



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1499 OF 2013

DAVID NAMU KARIUKI.....CLAIMANT

VS

COMMISSION FOR THE IMPLEMENTATION

OF THE CONSTITUTION.....RESPONDENT

AWARD

Introduction

1. *David Namu Kariuki* the Claimant in this case worked as the Head of Finance and Accounts in the Commission for the Implementation of the Constitution, the Respondent herein. Following his dismissal on 6th August 2012, he filed a claim on 16th September 2013 seeking relief for unfair termination of employment. The Respondent filed a Reply and Counterclaim on 29th October 2013 to which the Claimant responded on 8th November 2013. The matter was heard on 8th July 2014 and 1st December 2014 with the Claimant testifying on his own behalf and *Howard Onyolo Olumbe* testifying for the Respondent.

The Claimant's Case

2. The Claimant was employed by the Respondent on a four year contract effective 1st March 2012. His employment was subject to a three months' probation period. On 29th May 2012, the Respondent's Administrative Unit originated an internal memo seeking approval for expenditure towards a Corporate Social Responsibility (CSR) activity at Dagoretti Children's Home. The activity was to take place as part of Madaraka Day Celebrations on 1st June 2012.

3. According to the Claimant, his duty as Head of Finance and Accounts was to ensure that there were sufficient funds under the relevant vote, that authority to incur expenditure had been granted by the Authority to Incur Expenditure (AIE) holder and that the amount sought was reasonable for the particular expenditure. By the time the Claimant signed the imprest warrant, the expenditure had been authorised by four officers including the AIE holder. Once the imprest warrant was duly authorised, it was the responsibility of the applicant to follow up on payment.

4. On 5th June 2012, the imprest warrant was brought to the Claimant's attention for the necessary approvals whereupon the applicant explained to the Claimant that the activity had not taken place on 1st June 2012 as scheduled and that it would take place at a future date.

5. On 25th June 2012 the Claimant was interdicted and instructed to hand over all official documents in his possession. On 30th July 2012, the Claimant was called to a disciplinary meeting and on 6th August 2012 he was summarily dismissed. It is the Claimant's case that his dismissal was neither justifiable nor procedurally fair.

6. The Claimant's claim is as follows:

- a) A declaration that his dismissal was unlawful
- b) Reinstatement or re-engagement

7. In the alternative, the Claimant claims:

- a) Withheld salary for June and July 2012.....Kshs. 400,000

- b) Salary for unexpired contract term.....Kshs. 17,200,000
- c) Prorata leave for 5 months.....Kshs. 116,666
- d) Gratuity at 31% of annual salary.....Kshs. 1,488,000
- e) 3 months' notice pay.....Kshs. 1,200,000
- f) 12 months' salary in compensation for loss of employment....Kshs. 4,800,000

8. The Claimant also claims a certificate of service, costs and interest.

The Respondent's Case

9. In its Reply and Counterclaim, the Respondent admits having employed the Claimant as Head of Finance and Accounts. The Respondent states that while its Chief Executive Officer was away on official duty, the Claimant unlawfully approved an expenditure of Kshs. 420,000. The Respondent goes on to state that the said expenditure was neither part of the Respondent's mandate nor was it budgeted for.

10. Further, by the time the Claimant approved the expenditure, the date slated for the proposed CSR activity had passed. Additionally, by the time the expenditure was approved by the AIE holder on 5th June 2012, the Chief Executive Officer was in the office but the said expenditure was not brought to his attention.

11. On 23rd June 2012, the Chairman of the Respondent became aware of the withdrawal of the sum of Kshs. 420,000 and on 25th June 2012, the Claimant was interdicted for 30 days which was later extended by 14 days. The Claimant was subsequently summarily dismissed on 6th August 2012. The other officers involved in the irregular expenditure who were on secondment to the Respondent were released back to their parent ministries with recommendations for further action.

12. The Respondent pleads that the Claimant was on probation at the time of his dismissal and is therefore not entitled to notice pay. Further, having been summarily dismissed, he forfeited all the rights under his contract of employment.

13. By way of counterclaim, the Respondent claims from the Claimant the sum of Kshs. 420,000 being the amount of money lost in the unauthorised expenditure aforementioned.

Findings and Determination

14. The issues for determination in this case are as follows:

- a) Whether at the time of his dismissal the Claimant was still on probation;
- b) Whether the Respondent had a valid reason for summarily dismissing the Claimant;
- c) Whether in effecting the dismissal the Respondent observed due process;
- d) Whether the Claimant is entitled to the reliefs sought;
- e) Whether the Respondent has made out a proper counterclaim against the Claimant.

The Claimant's Probationary Period

15. The Respondent states that at the time the Claimant was dismissed he was still on probation and he is therefore barred from bringing this action by virtue of Sections 42(1) and 47(6) of the Employment Act, 2007. The Claimant on the other hand states that he was confirmed in his appointment by effluxion of time.

