



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO 22 OF 2018

DAVID KIPCHUMBA KOGO.....CLAIMANT

VERSUS

THE COUNTY PUBLIC SERVICE BOARD ELGEYO

MARAKWET COUNTYRESPONDENT

J U D G E M E N T

1. The Claimant pleaded that he was employed by the respondent and prior to that by Public Service Commission (JSC as an accountant in 1996. He was seconded by PSC to the County Public Service Board for Elgeyo Marakwet in 2012 in the same capacity.
2. According to the claimant he worked for the respondent diligently until 27th August,2017 when he was issued with a letter of interdiction. He claimed that allegations which led to his interdiction had no basis and in any event, he was never given a chance to defend himself before interdiction.
3. He responded to the letter of interdiction and raised weighty concerns which were never considered by the 1st respondent. The respondent proceeded to dismiss him from service through a letter dated 6th October, 2017.
4. The respondent on its part pleaded that the interdiction was in accordance with the relevant manual and the law and further that the respondent followed due process of law in that the Claimant was afforded the opportunity to present written responses to the complaint's against him and to make oral representations before the 1st respondent and that he made written defences as well oral representation before the Board.
5. The respondent further stated that all factors and evidence taken with into account, the Claimant was found culpable for the loss of the 2nd respondent's funds upon which it became necessary to dismiss him from service. The letter of dismissal granted the Claimant the right of appeal.
6. In his oral evidence, the Claimant further stated that he filed a witness statement on 10th January, 2018 which he sought to adopt as his evidence in Chief. It his evidence that he was invited for a disciplinary hearing but was not told he needed to be accompanied by anyone. He denied making payments to themselves.
7. In cross-examination he stated that his duties included processing of payments. His monthly salary was Kshs. 97,000/= and net was Kshs. 23,000/=. On 29th May, there was inward transfer of Kshs. 144,000/= to his account and another 152,000/=. On 30th June, 2014 there were other several transfers from the County Government. In July, 2017 he received Kshs. 841,000/= which was above his salary.
8. According to him, the main issue in the show cause letter was that he defrauded the respondent of Kshs. 1,500,000/= . According to him, he was not given any particulars of the account defrauded.
9. The respondent's 1st witness Mr. Francisca Jelagat Brtao stated that she was the secretary to the 1st Respondent's Board. It was her evidence that the 2nd respondent while conducting an audit query discovered that there were some discrepancies and other financial irregularities within the 2nd respondent and that the same revealed that the claimant among other had committed acts of fraud as well as conducted himself in such a manner as to amount to gross misconduct.
10. It was revealed that on various dates the Claimant colluded with others and caused irregular and unlawful payments to be made to his account for personal gain with respect to Equity Bank was kshs. 1,667,888/= and KCB Kshs. 1,216,1010/98. The respondent conducted a

preliminary investigation and it was decided to interdict the Claimant. He was further asked to show cause why disciplinary action should not be preferred against him.

11. In cross-examination she stated that there were allegations on falsification of pay roll records. It was further her evidence that the Claimant had not been issued with any other letter apart from the one by public service commission.

12. The respondent's second witness Mr. Jeremiah Changwony stated that sometimes in August and September, 2016 he noticed some accounting discrepancies in the expenditure vote incurred by the County Government on account of salaries. He duly notified the pay roll Manager being the person in charge of preparation of the pay roll with instruction that he reports to him the cause of the inconsistency. He never got a feed back from the said manager prompting him and other staff in the department to initiate inquiries on the said inconsistencies and by the end of January, 2017 the department formed a preliminary view that the said manager was the cause of the raised inconsistencies as he in collusion with the Claimant were making irregular and unlawful payments to themselves.

13. On the advice of the 1st respondent and to facilitate conclusive investigations, the Claimant amongst others were sent on suspension/interdiction. The Claimant was later on summoned to show cause before the 1st respondent.

14. In cross-examination he stated that he approved payment and that he approved the payments to the Claimant as well. The fraud was discovered in February, 2017 and disciplinary proceedings took place in August, 2017.

15. The Claimant in this case has claimed that he diligently served the respondent until 27th August, 2017 when he was issued with a letter of interdiction. According to him the allegations which led to his interdiction had no basis. He further stated that he was never given a chance to defend himself before the interdiction and that he raised weighty concerns which were never considered.

16. In the witness statement in support of the claim the Claimant seems to have repeated the averments in his memorandum of claim without going into details of the allegations he was facing. The gist of the Claimant's statement which he adopted as his evidence in Chief seemed to have dwelt more on the process followed in his interdiction and eventual dismissal.

17. The interdiction letter issued to the Claimant dated 25th August, 2017 makes two allegations against the Claimant namely; defrauding the County Government of over Kshs. 1,500,000/= and falsification of records.

18. In his response to the Show Cause letter dated 12th September, 2017 the Claimant among other elaborately explains the pay roll process and concludes that the process is not an event but a process which involves a series of individuals and department and that it involves a vigorous process of verification so it was not possible that an individual could perpetuate the alleged vices without being noticed.

19. The Claimant however did not deny that the two accounts one held at Equity Bank and the other at KCB belonged to him. Further the Claimant in his evidence stated that on 29th May, 2017 there was an inward transfer of 144,000/= to his accounts and another 152,000/= on 30th June, 2014. He further stated that there were several transfers from the County Government and that in July, 2017 he received Kshs. 841,000/= which was above his salary.

20. Under section 47(5) the burden of proof that an unfair termination has occurred is on the employee. The Claimant in his pleadings witness statement or documents filed has not satisfactorily explained the reason for which the funds above stated were being paid into his account by the respondent.

21. The respondent on the other hand felt these funds were fraudulently obtained by inflating the pay roll which according to the respondent was done by the Claimant in cohorts with others. The respondent exhibited in Court the relevant pay rolls schedules.

22. Fraud is a justifiable reason for termination of employment and the evidence in possession of an employer does not have to meet the threshold for conviction for a criminal offence for an employer to terminate on account of such allegations.

23. From the evidence, the Court is persuaded that there existed justifiable grounds to terminate the Claimant's service. On the issue of process, the Claimant was interdicted and simultaneously called upon to show Cause which he did. He was subsequently called for a disciplinary hearing which he attended and made his representations. The respondent's Board thereafter took the decisions to dismiss him and did so with the advice that if he was not satisfied, he should appeal to PSC.

24. In conclusion the Court finds the claim not merited and the same is hereby dismissed with costs.

25. It is so ordered

Dated at Eldoret this day of 2019

Abuodha Jorum Nelson

Judge

Delivered this 28th day of November 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge