



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1197 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

PETERSON NJUE NJERU.....CLAIMANT

-VERSUS-

THE ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed his Memorandum of Claim on 29/7/2013 through Onyoni Opini & Gachuba Advocates. His claim is that he was employed by the TSC on 29th July 2003 as an Executive Officer II/Human Resources Officer II on such terms and conditions as set out in his letter of appointment dated 29th July 2003 and 10th November 2003.
2. The Claimant avers that his employment was duly confirmed on 22nd December and he warned various salary rises over time. He avers that in January 2005 his basic salary was renewed to 19,655/=.
3. The Claimant states that his specific functions were to advise the DEO on matters of teachers' discipline, communication and implementation of the TSC Policies in the district receiving correspondence from teachers and submission of the same to TSC headquarters amongst other duties.
4. He avers that at all time, the TSC drew cheques in the name of the DEO to cash the same and pay the affected teachers to utilise the funds as per the instructions from the TSC.
5. He contends that it was the duty of the DEO to encash the said cheques and implement instructions from the TSC and that his role was only to counter sign the said cheques and the DEO would manage funds as per instructions from TSC.
6. It is the Claimant's case that he was never responsible for payment of teachers or at all and that this was the responsibility of the DEO and his duty was only to keep records.
7. He avers that he discharged his duties diligently and faithfully and lawfully at all times as required under the TSC Cap 212 Act and Public Officer Ethics Act 2003 and TSC Code of Regulations and all other enabling laws.
8. The Claimant contends that on or about 9th December 2005, the TSC through its employees or servants or agents one Mr. Gathogo and one Mr. Abukuse made a malicious criminal report at Kapsabet Police Station that he had stolen Kshs.681,651.15 being the property of the government of Kenya. The Claimant was then arrested and charged on 5/1/2006 with the offence of stealing by a person contrary to Section 280 of Penal Code and destroying evidence contrary to Section 116 of Penal Code.
9. The Claimant avers that during the pendency of the criminal trial the TSC interdicted him from duty with effect from 28th December 2005 and without any salary or benefits.
10. He was the then invited to attend some disciplinary proceedings during the pendency of the criminal trial. The Claimant avers that he was subsequently acquitted of the criminal charges on 7/8/2009.
11. He contends that he brought the same to the notice and knowledge of the TSC to reinstate him to his office and to pay him his full salary and benefits that had been withheld.

12. The Claimant contends that as he awaited the TSC response and of his request he was again served with an interdiction letter dated 14.7.2010 which he protested.
13. He was invited to a disciplinary hearing which he attended on 20th August 2010. He contends that during the disciplinary hearing, the TSC did not adduce any cogent evidence to support or prove charges against him but brought witnesses who had no knowledge of the workings of TSC at Kapsabet as regards money matters.
14. He contends that the proceedings were unfair and flawed and discriminatory against him. He avers that TSC witnesses were the same ones in criminal case No. 22 of 2006 at Kapsabet where he had been charged.
15. The Claimant was subsequently dismissed from TSC on 20th August 2010.
16. He now seeks payment of his withheld salary from 2005 to 2010, 1 months' salary in lieu of notice, an order for the TSC to pay him Kshs.70516 for 77 leave days accrued, his pension benefits of 73457.79 and compensation equivalent of 12 months salary. He seeks a declaration that his dismissal was unfair and unjustified. He prays for cost.
17. The Claimant gave oral evidence in Court and when cross examined, he stated that cashing of cheques was not part of his duties and he did not make follow up to payments of salary arrears. He denied receiving any cheques from any teachers. He also denies confessing owing teachers any money. He also denied having a register of cheques.
18. He however admitted that cheques at page 119 have his signatures at the back. He admitted he used to go to the bank on some occasion. He also admitted that the reverse of the cheques say "pay Peterson Njeru" and this is in relation to the cheque at page 122 for 11016 which is also mentioned in his interdiction letter. The cheque is in respect of one James Musonye of cheque No. 137958 page 35 and that the said James stated that he gave the cheque to the Claimant.
19. He also admits he was interdicted in respect of cheque at page 120 for 105,501.85 in respect of Bethuel Limo. The said Bethuel Limo Kiplagat (page 43) also stated he was not paid his 105,501.85 and that he had given the cheque to Mr. Njeru. He however denied encashing the cheques in question.
20. The Respondents filed their Statement of Defence and Counter Claim on 25/11/2013 through their Counsel. They aver that the Claimant was transferred to TSC Unit, Nandi District on 1.10.2004.
21. His duties included advising the District Education Officer (DEO) on teachers' personal matters. The Respondents listed a total of 20 duties that the Claimant was expected to deal with.
22. The Respondent contends that between 1-8-2005 and December 2005, they received complaints against the Claimant that he had encashed cheques meant for teachers' salaries amounting to Kshs.820,657.25 and fraudulently put 683,651.25 into his own use and failed to pay a number of teachers. Details are listed in the claim for money of different amount to 10 teachers.
23. The Respondent contends that following the above allegations they interdicted the Claimant from employment as per the TSC Code of Regulations. The Respondent contends that they conducted investigations into the embezzlement of the said funds and served Claimant with three interdiction letters.
24. The Respondent contends that the interdiction was based on the grounds provided for under the Code of Regulations for secretariat staff. That they also relied on statements of the affected teachers.
25. The Respondent avers that the Claimant wrote a Statement of Defence which was considered by the Respondent in compliance with provisions of Code of Regulations and Rules of Natural Justice during the disciplinary proceedings. A decision was then made to dismiss him from employment on 26.8.2010.
26. The Respondent avers that during the disciplinary hearing, the Claimant was given an opportunity to cross examine the witnesses at the disciplinary hearing. The Claimant was finally heard and a decision made.
27. The Respondent also aver that the Claimant was acquitted in the criminal count on a procedural technicality as the criminal case was prosecuted by police pursuant to the provision of the Penal Code and Police Act.
28. They also aver that the acquittal in criminal case could not salvage an employment contract which had insatiably broken down. The Respondents also aver that the Claimant is not entitled to prayers he has sought. They also made a counter claim for the Kshs.683,651.25 being money the Claimant illegally obtained from the teachers which Respondent state is government money.
29. The Respondent called 3 witnesses who gave evidence and reiterated the averments in the defence. RW2 a teacher by profession stated that he was expecting his salary between June and July 2005 which never came. In August 2005 he visited TSC Headquarters to inquire about the same. He was then told that his cheque had been paid by the (DHRO) District Human Resource Officer in Nandi. He was asked to go and follow up. He talked to the (DHRO) District Human Resource Officer in Nandi, the Claimant himself and the Claimant promised to pay him and even paid him in instalments of upto 50,000/=. His cheque was for Kshs.157,663.80 but was later paid the balance by TSC.
30. He stated that even the Claimant showed him the cheque when he visited him in his office in Nandi. The cheque is at page 122 of the Respondent's documents.

31. RW2 an Internal Auditor told the Court he did his audit on the issue of payments made and made his report. He avers that even the cashier identified the Claimant as the person he had given cash as he encashed the cheques from TSC.

32. I have examined all the evidence and submissions of the parties herein. The issues for determination are as follows:-

1. **Whether the Claimant was dismissed due to valid reasons.**

2. **Whether Claimant was subjected to due process.**

3. **Whether the Claimant is entitled to remedies sought.**

33. On the 1st issue, the Claimant was dismissed on 26/8/2010 and the letter indicated that the dismissal was due to the following reasons:-

“It has been alleged that you have breached Regulation 55/4 of the Code of Regulations for TSC Secretariat Staff in that:-

i) *While being the District Human Resource Officer, Nandi North between 1st August 2005 and December 2005, you encashed cheques meant for teachers’ salaries amounting to Ksh. 820,651.25, however, you fraudulently put Ksh. 683,651.25 into your own personal use since you failed to pay the following teachers as indicated below:-*

NAME & TSC/NO	CHQ NO	Voucher No.	Amount	Amount	Amount
			Kshs.	Paid	Not Paid
1. Bethuel K. Limo	137040	240116	105501.85	55,000	50,501.85
TSC/406375					
2. Elizabeth Muigei	135733	400430	14,440.30	NIL	14,440.30
TSC/381337					
3. Cheruiyot Joseph	137959	400700	4,480.30	NIL	4,480.30
TSC/212901					
4. Loyce Jebet	134428	240222	7,612.60	NIL	7,612.60
TSC/366917					
5. John Kiplagat Rop	136969	470161	187,765.35	11,000	76,765.35
6. Paul K. Keter	138492	240325	43199.45	NIL	43199.45
TSC/242645					
7. John K. Choge	133066	470050	157,663.80	50,000	107,663.80
TSC/322630					
8. James K. Musonye	137958	400699	11,061.30	NIL	11,016.30
TSC/143438					
9. Ezekiel K. Ngosolei	136215	400536	21,301.20	21,000	301.20
TSC/289801					
10. Rotich J. Felista	153754	470166	267,670	NIL	267,670.10
Total					
			820,651.25	137,000	683,651.25

ii) **You also breached Regulation 55/3 for TSC Secretariat Staff by neglecting that you failed to keep a payment register in your Office making it difficult for the Commission to establish how cashed cheques were paid to the teachers”.**

34. The Respondent indicated that the Claimant had breached its Regulations. The Respondent led evidence and called several evidence. The RW2 was one of the victims of an unpaid salary that was send to the DEO and encashed by the Claimant. RW2 told the Court that the Claimant even admitted his mistake and promised to pay the Claimant by himself and even paid him 50,000/=.

35. RW3 told the Court that as he did his audit, the bank cashier even identified the Claimant as the man who was encashing cheques at the bank.

36. The Claimant denied ever encashing cheques at the bank but when cross-examined admitted he signed the reverse of the cheques where it is indicated the payee was the Claimant.

37. At page 44 of the Respondent's documents, the Claimant had in writing acknowledged he received three cheques amounting 241,982.05 from the TSC and committed to pay the remaining amount by Friday 9th December 2015 without fail.

38. At page 45 and 46 of the Respondent's documents are also more acknowledgements from the Claimant of his non-payment of money due and owing to various teachers. At page 46 is the cheque in respect of RW2.

39. It is from these acknowledgements and evidence from Respondent that I make a finding that the Respondent had valid reasons to dismiss the Claimant from the service.

40. On issue No. 2, the Claimant admitted he was taken through the disciplinary process. The minutes of the disciplinary process have been annexed by the Respondents.

41. The Respondents called several witnesses who gave evidence and Claimant was allowed to cross examine. Despite Claimant indicating that the process was flawed, I find that the process was carried out fairly as envisaged under Section 41 of Employment Act 2007.

42. In the circumstances, I find the Claimant's dismissal fair and justified and I dismiss Claimant's case accordingly.

43. The Respondent counter claimed against the Claimant for Kshs.683,651.25. The Respondent proved that the Claimant indeed misappropriated this amount by failing to pay the teachers as expected. I therefore find for the Respondent on the counter claim as prayed for Kshs.683,651.25/=.

44. Each party will bear its own costs.

Dated and delivered in open Court this **20th day of December, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties.