



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 814 OF 2013**

**BENAYO M.I. NYAMWEYA.....CLAIMANT**

**- VERSUS -**

**COUNTY SECRETARY, NAIROBI CITY COUNTY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 7<sup>th</sup> December, 2018)

**JUDGMENT**

The claimant filed the statement of claim on 29.05.2013 through Omwoyo, Momanyi Gichuki and Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from his employment was illegal, unlawful and unwarranted and an order to issue reinstating him to his office.
- b) In alternative payment of monies in paragraph 12 Kshs. 13, 363, 000.00 being service pay Kshs. 11, 088, 000.00; leave pay for balance of years to retirement Kshs. 364, 000.00; 12 months' compensation Kshs. 924, 000.00; 3 months' salary in lieu of termination notice Kshs. 924, 000.00; and house allowance Kshs. 756, 000.00.
- c) General and punitive damages.
- d) Certificate of service per section 51 of the Employment Act, 2007.
- e) Costs of the claim.

The response to the statement of claim was filed on 24.02.2017 through Kabaka & Associates Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent employed the claimant as an Assistant Community Development Officer by the letter dated 10.03.2011. The claimant served as a civil servant per applicable law and policies. The claimant was summarily dismissed from employment by the letter dated 22.04.2013 with immediate effect on account of gross misconduct for fraudulently collecting imprest amounting to Kshs. 1, 998, 000.00 payable to Rose Mwangi, Alice Kinuthia and Helekiah Ojwang on various dates between the month of December, 2012 and January 2013 and purporting to use the same for HIV sensitization and payment of allowances for officers involved in the payment of bursaries. The letter stated that the dismissal was pursuant to provisions of section 44 (40) (g) of the Employment Act, 2007 which states that it is justifiable to summarily dismiss an employee if the employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

Prior to termination the claimant had been suspended by the letter dated 28.03.2013 for collecting an imprest of Kshs. 1, 998,000.00 payable to Rose Mwangi, Alice Kinuthia and Helekiah Ojwang respectively purporting to use the same for HIV sensitisation and payment of allowances for officers involved in the payment of bursaries. He was suspended with immediate effect and given 7 days to reply to the allegations. He received the letter on 2.04.2013 and replied by his letter of the same date. The claimant stated as follows:

- a) His senior, the accountant, ordered him to collect the money on behalf of the department. He complied per the code of conduct and ethics.
- b) He had been assigned to mainstream HIV, Counselling and Testing within the Department. Out of the cash he was authorised to spent Kshs. 970,000.00 for snacks, facilitation, certificates, report writing and documentation, laptop, projector hiring, stationary and

other learning materials. The money was spent accordingly and documentation was available.

c) The payment of bursaries was made by the accountant's office headed by Helekiah Ojwang and therefore the said Helekiah Ojwang had to account for the remaining Kshs. 1, 028, 000.00. He pleaded that investigations be carried out.

The claimant received the respondent's letter dated 05.04.2013 to produce evidence that he was granted authority to collect Kshs. 1, 028, 000.00 on behalf of the Department of Education and how he surrendered the same to the departmental accountant one Hezekia Ojwang. He was further to explain if authority was granted, why the vouchers in that respect were not raised in his name. He was to reply in 7 days. He replied by his letter dated 11.04.2013. The claimant explained that the Education Director introduced him to the cashier on phone and asked the cashier to allow him to collect the money on behalf of the Education Department. The vouchers were not raised in his name because he was not to spend the money other than the amount for HIV sensitisation as explained in his letter of 02.04.2013.

In his testimony before the Court the claimant stated as follows:

- a) He was ordered by the accountant to collect the money from the cashier.
- b) He had no written order by the said accountant directing him to collect the cash.
- c) He had not filed written authority to spent Kshs. 970, 000.00 as explained in his letter of 2.04.2013.
- d) He admitted that the receipts showed that the money was paid prior to the activity and such payment was without authority.
- e) The participants were 300 but the lists of participants filed showed 57 names of participants and the claimant admitted that 243 participants had not been accounted for. He testified that participants were to be in batches of 50 but he had no evidence in that regard. Those listed had not signed to confirm their presence.

The Court has considered the claimant's evidence. It is clear that the claimant had no authority to take the cash and after he took the cash he failed to account for its application or use. The claimant admitted that the participants at the alleged sensitization workshop were to be 300 but only 57 names were exhibited and they had not signed to confirm their presence. The claimant had no evidence to show that he handed over the share of the cash he collected to the Education Department. The Court finds that the respondent had a valid reason to dismiss the claimant as at the time of termination as envisaged in section 43 of the Employment Act. The claimant was given a notice of the allegations and a chance to exculpate himself and the Court returns that the procedure for termination was fair as per section 45 of the Act. The remedies as prayed for will fail except certificate of service per section 51 of the Act.

In conclusion judgment is hereby entered for the parties for:

- a) The respondent to deliver a certificate of service by 31.12.2018 per section 51 of the Act.
- b) Each party to bear own costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 7<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**