



**REPUBLIC OF KENYA**

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

**KENYA AT NAIROBI**

**CAUSE 592 OF 2013**

**MILAN NYOTA MIREMBO.....CLAIMANT**

**VERSUS**

**NAIROBI CITY COUNCIL.....RESPONDENT**

**JUDGEMENT**

1.The claimant seeks judgement against the respondent for immediate reinstatement, damages for unlawful and or wrongful termination and a permanent injunction restraining the respondent from interfering with the claimant’s job. Vide a letter dated 22<sup>nd</sup> April, 2013 the claimant was summarily dismissed from the respondent’s service for fraudulently authorizing the preparation of imprest vouchers amounting to Kshs 1,998,000 on various dates between December, 2012 and January 2013 in the names of Rose Mwangi, Alice Kinuthia and Helekia Ojwang which funds were ultimately misappropriated.

2. The claimant disputed the allegations and in his evidence in court stated that he was employed by the respondent as Deputy Director City Education Department. According to him the impugned payments were authorized by the Deputy Clerk. They were in respect of seminars to take place in nine districts. It was his evidence that there were two accusations, one concerning HIV funds and another concerning bursaries. He further stated that the imprest warrants were to be paid by the Treasury Department. He went to pick the cheque but was told to wait as all cash payments had been stopped. He later learnt a Mr Nyamweya had collected the cash. Nyamweya was not an imprest holder. He denied ever authorizing the cash office to pay Nyamweya. In cross-examination he stated that he was aware Nyamweya collected the cash fraudulently. He also stated that the respondent gave him notice to show cause.

3. The respondent called a total of six witnesses Mr Tom Nyatika who testified first informed the court that imprests are raised for activities by Departments. They are raised in the names of the accountant and administrative officers. The imprests in issue were in the names of Rose Mwangi and Alice Kinuthia. They were not authorized officers. Investigation further confirmed they were not organizing any event in the department. It was therefore irregular to use their names. It was his evidence that the claimant was the head of department and had authority to authorize imprest. According to him the claimant went against regulations. Mr Nyatike further informed the court that he sat in the HR Advisory Committee which deliberates staff issues and advises the County.

4. According to him the claimant was issued with a show cause letter and given an opportunity to respond. The claimant admitted that he authorized the imprest for Rose Mwangi and Alice Kinuthia. The two were not even aware the imprests were raised in their names. The HOD had the responsibility to ensure money was applied for the correct purpose. Further, immediately it was realized fraud was in the making, the HOD was supposed to report to the investigation department but in this case the claimant did

not immediately report. In cross-examination he stated that the imprest holder was accountable but Rose and Alice could not account for the money they did not collect.

5. The respondent's second witness Mr Helekia Ojwang stated that he was an imprest holder whenever appointed by the Director. The Kshs 1,028,000 was to be paid to him to give those who were handling bursary. According to him the director could authorize another person to collect the imprest.

6. The respondent's 3<sup>rd</sup> witness, Mr Maurice Okere informed the court that the claimant's case was brought before the HR Advisory Committee of which he was a member. On 28<sup>th</sup> March, 2013 the claimant was issued with a show cause letter. He replied on 3<sup>rd</sup> April, 2013. The claimant then appeared before investigation department on 22<sup>nd</sup> April, 2014. He recorded a statement which was considered by the HR Committee.

7. According to him evidence that payment was made to Benayo Nyamweya was tabled before the HR Committee it was the committee's view that the HOD did not follow up on the activities which were intended to be financed. It was further his evidence that the claimant discovered the fraud on 11<sup>th</sup> March, 2013 but did not report immediately. Instead he gave Nyamweya three days to pay the money which was an anomaly. He informed the investigation department on 15<sup>th</sup> March, 2013 which was eight days after the discovery of the fraud.

8. In cross-examination he stated that cheques must go to auditing and that there was a memo stopping cash payments. He further stated that the claimant ordered the cashier to pay Benayo. The respondent's further witness Alice Kinuthia informed the court that she could not raise an imprest and further that she did not raise the imprest for Kshs 485,000 and did not authorize anyone to do so.

