



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.1 OF 2015**

***(Before D. K. N. Marete)***

**KENYA UNION OF COMMERCIAL,**

**FOOD AND ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**WATER RESOURCE MANAGEMENT AUTHORITY.....RESPONDENT**

**AND**

**ATTORNEY GENERAL.....INTERESTED PARTY**

**JUDGEMENT**

This matter was originated by a Memorandum of Claim dated 11th November, 2014. The issue in dispute is therein cited as;

***“Unfair/unlawful dismissal of Irene Chepkemoi Chesiror.”***

The respondent vide a Respondent's Statement of Response dated 22nd January, 2015 denies the claim and prays that the same be dismissed with costs.

The 3rd respondent by a Statement of Response dated 16th November, 2015 and filed on 17th instant contends and submits that there is no cause of action against herself by the claimant but nevertheless denies the claim and puts the claimant in strict proof thereof. She prays that the suit against him be dismissed in entirety.

The claimant's case is that the grievant, one, Irene Chepkemoi Chesiror was deployed to the respondents institution after she attended an interview on 6th July, 2006. On 12th March, 2007 she was issued with a letter of appointment to the position of Accounts and Administrative Assistant with effect from 1st July, 2007.

It is the claimant's further case that on 18th August, 2008, the respondent's sub-regional manager without pursuing due process withdrew her duties and assigned these to other officers. On 9th October, 2008 the sub-regional manager did a letter of the same date accusing the grievant of late banking, all these before

first affording the grievant an opportunity to explain her side of the story. The claimant deems and contends that this was out of procedure.

The claimant further brings out his case elaborately as follows;

2.03 On 21<sup>st</sup> October, 2008, the Regional Manager before verifying the facts or affording the grievant the opportunity to be heard wrote a letter to the grievant warning her against the late banking. This was also contrary to the disciplinary procedures and practice. App. 7

2.04 On 5<sup>th</sup> December, 2008 the sub regional Manager made a secret report to the Regional Manager on payment of pending bills before first informing and/or notifying the grievant. App. 8

2.05 On 8<sup>th</sup> December, 2008 the grievant wrote a report to the Regional Manager on allegations leveled by the sub Regional Manager contained in his report dated 5<sup>th</sup> December, 2008 marked as Exhibit 6 above App.9

2.06 On 23<sup>rd</sup> December, 2008 the grievant made report on late banking to the Regional Manager the same was in response to the sub- Regional Manager report on late banking. App. 10 (a) & 10 (b)

2.07 On 6<sup>th</sup> January, 2009 the Regional Manager wrote a letter to the sub-Regional Manager inviting him together with the grievant to attend a meeting which was to discuss administrative issues. Unfortunately the grievant received the letter on the same date of the meeting 7<sup>th</sup> January, 2009 at 11.00am. The sub-Regional Manager attended but they did not. App. 11.

2.08 On 9<sup>th</sup> January, 2009 the sub Regional Manager wrote a letter to the grievant accusing her of boycotting the meeting which was scheduled for 7<sup>th</sup> January, 2009 to take place at regional office. App.12

2.09 On 10<sup>th</sup> January, 2009 the grievant made a response against the allegations boycotting the meeting. App. 13

2.10 On 12<sup>th</sup> January, 2009 the sub Regional Manager wrote a letter to the grievant demanding a refund of Kshs. 39,397.00 which she accused her of obtaining fraudulently.

2.11 On 17<sup>th</sup> January, 2009 the sub- Regional Manager issued an internal Memo to all staff on the issue of signing for money before payment. App. 15

2.12 On 15<sup>th</sup> January, 2009 the grievant made a response to sub- Regional Manager allegations contained in the internal memo dated 12<sup>th</sup> January, 2009 on refund of Kshs. 39,397.00 App 16

2.13 On 16<sup>th</sup> January, 2009 the sub- Regional Manager wrote a letter to Jumbo Petrol Station informing them that the grievant had ceased to transact any business with them on behalf of the institution App. 17

2.14 On 19<sup>th</sup> January, 2009 the grievant made a response to sub-regional Manager's letter dated 12<sup>th</sup> January, 2009 on signing of money before payment. App. 18

2.15 On 19<sup>th</sup> January, 2009 the Regional Manager wrote a letter to the sub Regional Manager informing him of the withdrawal of all account services from the sub-region transferring the same to the Regional office. App.19

2.16 On 19<sup>th</sup> January, 2009 the grievant wrote a protest letter to the sub-regional Manager on the manner she was searched by two male security guards on 16<sup>th</sup> January, 2009. App. 20

2.17 On 17<sup>th</sup> February, 2009 the grievant wrote a letter to the Regional Manager on unprocedural procurement practice at the sub-regional office on Jumbo filing station. App.21.

2.18 On 19<sup>th</sup> February, 2009 the grievant wrote a letter to the Respondent C.E.O asking for appointment letter App.22.

2.19 On 25<sup>th</sup> February, 2009 the grievant wrote a letter to the Respondent C.E.O on her intrigues and witch-hunting. App.23a-23(e).

2.20 On 1<sup>st</sup> July, 2009 the grievant responded to the show cause and transfer letter. App. 24.

2.21 On 9<sup>th</sup> July, 2009 the Respondent C.E.O suspended the grievant from services on allegation of dissertation. App.25.

2.23 On 16<sup>th</sup> July, 2014 the Respondent wrote to the conciliator alleging that they followed the due process in dismissing the grievant summarily from her services. App.26.

2.24 On 1<sup>st</sup> August, 2014 the Respondent wrote to the Conciliator in response to the letter of 18<sup>th</sup> July, 2014 calling for a conciliatory meeting where the Respondent out rightly declared their unwillingness to participate in the exercise. App. 27.

2.25 On 12<sup>th</sup> August, 2014 the Conciliator issued a Certificate as required by law. App. 28.

2.26 On 21<sup>st</sup> August, 2014 the Respondent issued a notice of intention to use the office of the Attorney General. App. 29.

The claimant contends and submits that the moment the respondent sub-regional Manager redistributed the grievants duties to other officers without notifying the grievant or even giving reasons for so doing, she fell into the trap of abuse of administrative code of ethics in Kenya and also lack of good faith. She further submits that once the matter got confused and a letter was done to the Regional Office, the issue could not be pursued conclusively and hence the need to move beyond this office.

She contends that she was accused discriminatively and secretly and whenever she responded to any allegation or accusation could not be pursued further. It is her further case that failure to address the grievant's concerns but instead issue a show cause letter and also convening a meeting and not notifying the grievant in good time for attendance was unfair. It is the claimant's case that the sub-regional manager either insulated himself from or was totally ignorant of administrative process bearing in mind that the respondent is a public office

It is the claimant's further case that it was unprocedural to suspend the grievant before she was heard and her issues astutely interrogated before suspension. This offended the law. Again, the suspension letter did not give details of the offences committed but casually made allegations. It is her other case that failure to pay the grievant's house and medical allowances and also convene a meeting to hear the grievant's issue was an affront to the code of regulations and the Employment Act, 2007 and a departure from traditional practice, law and fair practice and therefore unlawful.

It is also the claimant's position that to date, she has not been issued with a letter of dismissal despite the respondent's allegations that she was dismissed on 28th February, 2012 as is indicated in the letter dated 13th February, 2012.

The claimant's other averment is that the letter dated 13th March, 2012 prompted to report a dispute to the conciliation and calls for the letter of dismissal. The claimant further submits that the conduct of the 1st respondent is an affront to Section 41 of the Employment Act, 2007 and also Articles 41 and 50 of the Constitution of Kenya, 2010. This is also disregards the provisions of Article 28 by demeaning the dignity of the grievant. It is also a contradiction to the right of fair hearing.

She prays for;

1. *It is Claimant's humble prayers to the Hon. Court that the 1<sup>st</sup> Respondent's action to dismiss the grievant be declared unprocedural, unfair and unlawful.*
2. *That the Hon. Court be pleased to issue an order reinstating the grievant unconditionally and all accrued benefit paid within 30 days from the date of the judgment.*
3. *The claimant also pray that the Respondent be ordered to pay the Claimant and the grievant costs of attending conciliation meeting.*
4. *Costs of suit to Claimant.*

In the alternative to the prayers above the claimant prays as follows;

*The 1<sup>st</sup> Respondent to pay the grievant full salary when out of Employment upto the time of delivery of award/judgment.*

*The 1<sup>st</sup> Respondent to pay the grievant the following*

- |   |                                 |
|---|---------------------------------|
| a. <i>Notice of one month</i>   | <i>Kshs. 37,985.00</i>          |
| b. <i>Accrued leave days</i>  | <i>Kshs. 75,970.00</i>          |
| c. <i>Full salary for the duration out on suspension</i>                        |                                 |
| <i>(41 months x 37,985.00)</i>  | <i>Kshs.1,556,278.00</i>        |
| d. <i>Compensation for unlawful loss of employment</i>                          |                                 |
| <i>(1 month salary x 20 months)</i>   | <i>Kshs.759,700.00</i>          |
| <b><i>Total</i></b>   | <b><i>Kshs.2,429,933.00</i></b> |
| e. <i>Cost of the suit to Claimant</i>  |                                 |
| f. <i>Any other relief the Hon. Court deem fit to address cause of justice.</i> |                                 |
| g. <i>Certificate of Service.</i>   |                                 |

The respondent in defence admits the office of the grievant but adds that her duties included preparation of payment vouches, revenue collection from customers and banking. It is the further defence case that the revenue collected was to be banked on the same day in the event of weekends and public holidays, within 48 hours.

The grievant, being well aware of the banking procedure delayed bankings in July and August, 2008 prompting the Regional Manager to do a warning letter to the grievant on the subject. It is the respondent's further case that the grievant misappropriated funds in the following manner;

5. *The Respondent further states that the grievant on two separate occasions misappropriated funds. One time she requested the staff; a Mr. Kones, Mr. Mathenge and Mr. Nyamato to sign for money payable to them confirming their receipt of the same funds before actually receiving the said pay, an act which is contrary to the practices of the organization.*
6. *That at a separate interval, the 'grievant' in the financial year (2007/2008) made payments without*

proper authorization, leading to a loss of Kshs.39,397/= by the organization.

7. That the grievant in an attempt to cover up for the fraudulent obtaining of money and or improper authorization of the same, went ahead and misled the Respondent's sub-regional manager to believe that she had been instructed by a Mr. Kibet; the Headquarters Accountant to only reflect the pending bills in the returns and retain the vouchers at the sub regional office to await funds for payment and not include it in the report going to the regional office. It later turned out that some of the pending bills had already been paid.

*Annexed hereto and marked as WRMA-5 is a copy of a letter from the sub-regional manager dated 5<sup>th</sup> December, 2008.*

It is the respondent's further case that the grievant was invited to a meeting at his regional office in Kisumu. The grievant was to be accompanied by the sub-regional Manager so as to discuss emerging administrative issues with the regional manager but she failed to attend despite notice and communication. On 9th January, 2009, the sub-regional Manager wrote a letter to the grievant requesting an explanation for the boycott of the meeting but she only wrote back to dispute the mode of communication of the particulars of the meeting and denied knowledge of the meeting.

The respondent in further presentation of her case brings out a situation of conflict, massive controversy, confusion and misunderstanding in the relationship between the grievant and the respondent as hereunder;

12. That vide a letter dated 12<sup>th</sup> January, 2009 the grievant was given a chance to pay back the money that she had unlawfully paid to herself and or misappropriated as was the organization practice regarding misappropriated funds, but she failed to do so.

***Annexed hereto and marked as WRMA-9 is a copy of the letter from the sub-regional manager dated 12<sup>th</sup> January, 2009.***

13. That the grievant vide her letter dated 15<sup>th</sup> January, 2009 responded to the letter asking her to pay the Kshs. 39,397 where she denied that there was no proof and as such refused to pay the said amount.

***Annexed hereto and marked as WRMA-10 is a copy of the said letter.***

14. That by a letter dated 25<sup>th</sup> February, 2009 the grievant wrote a complaint letter to the Respondent alleging witch-hunt by the sub-regional manager.

***Annexed hereto and marked as WRMA-11 is a copy of the said letter.***

15. That subsequently, an investigation on the pending bills causing the loss of Kshs. 39,397 to the organization was then conducted on the 12<sup>th</sup> March, 2009 by the respondent's internal auditor; a Mr. Albert A. Kamaliki the Respondent's Human Resource Officer; a Ms Janipher Agumba and the Respondent's Internal Audit Assistant; Mr. Geoffrey T. Imbayi which found the grievant culpable of misappropriation.

***Annexed hereto and marked as WRMA-12 is a copy of the complied report.***

16. That by a letter dated 26<sup>th</sup> June, 2009 the grievant was asked to show cause why she should be considered for further appointment by the Respondent. The letter also informed her that she has been transferred to the National Office and should report not later than 6<sup>th</sup> July, 2009.

***Annexed hereto and marked as WRMA-13 is a copy of the said letter.***

17. That the grievant vide her letter dated 1<sup>st</sup> July, 2009 responded to the show cause letter dated 26<sup>th</sup> June, 2009.

***Annexed hereto and marked as WRMA-13 is a copy of the said letter.***

*18. That the grievant despite being aware that she had been transferred to work in the National Office effective 6<sup>th</sup> July, 2009 blatantly refused and or neglected and or failed to report at her new office as was required of her and was consequently suspended.*

***Annexed hereto and marked as WRMA-14 is a copy of the said suspension letter.***

*19. That a further report was conducted by the Respondent's CEO; Rosemary Lekesi and the Respondent's Internal Auditor; Mr. Albert A. Kamaliki to follow up on the grievant's disciplinary case.*

***Annexed hereto and marked as WRMA-15 is a copy of the said report.***

*20. That the grievant blatantly refused to report to the new place of work at the National office without giving any reasons whatsoever. On 13<sup>th</sup> January, 2010 the grievant was asked to show-cause why she should not be summarily dismissed and was invited to a disciplinary hearing.*

***Annexed hereto and marked as WRMA-16 is a copy of the said suspension letter.***

The respondent in the penultimate raises a counter-claim from the claimant as follows;

- 1. The 'grievant/Respondent made payments in the financial year (2007/2008) without proper authorization and or misappropriated funds, leading to a loss of Kshs. 39,397/= to the respondent.*
- 2. Despite several demands to the grievant/Respond to pay the Kshs.39,397/= that she misappropriated, she has persistently refused/failed and or neglected to do so.*

She also prays for;

- a. Kshs.39,397/=*
- b. Costs of the suit*
- c. Interest of (a) and (b) at court rates from the date of filing of this claim till payment in full.*

This matter was hotly contested. It came to court variously until the 17th November, 2015 when it opened for hearing.

The issues for determination in the circumstances of this case therefore are;

- 1. Was the termination of the employment of the claimant by the respondent wrongful, unfair and unlawful?*
- 2. Is the claimant entitled to the relief sought?*
- 3. Is the respondent entitled to the counter-claim?*
- 4. Who bears the costs of the claim?*

The 1st issue for determination is whether the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful. Here, the parties come out with very contrasting positions in support of their respective positions. These obviously are that this was unlawful for the claimant whereas the respondent denies illegality of the termination.

At the hearing, the claimant called the grievant, CW1- Irene Chepkemai Melly, nee Chesiror, who

testified in reiteration of the claimant's case. The respondent brought in six (6) witnesses who also testified in support of her case.

In her written submissions the claimant in further support of her case, submits a case of unprocedural termination of the grievant's employment by the respondent's lack of observation of the Section 41 of the Employment Act, 2007 as follows;

*“ .....Subject to Section 42(1), an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee, understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor Union representative of his choice present during the explanation.*

*(2) Notwithstanding any other provision of this part, an employer shall, before termination the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”*

It is the claimant's submissions that the grievant was never afforded a right to hearing and that no disciplinary proceedings were held to look into the issues of indiscipline. The claimant further submits that the grievant was not issued with a letter of termination and only came to know of the termination through the respondent's pleadings, to wit, exhibit 18 of the defence. She further denies not responding to the show cause letter or failing to attend a disciplinary meeting as invited.

The claimant further submits that there was no procedural fairness in the conduct of the grievant's disciplinary proceedings and termination adding that this was contrary to Section 10.17.1 of the respondent's Human Resource Policy Manual as follows;

*“Counseling shall be the first stage of the disciplinary process. Where circumstances indicate that there is no need to resort to formal procedures, the supervisor should discuss the matter with the employee, if the matter is serious, discussions should be adjourned and disciplinary procedure taken against the employee.”*

The agents of the respondent did not pursue this.

The claimant again, in both the testimony on the grievant and written submissions contends the respondent had no valid reason for termination of the grievant's employment as the grievant on three occasions reported to the respondent's head office but was requested to fetch and furnish a letter of release from the sub-regional office on reporting. This is not contradicted by the evidence of the respondent's witnesses and neither is their evidence of an issue of a release letter. This exonerates the grievant from blame in the circumstances.

The respondent in her written submissions also reiterate their case as set out in the pleadings and evidence by the witnesses. It is her submission that Section 47 of the Employment Act, 2007 places the burden to proof unlawful termination on the claimant whereas a justification of termination lies on the respondent. This is as follows;

*“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for termination of employment or dismissal shall rest on the employer.”*

The respondent further submits that the grievant's letter of termination dated 12th February, 2010 gives the following reasons for termination;

1. *Absconding duty with effect from July, 6<sup>th</sup> 2009 following her transfer to the National office;*

2. *Carelessly and improperly performing her work by failing to account for Kshs,39,397; and*
3. *Knowingly failing and refusing to obey a lawful and proper command issued by a person placed in authority over her, which amounts to insubordination.*

The respondent again submits that the grievant on 1st February, 2010 responded to the show cause letter as follows;

- i. *On the accusation of abscondment of duty, the grievant responded that she had been barred from entering the Kericho office nor to sign the daily attendance register. She also alleged that the locks to the accounts office had been changed hence she could not access the office. Here, she did not allege to have reported to the national office, knowing very well that she had been transferred there.*
- ii. *On the question of insubordination, the grievant responded that the grounds for transferring her were not genuine. She also stated that the respondent should have resolved the issues she had hitherto raised, before transferring her.*
- iii. *Finally on the charge of failure to account for Kshs. 39,397, she stated that the said sum comprised payments of pending bills done without authority and not petty cash. Here, the grievant admitted to have made payment of undeclared pending bills without authorization.*

The respondent therefore submits a case of lawful termination of employment and further relies on Section R, regulation 26 of the Public Service Code of Regulations which provides that an employee in the public service can be dismissed on account of gross misconduct, desertion and misappropriation of public funds. This couples with Section 44 (4) of the Employment Act, 2007 as follows;

- a. *without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*
- b. ....;
- c. *an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
- d. ....;
- e. *an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*
- f. ....;
- g. *an 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.*

To me, a determination of this issue is mainly anchored on four aspects of the case for the parties.

- i. The meeting at the Regional Manager office at Kisumu on 7th January, 2009.
- ii. The conduct of the grievant on transfer to the respondent's national office- Nairobi.
- iii. Show cause letter and the response thereto.

iv. Letter of termination.

The claimant denies culpability on the part of the grievant in all these issues. The respondent on the other hand submits that the testimonies of her six witnesses came out clearly in a demonstration that the grievant was in breach of the respondent's code of regulations on the following basis;

- i. *The grievant was summoned by her superior to the regional offices at Kisumu whereat the regional manager wanted to mediate between the grievant and her sub-regional managers. She did not attend the meeting. She did not even give any explanations for her failure so to attend. Three witnesses testified to her knowledge of the meeting prior to the material day. Sammy Mathenge testified that the grievant was informed of the meeting in his presence. In fact, he testified that a fax sent by the regional manager was read and a copy given to the grievant in his presence. Jones Nyamato stated that the grievant was reminded of the meeting in his presence. He further stated that on the material date, he went with Bilancio Maturue to the grievant's home to pick her. The testimonies of Jones Nyamato and Sammy Mathenge were corroborated by Bilancio Maturue. Her failure to attend the said meeting amounts to insubordination.*
- ii. *Secondly, having internally investigated the several claims against the grievant, the respondent transferred her to the national office and directed her to report to the Human resource office for redeployment. The grievant did not honour this transfer. At the trial, the grievant stated that she went to Nairobi to report to the Human Resource Office for deployment as had been directed but was asked to go back for a release letter from the branch. We submit that this was not only an afterthought but was also a plain lie. In the grievant's own letter dated 1<sup>st</sup> February, 2010 in reply to the Respondent's notice of show cause, the grievant stated that she did not honor the transfer since she believed that the respondent should have resolved her complaints instead of transferring her. At this stage, she did not say that she had gone to Nairobi but was returned. No evidence was given to show that the grievant had even requested for the alleged release letter from the regional manager. This conduct amounts to insubordination. The grievant therefore absconded duty by failing to honor the transfer and the respondent was entitled under the law to dismiss her.*
- iii. *My lord, the grievant admitted to have paid Kshs. 39,397 for undeclared pending bills without authority. Even though she denied misappropriation of the same, this within the respondent's code of regulations amounts to gross misconduct and warrants summary dismissal.*

I agree. There is overwhelming evidence by the respondent that the grievant was involved in the entire process of determination and resolution of the issues in dispute at the work place but neglected and or refused to heed. Hers is a case of evasion and hide and seek as evidenced by her response and testimony on the Kisumu meeting episode and reporting on transfer. This is unfortunate. Employees should under all circumstances never give an opportunity to their employers to fault their conduct or performance. A situation of being cornered or caught hands down is not good for any worker. This would be extremely dangerous and render them vulnerable to the vulgarlies of discipline and termination.

I also agree with the submission of the respondent that the grievant was the author of her own misfortune. She cannot be helped. I therefore find a case of lawful termination of the employment of the grievant and hold as such.

The 3rd issue for determination is whether the respondent is entitled to the counter-claim. We move here because the issue as to whether the claimant is entitled to the relief sought dissipates with the adverse finding on issue No.1 above.

Is the respondent entitled to the counter-claim? The respondent submits a case of the grievant admitting to have paid an amount of Kshs. 39,397.00/- for undeclared pending bills without authority. On the same note she admitted being aware of the financial procedures of the respondent that required her to avail express authority before making the payment. The respondent therefore urges for judgment in favour of the counter-claim.

The grievant throughout the proceedings does not unequivocally admit liability for the amount of the counter-claim. Again, we are on the face of a termination of the employment of the grievant. Whichever direction we may wish to look, to me, this termination would be adequate punishment to the grievant. Making an order for the counter-claim in the circumstances would be counter-productive and against the tenets of justice and good labour relations practice. I therefore dismiss the counter-claim as set out.

In the penultimate, I am inclined to dismiss the claim with an order that each party bears their own costs of the claim. This settles all the issues in dispute.

Delivered, dated and signed this 24th day of February 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Dickens Atela for the claimant union.
2. Mr. Juma instructed by Rachier & Amollo Advocates for the respondent.
3. Janet Langat for the Interested Party.