



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 214 OF 2013

EDWARD JUMA MASAKHA.....CLAIMANT

-VERSUS-

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 31st July, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 11.07.2013 through Kiplenge & Kurgat Advocates. The claimant prayed for judgment against the respondent for reinstatement to his previous job and in alternative:

- a. Kshs.44,244,196.00 together with interest from 7.12.2012 till payment in full.
- b. Damages for unfair termination equivalent to 12 months salary.
- c. The respondent to issue a certificate of service as per law required.
- d. Costs of this claim.
- e. Interest on (a) above.

The respondent's reply to the claim was filed on 30.07.2013 through Edward K. Wabwoto Advocates. The respondent prayed that the honourable court dismisses the claim with costs to the respondent.

The claimant was employed as a civil servant to the office of Conservator of Forest II effective 10.02.1989. Upon reorganization of delivery of environmental management services by the government, the claimant was employed by the respondent sometimes in 2003. On 1.07.2009, the claimant was promoted by the respondent to the office of Provincial Director of Environment and deployed in the Rift Valley Province stationed at Nakuru.

As the Provincial Director of Environment, the claimant was responsible for issuing Environmental Impact Assessment licenses for designated and authorized licenses. Under the respondent's prescribed arrangements for issuance of licenses, the claimant was authorized to issue licenses for low and medium risk projects. He was not authorized to issue licenses for high risk projects which were in the exclusive authority of the respondent and as issued at the head office at Nairobi.

On 15.3.2012, the claimant was informed by his deputy known as Joseph Kopejo about an urgent project that required to be licensed. The claimant was then attending a workshop in Eldoret. On the same date, he was assigned to attend a meeting organized for Permanent Secretaries at the Kenya Institute of Administration in Nairobi. In view of the urgent request by his deputy, the claimant signed two blank Environmental Impact Assessment licenses and left them with his deputy to complete the details as

requested by the deputy.

On 2.7.2012, the claimant received a telephone call from the respondent's Nairobi office about a high risk project license which the claimant had issued unprocedurally. It turned out that the high risk project license that had been issued irregularly was one of the blank licenses that the claimant had entrusted with his deputy to process and as per his deputy's request with respect to an urgent project on 15.3.2012. The claimant's deputy had in fact processed the license for a high risk project to be undertaken within the Maasai Mara Game Reserve. Further investigations by the claimant and the respondent revealed and confirmed that the license fees of Kshs.10,000 per project had not been paid. The claimant's environmental assistant called Brian Otiende admitted that the claimant's deputy had forwarded to the said Brian by Mpesa Kshs.20,000 with respect to payment of the license fees for the two blank licenses the claimant had signed and subsequently processed and issued by his deputy. The claimant's deputy had instructed Brian to go and pay the Kshs.20,000 in the respondent's Kenya Commercial Bank account as if Brian was the owner of the project. The claimant testified that Brian had deposited the money on the bank account in the name of the project owner known as Ole Ntutu. The said Brian then issued the respondent's receipt in the said Ole Ntutu's name and delivered the receipt to the claimant's deputy in Narok. At the time of the belated issuance and delivery of the receipt, the claimant's deputy Joseph Kopejo had been deployed to Kajiado but his rural home was in Narok. The investigations had revealed that the receipt was sent to Kopejo in July, 2012 long after the transaction in March, 2012 when the licenses had been issued without payment of the relevant license fee.

The case was considered by the respondent's disciplinary advisory committee meeting of 31.10.2012 and 1.11.2012. The claimant had been served with a show cause notice on allegations of fraudulent issuance of the high risk project license and the claimant was heard at the committee's meeting. The committee's findings were as follows:

1. The claimant was careless in signing blank licenses and he over trusted his deputy Kopejo.
2. It is likely that Kopejo knew that the licenses were issued wrongly and thus tried to cover the lead expert who handled the project.
3. The two officers were guilty though Kopejo seemed to bear more responsibility.
4. The claimant acknowledged his mistakes and apologized while Kopejo was very defensive.
5. The claimant and Kopejo were first offenders.

