



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 111 OF 2005

JULIUS LERIAMAN LELESIIIT.....PLAINTIFF

VERSUS

HON. ATTORNEY GENERAL.....1ST DEFENDANT

THE PERMANENT SECRETARY, PROVINCIAL ADMINISTRATION &

INTERNAL SECURITY.....2ND DEFENDANT

JUDGMENT

Julius Leriaman Lelesiit filed this suit on 7/4/2005 against the Hon. The Attorney General, the Permanent Secretary Provincial Administration and Internal Security, the 1st and 2nd Defendant. He seeks the following orders;

(a) A declaration that the purported termination of the Plaintiff's employment is unlawful, illegal, null and void and that the Plaintiff is entitled to payment of his salary from the date of such termination until such period that the Plaintiff's employment is validly and legally terminated.

(b) General damages.

In the Complaint, the Plaintiff stated that he was duly appointed as an Assistant Chief, Siambu Sub-Location, Lorroki Division, Maralal District on 28/9/1990. He performed his duties diligently till 19/9/2000 when he was dismissed from employment. He contends that the dismissal was illegal, bad in law, null and void and a gross breach of the contract of employment between him and the Government.

The Defendant filed a defence on 27/7/2005 in which it was pleaded that if at all the Defendant was on suspension, he was not entitled to any salary, that the dismissal was procedural and within the law; that after the appeal, the Plaintiff was duly notified of the decision. The Defendants denied being in breach of any contract.

When the case came up for hearing on 19/10/2011, the court noted that the Defendants were duly served with the hearing notice and an affidavit of service sworn by **Julius Kamotho Njaga** on 11/10/2011 was filed. The hearing notice was acknowledged by the State Law Office. Neither counsel nor any witness attended and the hearing proceeded ex-parte.

The Plaintiff (**PW1**) testified that after he was employed on 20/8/1990, as per letter of employment (**P.Ex.No.1**), he worked for 4 years, when the District Officer called him and handed him an interdiction letter on 13/12/1994 (**P.Ex.2**) for allegedly refusing the Mayor of Maralal Town Council, from farming

wheat in his location. He replied to the Notice to Show Cause on 23/12/1994 (**P.Ex.3**). He denied having any authority over anybody's piece of land in order to deny the Mayor permission to farm and denied all allegations leveled against him.

Again on 16/2/1995, the Plaintiff received a dismissal letter dated 8/2/1995 (**P.Ex.4**). It was alleged that he had frustrated development projects in his area and lacked respect for Senior government officials. The Plaintiff replied denying the allegations (**P.Ex.5**). The dismissal letter contradicted a letter written on 16/12/1994 by **Ntioo Letowon**, the chief of Poro Location. By that letter, the Plaintiff was promoted to Senior Assistant Chief.

The Plaintiff received yet another letter dated 9/6/1995 terminating his appointment (**P.Ex.7**) authored by **A. K. Kirui** on behalf of the Provincial Commissioner. Another dismissal letter was written by **Mr. Haji** for the Provincial Commissioner to the Plaintiff on 9/5/1996 indicating that he had been dismissed with effect from 9/6/1995 (**P.Ex.8**). On 25/5/1999, another letter was addressed to the Plaintiff, that the decision to dismiss the Plaintiff was rescinded and he was reinstated on suspension with effect from 8/2/1995. In the same letter, he was asked to show Cause why he should not be dismissed for gross misconduct (**P.Ex.9**).

On 6/1/2001, the Plaintiff received yet another letter dismissing him from work (**P.Ex.10**), with effect from 19/9/2000 on account of gross misconduct. On 30/11/2004, the Plaintiff received yet another letter (**P.Ex.11**), which varied the date of dismissal to 8/6/1995, which was the effective date of the suspension and he was to forfeit any claims from the Government. He was reminded of his right of appeal within 6 weeks and he did appeal vide the letter dated 12/11/2001. On 8/3/2005, the Notice of Intention to institute civil proceedings against the Attorney General pursuant to **Section 13A of the Government Proceedings Act** was issued (**P.Ex.13**) and it was acknowledged when the Senior Litigation Counsel for Attorney General's Office sought instructions from the Permanent Secretary's Office of the President.