16. According to the Claimant's letter of appointment dated 30th January 2012, he was to be on probation for a period of three months from the commencement date of his employment being 1st March 2012. The probationary period would therefore have terminated on 31st May 2012. It follows therefore that by the time the Claimant was dismissed on 6th August 2012, his probationary period had come to an end.

17. The law requires an employer to confirm an employee upon satisfactory completion of probation and if for any reason, an employer requires more time to assess the performance of the employee then the right thing to do is to formally extend the probation period for a specific period as provided under Section 42(2) of the Employment Act, 2007.

18. Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time (see *Jane Wairimu Machira Vs Mugo Waweru and Associates (Cause No. 621 of 2012)*). That said, the Court finds that the Claimant was confirmed in his appointment upon expiry of the probation period set out in the letter of appointment. This claim is therefore properly before the Court.

Reason for the Dismissal

19. I will now inquire into the reason for the Claimant's dismissal. Section 43 of the Employment Act, 2007 provides as follows:

(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.

20. On 25th June 2012, the Respondent issued the Claimant with a letter of interdiction stating as follows:

“This letter is to inform you that as a result of your actions in relation to imprest warrant no. 1379772 dated 05.06.2012 a matter that was brought to your attention, today 25.06.2012 the Commission for the Implementation of the Constitution for which you are an employee, has decided that you be interdicted for a period of 30 days while the matter is being investigated.

It is deemed that you violated sections of the Code of Regulations, the Public Officers Ethics Act and the Financial Orders that every employee is expected to follow.

You will receive half of your pay while you are on interdiction. You will be expected to cooperate during the time of investigations and be available when required. By this letter you are directed to handover all the property and documents in your possession to the Secretary/CEO. You are expected to vacate the premises immediately after the handing over today.

Your representation in this matter should be received within seven [7] days from the date of this letter.

Yours Sincerely,

Amb. Peter O. Ole Nkuraiyia, CBS

Secretary/Chief Executive Officer

21. The following day on 26th June 2012, the Respondent issued another interdiction letter to the Claimant in the following terms:

“This letter is to inform you that we have information that you have been involved in activities regarding misappropriation of Public funds, in violation of Code of Regulations, the Public Officers Ethics Act, the Financial Orders and the Constitution that every employee is expected to follow. The circumstances leading to your suspension were disclosed to you on 25th June 2012. The Commission for the Implementation of the Constitution [CIC] for which you are an employee, has decided that you be interdicted for a period of 30 days with effect from 25th June, 2012 while the matter is being investigated.

You will receive half of your pay while you are on interdiction. You will be expected to cooperate during the time of investigations and be available when required. By this letter you are directed to handover all the property and documents in your possession to the Secretary/CEO. You are expected to vacate the premises immediately after the handing over today.

Your representation in this matter should be received within seven [7] days from the date of this letter.

Yours Sincerely,

Amb. Peter O. Ole Nkuraiyia, CBS

Secretary/Chief Executive Officer

22. My reading of the two letters did not disclose any material differences or inconsistencies meriting comment by the Court. By the two letters, the reason for the Claimant's interdiction being his involvement in activities regarding misappropriation of public funds executed vide imprest warrant no. 1379772 dated 5th June 2012 was made known to him.

23. Further to the interdiction and the Claimant's representations, the Respondent decided to summarily dismiss the Claimant and therefore wrote to him on 6th August 2012 as follows:

“Reference is made to letters Ref. No. CIC/CONF/2/1/VOL.I of 25th June 2012, addressed to you by the Commission on suspension from CIC wef 25th June, 2012.

Further to letters addressed to you by the Commission on interdiction wef 25th June, 2012 Ref. No. CIC/CONF/2/1/VOL.1/(122) of 25th July, 2012 and Ref. No. CIC/CONF/2/1/VOL.1/(128) of 30th July, 2012, the preliminary inquiries on matters relating to withdrawal of funds of the Commission amounting to Kshs. 420,000 by certain of its officers and having held discussions with you on 30th July, 2012 concerning the matter, the commission has considered your written

and oral discussions and noted the following;

- a) *That as Head of Finance and Accounts, you were entrusted with the commission's funds and, accordingly, you bore personal responsibility to ensure that the funds of the Commission were only applied for purposes authorized by the Commission;*
- b) *You facilitated the withdrawal from the funds of the Commission of the sum of Kshs. 420,000 for unauthorized purpose and without approval of the Chief Executive Officer;*
- c) *Even though you had written to the Chief Executive Officer seeking approval of the proposed expenditure, you nonetheless proceeded to process the withdrawal and payment to the imprest holder of the amount in question despite having not any response from the CEO;*
- d) *On being requested verbally by the AIE holder to discontinue the process, you ignored his request;*
- e) *You took no steps to discuss the matter with the Chief Executive Officer upon his return in light of the fact that he had not responded to your request of approval of the proposed expenditure;*
- f) *You actively participated in a scheme designed to withdraw and apply funds of the Commission for an unauthorized purpose outside the core mandate of the Commission;*
- g) *You decided to charge the purported function to a nonexistent vote item while it was well within your knowledge that the commission has no policy on Corporate Social Responsibility;*
- h) *Whereas you submitted to the subcommittee of the Commission that you believed it was a very good cause to undertake, it became clear that you did not have the intention of visiting the Children's home in view of the fact that you took no steps to make arrangements for the visit after the money had been withdrawn and paid to the imprest holder;*
- i) *You deceived the AIE holder into approving the expenditure that you had cleared the matter with the Secretary/CEO and the Commissioners.*

In view of the foregoing, it is clear that you acted in abuse of office and misconducted yourself by superintending a scheme in which officers answerable to you wrongfully facilitated the withdrawal of the amount in question for an unauthorized purpose. Accordingly, the Commission finds that your conduct raises issues of integrity and competence to discharge the functions of your office. In addition, you are guilty of gross misconduct and neglect of office and the Commission is left with no alternative but to summarily dismiss you from your employment.

Yours Sincerely

Amb. Peter O. Ole Nkuraiya, CBS

SECRETARY/CHIEF EXECUTIVE OFFICER

24. In these letters, the Respondent gives a detailed account of the accusations against the Claimant that eventually led to his summary dismissal. In his evidence in chief, the Claimant tried to exonerate himself from blame by stating that by the time the imprest warrant was brought to him, it had already been approved by the AIE holder and his role was merely facilitative.

25. The Court found this explanation rather strange in light of the fact that in matters of finance and accounts, the Claimant was the guru in the Commission. The Court was even more perturbed by the Claimant's admission that he was aware that the budget presented for the proposed CSR activity was inflated in certain respects. Yet, he chose not to intervene since any excess funds would be returned upon surrender of the imprest.

26. Further, the Claimant appears to have been convinced by the imprest holder, who was his junior in rank and a lay person in finance matters that it was in order for him to approve the imprest warrant despite the fact that the date set for the CSR activity had in fact passed. To my mind, an employee holding the position of Head of Finance and Accounts cannot be allowed to be a bystander as routine financial procedures are flouted.

27. With regard to the role of the Chief Executive Officer in the sanctioning of the proposed CSR activity and the attendant expenditure, the Claimant was equivocal. On the one hand, he sent an e-mail to the CEO on 2nd June 2012 seeking approval for the CSR activity. He however testified that the approval of the CEO was not a requirement. At any rate, the Court was not convinced that an expenditure of Kshs. 420,000 which was to be charged to an alternative vote could be incurred without the express approval of the CEO or even the Commissioners.

28. In *Jessy Olukutukei Vs Feed The Children Kenya & Another [2014] eKLR* this Court held as follows:

“The burden on the employer imposed by Section 43 of the Employment Act, 2007 is to establish a valid reason that would move a reasonable employer to terminate the employment of an employee”.

29. Applying this standard to the instant case, I find that the Respondent has established a valid reason leading to the Claimant's summary dismissal.

Termination Procedure

30. I will now examine the procedure adopted by the Respondent in effecting the Claimant's dismissal. The accusations made against the Claimant fall within the province of misconduct. Section 41 of the Employment Act 2007, establishes the procedure for handling cases of misconduct as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

31. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases.

32. When the Claimant was interdicted on 25th June 2012, he was required to make his representations on the accusations made against him within seven days. The Claimant was also given an opportunity to present his case at a disciplinary meeting held on 30th July 2012.

33. In *George Kariuki Ngugi & 2 Others Vs Brolaz East Africa Limited [2014] eKLR Marete J* held that where an employee is subjected to disciplinary proceedings of which the employee has prior notice, then the requirements of Section 41 are satisfied. In the instant case, the Claimant was subjected to this procedure and the Court finds no evidence of procedural unfairness in the handling of his case.

Reliefs

34. In view of the foregoing findings, the Claimant's claim for unlawful dismissal together with all the prayers made thereunder fails and is dismissed. In the circumstances, the Claimant is only entitled to prorata leave for 4 months at the rate of 1.75 days per month making a total figure of Kshs. 53,333 which the Respondent is directed to release to him within the next 30 days from the date of this award. The Respondent is further directed to issue the Claimant with a certificate of service.

35. With regard to the Respondents Counter Claim no evidence was led to link the Claimant with actual receipt of the funds in issue. The counterclaim therefore fails and is dismissed.

36. Each party will bear their own costs.

It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF FEBRUARY 2015

LINNET NDOLO

JUDGE

Appearance:

Mr. Ongicho for the Claimant

Mr. Ojiambo for the Respondent