



**REPUBLIC OF KENYA**

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

**CAUSE NO. 326 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 8<sup>th</sup> March, 2018)**

**BENJAMIN TUMBO MATONOI.....CLAIMANT**

**VERSUS**

**THE BOARD OF TRUSTEES**

**NATIONAL SOCIAL SECURITY FUND.....RESPONDENT**

**JUDGMENT**

1. The Claimant initially filed suit against the Respondent in the High Court vide a Plaint dated 26.7.2004, seeking damages for unlawful termination. He avers that at all material times he was an employee of the Respondent working in the capacity of Clerical Officer from 2.1.1980 until 12.3.2004 when the Defendant unlawfully terminated his services.
2. That he worked diligently and with dedication until the said 12.3.2004 when he was terminated because of false and malicious allegations of gross misconduct which were never disclosed to the Claimant or at all neither was he given the opportunity to defend himself contrary to the Employment Act Cap 226 Laws of Kenya. He further avers that he was given a notice of 48 hours to vacate his place of work.
3. That by reason of the Respondent's actions the Claimant suffered loss and damage and prays for the suit to be allowed.
4. In their defence the Respondent admits the employment relationship and state that the Claimant was summarily dismissed from his employment for reasons within his knowledge. That the Claimant was afforded an opportunity to be heard and that they were not in breach of any employment terms. They claim that the Claimant was paid his full dues and none of the damages pleaded in the Claim accrue to him. They pray for the suit to be dismissed with costs.
5. In evidence the Claimant admitted having been served with a disciplinary letter dated 9.3.2004 which he Respondent to by 11.3.2004. He explained what had happened and denied inflating members accounts. He averred that he was not given an opportunity to face his accusers but was only taken to the security officer. That at the time of dismissal he was earning a gross salary of Shs. 66,660/=. That as a result of the Defendant's actions his Children did not complete school properly.
6. In cross-examination the Claimant admitted that he was familiar with the Respondent's regulations and he was aware that the schedule supplied to him to update records was supposed to be verified by a senior officer. He denied inflating any accounts. He also stated that he was not aware that the Respondent had an appeal procedure and that is why he never appealed.
7. RW1 led evidence that on 4.10.1997 at approximately 4 pm his security officer informed him that there was a claim payment at cash office which was suspicious. That he sent the said officer to the cash office to retrieve the file belonging to one Richard Wambua Musilu. That he discovered that the file was received under normal speed but on 7.10.1997 the speed of the file movement increased and it was due for cheque signing on 8.10.1997. That further discoveries revealed that the employee whose benefits were being processed was still in service. The said employee was summoned in the presence of officers and he recorded a statement stating that he was in need of money and had to use the money in the Respondent's custody.
8. He further stated that the interrogation revealed that the claim form for the said transaction were forwarded to the Claimant but he did not know the origin of the said forms. On 28.8.2003 he stated that he received a letter from the Permanent Secretary Ministry of Labour stating that the Claimant had been inflating members accounts as a result of which he checked the database and found names with similar accounts. That he wrote a letter asking for the Claimant to be removed from the department to allow investigations which confirmed that he was indeed inflating accounts.
9. RW2 worked at the Respondent's Human Resource Department and she stated that she was familiar with the case and led evidence that investigations were carried out by the security section and they received a report, which led to the Claimant being issued with a show cause

letter. That he responded to the letter on 11.3.2004 admitting he made a mistake, which warranted summary dismissal. That the Claimant was paid his terminal dues of Shs.22,186/= and there was no appeal from the said decision.

### **Submissions**

10. The Claimant's Counsel reiterated what was contained in the pleadings, the evidence led and prayed for the Claim to be allowed as drawn.

11. The Respondent's counsel on the other hand maintained that there was reason for termination and due procedure was followed. That the Claimant was in breach of the presumption of absolute integrity and honesty and should accept the consequences.

12. The Counsel argued that in 2004 the law applicable was the Employment Act Cap 26, which did not require the Respondent to observe principles of natural justice in termination of contracts of employment. They cite the case of **Ezekiel Nyangoya Okemwa vs Marine & Fisheries Research Institute (2016)eKLR** where it was held:

***“Employers had no obligation in observing principles of natural justice, in termination of contracts of employment. The Courts have explained that under the old employment law in Kenya, Employers could terminate contracts of employment at will, for good cause, bad cause or no cause. At the time, employment was at the will of the employer... Employment at will was the dominant doctrine, with near universal application in the Civil Courts”.***

13. The Respondent pray for the Claim to be dismissed with costs.

14. I have examined all the evidence of the parties plus the submissions filed. The Claimant was summarily dismissed by the Respondent on 12.3.2004. Before the dismissal he was served with a show cause letter to explain issues of inflated account.

15. The Claimant in his response admitted the inflation but stated it was a mistake which run across other files. He was thereafter summarily dismissed. The summary dismissal letter does not state reasons for the dismissal but that was not mandatory to the Employment Act regime 2004.

16. Under the Employment Act, Cap 226 (now repealed) the employer was not obliged to give reasons for termination or dismissal. That notwithstanding, the under the same regime of the Employment Act (Cap 226) principles of natural justice were never thrown out of the window. The right to a fair hearing is an inherent right and there can never be said to be an employment at will without rules of natural justice being adhered to.

17. In the current case, the Claimant was indeed dismissed without according him an opportunity to be heard on allegations levelled against him. It is for this reason I find the dismissal of the Claimant unfair and unjustified.

18. I accordingly award him:-

***1. An equivalent of 6 months' salary as damages for unfair dismissal - 6 x 66,630= 399,780/=.***

***2. 1 also award Claimant one month salary in lieu of notice = 66,630/=.***

**Total = 466,410/=**

***3. The Claimant should be paid his accrued pension as contributed towards the Pension Scheme.***

***4. I also award Claimant costs plus interest at Court rates with effect from the date of this judgement.***

**Dated and delivered in open Court this 8<sup>th</sup> day of March, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Oira for Claimant – Present

Respondent – Absent