The Defendant did not attend court or call any witnesses to support the allegations put forth in the defence. The Plaintiff's counsel identified the following issues for determination;

(1) Whether the allegations leveled against the Plaintiff were proved;

There were several allegations leveled against the Plaintiff which are that;

- (1) he devoted most of his time on frustrating development projects,**
- (2) undermining superior officers,**
- (3) discouraged local farmers,**
- (4) uninterested in growing wheat,**
- (5) lack of respect for Senior Government Officer,**
- (6) boosted that the chief is illiterate.**

As the Defendant purported to interdict and dismiss the Plaintiff, the chief who was the Plaintiff's immediate senior promoted the Plaintiff to **Senior Assistant Chief** with effect from 1/12/1994, and the reasons for the promotion were that he was involved in positive development, that he was industrious, disciplined and diligent. This is contrary to the allegations leveled against the Plaintiff by the District Commissioner and Provincial Commissioner. From the correspondence produced in court, there is no evidence to demonstrate that the allegations leveled against the Plaintiff were proved. In any event having failed to call any evidence in support of their defence, their actions were not justified. In the result, I find that the Plaintiff's interdiction, suspension and the ultimate dismissal was done in violation of the Public Service Commission Regulations. The manner of dismissal was not justified and I find that the Respondents acted maliciously, abused power and unlawfully. During that period when the Plaintiff was

tossed to and fro he was not even allowed to leave his station. The decisions were manifestly unfair, oppressive as the Plaintiff should have known his fate as soon as possible so that he could move on with his life. He needed to earn a living.

(2) Whether the Defendants complied with Public Service Regulations

The Plaintiff was dismissed five times. The first letter titled “**indiscipline**” is dated 13/12/1994 (**P.Exh.02**). In the letter, it was alleged that the Plaintiff was rude and disrespectful to the Area chief for failing to attend the chief’s meetings and alleging that the chief is illiterate. Secondly, the letter alleged that he had failed to encourage the Samburu people to take farming seriously. The second dismissal letter (**P.Ex.4**) of 8/2/1995 also gave the reasons that the Plaintiff was frustrating development projects in the area and undermining senior officers. He was interdicted in both instances. The Plaintiff could only be interdicted once to pave way for investigations into his alleged misconduct. Disciplinary procedure for public officers is governed by the Public Service Commission Regulations. The current Regulations came into force in 2005 well after the plaintiff had been dismissed from service. The applicable rules were those in existence before the 2005 Regulations.

The proceedings for discipline of public officer in Job Groups “**G**”, “**H**”, “**J**” or above was provided under **Regulation 26**. If the authorized officer believes that the proceedings against the particular officer may lead to a dismissal, he would notify the officer of the charges and give the officer time to exculpate himself and the date be specified; a report would be prepared and submitted to the Commission and the officer would be informed of the date when the investigation would be done, if there was need for more investigations. Investigations are conducted by a public officer and if witnesses were called, the accused person would be accorded a chance to see the evidence, be granted time to respond. The accused could also be represented. If there was need to prove more charges, the investigation officer would prepare a report and present it to the Commission, and it is the Commission to decide on the punishment to be meted. From the letters produced in evidence, there is no indication that this procedure was ever followed. The decisions were made without involving the Commission.

By letter dated 8/5/1996, the Provincial Commissioner wrote to the Plaintiff indicating that the decision to terminate his probationary period had been varied. The question is whether the Plaintiff was still on probation 5 or 6 years after appointment. **Section 23 (1) of the Public Service Commission Regulations** provided that a public officer will be required to serve on probation for one year unless a shorter or longer term is required. After 6 months of probation, the authorized officer of the Department had to indicate the suitability of the officer, whether he should be confirmed, probation extended or services terminated. Before recommendation is made for extension or termination, the Head of Department had the duty to inform the officer of his recommendations. There is no evidence that the Defendants complied with the above procedure.

Section 32(1) of the Public Service Commission Regulations provided that any misconduct by an officer shall be dealt with expeditiously after the occurrence. The Regulations envisaged a speedy trial which is one of the rules of natural justice. This is not what happened in this case. The authorized officers were unsure of what they wanted to do with the Plaintiff and wrote conflicting letters to the Plaintiff five times. **Regulation 35** provided for interdiction or suspension. Under **Regulation 35(2)**, an officer suspended or interdicted was entitled to half salary. During the time that the Defendant was not decided whether or not to dismiss the Plaintiff, the Plaintiff should have been entitled to half salary.

For all the reasons considered above, I find that the Plaintiff’s dismissal was done in total disregard of the rules of natural service. It was a total abuse of power by the public officers and in breach of the Public Service Commission Regulations and I declare the process of dismissal of the Plaintiff to have been illegal and unlawful. As to whether the Plaintiff is entitled to salary, I have observed above that pending any disciplinary proceedings against him, the Plaintiff was entitled to ½ salary.

(3) Is the Plaintiff entitled to damages?

There is no evidence that the charges leveled against the Plaintiff were proved. I have shown above that

the chief's letter (**P.Ex.6**) promoting the Plaintiff in December, 1994 spoke a different story from that of the Defendants. The Plaintiff lost a career, suffered loss and was kept in suspense and indecision from the Respondents for about 10 years. The Defendants' conduct is tainted with malice and entitles the Plaintiff to compensation. In **Dalmas Ogoye Vs KNTC Ltd 1996**, the Court of Appeal said that the only remedy in a claim for unlawful dismissal is damages. In the case of **C. P. C. Industrial Products Ltd Vs Omweria Ngima – Civil Appeal No. 197 of 1992**, the court cited the case of **Gunton Vs London Borough of Richmond Upon Thames (1980) 3 All .R. 577, Buckley L. J.** said at page 589(h);

“Where a servant is wrongfully dismissed, he is entitled subject to mitigation, to damages, equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. That date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself, that is to say, that he would have determined the contract at the earliest date at which he could properly do so: (see McGregor on Damages (13th Edition, 1972) paragraphs 884, 886 and 888.”

In the C. P. C. case, the court then said;

“damages for wrongful dismissal are limited to wages or salary the Plaintiff has lost subject to his duty to mitigate his damages. The assessment cannot take into account other considerations such as mental anguish and things like that ...”

Counsel for the Plaintiff urged this court to make an award of Ksh.5,000,000/= as general damages but there was no basis laid for the figure. It is unfortunate that the court was not told how much the Plaintiff used to earn. When the Plaintiff was interdicted on 13/12/1994, he was entitled to half salary. I believe he was paid that ½ salary. He was further interdicted by the letter dated 8/2/1995 which means he continued to get half salary till his dismissal on 9/6/1995.

Having found that the dismissal was without just cause, unlawful and malicious, I find that the Plaintiff is entitled to compensation as from the 9/6/1995 when he was first dismissed to the date of the final letter of dismissal dated 30/11/2004, which is about 10 years. The Plaintiff did not demonstrate that he mitigated his loss during that period, and based on the **C.P.C. Industrial Products Case (Supra)** I will, in assessing the damages due to the plaintiff, find an award of 6 years wages, to be adequate compensation. The figures to be used to compute the damages due to the Plaintiff will be the salary that he would have been entitled to during that period. The Plaintiff will also have costs of this suit.

DATED and DELIVERED this 22nd day of February, 2012.

R. P. V. WENDOH
JUDGE

PRESENT

Mr. Mukira for Plaintiff/Applicant

No appearance for Defendant/Respondent

Kennedy – Court Clerk