9. The 5<sup>th</sup> witness Mr Lawrence Ogindo informed the court that he was accused of fraudulently making imprest payment which he denied. According to him the procedure was that the HOD would seek approval of the Town Clerk to pay imprest. After the approval the accountant would raise the imprest warrant and forward to HOD for authorization after which a cheque would be raised. Once a cheque is placed before him, he would seek authority from CFO to avail the funds. He would then seek authority from the user department on who to pay. The authority is sought from HOD who in this case was the claimant. It was his evidence that he paid the money in question to Benayo Nyamweya because the claimant brought him personally and asked him to pay Nyamweya.

10. The respondent's last witness Mr Ruto was an investigating CID officer who confirmed most of the facts testified to by the four previous witnesses.

11. In termination of employment claims, an employer has the onus to prove and or justify the reason for termination or dismissal from employment. Proof as is in other civil claims is on a balance of probabilities. Further an employer must show in dismissing or terminating the employee's services a fair procedure was followed. The fairness of procedure does not demand that the process follows a particular predetermined format. What is critical is that such employee is given a fair and reasonable opportunity to defend self from the accusations. If all these conditions are reasonably met, the court will be reluctant to interfere.

12. In the matter before me, the claimant stated in her evidence before the court that he was employed by the respondent as a Deputy Director City Education Department. His dismissal was as a result of the accusation that he fraudulently authorized preparation of imprest vouchers amounting to Kshs 1,998,000/= on various dates between December, 2012 and January, 2013 in names of Rose Mwangi, Alice Kinuthia and Helekia Ojwang which funds were ultimately misappropriated. The claimant denied this accusation but did not refute the fact that funds to that extent were collected by one Mr Benayo Nyamweya on behalf of the designated imprest holders. The claimant testified that his officers wrote a letter (annexture 8 in his memorandum of claim) inviting staff to a sensitization workshop. Annexture 9 was a letter by the claimant to the Town Clerk seeking authority to incur expenditure on a sensitization on HIV/AIDS and substance abuse workshop.

13. The claimant as the Director of Education was the head of the department concerned. The request for the authority to incur expenditure was approved and an imprest warrant dated 8<sup>th</sup> November, 2012 prepared and authorized by the claimant as the Head of Department alongside others. The imprest warrants were in the names of Kinuthia Alice Huruine and Mwangi Rose Wambui. Although Rose was not called to give evidence, Alice was called and informed the court that she could not raise an imprest and further that she did not raise the imprest for Kshs 485,000/= and further that she did not authorize anyone to do so.

14. Mr Nyatike for the respondent informed the court that imprest were raised for activities by departments in the names of accountants and administrative officers. In this particular case, Rose and Alice were not authorized officers. Upon the loss of the money, the claimant informed the court that he wrote to Mr Nyamweya who apparently picked the funds on behalf of actual imprest holders to make available Kshs 164,500/= by 15<sup>th</sup> March, 2013 to enable him pay the staff. The claimant as the head of department was put in a position of responsibility. The authority to approve imprest requests placed on him duty of care on behalf of the respondents to verify any imprest request before approval.

15. The claimant in his evidence in court did not provide any evidence to show that he endeavoured to confirm with the purported recipients of the imprest whether indeed it was them who raised the request. The collection by Mr Nyamweya of the imprest though alleged was with authority of the claimant has not been proved, however, failure to verify if indeed Rose and Alice were the ones who raised the imprest request was negligence for which the respondent was justified to take disciplinary action against the claimant.

16. Considering the procedure followed in dismissing the claimant, he stated that he was issued with a notice to show cause and he responded to the same. The court is therefore satisfied that he was given a fair opportunity to respond to the accusations he was facing prior to dismissal.

17. The court therefore finds no merit in the claim and dismisses the same with costs.

18 It is so ordered.

Dated at Nairobi this 17<sup>th</sup> day of March, 2017

**Abuodha J. N.**

**Judge**

Delivered this 17<sup>th</sup> of March, 2017

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**