the pension claim as it will amount to unjust enrichment since his pension was payable to him once he attained 50 years of age.

It is the Respondent's submissions that the Claimant took all his leave days and none were deferred as he had failed to provide evidence of the same. The Respondent also submits that the Claimant was not in suspension during the period between February 2012 and May 2016 and such was not entitled to payment of salary during suspension. Further, the Claimant was to be issued with three months' salary in lieu of notice once he cleared which has not been done to date.

### **Determination**

After considering the evidence adduced by the parties, the analysis is as herein below and is premised on the following issues:

1. Whether the Claimant's employment was unlawfully and unfairly terminated.
2. Whether the Claimant has a successful case for Defamation.
3. Whether the Claimant is entitled to the reliefs sought

### **Whether the Claimant's employment was unlawfully and unfairly terminated.**

#### **Reasons for Termination**

Section 41(1) of the Employment Act requires an employer to explain to an employee the reasons for termination where the termination is on the ground of gross misconduct, poor performance or physical incapacity. The Claimant was not given reasons as to why his employment was terminated. The wording of his letter of termination dated 6<sup>th</sup> February 2012 is:

*"... we wish to inform you that the Board of Trustee sitting on the 1<sup>st</sup> February 2012, terminated your contract of service with the scheme... you shall receive three months' pay in lieu of notice in accordance with the contract... you are required to formally clear from the scheme..."*

Section 45 (2) of the Employment Act provides that where the employer fails to prove that the reason for termination is valid and fair, then the employment is unfair. The Respondent justified its reason for termination being that the Claimant failed to keep proper records as was required of him. However, since the termination letter was silent on the reasons for termination, the Respondent has failed to prove that the reason for termination was valid. Based on this fact alone, I am of the opinion that the termination was unfair.

The Court in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* stated that:

*"Section 41 of the Employment Act is couched in mandatory terms.*

*Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing ... The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets."*

#### **Due Process**

Section 41 of the Employment Act sets out the procedure for termination of employment. In addition to this, Clause 9.13 of the Kenya Railways Staff Retirement Benefits Scheme Regulations provides that:

*"An employee who is deemed to have committed an offence will be given the opportunity to exculpate himself in a due process."*

Further, Clause 9.13.2 states that:

*"Where the irregularity calling is of a more serious nature, the employee shall be informed in writing of the specific charges by the immediate superior officer to explain why disciplinary action should not be taken against him."*

Where the superior officer is not satisfied by the employee's explanation, he shall forward the matter for consideration by the disciplinary committee.

In cases of serious misconduct where dismissal or termination of service is likely and stoppage from the continued performance of his duty deemed necessary to facilitate full investigation into the case, the superior officer will request for approval from the CEO to suspend the employee from performing duties and proceed on compulsory leave.

The CEO will grant approval for the interdiction and inform the Board of Trustees.”

During cross examination, RW1 admitted that the disciplinary procedure as outlined under the Respondent's Staff Regulations required the issuance of a show cause letter and then suspension thereafter. RW1 admitted that the Claimant was not issued with a show cause letter and further conceded that the Respondent did not have a record of any disciplinary hearing.

The Respondent testified that when the Claimant appealed, he was informed that the Board was not operational and should wait until it was reconstituted but the Claimant chose to institute civil proceedings instead. The Respondent therefore submits that since the Claimant chose to abandon the disciplinary process, he is not entitled to claim unfair termination. I am of the opinion that institution of civil proceedings is not a bar to disciplinary proceedings and the same ought to have continued once the Board was reconstituted. In any event, due process as provided for under the law and the Kenya Railways Staff Retirement Benefits Scheme Regulations was not followed and whether or not the Claimant abandoned his appeal is irrelevant as the process was already flawed.

#### **Whether the Claimant has a successful case for Defamation**

It is trite in law that for a claim for defamation to be successful, the following standards must be met:

- a. The defamatory words must be pleaded.
- b. The words must be defamatory.
- c. The words must be published.
- d. The publication must lower a person in the estimation of right-thinking members of the society.

The Claimant's claim for defamation was not specifically pleaded, the Claimant did not prove that the words published in the newspaper were defamatory and that they lowered his reputation before the right-thinking members of the society. On the other hand, the Respondent's claim that money was lost was indeed a fact which was evidenced in the institution of criminal proceedings. As such, this claim fails.

#### **Whether the Claimant is entitled to the reliefs sought**

During cross examination, RW1 admitted that the Claimant's dues had not been paid. As such, the Claimant is entitled to the reliefs sought save for the certificate of service which had already been issued.

The claimant is entitled to his salary from the date of suspension to the date of termination. He is however not entitled to any payments after the date of termination as the Employment Act does not recognise the same.

The claimant is also entitled to pay in lieu of leave. According to the terms of his employment the claimant is entitled to 3 months' notice or pay in lieu thereof.

The claimant is also entitled to any leave not taken at the time of termination of his employment. The respondent having failed to produce evidence that the claimant took leave, he is entitled to the same. Having been unfairly terminated, he is entitled to compensation which I award him for 6 months taking into account all circumstances of his case.

#### **Conclusion**

In conclusion, I enter judgment for the claimant against the respondent as follows –

1. Salary during suspension from 1<sup>st</sup> November 2011 to 6<sup>th</sup> February 2012 to Kshs.620,298.80.
- 2.... Pay in lieu of notice – 3 months..... Kshs.575,989.80
- 3.... Annual leave 76 days..... Kshs.561,220.80
- 4.... Compensation..... Kshs.1,151,979.60

**Total Kshs.2,909,487.00**

The respondent shall pay claimant's costs for the suit and interest shall accrue on items 1 and 2 from the date of filing suit and on the rest of

the items from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**