



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1727 of 2011**

**PATRICK ONGUSO NASIBI..... CLAIMANT**

**VERSUS**

**NATIONAL WATER CONSERVATION**

**AND PIPELINE CORPORATION..... RESPONDENT**

**JUDGEMENT**

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By a Memorandum of Claim dated 5<sup>th</sup> October 2011 the Claimant alleges that he was wrongfully and unlawfully dismissed from employment by the Respondent on accusations of poorly maintaining accounts, wantonly issuing imprest and settling questionable claims. He alleges that these were not his responsibilities but those of the Chief Accountant and Finance Manager. He further alleges that his dismissal was based on the report of the Efficiency and Monitoring Unit [EMU] which he was not privy to. He further alleges that the grounds of dismissal were never proved. He seeks the following orders:-

- a) Six months Salary in lieu of notice - Ksh.135,655x6
- b) Unpaid salary for duration worked i.e. whole - Ksh.157,535.00  
month of February 2010 & 5 days of March
- c) Accrued unpaid leave for 108 days - Ksh.488,376.00
- d) Maximum compensation for unlawful termination - Ksh.1,627.860.00  
and loss of employment – Ksh.135,655x12.
- e) Issuance of Certificate of Service.
- f) A release of accrued pension amounts and interest thereon.
- g) Any other relief the Honourable Court may grant.
- h) Costs of the claim.

The Respondent filed its Replying Memorandum dated 7<sup>th</sup> November 2011 in which it alleges that the

dismissal of the Claimant was lawful as it complied with both the Employment Act and the Respondents Code of Regulations. The Respondent prays that the Claimant's case be dismissed with costs.

The issues for determination are therefore whether the Claimant's dismissal was lawful and whether he is entitled to the reliefs sought.

The parties were heard on 26<sup>th</sup> July and 24<sup>th</sup> September 2012. The Claimant was represented by Mr. Ochieng instructed by P. Ochieng Ochieng & Co. Advocates while the Respondent was represented by Mr. Kamwendwa instructed by N.M. Kamwendwa & Co. Advocates.

The evidence on record is that the Claimant was employed by the Respondent as an Internal Auditor on 7<sup>th</sup> July 1993. He was re-designated to Treasury Accountant on 13<sup>th</sup> August 2009. On 5<sup>th</sup> November 2009 the Claimant was sent on compulsory leave pending audit investigations of the Respondent following a report of the Efficiency Monitoring Unit in which the Claimant was adversely mentioned. He was invited to appear before the Human Resource and General Purpose Committee on 29<sup>th</sup> January 2010 to defend himself against charges arising from audit investigations on malpractices and payments. He was subsequently dismissed from employment by letter dated 26<sup>th</sup> February 2010.

The Respondents Code of Regulations annexed to the Respondents Reply Memorandum as 'Appendix B' provides for disciplinary procedure at Paragraph 11.24.5 in the following terms:-

- (i) An employee who misappropriates the Corporation's funds or deliberately, willfully or negligently authorizes wrongful payments out of the Corporation's funds will be liable to summary dismissal.**
- (ii) In addition, an employee who is found guilty of acts of omission or commission amounting to a serious offence or gross misconduct, and due process of the disciplinary proceedings have been made in terms of the provisions of these regulations, may be liable to summary dismissal.**
- (iii) Such an employee shall be dismissed from the service on account of gross misconduct.**

Paragraph 11.24.2 (iv) provides that in cases of serious misconduct where dismissal or termination of service is likely the Managing Director shall issue a "show cause letter" to the employee through which the employee may be interdicted or suspended depending on the nature of the case. The evidence on record does not show that the Claimant was ever given a letter to show cause. The letter sending him on compulsory leave merely states that

***"It has been decided that you be and are hereby send on compulsory leave with immediate effect pending further investigations in your area of operation".***

The next letter invited the Claimant to appear before the Human Resource and General Purposes Committee to defend himself against charges arising from Audit investigations on malpractice in payments. No charges were preferred against him nor was he given a report of the investigations. The Claimant stated in both the Memorandum of Claim and in his testimony that he was never given a copy of the investigation report by EMU or the Company. This evidence has not been contested by the Respondent. The Claimant was being asked to defend himself against unspecified charges contained in a report that was never availed to him.

The Employment Act provides at Section 41 provides that an employer shall before terminating the employment of an employee explain to the employee the reason for which the employer is considering termination and the employee shall be entitled to be accompanied during the explanation by a shop floor union official or another employee. The section further requires an employer to hear and consider any representations by the employee and the person accompanying him before termination or dismissal. Section 43 requires an employer to prove the reasons for termination or dismissal while Section 45 provides that the termination of employment of an employee is unfair if the employer fails to prove

that the reason for termination is valid.

In this case the employer did not comply with either its own code of regulations requiring it to give the employee an opportunity to respond to charges against him through a show cause letter or with the requirements of the Employment Act requiring him to explain the reasons for dismissal and give the Claimant an opportunity to be accompanied by a union official or colleague to the hearing. The charges in the letter of dismissal were never preferred against him at any time. He was thus condemned to summary dismissal without knowing the charges against him or given an opportunity to defend himself.

I therefore find that the dismissal of the Claimant was unfair. I now consider the prayers of the Claimant:-

**a) Six months' salary in lieu of notice**

The Code of Regulations does not provide for notice for normal termination of employment by the company. However the regulations provide for 6 months notice in the case of retirement either on attaining the age of 55 years or under the "50 year " rule. I find that 6 months notice as prayed for by the Claimant is therefore not unreasonable and give judgement in his favour in the sum of Shs.765,930 being 6 months' salary in lieu of notice based on a monthly salary of Shs.127,655 in the payslip for the month of January 2010.

**b) Unpaid salary for February 2010 and 5 days in March**

The Claimants letter of dismissal was dated 26<sup>th</sup> February 2010. He has however stated that he received the letter on 5<sup>th</sup> March 2010. This was not contested by the Respondent. I therefore give judgement to the claimant for the sum of Shs.148,930.85 being salary for February 2010 and 5 days of March 2010.

**c) Accrued Unpaid Leave of 108 days**

The Respondents witness admitted that the Claimant is entitled to leave up-to the date of dismissal. The letter of dismissal also states that he would be paid accrued leave. The Respondent did not contest the figure of 108 days claimed in the Memorandum of Claim. I therefore give judgement to the Claimant in the sum of Kshs.459,558 being 108 days accrued annual leave based on the salary of 127,655 per month.

**d) Maximum compensation of 12 months' salary**

The Claimant had worked for the Respondent from 7<sup>th</sup> October 1993 to 5<sup>th</sup> March 2010, a total of 17 years. There is no evidence of any misconduct for the whole of the period he worked for the Respondent. Having been unfairly dismissed after such long service with a clean record, it is my opinion that the Claimant is entitled to the maximum compensation of 12 months' salary. I therefore give judgement for the Claimant in the sum of Shs.1,531,860 being 12 months' salary.

**e) Certificate of Service**

The Claimant is entitled to certificate of service as provided for under Section 51 of the Employment Act.

**f) Accrued Pension**

This claim for accrued pension is not within the jurisdiction of this Court. The Claimant should seek the same as provided for under the Retirement benefits Act.

I therefore give judgement in favour of the Claimant in the total sum of Kshs.2,906,278.85. The Respondent shall also pay costs of the suit.

Orders accordingly.

**DATED AT NAIROBI THE 16<sup>TH</sup> DAY OF JANUARY 2012.**

**Read in open court and signed on 16<sup>th</sup> January, 2013.**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE.**

**In the presence of:-**

\_\_\_\_\_ **Claimant**

\_\_\_\_\_ **Respondent**