



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 4 OF 2014**

*(Before Hon. Justice Mathews N. Nduma)*

**WILSON WAMWEYA.....CLAIMANT**

**VERSUS**

**HON. ATTORNEY GENERAL.....RESPONDENT**

**J U D G M E N T**

1. The claimant was dismissed from service by a letter dated 12<sup>th</sup> July 2007 on allegations of having misappropriated Kshs. 440,000 imprest. The claimant received a letter from the Accountant General in April 2007 alleging that he had advanced himself Kshs. 440,000 illegally and that he should repay the same. This was followed by a letter from the permanent secretary office of the president provincial administration and internal security dated 5<sup>th</sup> May 2007 alleging that he had misappropriated public funds and was directed to pay the funds by 31<sup>st</sup> July 2007.
2. The permanent secretary suspended the claimant and dismissed him from public service on 12<sup>th</sup> July 2007.
3. The claimant being aggrieved by the dismissal appealed to the public service commission on 8<sup>th</sup> January 2010 but no communication has ever been received from the commission.
4. The claimant states that the dismissal was unlawful and unfair.
5. Under cross examination by counsel for the respondent, the claimant admitted that he had obtained an imprest of Kshs. 250,000 but not Kshs. 440,000. That he repaid Kshs. 250,000 upon demand by the Permanent secretary because it was an imprest advanced to him by the District Accountant. The claimant stated that the repayment was for accounting purposes because he had used the money.
6. The claimant stated that he had taken the imprest to pay officers in outside stations who could not come to the office.
7. The claimant stated that he had made a report accounting for Kshs. 240,000 which he had paid out to officers but he had to sell a plot to refund the government upon being accused of having misappropriated the money.
8. That the government acknowledged the repayment by a letter dated 11<sup>th</sup> March 2018 from the office of the president to the claimant.
9. The claimant stated that he repaid the money not because he had stolen it but due to harassment by his bosses. He made the first refund of Kshs. 55,000 in April 2007. The claimant stated that he was not called to any disciplinary hearing but was only asked to repay the money followed by a letter of dismissal. The claimant refuted that he had misappropriated government funds by a series of letters dated 30<sup>th</sup> April 2007, 15<sup>th</sup> May 2007 and 26<sup>th</sup> July 2007. The claimant had repaid the imprest in full.
10. The claimant prays for a declaration that the dismissal from public service of Kenya was unfair, unprocedural and unlawful.
11. The claimant prays for an order of reinstatement to the public service and to be paid arrears of salary and all other benefits from the date of the dismissal to the date of reinstatement.
12. In the alternative the claimant prays for payment of damages equivalent to the salary and other benefits he would have earned to the date of retirement. The claimant also prays for interest and costs.
13. This suit was filed on 15<sup>th</sup> January 2014 but the claimant was dismissed on 12<sup>th</sup> July 2007. Six (6) years limitation period was

applicable to this claim because the cause of action arose before the *Employment Act, 2007* became operational. The six year period expired on 12<sup>th</sup> July 2013. The claim was therefore filed several months after the limitation period had expired. However, by a ruling delivered on 3<sup>rd</sup> July 2013, Hellen Wasilwa J. granted application for filing the suit outside the limitation period under *Section 28 of Limitation of Actions Act, Cap 22 laws of Kenya*. The ruling was not appealed against and I cannot revisit the matter again.

14. The respondent filed a statement of defence on 22<sup>nd</sup> July 2016 but did not call any witness to refute the testimony adduced by the claimant under oath. The evidence by the claimant is therefore not contradicted.

15. The issue for determination is whether the claimant has proved that his dismissal was not for a valid reason and a fair procedure was not followed in dismissing him.

16. The uncontradicted testimony is that the claimant had obtained Kshs. 250,000 imprest to pay officers who were stationed in outside stations and could not come to the office to be paid.

17. That the claimant had paid the Kshs. 250,000 to various officers and had accounted for the money vide banking slip given to the District Accountant copies of which were presented to court. That the District accountant had authorized the claimant to take the imprest.

18. That the claimant was falsely accused by the Accountant General and the permanent secretary in the office of the president of having advanced himself Kshs. 440,000. The claimant denied having obtained Kshs. 440,000 as alleged or at all. The claimant stated that he agreed to repay the Kshs. 250,000 due to harassment by his superiors. That he had to sell a piece of land to repay the money despite that he had used the Kshs. 250,000 to pay allowances to officers in outside stations.

19. The claimant wrote several letters to explain himself and went ahead to repay the money but he received a letter of dismissal without being called before any disciplinary committee contrary to government regulations. That the claimant filed an Appeal to the Public Service Commission but the commission did not reply to him up to the time of filing suit.

20. The court is satisfied that the claimant was dismissed without valid reason and the respondent did not follow a fair procedure in dismissing the claimant. At the time of dismissal the *Employment Act, Cap 236 Laws of Kenya* was applicable. The Act did not provide for reinstatement to work nor did it provide for the twelve (12) months maximum compensation for the unlawful and unfair dismissal.

21. The remedy available to the claimant at the time was payment of damages for the unlawful and unfair dismissal under the common law and commutation of the dismissal to normal termination to allow the claimant to access terminal benefits including pension which were otherwise not paid to him by fact of dismissal.

22. The claimant was appointed to the public service by a letter dated 29<sup>th</sup> December 1989 as a clerical officer in the office of the president with effect from 14<sup>th</sup> November 1989. The claimant was confirmed and admitted to permanent and pensionable establishment by a letter dated 3<sup>rd</sup> April 1992. The claimant served various ministries and rose through the ranks to the position of a senior clerical officer. Sometimes in May 2006 he was deployed at the ministry of planning where he was handling Constituency Development Fund (CDF). It was whilst here when he encountered problems.

23. It is evident that the claimant was a career Civil Servant with a long service. There is no evidence he had any adverse record during all this period of public service.

24. Considering that the claimant was dismissed for no valid reason and without following a fair procedure, the court grants the following reliefs to the claimant:

(a) The dismissal of the claimant by the respondent with effect from 12<sup>th</sup> July 2007 is declared unlawful and unfair and the dismissal is commuted to a normal termination to allow the claimant to be paid his full terminal benefits including pension.

(b) The claimant is to be paid his full pension applicable to retired public servants with effect from 12<sup>th</sup> July 2007, being the effective date of his termination.

(c) The lump sum pension payable in advance and other terminal benefits including payment in lieu of notice is to be paid with interest at court rates from 12<sup>th</sup> July 2007 until it is paid in full whereas the rest of the pension is due to the claimant from his effective date of retirement.

(d) Damages due and owing to the claimant are limited to the notice period the claimant was entitled to as at the time of termination being 12<sup>th</sup> July 2007. The same is to be computed by the respondent and paid accordingly.

(e) The respondent to pay the costs of the suit.

**Judgment Dated, Signed and delivered this 14<sup>th</sup> day of October, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Waweru for the claimant

M/S Aliongo for Respondent

Chrispo – Court Clerk