



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 105 OF 2017

KENNEDY MOINDI OTWORI.....CLAIMANT

- VERSUS -

THE NATIONAL TREASURY.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th December, 2018)

JUDGMENT

The claimants filed the memorandum of claim on 23.01.2017 through R.O. Nyamweya & Company Advocate. The claimant prayed for:

- a. A declaration that the termination of his employment was unlawful, irregular, null and void.
- b. Reinstatement or re-engagement on the same as was.
- c. Payment of salary and benefits from the date of dismissal to the date of reinstatement.
- d. General damages for breach of contract.
- e. In alternative gratuity for 25 years Kshs. 1, 500,000.00 , and salary from January to December 2016 Kshs. 720, 000.00 making a sum of Kshs. 2, 220, 000.00.

The respondents did not file a defence or response to the memorandum of claim but filed on 14.03.2017 the 1st and 2nd respondents' replying affidavit to the application the claimant filed together with the memorandum of claim. Learned Litigation Counsel Leah Odhiambo for the Attorney General appeared for the respondents. At the hearing it was ordered, "**By consent the 1st and 2nd respondents' replying affidavit deemed to be the defence to the statement of claim; Article 159 apply.**" The replying affidavit was by Kenneth Odhiambo, the human resource manager for the 1st respondent.

There is no dispute that the claimant was at all material time employed as a civil servant. He was employed by the 2nd respondent effective 01.07.1991 as an Accountant II and deployed to serve with the 1st respondent. As at termination the claimant's gross monthly pay was Kshs.59, 000.00.

The Director General of Accounting reported as per the internal memo dated 06.08.2015 that the claimant while serving as the District Accountant at Mwingi Central Sub County treasury flouted government financial regulations and procedure. Investigations were carried out and an audit report was prepared and signed on 02.07.2015. It was reported that Kshs. 25, 798, 293.85 could not be accounted for including other operational weaknesses. The audit report concluded that the audit assignment revealed a number of irregularities, override of stipulated controls, breach of financial regulations and weaknesses in the internal control environment. Further, failure by the district accountant (the claimant) to exercise his advisory role contributed to the loss of public funds highlighted in the matrix availed in the report.

The claimant received the show-cause and suspension letter dated 08.01.2016. The allegations against him were as follows:

- a. The claimant made reversal of cash banking of Kshs. 155, 000.00 on 03.01.2014 and the same could not be accounted for.
- b. The claimant disregarded National Treasury circular Ref. AG.CONF.17/01 Vol. 4(47) of 08.05.2014 that instructed all District Accountants to close the old bank accounts. In disregard of that circular, it was alleged that the OPP Old Account's cash book was

operational till 01.04.2015.

c. Failure to account for cash balance of Kshs. 502, 287.95.

d. Revenue of Kshs. 1, 860, 000.00 was recorded in the cash book between 25.01.2011 and 10.01.2014 as AIA having been surrendered to OOP but the cheques were reversed between 13.05.2013 and 01.03.2015 and the amount had not been accounted for.

e. Kshs. 1, 225, 000 was withdrawn by the claimant between 03.06.2014 and 13.06.2014 and there were no corresponding entries in the cashbook; the withdrawals lacked documentary support; and therefore the usage of the money could not be ascertained.

f. Kshs. 4, 650, 430.40 being cash at hand for financial years 2013/2014 and 2014/ 2015 could not be accounted for.

g. The claimant issued 10 cheques amounting to Kshs. 1, 016, 072.80 and posted them in the cash book on 30.04.2015 but as at 22.05.2015 the cheques were still being held and not released for presentation.

h. 13 cheques payable to merchant suppliers KRA amounting to Kshs.1, 015, 901.60 were still being held at the time of the audit and there was no reason given for withholding the cheques which had since gone stale.

i. AIA collected between 31.01.2014 and 31.10.2014 amounting to Kshs. 539, 790.00 was not accounted for.

j. As at 18.05.2015 the State Department for Interior had unspent AIE balance of Kshs. 582, 442.40 but the bank balance was Kshs. 60, 644.55 so that the balance had been depleted due to unexplained cash for office use withdrawals.

k. The claimant misapplied depositors monies to unrelated expenditure amounting to Kshs. 2, 746, 745.25 so that the beneficiaries could not be paid.

l. The claimant diverted an AIE of Kshs. 150, 000.00 meant for purchase of generator and the funds utilised for other uses.

m. The claimant transferred Kshs. 235, 040.00 from the former Ministry of Trade to the Ministry of Interior on 18.06.2014 without authority amounting to unauthorised inter-vote borrowing.

n. AIA collections amounting to Kshs. 320, 450.00 being the difference between receipts in cashbook of Kshs. 363, 593.15 and cash in hand of Kshs. 43, 143.15 as at 28.02.2014 does not appear in the bank statement and therefore unaccounted for.

The show-cause and suspension letter stated that the allegations amounted to serious breach of discipline and could lead to summary dismissal. The claimant was asked to respond to the letter within 21 days and to be on suspension effective 01.01.2016 without salary but with full house allowance during the suspension.