The committee's recommendations were as follows:

1. The claimant and Kopejo be transferred and be issued with warning letters.
2. Kopejo be transferred to Mandera and the claimant to Siaya.

The respondent's Director General decided to overrule the committee's recommendations and instead dismissed the claimant from employment by the letter dated 7.12.2012. The letter stated as follows:

“SUMMARY DISMISSAL

Reference is made to our letter Ref: NEMA/0029/2003 dated 23rd October, 2012 in which you were asked to show cause why disciplinary action should not be taken against you on account of flouting the EIA established processing procedure.

This is to inform you that your response contained in your letter dated 30th October, 2012 and your verbal defense before the Disciplinary Advisory Committee on 30th October, 2012 are unsatisfactory. Consequently, it has been decided that you be and are hereby dismissed from this Authority's service with immediate effect on account of the above offence and in accordance with the service regulations.

Your pension benefits will be calculated as per the scheme rule but the withheld salary shall not be paid to you since your interdiction has not been lifted.

Enclosed herewith, please find the Official Secrets Act for your signature and that of witness and wealth declaration form for your final declaration on leaving service. Return the same to this office together with your staff identification card for our record and cancellation.

Note that you have the right of appeal for review of this decision to the Board of Management within fourteen (14) from the date of this letter.

Signed,

PROF. GEOFFREY WAHUNGU

DIRECTOR GENERAL

The claimant appealed against the summary dismissal to the respondent's board. The board's resolution on the claimant's appeal was as follows:

1. The board sanctioned and upheld the dismissal of the claimant for the reasons that he was guilty of the offences brought against him and the board further found that the offences were very grave and the claimant was also very irresponsible in the manner in which he handled the Environmental Impact Assessment licensing process.
2. The board further resolved that the matter be referred to the relevant government agencies and specifically the Ethics and Anti Corruption Commission for further investigation and appropriate action. The court observes that at the hearing, it was not established that the matter had been referred for such further investigation by the relevant government agencies.

While deciding the claimant's appeal, the board also considered at the same meeting the appeal by Joseph Kopejo and resolved as follows:

1. Allowed the appeal by Kopejo as according to the documents and other documents that were referred to, the board noted that even though he was guilty of the offences brought against him, he did not bear direct responsibility as he did not sign the license that was issued to the project proponent but that the license had been signed by the claimant who was Kopejo's supervisor. The board directed that Kopejo be reinstated and further that as a deterrent measure, a written warning be issued to him in respect to the manner in which he handled the proponent's money in the Environmental Impact Assessment process.
2. The board further resolved that upon Kopejo's reinstatement and issuance of a warning letter, he be demoted from Grade E6 to Grade E7.

The claimant was dissatisfied with the turn of events and he filed the present suit.

The court has considered the pleadings, the evidence and the submissions on record. The court makes findings as follows:

1. The respondent accorded the claimant notice and hearing as envisaged in section 41 of the Employment Act, 2007 so that there was due process throughout the administrative disciplinary proceedings.
2. The court has carefully considered the issues in dispute. The court upholds the findings of the disciplinary committee that Joseph Kopejo shouldered higher responsibility for the irregular issuance of the high risk project license in issue. In deciding the appeal, the board appears to have referred to material which in the opinion of the court would only mean the material that was before the committee and nothing more because no further material that may have guided the board beyond the material before the committee was presented before the court. The court further observes that in deciding the appeal, the board directed further investigations by relevant

