REPUBLIC OF KENYA

High Court at Machakos

Civil Case 286 of 2011

FREDRICK ODHIAMBO OJWANDO …… PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL ……..…… DEFENDANT

J U D G M E N T

This case which was a **Nairobi** matter filed as **HCCC 682 of 2009**, was forwarded to Machakos by **A.K. Ndungu Principal Deputy Registrar Civil Division Nairobi** on 28th June 2012. The file was thereafter placed before me at **Machakos**, and I was persuaded by **Mr Atanda** for the plaintiff to deliver judgment. I had heard the case in **Nairobi** in 2011 and ordered that parties file written submissions.

The case is grounded on an amended plaint dated 17th December 2009 and amended on 10th February 2011. In the amended plaint the following orders are sought:-

A. Declaration that the dismissal of the plaintiff from service on the 5th July 2002 by the defendant was unlawful, illegal and unprocedural and an order to hereby issue reinstating the plaintiff without loss of benefits or salary to date.

B. Half salary arrears to be calculated from the date of interdiction to the date of suspension.

C. Damages/Compensation for wrongful and/or unfair dismissal in accordance to the Code of Regulations, the Employment Act and the Labour Institutions Act.

DD. Gross salary calculated from the date of suspension to the date of dismissal.

EE. Without prejudice and in the alternative an order for payment of compensation and all entitlements to the plaintiff as by law provided and specifically salary entitlement from the date of reinstatement to the date of filing suit.

F. Costs and interest of this suit.

G. Any other suitable relief as may be deemed fair and just by this Honourable Court for the ends of justice to be met.

The defendant, who is the Attorney-General on behalf of the Ministry of State for Immigration and Registration of Persons and the Public Service Commission, filed a defence to the original plaint on 28/7/2010. It was admitted that the plaintiff was an employee of the Government as an Immigration Officer at **Jomo** Kenyatta International Airport, but that his services were lawfully terminated, for having allowed a prohibited immigrant from **Sudan** one **Tariq Idriss Hassan** to disappear temporarily from confinement at the Airport in January 2001. It was also the defence that in July 1999, the plaintiff irregularly endorsed an entry and exit permit at **Wilson** Airport for **Mrs Levitan** by falsely indicating that the said person had travelled to **Tanzania** and back, while knowing that the said person never left Kenya.

One witness testified for the plaintiff, and one witness testified for the defendant.

PW1 was **Fredrick Odhiambo Ojwando**, the plaintiff. It was his evidence that he was 41 years old and a BA graduate of the University of **Nairobi.** He was employed by the Government as an Immigration Officer in 1997 and, at the time of the incident, he was deployed at the **Jomo** Kenyatta International Airport (JKIA). His duties on the day of the alleged complaint against him, were to man the clearance of foreign arrivals together with other officers. On that day, he was not incharge of prohibited immigrants, which duties were carried out by another officer a **Mr Waiganjo**. **Mr Waiganjo** had the key to the cells on that day which was 19/1/2001. The plaintiff on that day was clearing foreign arrivals and specifically **Chinese** diplomats from **Entebbe**. **Mr Waiganjo** dealt with prohibited immigrants and East African citizens.

In the course of that day, there was a distress situation which was noted by **Mr Waiganjo** in that water had leaked into the prohibited immigrants cell which was carpeted. **Mr Waiganjo** used the key which he **(Waiganjo)** had and opened the cell for the prohibited immigrants, to allow cleaners remove the water. It was then that one prohibited immigrant mingled with the incoming foreigners and walked out. On 26/1/2001, the plaintiff was interdicted because of that incident. It was his evidence that if there was a mistake, it was not his. He produced a number of documents, including the letter of interdiction, as an exhibits.

During interdiction, he was required to report to the Deputy Immigration Officer on duty every week. On 6/6/2001, the Deputy Immigration Officer informed him that there was a letter reinstating him, which the Principal Immigration Officer **(Mr Ole Ndiema)** was studying. It was his evidence that he was not given that letter but his salary was adjusted to the normal salary from the ½ salary per month he used to receive during interdiction. He produced two payslips to demonstrate the difference of salary received – that is for July 2001 and for September 2001.

It was his evidence that though he went severally to the Principal Immigration Officer's office to try and get the letter of reinstatement, the same was not given to him. After 9 years, he managed to get a copy of the letter reinstating him to work, which was filed in the secret registry. It was signed by a **Mrs R.A. Shakaba** for the Permanent Secretary and was dated 6/6/2001. He produced the letter as an exhibit.

It was his further evidence that on receipt of this letter, he appealed to the Public Service Commission. The response he got from the Public Service Commission was that the matter had been closed. The letter from the Public Service Commission was very terse, and it stated that he should seek legal redress. This letter was signed on behalf of the Permanent Secretary.

It was his evidence that he really pursued the issue of his reinstatement. He even went to the office of the **Ombudsman** in pursuit of reinstatement.

He testified that he responded to the initial letter to show cause. He was aware of a letter dated 26/10/2001 alleging neglect of duty. He responded to these allegations by a letter dated 26/11/2001. He

however later received a letter of dismissal dated 5/7/2002.

It was his further evidence that he was not called for discussions or a hearing before being dismissed in contravention of the Regulations. His dismissal from service was therefore malicious and unlawful. It was also his evidence that he gave a notice of intention to sue to the Attorney-General before filing suit. He produced a letter from the Attorney-General to the Public Service Commission following his notice to the Attorney-General on the matter, dated 14/7/2009.

In cross-examination, he reiterated that on 19/1/2001 it was **Mr Waiganjo** who was incharge of prohibited immigrants. He conceded that he had been incharge of prohibited immigrants a number of times before. He was to be incharge of them the next day.

He stated that it was **Mr Waiganjo** who made him aware that one prohibited immigrant had disappeared. The immigrant had disappeared for one hour and resurfaced as **Mr Waiganjo** looked for him. He was aware that the immigrant was doing business at the airport and was to be deported to **Sudan**. He stated that the original letter of reinstatement was retained at the secret registry. In his view, it was kept away from him by **Mr Ole Ndiema** because of impunity. He however did not enquire as to why the letter was not released to him. Before he became aware of the letter of reinstatement, he had received a letter of termination of service. He stated that he made a number of appeals to the Public Service Commission, which were not successful. His major complaint was that he was not called to defend himself. He stated that his case was even discussed in Parliament. He was not aware that the Minister gave an answer to the query raised by the plaintiff. That was the close of the plaintiff's case.

The defence called one witness DW1 **Johnson Munyua Kahendi** a Human Resource Management Officer in the Ministry of Immigration. It was his evidence that he did not initially deal with the plaintiff's case. However, he had the personnel file. It was his evidence that the plaintiff was interdicted when he was working at JKIA. The witness dealt with the plaintiff's case from 2008, when he applied for review of the case. From the file, the record was that the plaintiff was interdicted on 26/1/2001 for alleged release of a prohibited immigrant, when he was working with another officer by the name of **Mr. Waiganjo**. He testified that **Mr Waiganjo** was dismissed on account of the same issue.

It was his evidence that he went through the plaintiff's file and found that the first appeal was filed out of the time. The witness made recommendations to the Public Service Commission. The appeal was dismissed because it was not credible. He stated that it was also on record in the file that the plaintiff previously had another case involving the passport of a **Tanzanian** national at **Wilson Airport**.

On being shown the letter of reinstatement, he stated that it was irregular and that was the reason why it was not released to the plaintiff. According to him, when the letter of reinstatement was written, the matter had not yet been sent to the Ministerial Committee as required by law. Later, the matter was taken to the Public Service Commission and a decision was made.

It was his evidence that the matter was even discussed in Parliament and that the Minister answered the questions raised. The Minister stated the position that the matter had been closed.

It was his further evidence that though the plaintiff tendered his defence to the Ministry, the same was not successful. According to the information from the Principal Immigration Officer, both the plaintiff and **Mr Waiganjo** were incharge of the immigrant, who was a deportee terrorist from Sudan.

In cross-examination, he stated that he did not know how long the deportee had stayed in **Kenya.** The information he had about what transpired was from other persons, as he was not at the JKIA. The witness maintained that the existing disciplinary procedures were complied with. He stated that he had the minutes of the proceedings in the file. He reiterated that the letter of reinstatement could not be handed over to the plaintiff because it was irregular, as the person who wrote it was not authorized by the Ministerial Human Resources Management Committee to do so. He did not have records of deployment of staff. He stated that only the Principal Immigration Officer could substantively talk about deployment of staff on that particular day of the complaint.

In re-examination, he stated that he had handled the matter from 2008. He wrote briefs and recommendations on the matter.

That was the close of the defence case.

After the close of the case for the plaintiff and the defence, the parties' counsel agreed to file written submissions. The plaintiff's submissions were filed on 29/9/2011 by his counsel **Ombati otieno & Opondo Advocates**. The defendant's submissions were filed earlier on 1/8/2011 by the Attorney-General. I have perused the submissions on both sides.

I must state at the outset that the plaintiff was dismissed in 2002. The Constitution and the law applicable was therefore that which was operational then.

Though the defence raised the issue that notice of intention to sue was not served on the Attorney–General, no evidence was tendered by them on the issue.

The issue was also not raised in the Attorney-General's submissions. I have seen a copy of a notice of intended prosecution dated 10/07/2009 which notified the Attorney-General that the plaintiff intended to file court proceedings. A copy of a letter from the Attorney-General dated 14/07/2009 to the Public Service Commission seeking instructions on the matter, was also produced by the plaintiff as an exhibit herein. In my view, the notice of intension to sue the Attorney-General was served. The exhibits produced by the plaintiff also show that the government communicated to him regarding his request for review resting with a letter dated 25th May 2009. In my view, therefore, proper notice was given and, the suit is not statute barred, as it was filed in 2009.

The substantive issues here are whether the plaintiff was negligent in the performance of his duties, and whether a fair hearing was accorded to him before termination of service. The other issue is whether he is entitled to the reliefs sought, and who will bear costs.

Though the plaintiff did not specifically produce his letter of appointment or deployment, the bundle of documents to be relied upon filed contained the letter, and several other letters. The letter dated 26th January 2001, which was the letter of interdiction, gives a brief of his duties on 19/1/2001 and the complaints leveled against him. He was said to be a Unit Supervisor, and that the then Prohibited Immigrants Officer was under him. It was alleged that he let a prohibited immigrant a **Mr Hassan Idriss Tariq** to disappear for some time and neither informed the shift supervisor, nor the incoming officers. That instead, he informed the incoming officers that **Mr Tariq** had gone to make a telephone call.

By this letter, the plaintiff was asked to make presentation in response to the allegations by 15th February 2001. The plaintiff did not produce a copy of his response, but produced a copy of a letter dated 6th June 2001 reinstating him, but which letter he claims he saw in 2009. He however produced a letter from the Permanent Secretary dated 26th October 2001 referring to the subject incident of 19th January 2001, and another incident at **Wilson** Airport of July 1999, requiring him to defend himself within 21 days. To this, he produced his response dated 26th November 2001 which gave a detailed response to the allegations. He was however, later dismissed vide a letter dated 5th July 2002.

The letters produced by the plaintiff and his evidence are quite clear. He was on duty on that material day. No witness from the defendant came to court to testify regarding the duties and responsibilities the plaintiff was assigned on 19th January 2001. He was working with others. His evidence was not controverted.

There is no evidence that any of the persons who wrote the letters about the incident was the immediate supervisor of the plaintiff or the one who gave him duties or assignments. All were office employees, who appear to have been at the Ministry headquarters or the Public Service Commission. The witness for the defence (DW1) was a Human Resource Officer. He was involved in the matter much later, in 2008. The

incident occurred in January 2001. He stated that only the Principal Immigration Officer could be able to testify on duties assigned to officers. The said Principal Immigration Officer did not testify. In my view, the plaintiff's story about his role and responsibilities on that day was not controverted. It was clear from both the plaintiff and defence, that it was another officer a **Mr Waiganjo** who was incharge of the prohibited immigrants on that day. That officer was dismissed according to the defence witness. Supervision is different from execution of specific functions. I find that the plaintiff was not negligent in his duty. Under **section 107** of the **Evidence Act**, he who alleges must prove. The defendants alleged that the plaintiff was negligent. The evidence on record is infact that another employee a **Mr Waiganjo** was incharge of prohibited immigrants when **Mr Tariq** disappeared for some time. In my view, it was the responsibility of **Mr Waiganjo** to report the incident to the incoming officers, and not the plaintiff herein. Therefore, the plaintiff was not negligent in the performance of his duties.

