



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 353 OF 2010

COSMAS MULANDI NDETI CLAIMANT

VERSUS

KENYA NATIONAL AUDIT OFFICE 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

Mr. Oraro for Claimant

Mrs. Okwara for Respondent

JUDGMENT

1. The Claimant was employed by the Respondent on 7th July 1991 as an Audit Trainee. He worked continuously upto 18th June 2003. He was confirmed as an Audit Examiner in Job Group H on permanent and pensionable terms.
2. He was auditing State Corporations based in the North Rift. His gross pay at the time of termination was Kshs.14,000/= per month. He was registered with NSSF and NHIF.
3. On 18th June 2003, he received a letter of suspension from employment.
4. It was alleged that he had taken an imprest from a client by the name of **Kerio Valley Development Authority** contrary to Auditor General's Circular Ref. No. (225(19) of 23rd June 1997.
5. The Claimant denies that this circular was applicable to him since he worked for Auditor General Corporations. The circular prohibited cashing of personal cheques and obtaining of imprest from Auditors.
6. The Claimant states that the imprest arrangement was made inhouse and was known and permitted by the Head Office to help the Auditor expedite work pending receipt of actual imprest.

The Deputy Auditor General **Mr. Winton J.O. Orege** suspended him.

7. This issue caught the Claimant and his colleagues in Corporations unawares at the Eldoret Office. However some of the colleagues who had taken the same imprest did not receive a letter of suspension.

8. The Claimant admitted that he had taken the imprest to pay for emergency Hospital fees for his wife. He apologised and assured Mr. Orege that he would not do it again.

During the period of suspension, he was without pay.

9. On 14th October 2003, he received a letter of dismissal from Mr. Orege.

10. He wrote an appeal on 24th October 2003. The ground of Appeal was that; he had a clear record and was not brought before a disciplinary committee contrary to **Regulation 36** relating to officers in job group G to K. The appeal was dismissed on 22nd December 2003.

11. He filed a 2nd Appeal on 4th March 2005 stating that he had already repaid the imprest and was not given a hearing.

On 6th June 2005, the 2nd Appeal was dismissed.

12. He knew the outcome of the 2nd Appeal in 2008, when his Advocate wrote to the Respondent. The letter of dismissal was sent on 25th July 2008.

13. It is the Claimant's case that the decision to dismiss him was drastic and grossly excessive in the circumstances of the case especially because he had a clean record of service throughout his years of service.

14. He explained that the office of the Controller General and Auditor General were separate from the Auditor General Corporation. That the two offices were merged after his dismissal.

15. That not all who had taken imprest were dismissed. This was discrimination. He recalled **Mr. Joseph Mwoboki** and **Peter Machana** as colleagues at Eldoret who were not dismissed and they continued to work.

The Claimant states that a demotion or deferral would have served as sufficient punishment in the circumstance of the case or even a letter of reprimand.

16. He prays for:

- a. declaration that the dismissal from service was unlawful;
- b. reinstatement into service;
- c. payment of withheld salary from 18th June 2003;
- d. costs of the suit.

17. The annexures 1 to 16 were submitted as exhibits in support of the Claimant's case.

18. In particular, the General circular No. C225 issued by **Mr. D.G. Njoroge**, Controller & Auditor General dated 23rd June 1977 was directed to Director of Audit, Assistant Director of Audit (C), Assistant Director of Audit (P), Assistant Director of Audit (L) and all Branch Heads. It was headed cashing of personal cheques and addressed two issues as follows:

- a. cashing of personal cheques at Government offices and at places where officers are carrying out audit inspections; and
- b. obtaining credits under the guise of Safari imprest.

The controller and Auditor General prohibited the above said practices.

19. The Claimant obtained imprest in the sum of Kshs.23,000 from a client, Kerio Valley Development Authority between 20th March to 15th October 2002.

20. The offices of the Controller and Auditor General and The Auditor General (Corporations) were merged through the *statute/law (miscellaneous Amendments) Act No. 2 of 2002* with effect from 7th June 2002. This had the effect of abolishing the office of Auditor General (Corporations) where the Claimant worked.

21. Part of the Claimant's defence is that as at 20th March 2002 and 15th October 2002 when he took the imprest, the circular prohibiting obtaining credit from a client was not applicable to the staff of Auditor General (corporations). This is clearly not the case with respect to the latter imprest as both offices were merged with effect from 7th June 2002. This defence does not avail him therefore.

The real issue is whether or not the Respondent followed due process in dismissing him and whether the sanction of dismissal was excessive hence unjust in the circumstances of the case.

Defence

22. The Hon. attorney General filed a Memorandum of Response on 20th July 2010 denying all the particulars of claim on behalf of the 1st and 2nd Respondents.

23. The Respondents aver that the dismissal of the Claimant was for a valid reason and in terms of a fair procedure.

The Respondent called two (2) witnesses namely **Christopher Muguku Warui** and **M/s Mary Nafula Wanyama**.

24. The testimony was to the effect that the Claimant was dismissed for a lawful and fair reason and in terms of a fair procedure.

25. Mr Christopher Muguku Warui told the Court that he worked as an Assistant Manager of the 1st Respondent and had served for about 30 years. That he was aware of this case and knew the Claimant.

26. That the Claimant had borrowed Kshs.23,000/= from an Auditee contrary to the circular of the controller and Auditor General. He was given a letter to show cause. His explanation was not satisfactory. Disciplinary hearing was conducted in terms of the relevant regulations and the committee recommended his dismissal. His 1st and 2nd Appeal were also dismissed by the 2nd Respondent, the Public service Commission.

27. The witness told the Court that all staff at the Auditor General (Corporations) were well aware of the circular and its content was communicated to them including the Claimant.

That the Claimant had obtained imprest from a client and wrongly used it for personal reasons. These were two wrongs because it was prohibited to obtain imprest from an Auditee and secondly, imprest could only be used for official duty.

The witness withstood very close cross-examination and his testimony was largely unshaken.

28. The evidence was corroborated by Mary Nafula Wanyama RW2 who told the Court that she worked at the Public Service Commission the 2nd respondent and was aware of this matter.

The matter came to the Commission on Appeal on 24th October 2003. The Commission considered the Appeal and found it to be without merit and dismissed the same.

29. She produced the relevant regulations applied in the disciplinary process adding that, the Claimant being an officer in Job Group 'H' was lawfully dismissed in terms of **Legal Notice No. 148 / 2002** by an authorized officer.

That during that time employees were not required to appear in person at the disciplinary and Appeal hearings. That **Legal Notice No. 32 of 1998** had dispensed with personal appearance of officers. The Claimant had however made written representation which was fully considered and a decision to dismiss was taken.

Determination

30. The Court has evaluated the pleadings, the oral and documentary evidence before Court and has come to the following conclusion;

- i. that the Claimant was guilty of misconduct in that he admitted to have borrowed money from an Auditee in the cause of duty contrary to express instructions of his employer the office of the Controller and Auditor General.
- ii. the Claimant was subjected to a fair disciplinary process including a disciplinary hearing and 1st and 2nd Appeal in terms of the regulations applicable at the time.
- iii. the offence committed by the claimant was of a serious nature as it had the potential of comprising his impartiality while conducting an Audit of the operations of an Auditee he was already indebted to.

31. In the final analysis, the dismissal of the Claimant by the 1st and 2nd Respondents was for a valid reason and the dismissal was effected in terms of a fair procedure. The entire suit is dismissed with costs to the Respondents.

Dated and Delivered at Nairobi this 31st day of October, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE