



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 4295 OF 1992

FRANCIS NDUATI NJUGUNAPLAINTIFF

VERSUS

MURANG'A MUNICIPAL COUNCIL1ST DEFENDANT

THE ATTORNEY GENERAL2ND DEFENDANT

THE PUBLIC SERVICE COMMISSION.....3RD DEFENDANT

JUDGMENT

1. The plaintiff via his plaint dated 7th August 1992 has sued the 1st, 2nd and 3rd defendants jointly and severally for wrongful and unlawful dismissal from employment. The plaintiff avers that on or about 15th October 1987, the 1st defendant wrongfully and unlawfully without any reasonable excuse suspended the plaintiff from executing his duties and commanded him to leave his office during working hours and consequently unlawfully stopped the plaintiff's salary. That in the year 1989 the 3rd defendant through the Permanent Secretary Ministry of Local Government wrote to the 1st defendant recommending the plaintiff's services to be terminated. That on 22nd August 1989 the 1st defendant wrote to the plaintiff advising that the 3rd defendant had terminated his services which termination the plaintiff claims was unlawful and wrongful and contrary to the Natural justice. That due to the said termination the plaintiff has been unable to secure employment and has suffered loss and damage. Despite demand being made and notice to sue in default given the defendants refused to admit liability necessitating the filing of this suit. The Plaintiff prays for;

- i. A declaration that the plaintiff's dismissal was wrongful and unlawful?
- ii. An order directed against the 1st defendant to reinstate the plaintiff to his former position with full benefits
- iii. General damages for wrongful and unlawful dismissal
- iv. Costs of suit

2. The defendant in its statement of defence filed on 10th March 1993, admits terminating the plaintiff's employment on the recommendations of the Permanent Secretary Ministry of Local Government but denies that the same was neither unlawful, wrongful nor arbitrary or contrary to the rules of natural justice. The plaintiff filed their agreed issues and list of documents on 30th June 2000.

3. This matter was partly heard before Justice Gacheche and the parties advocates confirmed that the typed proceedings were in order and the court proceeded to give a judgment.

4. The plaintiff Francis Nduati Njuguna testified that he was employed by the council on 2/2/1972 as a Revenue Clerk earning a salary of Kshs. 350/- and was later on promoted in 1978 to the position of cashier earning a salary of Kshs.1,590/-. His services were unlawfully terminated on suspicion that he had stolen council money. He handed over to the treasurer and the clerk and was locked up by the police and investigations began. That at the time his services were terminated he was given a letter dated 15/10/87 and prior to which he had been released on bond. He was taken to court on 2/12/1987 and was charged with 36 counts of misappropriation of council funds in Criminal Case No. 2784 of 1987 where he pleaded not guilty. The said criminal case continued up to 14/3/1989 when it was withdrawn for lack of evidence. He subsequently wrote a letter on 16/3/1989 and requested to be reinstated but received no reply and further wrote a reminder on 15/5/1989. He later on received another letter dated 6/12/1983 by the clerk of the council explaining that his services had been terminated for desertion of duty, which he denied. He attributes his misfortune to malice by administration officer because he had constructed a stone building with money he had borrowed from Home Savings and Mortgage in 1984 which he was paying with his Owner occupier house allowance of Kshs. 1,950/- he was getting every month that by 31/12/1987 the outstanding amount was Kshs. 1,475,555/55 and he has not been able to clear the loan due to high rate of interest and he had to give security of the title deed which they have threatened to sell on two occasions.

5. On cross examination by Mr. Gacheru he stated that he was arrested on 8/10/1987 he did not go to work as he was handing over to the police and was placed in custody until 9th October 1987 when he was bonded and was told to be reporting to CID Murang'a every fortnight. That at the time he had been suspended as he received his suspension letter on 23rd November 1987. That he had gone to the council premises on 12/10/1987 and was warned against going there. That he had no chance to read the regulations as he did not have the book. He reported on 26/11/1987 but once he was bonded by the police he was told not to report to the office. That he remained in police custody between 27/11/87 and 8/12/87.

6. On cross examination by Mr. Bhandu he testified that he did not go to the office on 14 and 15 October and had not applied for leave and admitted that the bond did not indicate that he should not go to the office and that he was aware that if he did not report to the office he would be dismissed.

7. Alfred Warigi Manyara for the 1st Defendant the Town Clerk of Muranga Municipal Council for over 1½ years and who was custodian of the civil matter of the Municipal Council testified that he found the matter in respect of this suit pending. He affirmed that the plaintiff was employed on 2/2/1972 as a Revenue Clerk earning Kshs.1500/- per month and that he had given his address as P.O. Box 23 Saba - Saba. That the letter of appointment denotes that one is subject to Councils regulations. That the treasurer noted discrepancies and they wrote to the plaintiff after failing to respond in time the matter was forwarded to the Finance Department and General Purpose Committee Meeting of 24/11/1987 after the said meeting the matter was reported to the Public Service Commission which approved the decision to dismiss the plaintiff. That on 19/12/1989 the police wrote stating that he had been in police custody for 4 days having been detained from 1/12/89 to 8/12/89. He affirmed that the plaintiff was lawfully dismissed.

8. On cross examination by Mr. Okello, he testified that the plaintiff was dismissed for deserting duty and though he was given a right of appeal, his two appeals to the Public Service Commission were rejected and the matter was treated as concluded.

9. On cross examination by Mr. Chege he testified that the plaintiff did not comply with the termination letter suspending him. That while on suspension an officer was not to leave the station without permission. That they were not aware he was in police custody nor was there any evidence that after the plaintiff's arrest he was to report to the police station. That later on the state withdrew the charges against the plaintiff under section 87 and he was not found guilty of theft nor was he acquitted and they could still have him re-arrested. He stated that the desertion was not to justify a dismissal but he had been served with two letters. That the plaintiff during suspension was not entitled to any salary.

10. DW2, Mary Nafula Wanyama testified that the plaintiff was informed of the reasons for his dismissal

was desertion as per their letter dated 9/8/1989, he appealed against the dismissal and it was disallowed on 1/12/1989 and the case was ordered closed and the said decision communicated to the through the P.O. Local government.

11. On cross examination by Mr. Chege, she testified that the plaintiff was suspended from the council on suspicion of stealing public funds but was to report to the office on daily basis. She denied any knowledge of the plaintiff's arrest or his handing over to another officer on 7th and 8th October 1987. She stated that the plaintiff was given a notice to show cause but declined to defend himself and wasted his chance of being heard and was not heard only to be arrested long after his suspension on 27/11/87 she denied being aware that he had been arrested on 8/10/87 and that the regulation 28 of the PSC Act provides for investigations if the need arises adding that they were informed that the plaintiff was arrested on 27/11/87 and arraigned in court on 1/12/87 having been in police custody for 4 days.

12. DW3, Corporal John Kilonzo Mutizo, testified that according to the cell register opened on 23/11/87 and remained in custody until 1/12/87 and could not tell why the plaintiff was released on bond.

13. On cross examination he testified that the bond has a stamp of DCIO but the same did not indicate that the plaintiff was in custody at the time. He testified he could not testify of what transpired prior to 23/11/87. He testified that a person can be summoned and issued with a bond or he can be arrested and issued with one.

14. Parties filed written submissions. The plaintiff on his part gave a brief background of the matter culminating to this case. That the suspension letter was written on 15/10/87 and he was accused of not being in employment since 9/10/87 and was dismissed on grounds of regulation no. 24. That regulation 28 of the said regulations required a person to be absent from employment for at least 10 days and it was not justified to suspend him for being away for 6 days. That the 1st defendant is the one who initiated and procured the arrest of the plaintiff and on 7th and 8th he was in the office handing over and was arrested on 8th October 1987 a fact known to the defendant and he wrote a letter suspending him knowing well that he had been arrested. That they wrote to the plaintiff and instructed him not to leave his place of work even though he had been given up to the police and was required to report to the police daily but they did not listen as they were hell bent on dismissing him. That the 1st defendant continued accusing him of absenting himself from reporting to his work place when it had suspended him without pay and given his office to another member of staff. That the police records show that the plaintiff was arrested on 8th October 1987 and was given a police bond on 9th October 1987 with instructions to appear in court on 23/10/87 and he was re-arrested on 27/12/87 and was produced in court on 2/12/87 and remained in prison from 8/12/87 to 16/12/87.

15. That the 1st defendant recommendation that the plaintiff that the plaintiff be summarily dismissed. The 3rd defendant acted arbitrarily and without following procedure laid out under regulation 28 of the Public Service Commission as the regulations provides that one can only be dismissed where he is absent from duty without leave or reasonable cause and cannot be traced for a period of 10 days. That the 1st defendant via the letter dated 19/11/87 wrote to the plaintiff asking his whereabouts and he responded the same via his letter dated 25/11/10 where he indicated that he was in police custody and the defendant did not respond and blatantly recommended the plaintiff to be dismissed and blatantly flouted the rules of natural justice as a result the plaintiff suffered immense loss and damage. That at the time of dismissal he was earning Kshs. 4,240/- and was not given notice nor salary in lieu of notice. That he had secured a mortgage of Kshs. 140,000/- in 1984 and by December 87 it stood at 2,000,000/- adding that he was unable to pay he was unable to pay due to the unlawful dismissal as he lost the Kshs. 1,990/- per month he was to receive as house allowance that after the suit was withdrawn he went to the 1st defendant on many occasions seeking reinstatement but they declined and no cogent reasons were given to him reasons he seeks damages incurred.

16. The 2nd and 3rd defendant's in their submissions state that the plaintiff's case is premised on a review of the decision of the Public Service Commission to dismiss from service on account of desertion of duty

as set out under regulation 28 of the Public Service Commission Regulation 1984. The 2nd and 3rd defendant argued that this honorable court lacks jurisdiction to review an administrative action which jurisdiction is a special jurisdiction under the Law Reform Act. That the plaintiff's 1st and 2nd appeal to the Public Service Commission that he brought the matter to court and the same out to be by way of Judicial Review and not by way of civil suit. Further that should the plaintiff's dismissal be found to be unlawful the plaintiff is only entitled to payment in lieu of notice which under Civil Service regulation is one month. He referred the court to two texts; Chitty on contracts and Mayne and Mc Gregor on damages, in both tests the authors are on agreement that once a party who is wrongfully terminated by his/her employer the aggrieved party is only entitled to sums he/she would have earned in alternative employment since common law supposes a duty of mitigation of losses by the party through alternative employment. Further that under regulation 28 of the Public Service provides that the plaintiff is only entitled to any right or claims to pension, gratuity annual allowance. Further that the suit is statute barred having been filed after the lapse of 3 years contrary to the provisions of section 3 of the Public Authorities Limitation of Actions Act. The defendants sought the plaintiff's suit to be dismissed with cost.

17. I have read and considered the parties pleadings and submissions. After considering the evidence of both sides and their respective submissions; the issues for determination are as follows:-

- i. Whether the defendant's action of dismissing the plaintiff was unfair or wrongful.
- ii. Whether the plaintiff was accorded a fair hearing?
- iii. Whether the plaintiff is entitled to remedies he has sought?

18. From the evidence of the plaintiff, he was arrested and charged in criminal case no. 2784 of 87 with 36 counts of stealing by person in the public service contrary to Section 280 but the charges were withdrawn for lack of evidence. During the pendency of the criminal case vide the letter dated 15th October 1987 the 1st defendant sought to know why the plaintiff had not been in office since 9th October 1987 and suspended him from service effective the said date under Regulation 24 of the Public Service Commission (Local Authority officers regulations) and instructing that he should not leave the office without his permission pending consideration of his case. On 19th October 1987 the Muranga Municipal Council further wrote to the plaintiff via their letter dated 19th November 1987 emphasizing that the plaintiff was supposed to remain within the precinct of the Town hall during working hours while under supervision and gave him 10 days to explain himself or face summary dismissal as per regulation 28 of the Public Service Commission.

19. The plaintiff in reply to the council's letter dated 19th November 1987 wrote to the 1st defendant on 27th November 1987 indicating that he had to report to the Police and CID headquarters after he had been handed over to them on 8th October 1987. The plaintiff in his letter dated 16th March 1989 sought reinstatement to his position after the conclusion of the criminal matter on 14th March 1989, two months on after receiving no response the plaintiff via letter dated 15th March 1989 following up on his earlier letter on reinstatement. The Council vide their letter dated 16th June 1989 wrote to the plaintiff indicating they would communicate to the plaintiff once the matter is settled. The council further in their letter dated 22/08/1989 informed the plaintiff that the Public service Commission reaffirmed their decision that the plaintiff's decision that his services were terminated with effect from 14th October 1987 this was further reaffirmed their decision in their letter dated 6th December 1989.

20. The Deputy Secretary in its letter dated 1st December 1989 stated that the plaintiff was appealing to be reinstated having been dismissed from service on 14th October 1987 for absconding duty without reasonable cause. The plaintiff on his part does not dispute this, but in his defence claims that he was only absent for 6 days because he was in police custody and also that he had to report to the police station as the charges levied against him were still being investigated. The defendant in efforts to verify this called Corporal John Kilonzo Mutizo, who testified that according to the cell register opened the plaintiff was booked on 23/11/87 and remained in custody until 1/12/87. This does not fall within the dates of 9th October 1987 referred to by the Muranga Municipal Council's letter dated 19th October 1987. From the

fore going it is evident that the plaintiff was asked to explain his absence from duty and he responded to the said claims. However it appears the same did convince the Public Service Commission. There was no dispute that a public officer could be summarily dismissed from government service for absence from duty without leave. Indeed Regulation No. 28 of the Public Service Commission Regulations made under Service Commission Act, (Cap 185) provides: *“Where a public officer is absent without leave or reasonable cause for a period exceeding twenty four hours and the public officer cannot be traced within a period of ten days from the commencement of such absence or if traced no reply to a charge of absence without leave is received from him in writing within ten days after the dispatch of the charge to him, the authority empowered to dismiss him may summarily dismiss him.”*

21. I find that the Public Service Commission followed the laid down procedures in arriving at a decision to dismiss the plaintiff. The plaintiff was given a right of hearing and a fair hearing for that matter. It is evident from the numerous correspondences produced in evidence before this court that the plaintiff absented himself from duty without authority from his superior and he never sought permission or prior consent to be absent from duty. I find that the plaintiff is not entitled to the damages sought and dismiss his claim with costs. Orders accordingly.

Dated, signed and delivered this **17th** day of **September** 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Plaintiff**

.....**For the Defendants**

Ms. Charity

Court Clerk