



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1236 OF 2012

WILSON NGARUIYA NJOROGI.....1ST CLAIMANT

DAVID NJUGUNA NG'ANG'A.....2ND CLAIMANT

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND

TECHNOLOGY.....RESPONDENT

JUDGMENT

Introduction

1. The 1st Claimant was employed by the Respondent on 10th March 1990 as a senior account assistant while the 2nd Claimant was employed on 15th November 1989 as an assistant accountant. They were summarily dismissed on 29th January 2010 for negligent performance of duty which caused the respondent to lose Kshs.307,300. They brought this suit on 20.7 2012 contending that the termination was unfair because they never committed the alleged misconduct, and that they were not accorded a fair hearing in the first instance and also on appeal. They therefore prayed for the following reliefs:

a. That the Respondent pays to the Claimants special damages in the sum of KShs. 4,009,919.00 as particularized below:

1st Claimant

i. 5 months half salary being the period he was on suspension.....KShs. 77,895.00

ii. 45 days leave allowance due as at the date of suspension.....KShs. 46,737.00

iii. Hardship allowance.....KShs. 140,211.00

iv. School fees paid for his children studying in the institution.....KShs. 936,000.00

v. Claimant's school fees refund.....KShs. 700,000.00

vi. Salary arrears paid to other staff during the suspension period.....KShs. 747,792.00

vii. Penalty on a loan advanced to the 1st Claimant by Equity Bank with the Respondent as guarantor, which guarantee was withdrawn after his dismissal leading to his default.....KShs. 350,000.00

2nd Claimant

i. 5 months half salary being the period he was on suspension.....KShs. 57,125.00

ii. 250 days leave allowance due as at the date of suspension.....KShs. 187,283.00

iii. Salary arrears paid to other staff during the suspension period.....KShs. 539,376.00

iv. Penalty on a loan advanced to the 1st Claimant by Equity Bank with the Respondent as guarantor, which guarantee was withdrawn after his dismissal leading to his default.....KShs. 227,500

b. That the Respondent pays to the Claimants their terminal benefits.

c. That the Respondent pays the Claimants compensation as provided for in section 49 of the Employment Act 2007.

d. That the Respondent pays the cost of this cause.

2. The Respondent filed her Statement of Reply on 13th February 2013 and admitted to employing the Claimants but contended that the Claimants' dismissal was lawful and as a result of their negligence that resulted in the loss of KShs. 307,300.00. The Respondent further contended that the Claimants were accorded a fair hearing at the first instance and even on appeal. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on diverse dates on 5th June 2018, 20th September 2018 and 20th November 2018 when the Claimants testified as CW1 and CW2 and the Respondent's Chief Internal Auditor, Mr. Simon Gichuru Kimotho, who testified as RW. In addition, the respondent requested for leave to adopt the written statement by her second witness, Dr. Joseph Obwogi, who was absent, and I admitted it subject to the protest by the claimants' counsel that she wanted to cross examine the witness. After the conclusion of the hearing, both parties filed their written submissions.

The Claimant's Case

4. CW1 stated that he was a farmer and a part-time lecturer at Greta University. He adopted his witness statement dated 24th October 2017 as his evidence. He testified that he was employed by the respondent as a Section Head in the Finance Department from March 1990 and worked diligently and honestly. That in the year 2008, he was transferred to Payment Section because the Head of the Section, Mr. Kimeu was sick for a while.

5. On 18.8.2009, he was served with a letter suspending him on half pay alleged involvement in doubtful and questionable cash transactions, which conduct was scandalous or disgraceful and contrary to clause 6.3 (iii) of the Terms and Conditions of Service. Thereafter he was invited to a disciplinary hearing on 17.12.2009 where he faced two counts of approving payment voucher number 78989754 for Kshs.307,300 and payment number 78989757 for Kshs. 209,300 dated 26.6.2008, which were both supported by photocopied documents.

6. Cw1 further testified that, at the disciplinary hearing, he explained that he prepared the voucher using original documents and that the endorsements thereon were visible on the copies. He contended that someone must have photocopied the originals attendance list and attached the voucher. He further contended that had used photocopies against the respondent's procedures, his seniors in the chain approvals would have declined to give their approval to the irregular documents. His explanation was however not fully successful because he was acquitted only on the count relating to payment voucher no 78989757 for Kshs.209,300 but convicted on the count relating to payment voucher number 78989754 for Kshs.307,300.

7. Cw1 further testified that the original list of attendance which used to approve payment voucher for 26.6.2008 was not signed by the Council members because it was done in advance and the payees signed to acknowledge payment on the day the meeting. That the list is the one annexed to the payment voucher number 78991054 dated 28.7.2008, and which was tampered to reflect the said payment voucher number 78991054. That the payment voucher number 7899104 was for a different financial from that of the original list of attendance annexed thereto and dated 26.6.2008.

8. He further testified that after the said explanation the panel told him to step outside for a moment but he was never recalled. He therefore contended his hearing was never concluded because he had been informed to wait outside before finishing his defence. After the dismissal, he appealed against the decision and objected the constitution of the appeals panel because some members who had sat in the first hearing including Deputy Vice Chancellor finance, Vice chancellor and Finance Officer, were also involved in the transaction under investigation by being the author of the attendance list and the cheque signatories. The appeal was however dismissed and rejected.

9. He contended that no money was lost through negligence on his part in relation to the transaction contained in the payment voucher number 78989754 dated 26.6.2008 for Kshs.307,300 because after paying the 14 out of 21 Council Members who attended, the unpaid cash should have been re-banked as it was the procedure in the university. Therefore he contended that the termination was unjustified and unfair and prayed for compensation plus other the reliefs sought in his suit.

10. He contended that employees who had children in the university were entitled to a fee waiver and maintained that his two children were entitled to 50% and 60% fee waiver. He further contended that the Respondent had promised to refund his Masters fee once he concluded his studies but the same was never refunded despite finishing the course while still in the employment.

11. He further testified that after the unfair dismissal, his loan with Equity Bank accrued penalties and he suffered loss. He was not paid any dues. He concluded by stating that he was not paid his terminal dues after the dismissal.

12. During cross examination Cw1 stated that he was acting Head of Payment Section when Mr. Kimeu was sick and his duty was to supervise and approve payments. He clarified that payment voucher number 78981054 for Kshs.193,500 was not among the vouchers he was

charged with during the disciplinary hearing but voucher number 78989754 for Kshs.307,300. He stated that the former was annexing the original attendance list which he used to approve the latter voucher number 78989754 dated 26.6.2008. He however stated that the said list was tampered with to reflect the voucher number 78991054 which was for 28.7.2008.

13. He further explained that the photocopied attendance list dated 26.6.2008 attached to the voucher number 78989754 for Kshs.307,300 was indeed a copy of the original list wrongfully attached to the voucher number 78991054 dated 28.7.2008. He explained that the original list was not signed as usual when he approved the voucher because it was done in advance and signed later by the payees on the day of the meeting. He contended that a comparison of the original list of attendance and the photocopy would show that the endorsements and the payment voucher number indicated in handwriting are matching. He therefore maintained that the original document was photocopied later by someone and fraudulently used for some other transaction. He admitted that he approved payment voucher number 78991054 dated 28.7.2008 but stated that it was based on the original attendance list dated 26.6.2008 which he maintained that he used it in approving voucher number 78989754 dated 26.6.2008 for Kshs.307,300. He further contended that during the disciplinary hearing, the Cashier admitted that he withdrew the Kshs.307,300.

14. He maintained that there is no way a photocopy could go through the numerous levels of approval without being noticed. He denied that he admitted wrong doing vide his letter to the respondent's VC dated 26.2.2010. He admitted that he was invited to a hearing and attended with 2 union representatives. He further admitted that he had no evidence to prove his loan penalty of Kshs.350,000.00 or that he was entitled to salary arrears after a backdated increment was awarded during his suspension, fees waiver, hardship allowance or that he had paid the fees deducted from his salary. He contended that all the documents were in the custody of the respondent.

15. Upon re-examination, he clarified that the initial request of voucher no. 78991054 was for Kshs.307,300.00 but only Kshs.193,500.00 was paid.

16. CW2 also adopted his written statement as his evidence. He testified that he was employed by the respondent in March 1990 and served in various positions the last one being Accounts Assistant. That in August 2009, he received a suspension letter raising two issues connected to payment voucher number 78989757 for Kshs.209,300 and 78989754 for Kshs.307,300. He states that he was only aware of the former voucher but not the latter and consequently he went to the Finance Office and requested to see the documents but he was denied access to the same.

17. CW2 further testified that he was invited to a hearing and that is when he was shown the documents. That after denying the offences charged, he was told to wait outside to allow the panel to discuss and call him back but he was never called back. Instead he was served with dismissal letter dated 24.2.2010 and appealed against the dismissal but the appeal was dismissed by a panel which constituted members of the disciplinary committee including the DVC as the Chairman, and who was in charge of Finance Department. His second appeal was never heard.

18. CW2 testified that the procedure for payment starts with the a request for payment from DVC Administration to the Finance Office for approval after which the request is forwarded to him for preparation of payment voucher. That he prepares the voucher and attaches it on the original Request and forwards it to the accountant (CW1) for approval.

That CW2 then forwards the documents to the budget and Control Department who confirms availability of funds and passes it to the Examination to verify the documentation and passes the same to Senior Revenue Accountant for further verification of the documents. From there the documents are forwarded to the Deputy Finance Officer to confirm availability of funds and then taken back to the Revenue Accountant to write a cheque. From there the cheque goes to the Deputy Finance Officer to sign, stamp and forward to the Finance Officer to sign the cheque. Thereafter the cheque goes to VC or DVC for the third signature. Finally, then it goes to the Chief Cashier Revenue to cash the same at the Bank and pay out.

19. CW2 testified that the money in issue was for payment of Council Members which is paid on the day of the meeting. He stated that in the said long process of payment he is was involved in stage 3 of preparing the payment voucher after which he never saw the document again. He denied that he raised a payment voucher using photocopied document and contended that such a document would go nowhere in the verification process. He further contended that he was dismissed unfairly.

20. During cross examination, he confirmed that it was his duty to ensure that original documents were attached to the vouchers he prepared. He admitted that he prepared payment voucher number 78989754 (DMFI-2b) for Kshs.307300 based on an original supporting document (DMFI-1a). However, he didn't know where the original documents went thereafter.

21. CW2 admitted that he was served with a letter dated 9th December 2009 asking him to attend a disciplinary hearing, which letter had a charge sheet annexed to it. He further admitted that he was accompanied by union representatives to his hearing who was chased before the decision was made. He however contended that he had raised the issue of having inadequate time to prepare.

22. In re-examination, CW2 stated that the payment voucher no. 78991054 (DMFI-1b) dated 28.7.2008 was made after the meeting for 26.6.2008. He further stated that voucher number 78991054 (DMFI-1b) and original list (DMFI-1a) were not for the same meeting as they were prepared one month apart. That DMFI-1a was altered to reflect a different voucher number (78991054) at the bottom and was altered by an unknown person. He denied altering the documents and maintained that after preparing the vouchers, he had no access to them again.

Defence case

23. RW1 adopted his written statement filed on 8.11.2017 as his testimony. He confirmed that the claimants were both employed by the respondent as Head of Payment Section and Payment Clerk respectively. He stated that the 2nd claimant had the duty to raise payment vouchers ensuring that they were well supported by appropriate back-up documents. That after preparing the same he was supposed to sign

the payment voucher indicating that he was the one who prepared and then forward to the 1st claimant (payments supervisor) to counter check and approve the payment.

24. Rw1 testified that in May 2009 his Department of Internal Audit noted anomalies in payments to Council Members in 3 instance. That in all the 3 cases, there was a genuine payment followed by a fraudulent one and the respondent lost a total of Kshs.823,900. That the transactions involved 2nd claimant (payment clerk), 1st claimant (Head of payment section), Francis Muka (Document Examination Officer) and Joseph Muchiri (Chief Cashier) who acted in a concert using photocopied documents to support the second fraudulent payment.

25. He testified that 21 Council members were to attend a meeting on 26th June 2008 at the respondent's Board room but only 13 attended. As a result, the cashier paid Kshs.193,500.00 by voucher no. 78991054 instead of the anticipated Kshs.307,300.00. However, the 2nd Claimant prepared voucher no. 78989754 with the same date, for the unprocedural payment of Kshs. 307,300.00 and used a photocopied list of attendants. This was approved by the 1st Claimant and processed by the other relevant officers and finally Mr. Muchiri, the chief cashier, cashed cheque no. 000025 for Kshs.307,300 dated 30th June 2008.

26. He further testified that the wrong payment of Kshs.307,300 vide voucher number 78989754 was posted in 2007/2008 financial year while the genuine payment of Kshs.193,500 was wrongly posted in 2008/2009 financial year.

27. He testified that on 27.6.2008, there was another Council meeting at Grand Regency but only for 14 members. That Kshs.209,300 was drawn from the Cashiers float but because only 11 members attended, only Kshs.166,400 was used and the cashier replenished his float with the same amount on 2.10.2008. He contended that the process of paying allowances was either by advance requisition and re-banking of the unpaid allowances or by use of the cashier's float and seek refund later to replenish the float. In this case, he contended that the claimant was using his float to pay and still process another payment fraudulently.

28. Rw1 further testified that the Claimants were taken through a disciplinary hearing on 17th December 2009 in the presence of their union officials. That the Claimants were informed of the documents that formed the basis of their charges which is acknowledged by their letters dated 22nd August 2009, 26th February 2010, 8th March 2010 and 20th September 2011.

29. Finally, he contended that during disciplinary hearing, the 2nd Claimant admitted that he prepared voucher no. 78989754 which was approved by the 1st Claimant and as a result they were found guilty and dismissed. That they appealed against the dismissal and were heard on 18th August 2010 but their appeals were dismissed.

30. During cross examination, Rw1 admitted that the original list of attendance dated 26.6.2008 (DMFI-1a) was genuine document endorsed by the Finance Officer for payment to be processed. He further stated that the said list could not have been used to prepare voucher number 78989754 (DMFI-2b) dated 26.6.2008 for Kshs.307,300. He maintained that the said voucher was prepared using a photocopied list (DMFI-2a) which, according to him was wrong. He however admitted that the said DMFI-2a had remarks from the Finance Officer saying, kindly process, which were also photocopied. He further admitted that voucher DMFI-2b for Kshs 307,300 dated 26.6.2008 was older than the one dated 28.7.2008 for Kshs.193,500 (DMFI-1b) which was allegedly prepared using the original list DMFI-1a dated 26.6.2008. He also admitted that Voucher DMFI-2b had no cancellations while DMFI-1b had cancellations of the voucher number. That likewise the original list DMFI-1a had cancellation of the voucher number but the photocopied list DMFI-2a had no such cancellation. That the DMFI-1a & b and DMFI-2a & b referred to the same meeting held on 26.6.2008.

31. RW1 further admitted that the claimants were not responsible for the wrong posting of the said payments but some persons who sat in the disciplinary panel to judge the claimants. That also others who were involved in the payment process including the DVC sat in the panel to judge the claimants. He concluded by stating that the claimants were responsible for preparing a voucher which caused a loss of Kshs.307,300 to the respondent and were found guilty and punished just like all the other people who were involved in the payment process. He however admitted that there was no evidence to that the council members were paid from the cashier's float on 26.6.2008.

32. The respondent adopted as evidence the written statement of Dr. Joseph Obwogi dated 7.11.2017 when he failed to attend the hearing.

The claimant's counsel never objected but warned about the evidential value of the statement because was denied the opportunity to cross examine the author as she had intended.

33. The summary of the written statement by Dr. Joseph Obwogi is that, in May 2009, the Internal Audit Department noted irregularities in payment of payments of Allowances to Council members. That the claimants, Mr. Joseph Muka (Document Examination Officer) and Mr. Joseph Muchiri (Chief Cashier) were charged with neglect of duty and after being heard by the Staff Disciplinary Committee on 17.12.2009, they were dismissed for approving fraudulent payment which caused a loss of Kshs.307,300 to the respondent. That the claimants appealed against the dismissal and they were heard by the Non-teaching Staff Disciplinary Appeal Committee on 18.8.2009, which he attended, and the appeals were dismissed.

The Claimants' Submissions

34. In their written submissions filed on 7th December 2018, the Claimants submitted that the termination of their employment was unfair because the reason for the dismissal was not valid and fair, and the disciplinary hearing against them was procedurally unfair since the rules of natural justice were breached and the claimant denied adequate time and information to prepare for the hearing. They submitted that the respondent has not proved that the payment voucher number 78989754 for Kshs.307,300 was raised using a photocopied document. They contended that, they were singled out for disciplinary action in a process which involved 13 individuals all of whom had the obligation to verify the authenticity of the documents supporting the payment. That they viewed their dismissal as premature and unfair and prayed for the reliefs sought. They relied on **Samwel Chege Njogu vs. Easy Coach Limited**.

35. The Claimants submitted that they have proved the special damages sought and prayed that they be awarded as prayed. They relied on **Patrick Abuya vs. Institute of Certified Public Accountants of Kenya & Another [2015] eKLR** and **Henry Kamau Ngare vs. Teachers Service Commission & Another [2016] eKLR**.

36. Finally, they prayed for costs of the suit.

The Respondent's Submissions

37. The Respondent submitted that the Claimants has failed to rebut the particulars of negligence and fraud as set out in the Respondent's reply. Consequently, she contended that the said particulars are not in dispute hence admitted. She relied on **Mount Elgon Hardware vs. United Millers Limited [1996] eKLR** where the Court of appeal held that:

“The Respondent properly pleaded the particulars of such negligence. The appellant wholly failed to traverse by any further pleadings the particulars of negligence alleged in the Respondent's defence. In those circumstances, the learned judge was perfectly entitled to conclude that the appellant had admitted the negligence alleged in the defence...”

38. The Respondent further submitted that the reliefs sought have not been proved and relied on the case of **Douglas Odhiambo Apel & Another vs. Telkom Kenya Limited [2014] eKLR** to urge that, special damages should be specifically pleaded and strictly proved through evidence before they are awarded. She further submitted that the prayers tabulated in the claimants' submissions are exorbitant, lack legal justification and vary from the pleadings and urged that, since parties are bound by their pleadings, the particulars itemized in the Claimants' submissions should be disregarded. The Respondent relies on the case of **James K. Kamau vs. Nairobi City Council [2018] eKLR**.

39. As regard the written witness statement by Dr. Joseph Obwogi, filed and adopted by the respondent as evidence, the Respondent submitted that the statement is of probative value and should be considered. She relied on the case of **Federation of Women Lawyers (FIDA) Kenya & Others vs. Inspector General of Police & 2 Others [2016] eKLR**.

40. As regards unfair termination, the Respondent submitted that she lost Kshs.307,300 as a result of the claimants preparing and approving payment voucher based on a photocopied request for payment to council members. She contended that if the claimants were vigilant and not negligent, the said money would not have been stolen.

41. She further submitted that the Claimants were informed of the charges against them, given ample time to prepare, accorded a hearing in the presence of union representatives and also granted a further hearing on appeal. She further submitted that, the Claimants never raised the issue of the composition of panels that heard their case and also the appeal. She relied on the case of **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR**.

42. Finally, the Respondent submitted that due procedure was followed before dismissing the claimants and contended that no remedies accrued to them. She relied on **Francis Nyongesa Kweyu vs. Eldoret Water and Sanitation Company Limited [2017] eKLR** and **Wyckliffe Daniel Bengi vs. M/s Regnal Oil (Kenya) Limited [2015] eKLR**.

Analysis and determination

43. After carefully considering the pleadings, evidence and the submissions presented by the parties and their respective counsel, there is no dispute that the Claimants were employees of the Respondent and that they were summarily dismissed for negligent performance of their duties which allegedly occasioned a loss of Kshs.307,300 to the Respondent. The issues for determination are therefore summarized as follows:

- a. Whether the written statement by Dr. Joseph Obwogi, adopted by the respondent during the trial has any evidential value.
- b. Whether termination of the Claimants' employment was unfair and unlawful.
- c. Whether the Claimants are entitled to the reliefs sought.

Whether the written statement by Dr. Joseph Obwogi adopted by the defence has any evidential value

44. The Claimants contended that the allegation in the witness statement by Dr. Joseph Obwogi are mere allegations since they were not tested by cross examination. However, the respondent submitted that the testimony was of probative value and should be considered. In my view the fact that the claimants' counsel did not object to the adoption of the statement without calling the maker, cannot be presumed that she consented to the choice by the defence. She had no obligation to aid the respondent in presentation of her case. The minute she indicated that she intended to cross-examine the witness and wondered about the evidential value of the adopted written statement without cross examination of the maker, the defence counsel should have approached the matter with the umber lights on. Considering the potential risk of prejudice which the said statement may occasion to the claimants' case, I will not consider it in this judgment. The foregoing view does not change the fact that none of the parties herein has relied on the rejected statement as core evidence to prove his/her case.

Whether termination of the Claimants' employment was unfair and unlawful

45. Under section 45(2) of the Employment Act termination of employees contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that a fair procedure was followed. Valid and fair reason must be related to the employee's

conduct, capacity and compatibility, or based on the employer's operational requirements. On the other hand, procedure is fair if the employee is granted a fair hearing in terms of justice and equity.

Reason for Termination

46. The Claimants dismissal letters indicated that the reason for their dismissal was due to the negligent performance of their duties thereby occasioning loss to the Respondent. It is respondent's case that the claimants prepared and approved payment voucher number 78989754 dated 26.6.2008 for Kshs.307,300 based on a photocopy of list of attendance dated 26.6.2008. She produced the said photocopied list and voucher as exhibit D.2a and 2b respectively. On that basis Rw1 contended that the claimants acted negligently by initiating payment process based on the photocopied document against the respondent's policy and procedures and thereby occasioned a loss of Kshs.307,300 to the respondent.

47. The claimants have admitted that they prepared and approved the payment voucher number 78989754 for Kshs.307,300 after receiving instruction to do so based a list of attendance prepared by the DVC for a council meeting on 26.6.2008. They contended that the list was original and it had the endorsement by the Finance Officer for the payment to be processed. They contended that the list was not yet signed by the payees because the payment was being processed in advance, and the payees were to sign on the day of the meeting.

48. They contended that the original list they used was the one produced by the respondent as exhibit D.1a before it was signed by the payees and before it was tampered with at the bottom to alter the payment voucher number. They urged that the details in the said original list (exh.D1a) matched the photocopied list (exh.D2a) save for the said alteration which they contended that they were done after they processed the payment voucher number 78989754. They contended that after the preparation and approval, the documents climbed through a ladder of approval to the signatories and Chief cashier who went to withdraw the cash at the bank and paid the council members on the due date. They also contended, and Rw1 admitted that after parting with the said documents, they lost access to the same and they were not required to know what happened to the payment voucher thereafter.

49. I have carefully considered the evidence presented to me. The termination letters and the proceedings of the disciplinary committee cited the reason for the summary dismissal of the claimants as negligent performance of duty by preparing and approving payment voucher number 78989754 for Kshs.307,300 supported a photocopied document which happens to be the list of council members for a meeting on 26.6.2008 produced as Exh.D2a. The said document matches in every detail to the original list produced as Exh.D1a save for the alterations on the payment voucher number from 78989754 to 78991054. In my view, it does not require the expertise of a document examiner to discern that Exh.D2a is a photocopy of Exh.D1a which Rw1 described as a genuine document.

50. The approving signatures in the Exh.D2a are without any peradventure similar and a duplication from ExhD1a. The payment process was completed on 30.6.2008 by the chief cashier Mr. Muchiri according to the bank statement and delivery note produced by the respondent as Exh.D3h and D3i. There is therefore no way the list (exhD1a) could have been used a month later to prepare payment voucher number 78991054 dated 28.7.2008 for Kshs.193,500. If it was used that was a fraud and the buck stopped with the senior ranking officers in the payment approval chain.

51. The foregoing notwithstanding I am afraid to say that the testimony by Rw1 cannot disprove the evidence by the claimants that they used the original list (Exh.D1a) to prepare and approve voucher number 78989754 for Kshs.307300. The said evidence by the claimants is confirmed by the evidence of the Document Examination Officer Mr. Muka who stated that he verified that the voucher was supported by the original list of attendance. The evidence in the said proceedings by the Chief Cashier cannot be trusted because he is main culprit in the fraud and his role in the payment chain was not documentation but only to cash the cheque and pay the council members on the due date. Even if I was to believe him, which I don't, can I believe that the Council Member could have accepted to append their signatures on an accounting document full of alterations in the manner the original list was done? Would they accept to sign for a payment of sitting allowance for a meeting on 28.7.2008 using an accounting document (exh.D1a) which was for a meeting held a month earlier, that is, on 26.6.2008? And what would the DVC (convener) of the meetings, on 26.6.2008 and 28.7.2008 say about double withdrawal of money using the alleged photocopied documents, considering that he was originator of the payment request using original document and he was the last approving officer and the third signatory of the cheque?

52. Under section 43 and 45 of the Employment Act, the burden of proving the reason for the termination lies with the employer. In this case I find on a preponderance of evidence that the employer has failed to prove that the 2nd claimant prepared payment voucher number 78989754 (exhD2b) based on a photocopied document namely, list of attendance (exh.D2a). I am however persuaded by the claimants evidence that the said voucher was genuine and was prepared based on the original list (exh. D1a) before it was signed by the council members and before the details on the payment voucher number was tampered with. Consequently, I return that the respondent has failed to discharge her burden of proving that she dismissed the claimants for a valid and fair reason and such the dismissal was unjustified and unfair within the meaning of section 45 of the Employment Act.

Due Procedure

53. The Claimants have contended that their dismissal was unfair because they were not accorded a fair hearing. That their request to see the relevant documents before the disciplinary hearing was denied and the composition of the disciplinary committee and the Appeals Committee was conflicted since the same people sitting to judge them had participated in the payment process which was said to be fraud. That on appeal the same persons who passed the decision appealed from sat a part of the Appeals committee. Finally, the claimants were offended that the union representatives were not allowed in the decision making after the hearing.

54. On the other hand, the Respondent contended that the Claimants were informed of the charges for which disciplinary action was contemplated by letter dated 9.12.2009 which also invited them for a hearing on 17.12.2009. That on the said date, they were granted a fair hearing where they defended themselves in the presence of their union representatives. Finally, they were given a right of appeal and they were also heard on their respective appeals but failed to succeed.

55. Section 41 of the Employment Act provides in mandatory terms that before terminating an employee's contract on ground of misconduct, poor performance or physical incapacity, the employer shall explain to the employee in a language he understands and in the presence of another employee of his choice or shop floor union official, the reason for which termination is contemplated and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

56. In this case, the claimants have admitted that they were served with suspension letters in August 2009 citing the reason as negligent performance of duty which is a misconduct under section 44(4) (c) of the Employment Act. They further admitted that they were served with invitation to hearing attaching the charges on 9.12.2009 and that they were heard on 17.12.2009 in the presence of 2 union representatives. Finally they have admitted that they were given right of appeal and they were heard on their respective appeals. On a preponderance of evidence, I find that the respondent has proved that she followed a fair procedure before dismissing the claimants as required by section 41 and 45 of the Act.

57. In so finding, I dismiss the allegation by the claimants that they were denied opportunity to see the material documents before the hearing and that the panels in the first instance and on appeal were conflicted and improperly constituted. If that was the case, the claimants had the union officials to assist them make formal requests in writing and if denied use all other means at the disposal of the union to get the same or object to the hearing before the requests were met.

Whether the Claimant is entitled to the reliefs sought

58. In view of the finding herein that the dismissal of the claimants was unfair and unjustified, I award each one of them compensatory damages under section 49(1) of the employment Act being one month salary in lieu of notice plus 12 months salary compensation considering their long service of 20 years and the fact that they never contributed to the dismissal through proven misconduct. The said awards are statutory under section 35(1) (c) and 49 (1) of the Act and as such the respondent was presumed to know the magnitude of the claim under the said provisions of the law whether specifically pleaded or not.

59. The Claimants prayer for 5 months half salary during the period they were on suspension is granted. The Respondent has submitted that she is ready to pay the same, subject to the Claimants clearing with the relevant departments. I therefore grant the salary arrears, which accrued due to half pay during the 5 months' suspension period.

60. The claims for hardship allowance, refund of fees and fees waiver and penalty on bank loan have not been substantiated by evidence and they are dismissed. Likewise, the claim for salary increment arrears lacks particulars and it has not been proved by evidence and I therefore dismiss it.

61. The claim for unpaid leave allowance is also dismissed for lack of particulars and evidence.

62. The claim for service pay and/or gratuity is dismissed because the Terms of service produced by the claimants suggested that they were in a compulsory pension plan. Let them pursue their pension under the Pension Scheme Rules.

Conclusion and disposition

63. I have found that the dismissal of the claimants was unfair and unjustified because there was no valid and fair reason to warrant the same despite a fair procedure having been followed. Consequently, I enter judgment for them against the respondent in the following terms:

First claimant

Notice Kshs. 155,790

Compensation Kshs. 1,869,480

Salary arrears Kshs. 389,475

Kshs.2,414,745

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Second claimant

Notice Kshs. 114,274

Compensation Kshs.1,371,000

Salary arrears Kshs. 285,625

Kshs.1,770,899

=====

The claimants will have costs and interest at court rates from the date hereof. The award is however subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of March, 2019

ONESMUS N. MAKAU

JUDGE