The claimant replied to the show-cause letter by his letter dated 22.02.2016. The letter as filed for the respondent has many missing pages including the last page that was supposed to be signed. The claimant filed an unsigned copy of that letter. The incomplete letter filed for the respondent is paginated at the bottom while the one by the claimant is not paginated at all. The Court returns that the copies of the purported claimant's letter of reply to the show-cause and suspension letter are seriously incomplete or tampered with and the Court will place little weight on the letter's contents except to the extent that the letter shows an undisputed position that the claimant replied to the show-cause and suspension letter.

The claimant was subsequently dismissed from the civil service by the letter dated 09.12.2016. The dismissal was effective 02.08.2016 on account of gross misconduct and the case was referred to the Attorney General for the recovery of lost funds. The letter stated that the claimant was to indicate in 21 days how he intended to pay the government liability of Kshs. 12, 899, 146.95 which was misappropriated during his tenure as the District Accountant at Mwingi Central Sub-County Treasury. The claimant was to automatically forfeit any claims for pension and other related benefits under the Pensions Act Cap 189. The letter stated that the claimant had a right of appeal to the 2nd respondent within 6 weeks from the date of the dismissal letter. The claimant appears to have opted to file the suit instead of appealing.

The **1st issue** for determination is whether the termination of the claimant's civil service was unfair. First, the Court returns that the respondent failed to call a witness and did not therefore by way of relevant evidence establish that the reason for termination was genuine or valid as at the time of the dismissal as envisaged in section 43 and 47(5) of the Employment Act, 2007. The claimant pleaded and testified that he had a clean record of service, he had not received a warning letter and he was placed on suspension after he blew the whistle about the loss of funds and the same could not be accounted for. The claimant also pleaded and gave evidence that prior to termination, the respondent failed to give him an opportunity to be heard about the allegations. The Court returns that while the replying affidavit was by consent deemed to be the defence, the averments in the memorandum of claim remained unchallenged. But the findings are only one part of the Court's considered view of the case.

The Court's further consideration of the case is as follows.

The claimant says that he was a whistle blower who was dismissed from the service without a genuine reason and on account of the matters he had reported as the whistle blower.

The evidence is that by the letter dated 07.07.2014 the claimant required the cashier (Stephen M. Mukumbu) who had served at the district for a long time to explain and account for the unaccounted Kshs. 3, 707, 291.10. The claimant also addressed to the same cashier the letter

dated 25.09.2014 stating that the total cash that was to be in cash book was Kshs. 8, 270, 424.55 out of which Kshs. 6, 362, 393.50 was outstanding as not accounted for. The cashier appears to have failed to address the concerns and the claimant then reported the matter to the 1st respondent's Principal Secretary by the letter dated 31.03.2015. The claimant reported that Kshs. 5, 906, 091.90 had not been accounted for by the cashier in circumstances whereby the claimant was newly deployed to the station to replace and the outgoing District Accountant the claimant had replaced had been unwell and had subsequently died.

The Court has revisited the material on record. The internal memo dated 14.04.2015 filed for the claimant and signed by the Deputy Accountant General states that the claimant knew about the missing cash and how it happened more than a year prior to his reporting the loss – and the Court finds that the claimant has not disputed that crucial and material position in the matter. Further the district cashier (Stephen M. Mukumbu) had refunded some over Kshs. 2 Million. It was therefore clear that the claimant had mismanaged the sub-county treasury. In his reply to the show-cause notice as filed in Court, the claimant confirmed that he had transferred Kshs. 235, 040.00 without authority. Taking all that evidence into account, the Court returns that the claimant was not a whistle blower as he alleged but by his own evidence, he failed to discharge his duties as expected and only reported the losses belatedly when he could no longer cover up for the financial irregularities at the Sub-County treasury.

As for the procedure, it is clear that the respondent failed to accord the claimant a disciplinary hearing as was envisaged in section 41 of the Employment Act, 2007 and the applicable regulations and policies as issued by the 2nd respondent. The Court returns that the termination was unfair in that respect but the procedural irregularity would be excusable in view of the admission in the claimant's reply to the show cause letter and obvious and unexplained belated action by the claimant to draw the Principal Secretary's attention to the disheartening loss of funds at the Sub-County treasury – taking the material before the employer as at the time of dismissal, the hearing would serve but a superfluous purpose.

The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court returns that the claimant substantially contributed to the dismissal when he belatedly reported the loss to the Principal Secretary. Further, the claimant admitted that he had undertaken an inter-vote transfer of funds which was without the requisite authority. The Court considers that such are matters that render the claimant's continued civil service untenable. The Court has considered the unfair termination in view of the procedural unfairness. The Court has weighed the resultant unfairness against the aggravating factor that the claimant admitted the illegal transfer of funds and it is clear that he belatedly reported the substantial loss of public funds. By the claimant's own actions and conduct the financial irregularities and loss of funds at the Sub-County treasury persisted for a very long time without his prompt and professional intervention. The Court has considered the mitigating factor in favour of the respondent that the claimant was notified to appeal to the 2nd respondent but failed to do so. The Court returns that the claimant's contribution to his termination substantially diminished the claimant's entitlement to compensation under section 49 of the Employment Act, 2007. In view of the parties' margins of success and all circumstances of the case, each party will bear own costs of the suit especially that the respondents failed to file a statement of response as formally required by the rules of the Court.

In conclusion, judgment is hereby entered for the parties and the suit is determined as dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 14th December, 2018.

BYRAM ONGAYA

JUDGE