



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 965 OF 2010**

**DAVID NAMU KARIUKI.....CLAIMANT**

**- VERSUS -**

**INSTITUTE OF POLICY**

**ANALYSIS AND RESEARCH.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday 10<sup>th</sup> April, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 15.09.2010 through Ojienda & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) November salary Kshs. 200,000.00.
- b) December salary for 11 days Kshs. 70, 967.00.
- c) Full year May 2008 to April 2009 leave Kshs. 200, 000.00.
- d) 7 months May 2008 leave to November 2009 leave 116, 666.00.
- e) 3 months pay in lieu of notice Kshs. 600,000.00.
- f) Self contribution on pension unremitted (5 months) Kshs. 37, 500.00.
- g) Staff ISWA unlimited contribution (3 months August, September and October 2009) Kshs.60, 000.00.
- h) IDRC – TTI 5 months' salary top up funds already deposited in the KCB University branch Kshs.500, 000.00.
- i) 1 year compensation Kshs. 2, 400, 000.00.
- j) Any other relief that the Court may deem fit to grant in the circumstances.
- k) Total Kshs. 4, 183, 133.00.

The respondent's response was filed on 06.10.2018 through Antony M. Mulekyo Advocates. The respondent prayed that the claimant's suit be dismissed with costs and, the claimant to be held responsible for the financial loss suffered by the respondent owing to the claimant's negligence. The respondent counterclaimed that it was entitled to recover from the claimant in terms of section 19 of the Employment Act, 2007 the loss incurred and attributable to the claimant being PAYE penalties due to cheques delay Kshs. 152, 699.00; withdrawal of donor funding due to failure to reply; and other particulars of loss incurred to be sated after ongoing investigations.

There is no dispute between the parties that they were in a contract of employment. The respondent employed the claimant by the letter dated 02.04.2008 as its Finance and Administration Manager. The contract was for an initial 3 years effective 05.05.2008 (so that it was lapsing on or about 04.05.2011). The contract was renewable subject to satisfactory performance and availability of funds.

The claimant was dismissed from employment by the letter dated 11.12.2009 signed by Prof. Shem E. Migot-Adholla, the Chairman of the

respondent's board of directors. The dismissal letter addressed to the claimant stated thus, "**Following the Institute's two warning letters to you and further to your appearance before the IPAR Board today concerning your work performance and conduct, this is to inform you that the IPAR Board was not satisfied with your defence in respect of questions put to you. Consequently, the Board has decided to dismiss you summarily for gross misconduct with immediate effect without any benefits save for your statutory benefits less any liability you may owe to IPAR.**"

The record shows that the respondent had raised numerous queries about the respondent's performance of his duties. In the letter dated 19.06.2009 the respondent's Executive Director Prof. Justus Inonda Mwanje demanded an explanation from the claimant on the following issues:

- a) Why the claimant did not disclose to Dr. David Gachuki, the Finance and Staff Committee (FSC) that there was no money to run IPAR programmes while presenting cheques to him to pay.
- b) Why the claimant withheld cheques at his own discretion.
- c) Why the claimant had disobeyed direct orders of the Board and of the Board's Finance and Staff Committee.
- d) Why the claimant had made disparaging remarks on the respondent's previous management and Board of Directors.

The claimant submitted his explanation by the letter dated 19.06.2009. He explained that cheques had 6 months validity and could be signed and withheld until funds became available but in view of the concerns he would never present cheques for signing without ready funds to pay up. He admitted he had failed to surrender all the 22 cheques to the chairman of the Finance and Staff Committee. He admitted he made rude and uncalled for remarks on the comprehensive financial report. He apologised for using harsh language, promised it would not happen again, and begged for forgiveness.

The claimant made a further explanation by his letter dated 02.07.2009 addressed to the chairman of the Finance and Staff Committee and asked for forgiveness for the oversight and hoped he'd be cleared.

By the letter dated 03.07.2009 addressed to the chairman of the Finance and Staff Committee the claimant apologised for the mix up in the two letters hand delivered with certain cheques and both letters being unsigned. He asked to be forgiven for his oversight.

The show-cause letter dated 24.07.2009 by the respondent's Executive Director conveyed to the claimant the Board's decision that the claimant responds to alleged unprofessional conduct on the following matters:

- a) Withholding without valid authority signed cheques payable to various parties as far back as September, 2008.
- b) Failure to follow instructions issued by the Special Finance and Staff Committee meeting to surrender cheques until the 12<sup>th</sup> June 2009, two weeks later, even after which only 16 of the 22 cheques were surrendered to the chairman Finance and Staff Committee.
- c) Failure to provide valid reasons to the Finance and Staff Committee, through the chairman, why six cheques were held in disobedience of the Board's instructions through the Committee.
- d) Use of disparaging remarks in a Board Paper (Finance Report) on the person of the previous management and on a member of the Board of Directors of the Institute. He was to respond in 4 working days.

The claimant replied by his letter dated 28.07.2009 and repeated the explanations, admission of the allegations and apology like he had done in his earlier reply and concluded, "**I personally have a lot of respect for the entire Board of Directors and I am ashamed of myself that this issue has taken this unfortunate direction. I want to assure the Board that I am a professional and will adhere to the code of ethics. I am treating this very seriously and I assure the Board of my commitment and dedication. All these matters arose out of urgency, importance and the desperation given that the expected funds were not received in time. I asked all the Directors that I may have offended to take heart and forgive me. As long as I work in IPAR, I will adhere and follow to the letter the laid down procedures and the decision of the Board and my superiors.**"

The matter culminated in the warning letter dated 05.10.2009 signed by John Akoten, PhD, Acting Executive Director. The claimant acknowledged receipt of the warning letter by signing on 05.10.2009. The letter listed the following as a demonstration of acts of unprofessional conduct on the part of the claimant:

- a) Failure to take true record of minutes of Board meetings. In several occasions the chairman of the Board and the chairman of the Finance and Staff Committee had pointed out in writing specific deficiencies and misrepresentations in minutes which the claimant had circulated to the Board and the Committee before the same being released by the Executive Director.
- b) Sending letters to some members of the Board contrary to the respondent's established operation and communication procedures.
- c) Reluctance to provide required financial information in a timely fashion whenever the claimant was required to do so.
- d) Failure to provide adequate explanation as to why signed cheques were withheld without written authority and delaying to

surrender some of the withheld cheques after being directed to do so by the chairman Finance and Staff Committee.

e) Using boastful language and making disparaging remarks against the person of the former Executive Director of the respondent without cause, though in a report signed by the Executive Director.

f) Failure to adhere to laid down regulations and procedures as provided in the "Operations Manual for Administrative Information, Finance Systems, and Staff Rules and Regulations," when handling financial matters of the respondent.

The warning letter concluded thus, "**Given the above, you are hereby required to:**

- 1. Immediately reform your behaviour as the Finance and Administration Manager by refraining from all unprofessional behaviour.**
- 2. At all times ensure high standards of professionalism and personal integrity in handling all financial and administrative matters of the Institute.**
- 3. Desist from deliberately misinterpreting and failing to consult the ED on any contractual service providers which could expose IPAR to reputational risk, criminal or civil litigation.**

**You have been placed under strict observation for a period of four months from the date of this letter. Your performance shall be carefully assessed and a report shall be periodically submitted the Board of Directors for appropriate action."**

The respondent's Board held a special meeting on 11.12.2009 and resolved as follows as relates to the claimant's contract of service:

a) In his presence before the Board, Mr. David Kariuki, the Finance and Administration Manager, did not satisfy the Board concerning the issues put to him. Consequently, the Board decided to summarily dismiss him without any benefits save for statutory benefits less any liability that he may owe to IPAR. To that end, the Board instructed the Chairman of the Board to write to FAM about the decision.

b) Ms. Alice Kariuki immediately takes over the responsibilities for financial management for the time being.

Thus, the respondent's chairman of the Board of Directors issued the letter of summary dismissal dated 11.12.2009.

The Court has considered the pleadings, the evidence, the submissions and all the material on record.

The **1<sup>st</sup> issue** for determination is whether the termination of the claimant's contract of service by way of summary dismissal was unfair. The evidence on the issue is rather straightforward. The claimant was asked to explain himself about the allegations particularly surrounding the withheld cheques and disparaging remarks about the Board members as per the letter dated 19.06.2009. He explained by his letters of 19.06.2009, 02.07.2009 and 03.07.2009. The respondent then issued a show-cause letter dated 24.07.2009 about the same allegations. The claimant responded by his letter dated 28.07.2009. The Board considered his replies which substantially were admissions and apologies pleading for forgiveness. The Board in its very considered judgment and wisdom decided to impose a punishment by way of the warning letter dated 05.10.2009. The Court finds that with respect to the allegations in issue, the disciplinary process as had been initiated and continued by the respondent against the claimant was thereby closed with the imposition of the punishment of a warning. The Court holds that with respect to those allegations, the respondent's disciplinary power was thereby exhausted and the respondent could not validly and subsequently impose another punishment against the claimant with respect to those allegations – as the respondent was chained by the rule against double jeopardy.

The warning letter was clear that by that reprimand the claimant was placed under strict observation for 4 months for his performance to be closely observed and assessed with periodic reports submitted to the Board. The four months had not lapsed and on 11.12.2009, without reference to any such periodic reports or fresh set of adverse allegations against the claimant, the Board met and purported to summarily dismiss the claimant from employment. The Court returns that as at the time of termination, the respondent has failed to establish the valid or genuine reasons by which the summary dismissal was justified as envisaged in sections 43, 45, as read with section 47 (5) of the Employment Act, 2007. Further the Court returns that the claimant has established that he was dismissed without due process of a notice and a hearing as envisaged in section 41 of the Act. As submitted for the claimant in **Shankar Saklani –Versus- Dhl Global Forwradng (K) Limited [2012]eKLR**, the Court held that even in cases of summary dismissal on account of gross misconduct hearing and notification on the part of the employer are mandatory – only that in event of gross misconduct leading to a summary dismissal, the notice can validly be shorter than is provided in the contract of service or the statute. In this case, the Court has found that as at the time of summary dismissal there was no adverse allegation levelled against the claimant and it was irreparably misconceived for the respondent to purport to impose the summary dismissal on account of previous allegations for which the claimant had already been punished by way of the warning that the respondent had voluntarily decided to impose. The procedure cannot be said to have been fair in view of the findings that the summary dismissal amounted to double jeopardy.

The Court therefore returns that the summary dismissal was unfair both in substance or merits, and, procedure.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) The claimant prays for November salary **Kshs. 200,000.00**. The evidence was that the claimant worked for November 2009 and there was no evidence that he had been paid, He is awarded as prayed for.

b) The claimant worked up to 11.12.2009 when he was dismissed and the Court awards him December 2009 salary for 11 days **Kshs. 70, 967.00** as prayed for.

c) The claimant had worked full year May 2008 to April 2009 and is praying for pay in lieu of annual leave Kshs. 200, 000.00. The claimant also worked 7 months May 2008 leave to November 2009 and is praying for annual leave prorata Kshs. 116, 666.00 as prayed for and under section 28 of the Act. Clause 6.9.2.2.2 of the respondent's Operating Manual for Administrative Information, Financial Systems and Staff Rules and Regulations provided thus, "**Leave must be taken in the calendar in which it arises, but the ED has the discretion to approve any leave to be carried forward to the following year, provided such leave does not exceed one year's leave.**" There is no evidence that the claimant obtained the Executive Director's approval to carry leave forward for the 2008 calendar year. For 2009 the claimant worked until 11.12.2009 and the Court considers that he had earned his leave for that year and is awarded **Kshs. 200, 000.00** and as per sections 35 and 28 of the Act.