government agencies thereby suggesting that it did not have sufficient material before it to decide the appeal. In the opinion of the court, such are circumstances that perforated the board's decision in deviating from findings of the committee that, Kopejo was more responsible for the issuance of the irregular license than the claimant; and that the claimant had trusted his deputy Kopejo to regularly issue the licenses upon his signing. The question in issues is: What misconduct did the claimant commit in trusting his deputy to honestly undertake the correct procedures in releasing the license to the proper proponent of the project? The material before the court showed that the claimant trusted his deputy Kopejo in the ordinary course of business as he had done so before and it was within his authority to assign his deputy accordingly. In the findings of the court, there was nothing wrong in the claimant trusting his deputy to do the correct thing as it was within the claimant's scope of duties to trust that those who work under him will perform honestly as expected. In this case, all evidence pointed to the finding and the court finds that the claimant's deputy Kopejo breached the high trust the claimant was entitled to behold in him so much so that the court finds that in absence of evidence that the claimant intended to issue the license irregularly or fraudulently should not have been adversely visited upon the claimant through the summary dismissal in issue. The court further finds that taking into account the evidence on record, Kopejo breached the trust the claimant bestowed on him as the claimant's deputy and Kopejo designed and executed the issuance of the irregular high risk project license in issue. There was no material presented to the court to show that the claimant failed to perform his duties in trusting Kopejo as his deputy to use the license as signed and intended by the claimant. In the circumstances of the case, the court finds that at the time of the summary dismissal by the respondent's Director General and at the time the respondent's board on appeal upheld the summary dismissal, there was no valid reason for the respondent to terminate the claimant's employment and the dismissal was unfair under section 43 of the Employment Act, 2007. While making the finding, the court further holds that it would be unfair labour practice for an employer to terminate a manager or other senior officer on account of obvious breach of trust by an officer working under the manager because managers are entitled to trust those who work under them and an employer's service delivery would be impossible if such trust relationship is not protected and respected.

3. The court has revisited the evidence. All evidence point that the claimant's deputy known as Kopejo designed and executed the issuance of the high risk project license in issue. First, Kopejo told the claimant that there was an urgent project within the claimant's authority to sign for the license. Secondly, Kopejo failed on his duties to honestly complete the license form for the intended purpose. Thirdly, Kopejo was at the centre of the belated payment for the license. Despite such glaring evidence throughout the administrative investigations and disciplinary proceedings, the respondent's board in deciding the appeals decided that the claimant's dismissal is upheld while Kopejo was retained in the respondent's service. The court finds that the board's decision to uphold the claimant's dismissal and to retain in service the claimant's deputy who was the key culprit in the case was not proportional. The principle of proportionality required the respondent to impose punishments that were corresponding to its employees' gravity of liability in view of the alleged misconduct in issue and taking into account the relevant evidence. Section 3 of the Industrial Court Act, 2012 upholds the principle of proportionality which the court has found was not upheld by the respondent in the present case.
4. The final issue for determination is whether the claimant is entitled to the remedies as prayed for. The court has found that the claimant did not engage in a fraudulent deal leading to the irregular issuance of the high risk project license in issue and as it had been alleged in the show cause letter. The court has found that the reason for the claimant's termination was in fact blatant breach of trust by his deputy known as Kopejo. The court has found that the termination was unfair. The respondent is a public body and the claimant is a public officer with a clean record of service since 10.02.1989. The court has found that the respondent's board did not act with proportionality in rejecting the claimant's appeal especially that there were no grounds established for the board to deviate from the findings of the respondent's disciplinary advisory committee. Taking all the circumstances of the case into account, the court finds that the claimant is entitled to reinstatement with full pay with effect from 7.12.2012 including release of the withheld salary throughout the

period of interdiction and to continue in the respondent's employment unless lawfully terminated.

In conclusion, judgment is entered for the claimant against the respondent for:

1. Reinstatement with full pay with effect from 7.12.2012 including release of the withheld salary throughout the period of interdiction and to continue in the respondent's employment unless lawfully terminated.
2. The claimant to compute the amount of money due under order (1) above and serve upon the respondent by 15.08.2014, for the parties to record the amount in court on a date convenient to both parties.
3. The respondent to pay the amount in (1) and (2) above by 1.10.2014, failing, interest at court rates to be payable from the date of the judgment till the date of full payment.
4. The claimant to report to the respondent's Director General between the date of the judgment and 8.8.2014 for appropriate deployment.
5. The respondent to pay costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Thursday, 31st July, 2014.**

BYRAM ONGAYA

JUDGE