Was the plaintiff given a fair hearing? No authority was cited by either side on what constitutes a fair hearing. Even the provisions of **Code of Regulations** were not cited. In my view, a fair hearing does not necessarily mean that a person must be called to appear for proceedings in person. There will be straight forward cases where it will not be necessary to interrogate matters. However, in matters such as the present one where there was a big difference-or contest between the version of the plaintiff and that of his employer, in my view it was necessary to call the plaintiff to defend himself against the allegations so that he could be questioned to verify his side of the story. It is apparent that a previous undocumented incident of July 1999 informed the decision to terminate the plaintiff, which was not right. He does not appear to have been charged or reprimanded for that previous incident, therefore it should never have been used against him.

In the US Supreme Court decision of **Goldberg's –vs – Kelly 397 US 254 (1970)** the court held that an agency cannot terminate a recipient's welfare without a pre-termination hearing. In my view, terminating ones employment where the employee contests the allegations leveled against him or her requires that he or she be heard before that termination. In default, that termination of services will not be fair. I find and hold that there was no fair hearing in the present case. I find and hold that the termination of plaintiff's services was irregular and unlawful, illegal and unprocedural.

Though the plaintiff did not appeal the decision to dismiss him within six (6) weeks from 5th July 2002 as communicated to him, in my view, that administrative default cannot deny him his rights to be heard in this court. He also appears to have corresponded with the employer up to the letter to him from the Permanent Secretary dated 25/5/2009, which closed any further correspondence with him. This was an admission by the defendant that the matter was under consideration till then. In addition, I have not been informed that there exists any legal bar to the plaintiff from taking these proceedings in 2009, while his services were actually terminated in 2002. In my view, time started running in 2009 when the employer closed the matter.

Is the plaintiff entitled to the prayers sought? I have already dealt with the issue of legality or the termination and found that the termination of services was unlawful, illegal and unprocedural. Some of the prayers sought are not grantable. He has asked for reinstatement. If an employer has lost faith in an employee, he cannot be forced to retain an employee or reinstate him or her. The relationship of employer- employee is one of trust and confidence, which cannot be forced or enforced by the court. This is the **Common Law** position. I will not reinstate the plaintiff. In my view, unless there is written law granting this court's jurisdiction to reinstate an employee whose services have been terminated, the court cannot do so. I am not aware of any statute that confers on the High court jurisdiction to reinstate an employee whose services have been terminated.

In **Okongo –vs- Attorney-General (1988) KLR 748 at page 745** the Court of Appeal held:-

"But as a matter of contract between the parties, in this court reinstatement cannot be ordered….It follows that once an employee has been dismissed, whether rightly or wrongly the dismissal stands…..damages for breach of contract is the remedy to which an employee is entitled."

I am fortified in my findings on the above decision.

The plaintiff has asked for payment of damages under various heads. In my view, with regard to the substantive prayers for damages, the plaintiff can only be granted damages for wrongful and unfair dismissal. He cannot be granted loss of salaries and benefits to date. Those can only be paid to people who are working.

The plaintiff claims the recovery of salaries and allowances has to be in accordance with the **Code of Regulations**, the **Employment Act**, and the **Labour Institutions Act**. However, no specific provisions of those **Regulations** or **Acts of Parliament** were cited. Nor did the plaintiff or his advocate attempt to quantify the said damages. In the absence of any specific guidance on the issue of these damages, this court can only award damages for wrongful termination of service, as specific or special damages have to be proved. In my view also, the only damages that can be awardable for wrongful termination of employment of the plaintiff herein is payment for the period of employment termination notice, as the employment of the plaintiff was not specifically protected by law.

Needless to say, under the common law, general damages for inconvenience caused by wrongful termination of employment are not payable. I take it that the maximum notice of termination of employment period in the public service is 3 months. Therefore, I award the plaintiff damages for wrongful termination of service calculated at three (3) months basic monthly salary plus three (3) months house allowance as on the payslip for September 2001, which Kshs.9,355/= as basic salary and Kshs.6,000/= house allowance per month, times three months.

The plaintiff is also awarded the costs of the suit as well as interest at court rates. The interest on the damages will accrue from the date of this judgment till payment in full. Interest on costs will accrue from when same is determined either by agreement or on taxation.

Orders accordingly.

Dated and delivered at Machakos this **19th** day of **December** 2012.

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George Dulu

Judge

In the presence of:

Mr Ochola for Plaintiff present

Plaintiff present

N/A for Attorney – General

Mutinda – Court clerk