d) The contract provided for 3 months pay in lieu of termination notice and the claimant is awarded **Kshs. 600,000.00** as prayed for because the summary dismissal was abrupt and unfair.

e) The claimant prayed for self contribution on pension unremitted (5 months) Kshs. 37, 500.00. No submissions were made for the claimant on the prayer and the Court deems that the same was abandoned. In any event no payslips were filed for the 5 months in issue to show the deduction and then no pension statement was exhibited to show the alleged failure to remit. The prayer will fail.

f) There were no submissions made for the claimant on Staff ISWA unlimited contribution (3 months August, September and October 2009) Kshs.60, 000.00 and the prayer will fail as deemed abandoned or not justified at all.

g) The claimant prayed for IDRC – TTI 5 months' salary top up funds already deposited in the KCB University branch Kshs.500, 000.00. The claimant's witness No. 2 (CW2) testified that the claimant was entitled to salary top up for 5 months with respect to the fund budget commencing July 2009 and the funding having come belatedly on 22.09.2009, the claimant was entitled to the top up effective 01.07.2009. The exhibit on record at folio 40 of the claim bundle confirms that the funds of Kshs. 10, 998, 959.75 were credited in the respondent's bank account and there is no reason to doubt CW2's evidence that the claimant was entitled as claimed. However there was no evidence of the approval of the top up by the respondent's Board. Further there was no exhibit showing the agreement on funding the Think Tank Initiative that is said to have made a provision for the alleged claimant's top up for Kshs. 100, 000.00. The Court returns that on a balance of probabilities the work the claimant may have done in that regard was within his contractual duties and remuneration. The prayer will fail.

h) The claimant prays for 1 year compensation Kshs. 2, 400, 000.00. The Court has considered that the claimant was serving the 2<sup>nd</sup> year of the 3 year contract. The Court has also considered the bumpy relationship between the parties characterised with the allegations the claimant admitted leading to the imposition of the warning. The Court considers the two to be mitigating factors in favour of the respondent. On the other hand, the claimant desired to continue in employment and established that the withholding of the cheques was due to the respondent's financial difficulties. To balance justice for the parties the claimant is awarded 6 months' gross salaries in compensation for unfair termination under section 49(1) (c) of the Act at Kshs. 200, 000.00 per month making **Kshs. 1, 200, 000.00**.

The **3<sup>rd</sup> issue** for determination is whether the respondent is entitled to the counterclaim. The counterclaim is for **Kshs. 152, 699.00** PAYE penalties.

As submitted for the respondent no response to the counterclaim was filed. The claimant offered no defence or evidence to oppose the claim.

The respondent exhibited voucher dated 19.04.2011 showing payment of penalty on PAYE for the month of June 2009 and the interest accruing therefrom being Kshs. 152, 699.00.

The Court returns that the respondent has established the counterclaim. As submitted for the respondent the same will be applied in a set off from the sum of money due to the claimant. As the claimant never opposed the counterclaim, the counterclaim is allowed with no orders on costs.

The claimant's sum of money due as per this judgment is Kshs.2, 270, 967.00 less Kshs. 152, 699.00 makes **Kshs.2, 118, 268.00** payable to the claimant under this judgment. The respondent will pay less lawful PAYE as by law provided.

In conclusion the suit is hereby determined and judgment is hereby entered for parties for:

a) The respondent to pay the claimant a sum of **Kshs. 2, 118, 268.00** by 01.06.2019 failing interest to be payable thereon at court rates from the date of filing the suit till full payment.

b) The respondent to pay the claimant's costs of the suit.

c) The respondent's counterclaim allowed with set off as already computed in this judgment and with no orders on costs.

**Signed, dated and delivered in court at Nairobi this Wednesday 10<sup>th</sup> April, 2019.**

**BYRAM ONGAYA**

**JUDGE**