



**REPUBLIC OF KENYA**

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

**CAUSE 485 OF 2010**

**ISHAK A. F. CHANZU.....CLAIMANT**

**VERSUS**

**BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND....RESPONDENT**

**JUDGEMENT**

1. By a memorandum of claim filed on 23<sup>rd</sup> April, 2010 the claimant pleaded that he was employed by the respondent on 2<sup>nd</sup> September, 1991 as an Assistant Accountant. In 2009 he was appointed as acting Finance Manager. As Finance Manager he pleaded that his services could only be terminated by the Board and if he was to be terminated for negligence or misconduct he was entitled to be heard before the termination. By a letter dated 22<sup>nd</sup> December, 2009 the respondent summarily dismissed the claimant for misconduct and negligence. The claimant there claimed terminal benefits and damages following the termination.

2. The respondent responded to the claimant's averments by filing a replying affidavit instead of filing a memorandum of claim. The court will overlook this procedural technicality and regard the affidavit by Mr Austin Ouko as the response to the claim. According to the respondent on 22<sup>nd</sup> December, 2009 the claimant was properly dismissed from employment for carelessly and improperly performing his work.

3. The respondent stated that on 7<sup>th</sup> August, 2009 the claimant approached a Mr Jimmy Makyarkiy, the Head of 'respondent's salaries section and ordered him to give him the cheque for Kshs 41,564,852 payable to Paymaster General for onward delivery to KRA. The cheque was eventually allegedly misplaced by the claimant when he was travelling to the City Centre using public means.

4. According to the respondent it was surprising for the claimant to use public means to carry the cheque yet he was entitled to use respondent's availed cars. Further the respondent being a Finance Manager was not supposed to physically deliver cheques to a bank and was procedurally bound to instruct one of his officers to undertake the task.

5. The Managing Trustee duly wrote to the claimant on 2<sup>nd</sup> September, 2009 enumerating the complaint and requiring the claimant to make representation and showcause why disciplinary action should not be taken against him. On 9<sup>th</sup> September, 2009 the claimant responded to the claim as requested by the Managing Trustee of the respondent but the response was considered by the respondent's Board unsatisfactory.

6. The respondent further stated that prior to the termination the claimant had earlier been suspended from the respondent's employment on 16<sup>th</sup> October, 2008 for negligence by authorizing Discount Securities Ltd to trade in respondent's shares without securing corresponding share certificates thus exposing the respondent to the risk of loss of close to Kshs 1.4 billion. The claimant was reinstated without prejudice to the on-going investigations by EACC.

7. Regarding leave, the respondent stated that the claimant was informed by the managing Trustee of unutilized leave of 75 leave days as at 30<sup>th</sup> June, 2009 hence at the date of termination he could only claim a further 15 days of leave for the remaining 6 months to the end of the year 2009. The respondent further stated that under article 11:2:1(d) of the respondent's Human Resource Policy Manual leave could not be accumulated for more than 60 days and that any leave accumulated in excess of 60 days stood forfeited unless special circumstances warranted extension.

8. In his oral evidence the claimant stated that he worked for the respondent from 1991 to 2009 he worked as an Assistant Accountant but by the time he left he was acting Finance manager. His duties entailed advice on effective finance management, coordination of cash flow and preparation of financial statements. For the acting role he was paid acting allowance. However between November 2008 and March 2009 and October to December 2009 he was not paid his allowances.

9. He confirmed that on 2<sup>nd</sup> September, 2009 he received a letter from the Managing Trustee enquiring about the misplaced cheque. According to him he carried the cheque to KCB Kencom Branch to bank it to the KRA account but when he got to the bank he realized the cheques were not with him. When he returned to the office he did not find the cheque too. He then called KCB who advised him to issue a

stop order which he did. He also reported the loss of the cheque to the police. After which the respondent issued a replacement cheque.

10. According to him he responded to the Managing Trustees letter and continued to work normally. On 22<sup>nd</sup> December, 2009 he received a dismissal letter from the Security Officer. The termination was over the lost cheque and a transaction involving NASSEFU which it was alleged questioned my integrity. His termination was with immediate effect and according to him he was never given time to clear his personal effects and was never allowed back to collect them. He was paid Kshs 253,950/25 as terminal dues and accrued leave. According to him the terminal dues were wrongly calculated. It was based on basic pay instead of gross pay. According to him the Board should have been the one to remove him and that he was never accorded any hearing before termination.

11. In cross-examination he stated that they used to have a messenger a Mr Opepo but that there was no one who was specifically designated to bank cheques. He stated that he had authority to bank cheques. It was his evidence that on the material day he was on his way to KRA. He used his car to the bank. He found the bag where the cheque was had been slit open. He further stated that the payment to him included 89 days of leave.

12. The respondent's witness Ms Regina Mwaah stated that she was the acting Employee Relations Officer of the respondent and that she had knowledge of the claim through documents filed an records kept by the respondent. It was her evidence that the misplaced cheque was for PAYE. According to her the claimant had no authority collect the cheque. The cheque should have been collected by the head of payroll.

13. According to her the cheque should be registered in the dispatch register and the person books a vehicle to deliver the cheque. The claimant never followed the procedure. The claimant boarded a matatu and never used his private vehicle as claimed. It was her evidence that the claimant had previously been interdicted and the interdiction was lifted on 24<sup>th</sup> April, 2009.

14. Ms Mwaah further informed the court that the claimant responded to the show cause letter but the Committee found his explanation unsatisfactory. The committee wondered why a person of the claimant's cadre offered to deliver the cheque while there were staff ready to deliver the cheque. It was her evidence that upon termination the claimant was paid his accrued leave together with his terminal dues.

15. In cross-examination he stated that the claimant had no authority to collect the cheque and that the claimant asked for the cheque from the officer who was having the cheque and that the office was his junior.

16. Under section 43(2) of the Employment Act the reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee. Further employment is personal relationship hence trust is paramount. The claimant does not deny handling the cheque in issue.

17. His account of how the cheque came to be lost while under his custody is however not convincing. The claimant alleges that he used his personal vehicle to the bank on the material day and when he got to the bank he found out that the bag where he had kept the cheque had been slit open and the cheque missing. The claimant did not make any allegation whether he was with other people in his car or the car was at some stage vandalized.

18. The claimant also did not satisfactorily explain why a person of his level opted to collect this particular cheque to bank yet there were officers assigned for this responsibility. In as much as the cheque was countermanded and a replacement issued the claimant's conduct created doubt about his integrity and it could be possible that he engineered the disappearance of the cheque. The court is therefore persuaded that there existed valid reasons for the termination of the claimant's services.

19. Concerning the procedure followed the claimant was issued with a show cause letter to which he elaborately responded. The respondent did not find his explanation satisfactory and terminated his services. Oral hearing is not mandatory where an employee has been issued with a show cause letter and elaborately responded to the charges raised. This is more so where the charge is a single issue as the case here.

20. The claimant was called upon to explain the circumstances under which the cheque got lost which he elaborately did in his response to the show cause letter. What was left to be clarified again in the oral hearing? It is the court's view that the omission to conduct an oral hearing in this particular case occasioned the claimant no prejudice and that the termination of his service was for valid reasons. The claim is therefore found without merit and is hereby dismissed. The fact that the claimant has since died, the court would not make any order on costs.

21. It is ordered.

**Dated at Nairobi this 28<sup>th</sup> day of June, 2019**

**Abuodha J. N.**

**Judge**

**Delivered this 28<sup>th</sup> day of June, 2019**

**Hellen Wasilwa**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.