



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 981 OF 2013

ANTHONY ODHIAMBO OGOLA.....
1ST CLAIMANT

CHRISTOPHER WANGARE KAMWARE.....
.....2ND CLAIMANT

VERSUS

**KENYA SCHOOL OF GOVERNMENT (FORMERLY KENYA INSTITUTE
OF ADMINISTRATION).....RESPONDENT**

JUDGMENT

1. The 1st and 2nd claimants were employed by the respondent as Senior Accountant on 1st October, 2004 and as clerical officer by Public Service Commission on 1st January, 1979 respectively.
2. On 4th September, 2006 they both received letters dated the same day from the Director of the respondent sending them on compulsory leave to allow for investigation which was to be conducted by special audit team.
3. The Claimants were subsequently summoned to the CID and recorded statements concerning loss of grants and revenue cash books however no prosecution ever took place and when this suit came for hearing it was more than eight years since the events alleged took place.
4. On 19th April, 2007, after a period of almost one year from the date of compulsory leave, the 2nd claimant received a suspension letter suspending him from duty with effect from 12th April, 2007 and warning him that he would not be receiving salary until the investigations on the alleged fraud were complete.
5. The 1st respondent on the other hand received a letter dated 28th September, 2006 concerning expiry of his contract and advising him to continue staying in the respondent's institutional house awaiting the outcome of the audit.
6. At the trial, the 1st claimant testified that he was sent on compulsory leave because there was special audit and some cash books were missing. According to him, he did not immediately know the outcome of the audit but came to do so in May, 2009 when he was called upon to explain some findings in the cash book as raised by the internal audit. It was his evidence that the audit raised queries over cancellation and

adjustments in the cash book and that he was summoned by the respondent and told to go and respond within a certain period. He however asked for the extracts of the cashbook where queries were raised to enable him respond but was never given. He stated that before he was sent on compulsory leave, a committee was formed and he was asked to explain the anomalies in the cashbook and thereafter the respondent's council resolved that he and the 2nd respondent be sent on compulsory leave.

7. It was further his evidence that he later received a letter from the respondent warning him that he was the one responsible for the loss and was asked to return the money within 14 days or be taken to Court. He was later summoned by the Police at Gigiri Police Station and recorded a statement but had since then and up to this time of trial never heard anything about the issue.

8. In cross-examination, he stated that he was on 2 years contract and it was to expire on 30th September, 2006. He further stated that he was sent on compulsory leave on 5th September, 2006 but was paid for that month. His contract was never renewed. According to him the contract provided for one month's notice of termination. In his view, there was no reason for sending him on compulsory leave.

9. It was further his evidence that there were cancellations in the cashbook which were done after bank reconciliation. There were also cash transactions not supported by cash. He also stated that the cashbook entries were not properly done and required adjustments. He admitted that he authorized the 2nd respondent to cancel the entries in the cashbook.

10. The 2nd Claimant on its part stated that he was sent on compulsory leave to allow the auditors carry out investigations. He stated that there was loss of cashbooks and irregular cashbook adjustments.

11. It was further his testimony that he saw the audit report in 2009 when he was summoned to go and pick the letter which contained audit queries. He also testified that he was called to the Police Station and recorded a statement over the lost funds.

12. In June, 2008, he received a letter informing him that the matter was still under investigations by the police. After some time he sent a demand letter through his lawyer but received a termination letter in response. The termination letter informed him that his services were being terminated on account of gross misconduct. According to him the letter never told him what amounted to gross misconduct.

13. In cross examination he stated that the respondent was created in 2003 and before he was an employee of Public Service Commission. He admitted that he was in charge of entries in the cash book and that there were cancellations to allow for the adjustments in the cashbook.

14. It was further his evidence that a committee was formed to investigate the matter and he appeared before the committee and was questioned about the cancellations. He further stated that he responded to the letter dated 16th May, 2008. The letter, he said came after the termination of his services and that he responded through his advocate.

15. The respondent on its part called a Mr. Joshua Onyango Ochuka who stated that he was working for the respondent as Human Resource Manager. It was his evidence that he was not in respondent's employment at the time the events complained of took place but he came to know of them through documents he interacted with concerning the case. According to him, Kenya National Audit Office detected irregularities in the respondent's accounts and the claimant's were suspended as a result. The claimants were subsequently given a chance to defend themselves before a committee formed for that purpose. Whereas the 1st claimant was on a 2 year contract, the 2nd claimant was on permanent and pensionable contract. The latter was terminated and asked to collect his terminal dues.

16. It is common ground between the parties that there were financial irregularities in the respondents financial books. It is also not disputed that as a result of these irregularities some audit was carried out and a report compiled. According to the report some Kshs.18 million was misappropriated or lost. The loss was blamed on improper keeping of books of account which was the responsibility of the 2nd

claimant under the supervision of the 1st claimant.

17. The claimants disputed the loss but did not offer any evidence to the contrary. In fact both claimants admitted that they either made or caused to be made the irregular cash book adjustments which in their view were acceptable but which the auditors picked as responsible for the financial sleaze.

18. Section 44 of the Employment Act permits summary dismissal from employment for reasons listed thereunder. Whereas the list is neither exclusive nor exhaustive, an employee who carelessly and improperly performs any work which from its nature it was his duty to perform carefully is liable to summary dismissal.

19. Auditors are professionals and their role is to ensure prudent and sound financial systems and processes are followed in accordance with international accounting standards and best practices. They carried out an audit of the respondents systems and procedures at the time the claimants were responsible and in charge and found that the cash book adjustments and cancellations were irregular and were responsible for the financial loss. The relevant extracts of this report were made available to the claimants and they were called upon to respond to the accusations against them. The claimants failed to offer any counter professional opinion to the audit report leaving it unchallenged in terms of its findings and conclusions. It therefore mattered not that the claimants were the ones who benefitted from the lost funds or that they were prosecuted for their loss.

20. In terminating the services of the claimant's the respondents formed a committee before whom the claimants appeared and were questioned about the irregular adjustments in the cashbooks and their eventual loss. It therefore cannot be said that the respondent did not follow a fair procedure prior to terminating the claimants' services.

21. The concern of the Court in any dismissal dispute is to inquire into the justification and validity of the reasons for dismissal and if satisfied, examine the procedure followed in the separation from the contract of employment in terms of fairness as contemplated in the Employment Act and rules of natural justice generally and if satisfied, decline to interfere with the decision to terminate the services of such employee.

22. As was recently observed by the Court in the case of **Jeremiah Mungai v. Equity Bank Ltd Cause No. 165 of 2013**, it was not the intention of the Employment Act and indeed employment law generally that disciplinary process take the form and rigour of a Court trial. What is important is that separation of parties to an employment contract is done justifiably and for valid reasons and further that it is carried following a fair procedure in tandem with the Employment Act and rules of natural justice generally.

23. In the case before me, I am reasonably persuaded that there were valid and justifiable reasons for terminating the claimant's services and that in doing so the respondent followed a fair procedure. The claimants' claims therefore fail on merit and are hereby dismissed with costs.

24. It is so ordered.

Dated at Nairobi this 11th day of March 2015

Abuodha J. N.

Judge

Delivered this 11th day of March 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge