

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 63 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JONES OKERO MOMANYI.....CLAIMANT

-Versus-

PUBLIC SERVICE COMMISSION.....RESPONDENT

J U D G E M E N T

The Claimant filed the claim herein alleging unfair interdiction and dismissal by the Respondent. The Respondent filed a defence denying that the interdiction and dismissal were unfair. At the hearing the Claimant testified on his behalf and the Respondent called one witness. The parties thereafter filed and exchanged written submissions.

Facts of the Case

The Claimant was employed by the Respondent as a clerical officer on 1st April, 1979. He was promoted through the ranks and at the time of dismissal on 23rd May, 2013 he was an Accounts Assistant II deployed as District Cashier, Borabu District.

On 11th January 2011 the Respondent wrote to the Claimant accusing him of encashment of cheques drawn in favour of commissioner of VAT and converting the cash to personal/office use without authority. The letter required him to give an explanation before disciplinary action is taken against him.

On 20th May, 2011 the Claimant was issued a letter of interdiction on grounds of financial mismanagement or misappropriation of cash in the District Treasury during the financial years 2008/2009 and 2009/2010. The particulars of the financial mismanagement/misappropriation were stated as follows:-

- Cash procurements and items not taken on charge - Kshs.729,830
- Unaccounted for fuel - Kshs.60,760
- Failure to maintain an inventory register - Kshs.648,640
- Issuance of IOU's and borrowings between accounts (votes)
- A poor working relationship between you, the District Accountant, and the District Internal Auditor
- Encashment of VAT cheques totalling Kshs.428,388.70 as shown below:-

The Claimant responded to the 1st letter on 31st January, 2011 and the interdiction letter on 26th June, 2011. He explained that he encashed the cheques on instructions of the Roads Engineer who was the AIE holder and the District Accountant whose instructions he could not disobey. On the cash procurement, Accounting for fuel, maintaining an inventory register, issuance of IOUs and borrowing, the claimant explained that these were duties of the District Accountant who allocated him duties. He stated that it was not his responsibility to perform those duties.

Cheque No.	Department	Amount Encashed (Kshs)
005	OOP	137,818.00
016	ROADS	104,689.70
017	ROADS	19,629.00
026	ROADS	29,700.00
027	ROADS	136,552.00
	TOTAL	428,388.70

On poor relationship with District Internal Auditor (1) (A) the Claimant explained that their relationship became strained when he asked the District Internal Accountant to account for Shs.10,000 that he had sent to the District Internal Accountant at his request while he (District Internal Accountant) was in Kisumu.

The Claimant sent a further response by an undated letter explaining that the District Commissioner had refunded part of the encashed VAT cheques in the sum of Shs.137,818 by cheque dated 14th November 2011 and an agreement had been reached between the District Commissioner, the District Accountant and District Roads Engineer who were the signatories to the account on how to pay the balance.

The Claimant's case was referred to the Ministerial Human Resource Management Advising Committee of the Ministry of Finance at its meeting held on 31st October, 2012. The committee made the following recommendations:-

Mr. Jones O. Momanyi

- He was the district Cashier at the Borabu District Treasury
- The officer encashed VAT cheques, knowing very well that this was revenue which ought to have been paid to KRA totalling to Kshs.428,389.00

These were VAT/Income Tax charged for various goods and services supplied to various Departments during the financial year 2008/2009.

- A team from this Department was sent in 2011 to Borabu to verify some of these issues confirmed the above as true, the DC issued a refund cheque no.000537 for Kshs.137,818/- dated 16/11/2011 which has been surrendered to Commissioner of VAT
- Encashed cheque no.119 of 14/07/2010 for Kshs.25,590/- being part of Kshs.470,702/- alleged to have been misappropriated from Ministry of Health
- The officer in his letter dated 3/2/2012 admits that he was under instructions from the District Accountant to encash VAT cheque being aware that such cheques were not for office use and therefore not to be encashed
- He also acknowledges that the DC has since paid Kshs.137,818/- being one of the VAT cheques and adds to say that the remaining cheques were to be refunded by the District Accountant and District Roads Engineer

The Head of Department reiterates that the earlier comments and recommendations on the case still stand.

Recommendation

The Committee deliberated and recommended that both Mr. Cornel O. Onyango and Mr. Jones O. Momanyi be dismissed from the Service with effect from 1st May, 2011.

The Claimant was issued with a letter of dismissal from service on 23rd May, 2013. The grounds of dismissal in the letter are that:-

- (i) You made cash procurement of items not taken on charge amounting to Kshs.729,830;
- (ii) You did not account for fuel withdrawal worth Kshs.60,760;
- (iii) You failed to maintain an inventory to register amounting to Kshs.648,640;
- (iv) You issued IOU's and borrowed between accounts (Votes) and
- (v) Encashed VAT Cheques totalling to Kshs.428,388.70.

The letter further states that upon dismissal the Claimant forfeits any claim towards pension and other related benefits in accordance with the Pensions Act Cap 169 of the Laws of Kenya. The letter informed him of his right to apply for review of the decision.

The Claimant appealed against the dismissal but the appeal was dismissed. He further applied for review of the decision which was also rejected.

The Claimant thereafter filed this suit.

In the statement of claim the claimant alleges that the disciplinary process and consequent dismissal was illegal, unprocedural and unlawful as it was contrary to regulations G23, G24, G32 and G33 of Public Service Commission Regulations and Articles 47 and 50 of the Constitution.

