



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 13 OF 2015

ELIUD MUNGA KIRAGU.....CLAIMANT

VERSUS

THE NATIONAL TREASURY.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th September, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 06.02.2015 through Ishmael & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Declaration that the termination of the claimant's employment was unlawful and violated the claimant's rights to fairness and fair labour relations as provided for under Article 50 of the Constitution and Employment Act.
- b. General damages for wrongful and unfair termination of the claimant arising from the dismissal.
- c. Accrued half pay for the period of interdiction.
- d. Payment of the remaining period of employment in lieu of non-reinstatement.
- e. Accumulated pension payable.
- f. Costs of the suit and interest at court rates in (b), (c), and (d) above.
- g. Any other relief the court may deem fit to grant.

The respondents filed the memorandum of response on 17.04.2015 through F.O. Makori, Litigation Counsel, for the Attorney General. The respondents prayed that the memorandum of claim be dismissed with costs. The respondents filed the amended memorandum of response on 30.04.2015 and the claimant filed on 22.05.2015 the reply to the amended response.

The suit was heard on 16.07.2014 and final written submissions were filed for the parties.

The claimant was employed to the position of Auditor II and deployed to the Ministry of Co-operative Development with effect from 15.01.1988. The claimant was confirmed to permanent and pensionable service on 22.08.1990.

The claimant rose through the ranks to the position of Principal Auditor in the Ministry of Finance. At all material time the claimant was deployed to serve at the Ministry of Education as the Principal Auditor.

The events leading to this case related to the claimant's service at the Ministry of Education. The claimant received the letter dated 6.05.2011 which stated as follows:

“RE: MISCONDUCT

It has been established that during the period 2006-2009 when you served as Internal Auditor in-charge of Ministry of Higher Education Science & Technology, the Government lost Kshs.61, 613,353.25 through misappropriation of public funds.

A forensic audit recently conducted in the Ministry has confirmed that you endorsed the payment vouchers and cash books related to the loss.

The purpose of this letter therefore is to request for your explanation as to why action should not be taken against you for abetting the loss of Kshs. 61, 613,353.25 by:

- 1. Signing payment vouchers related to fraudulent transactions.**
- 2. Signing cash books related to the fraudulent transactions.**
- 3. Failure to detect the fraudulent activities in the ministry.**
- 4. Failure to report on the fraud.**
- 5. Failure to report on the weak internal controls as regards cash management.**

Samples of the documents bearing your signature are attached herewith.

Your explanation if any should reach this office by 12th May 2011.

Signed

PHILIP G. NDUNG’U

INTERNAL AUDITOR GENERAL”

The letter dated 13.07.2011 was addressed to the claimant about the alleged gross misconduct. The letter set out the same allegation as contained in the earlier letter of 6.05.2011 and asked the claimant to show-cause why the intended disciplinary action would not be taken against him. He was required to make representations within 14 days.

The claimant's specific defence to the allegations as levelled against him were as follows:

- a. It was not his negligence that the loss of Kshs. 61,613,353.25 occurred because he was not the in-charge of the cashier under whose custody the funds got lost. The accountant in-charge of the ministry was the one who was responsible on day to day basis as he was the one signing cheques which withdrew the money from central bank. As an auditor, the claimant stated that he did not handle cash or cheques. The claimant stated that as per the forensic audit report, the loss occurred through cash withdrawn by the cashier and stolen through cash book manipulation and not through any payment vouchers as maliciously put by the department of the Auditor General.
- b. On failure to detect fraud the claimant stated that it was, as a matter of professional practice of fraud examiners and internal auditors, difficult to detect fraud so that it took time, even up to 4 years, to detect fraud; and fraud could not be detected 100%. In the present case, the external auditors had not even detected the fraud. The claimant further stated that he had operated below capacity as he did not have sufficient assistants and had operated alone for some time. He stated that his superiors were aware of that shortage and he required deployment of at least three senior and experienced internal auditors to handle the big ministry which had many institutions. Further, the claimant had been transferred to the Prime Minister's office on 7.08.2009 before he could implement his work plan for 2009/2010 which had prioritised the ministry headquarters as opposed to the institutions as a high risk area after the ministry's 3 years of existence.
- c. The claimant stated that he had not signed any payment voucher or cash book related to the

fraudulent transactions and the said loss of Kshs. 61,613,353.25. After the fraud was detected, six months had lapsed and he had not been charged in a criminal court for the alleged fraud showing that the vouchers in issue were genuine. Thus, the vouchers he was shown had been genuine. The person who was charged was the cashier and the claimant was a witness in the criminal case.

- d. The internal controls were instituted by the management and internal controls by themselves could not prevent fraud as it happened in the present case. By circulars, the National Treasury instituted the internal controls across the Government and he always reported on the internal controls but it was not his duty to implement those controls.

It was the claimant's case that the forensic audit report did not mention him as he had been unfairly treated. The fact that the case took more than 2 years to be forwarded to the Public Service Commission, for the claimant, showed that his superiors at the Internal Audit Department had mishandled the case and were keen to unfairly punish him.

To show malice and bad faith, the claimant stated that he had been transferred to the Ministry of Finance from the Ministry of Co-operative Development in 2005 already in the position of Principal Internal Auditor but had been denied promotion in 2008 as other officers got promoted. The claimant stated that he was the longest serving Principal Internal Auditor in the entire civil service and the claimant's case was that he had been mistreated for joining the Internal Audit Department of the National Treasury. It was his case that he had served with a clean record and since 1989 to 2005 while at the Ministry of Co-operative Development he had been an AIE holder and he had never answered any audit query or his integrity questioned so that he could not have suddenly changed in 2006 to become a fraudulent civil servant as it was levelled and alleged against him.

The Public Service Commission dismissed the claimant from the civil service with effect from 13.07.2011 as per the letter dated 1.04.2014. The claimant appealed against the dismissal by the letter dated 30.07.2014 by which the National Treasury forwarded the appeal to the Commission. The Commission disallowed the appeal as per the letter dated 17.09.2014.

The **1st issue** for determination is whether the claimant's dismissal was unfair. The court has considered the evidence on record. The respondents are required to establish that the reasons for termination were genuine as they existed at the time of the dismissal as envisaged in section 43 of the Employment Act, 2007. The claimant's dismissal was founded upon the findings and recommendations of the forensic audit report and subsequent committee hearings. Of particular interest is the report by the investigation committee that was appointed on 29.05.2012 by the Ministerial Human Resource Management Advisory Committee. The investigation committee gave the claimant an opportunity to be heard and the claimant verbally set out his defence. The findings of the committee as per its report signed on 22.03.2013 were as follows:

- a. The claimant concentrated on auditing the Ministry's institutions at the expense of auditing the Headquarters' cash management.
- b. The claimant failed in his duty as the Auditor-in-Charge by failing to check and advise relevant persons.
- c. The claimant failed to allocate duties including allocating the duty to check Ministry books.
- d. The claimant's oral and written representations failed to address the allegations levelled against him.

The committee then recommended that the claimant be retired in the public interest because he was guilty of the charges against him.

Under section 3 of the Employment Act, 2007 this court serves the object of ensuring just, expeditious, efficient and proportionate determination of the disputes before it. The court has considered that the claimant put a strong defence that he was not provided sufficient staff to work with. The court has further considered the generalised approach the committee took in finding that the claimant was culpable as charged without establishing the claimant's failures in relation to the details of the allegations as levelled against the claimant.

Taking all evidence into account, the court finds that the respondent failed to take into account all the material before finding that the claimant was culpable. It is not clear how the Commission evaluated and resolved the strong mitigating or defence factors that the claimant was not provided sufficient staff, the loss was not attributable to the vouchers as alleged, it took time to detect fraud and that the claimant was on the whole not culpable. The court has considered that the forensic report did not specifically mention the claimant and the respondent's witness RW1 stated that the report did not implicate the claimant. The court has considered proportionality and the evidence and finds that the dismissal was unfair because the reason was not genuine as provided in section 43 of the Employment Act, 2007.

While making that finding, the court further finds that the claimant was given a notice of the allegations and was heard as envisaged in section 41 of the Act so that the respondents adhered to fair process. The court finds that the claimant's allegation and submission that the hearing was unfair due to involvement of the Auditor General was unfounded because it was not shown that the Auditor General had been previously, directly or indirectly, been involved in the case.

The 2nd issue is whether the claimant is entitled to any of the remedies as prayed for. The court makes findings as follows:

1. The claimant has not showed that he complained about the insufficient staff throughout his service so that by that failure the court finds that the claimant contributed to his termination. The court has taken into account the long service of over 18 years and that the record of service was clean. The claimant is awarded 6 months compensation under section 49 of the Employment Act, 2007 making **Kshs.467, 136.00**.
2. Taking into account the principle of proportionality, the claimant is not entitled to the withheld half pay that was withheld during the interdiction as he contributed to the dismissal.
3. Taking into account the principle of proportionality, the court finds that the dismissal was excessive punishment as it was unfair and the court finds that the claimant is entitled to retirement in the public interest with effect from 1.10.2011 with full pension benefits as per the Pensions Act.
4. The claimant is entitled to a certificate of service and costs of the case.

In conclusion judgment is entered for the claimant against the respondents jointly and severally for:

1. The declaration that the claimant's dismissal from the civil service as a Principal Internal Auditor was unfair.
2. The dismissal of the claimant from the service with effect from 13.07.2011 is hereby set aside and substituted with retirement in the public interest with effect from 1.10.2011 with full pension benefits as per the Pensions Act.
3. The respondents to pay the claimant compensation for unfair dismissal **Kshs.467, 136.00**.
4. The respondents to deliver the claimant's certificate of service by 1.01.2016.
5. The respondents to pay the pension and compensation by 1.12.2016 failing interest at court rates to be payable thereon from today till full payment.
6. The respondents to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 25th September, 2015**.

BYRAM ONGAYA

JUDGE