The Claimant seeks the following orders:-

- a) A declaration that the Claimant's interdiction and consequent dismissal from the respondent's service was un-procedural, illegal and null and void.
- b) An order that the claimant be reinstated to the service of the respondent and be thereafter retired and be paid his benefits and salaries for the period the claimant was under interdiction and dismissal and benefits due to the claimant upon retirement.
- c) An order for payment of general damages.
- d) Costs of the Claim.
- e) Interest at court rates.

The Respondent's case is that it complied with due procedure under the regulations governing discipline in the Civil Service as contained in the Service Commission Act Cap 185 and the Public Officer Ethics Act, 2003, that the Claimant admitted encashing VAT cheques through the authority of the District Accountant while aware that compliance with such instructions was illegal and detrimental to his duties.

Determination

The issues for determination are whether the dismissal was fair and whether the Claimant is entitled to the prayers sought.

Section 41 of the Employment Act provides for procedural fairness while section 43 provides for validity of reasons for termination. The two sections provide as follows;

41. Notification and hearing before termination on grounds of misconduct

(1) 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 this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear 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.

43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45(1) and (2) prohibit unfair termination. It provides as follows:-

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

The Respondent has in my opinion proved validity of reason for termination. The Claimant was aware of financial regulations and specifically, that he could not encash VAT cheques taking into account the nature of his job and his long experience of 32 years. He was aiding in the misappropriation of VAT cash. His defence that he was acting on orders of the District Accountant and the District Roads Engineer who were both signatories and AIE holders is not valid. The law only requires an employee to obey lawful orders.

The other allegations have however not proved against the Claimant. There is no evidence that disciplinary action was taken against the District Accountant and the District Roads Engineer who instructed the Claimant to encash the VAT cheques and were beneficiaries of the said cheques.

On the procedure leading to the dismissal of the Claimant, the Respondent did not give him a hearing as

provided in section 41 of the Employment Act. He was issued with a show cause letter which he responded to. He was not called to the disciplinary committee hearing which decided his fate. Section 41(2) requires that the employer shall before summarily dismissing an employee, hear and consider any representations made by the employee and by the person accompanying him to a disciplinary hearing. The Claimant was therefore condemned without a hearing as contemplated under section 41 of the Employment Act and to this extent the summary dismissal was unfair.

It is also worth noting here that although the ministerial Human Resource Management Advisory Committee held on 31st October, 2012 found the Claimant guilty of only the first charge of encashment of VAT cheques, the letter of dismissal included the four other charges for which the Claimant was not found culpable. I further note that the person who made recommendations for rejection of the Claimant's appeal and review was K A Odhiambo who also sat in the ministerial Human Resource Management Committee Meeting that made the decision for his summary dismissal. This means therefore that there was no independent and impartial consideration of the appeal and the review. The Respondent therefore did not comply with its own procedure as it failed to independently and impartially consider the appeal and review filed by the Claimant. Both the appeal and the review were a sham.

Remedies

Having found that the Respondent included grounds that were not included in the recommendations for the Claimant's dismissal, that the Respondent failed to comply with section 1 and with its Rules of Conduct I declare the summary dismissal unfair.

The Claimant prayed for reinstatement and thereafter retirement. The Claimant relied on the case of **East African Airways v Knight [1975]1 EA 165** in which the court awarded 18 months salary in lieu of notice. The Claimant also relied on the case of **Barclays Bank of Kenya Limited v Njau [2006]1 KLR 92** wherein the court awarded Mr. Njau 12 months salary in lieu of notice. The Claimant further relied on the case of **Paramount Bank Limited v Mohammed Ghias Qureishi & Another [2005]eKLR** where the Claimant was awarded notice of 12 months.

The Respondent relied on the case of **Wells Fargo Limited v Cyrus Kioko & 48 others [2015]eKLR** wherein the court of Appeal citing the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others** stated:-

"Reinstatement is not an automatic right of an employer; it is discretionary and each case has to be considered on its own merits; that traditionally to continue in such relationship against the will of one of them when this can engender friction which is not healthy for business. Section 49(4) of the Employment Act encompasses the elements of reasonableness and practicability before reinstatement is ordered."

In this case, I do not think reinstatement is a reasonable remedy taking into account the age of the Claimant which at the time of dismissal on 23rd May, 2013 was about 55 years. However, taking into account his long service of about 34 years and this considerably clean record with only one previous charge in 2001/2002 financial year, summary dismissal was an extremely severe punishment. I therefore reduce the summary dismissal to retirement with full benefits including terminal leave to be paid in cash.

I have noted that although the Claimant's letter of dismissal is dated 23rd May, 2013. It is stated that it is effective from 1st May 2011. This is not proper as dismissal cannot take effect retroactively. The date of retirement is therefore the date of the letter of dismissal. The claimant is also to be paid all the half salary withheld during the period of interdiction from 1st May, 2011.

Having reduced the Claimant's dismissal to retirement, he is not entitled to general damages. The Respondent will however pay the Claimant's Costs of this suit and the decretal sums will attract interest from date of Judgement.

In summary, the Claimant is granted the following orders:-

1. Declaration that the dismissal of the Claimant was unfair.
2. An order that the dismissal be converted to retirement with full benefits effective 23rd May, 2013.
3. Payment in lieu of terminal leave of 6 months in the sum of Shs.168,972.
4. Payment of withheld half salary from May 2011 to May 2013
(Shs.12,331 x 25) Shs.308,275/-.
5. Costs.
6. Interest on decretal sum from date of judgement.

Judgement Dated, signed and delivered this 8th day of September, 2016

MAUREEN ONYANGO

JUDGE