



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)

HCC NO. 2520 OF 1996

ALBERT N. CHOKERA.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL..... RESPONDENT

CONSOLIDATED WITH

HIGH COURT CIVIL CASE NO. 2846 OF 1996

RAPHAEL K. IMUTI.....PLAINTIFF

VERSUS

D.K. MATIVO.....RESPONDENT

THE HON. ATTORNEY GENERAL.....RESPONDENT

AND

HCCC NO. 2846 OF 1996

JOHN KOBIA MUKIIRA..... PLAINTIFF

VERSUS

D.K. MATIVO.....RESPONDENT

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Albert Chokera (plaintiff in HCCC No 2570/96) was appointed a Chief of Ankaramia Location Nyambene District in October, 1993. He was a teacher before appointment as a chief. He was interdicted vide a letter dated 15.4.96 and eventually retired on public interest vide a letter dated 28.6.96 with full benefits.

Raphael Kailemia Imuti (plaintiff in HCC no. 2846/96) was appointed as Assistant Chief with effect from 5.10.94. He was interdicted vide a letter dated 15.4.96. He was serving on probation and by a letter

dated 18.7.96 his services were terminated. He was only entitled to one months salary in lieu of the Notice.

John Kobia Mukiira (plaintiff in HCC NO. 2847/96) was appointed Chief Grade 1 by a letter dated 21.10.93. He was interdicted through a letter dated 15.4.96. He was retired on public interest by a letter dated 28.6.96 with full benefits. He was elected the area councilor on 29.12.97

The plaintiffs claim in the respective plaints are identical. Each avers in para 9 of the respective plaint that retirement in the public interest was wrongful, improper and illegal. The particulars of that averment is given. In short plaintiffs allege in the particulars that the provisions of regulation 40 of Public Service Regulations were not complied with and that they were not given an opportunity to be heard.

Each plaintiff further avers in para 10 of the respective plaint that the decision to retire each on public interest was contrary to law and a nullity in that it was a breach of Rules of natural justice as each was not give hearing or sufficient hearing be fore the appropriate authority.

The reliefs sought in each plaint are

- (a) A declaration that plaintiffs retirement was wrongful and a nullity
- (b) An order for the reinstatement
- (c) payment of full salary from 15.4.96 to date of judgment and all other consequential entitlements

And/or alternatively

- (d) Damages
- (e) costs of the suit
- (f) Any other or better relief

Plaintiffs' counsel in his written submissions has cited the provisions of regulation 40 and set out the procedural steps which should have been taken before the plaintiffs were retired. He relies on the case of Joseph Mulobi versus The Attorney General and Anor Nairobi HCC NO, 742/85 in which the court dealt with the provisions of Regulation 40 of public service commission Regulations made under Public Service Commission Act - Cap 185. In that cas the court followed an earlier decision to the effect that in cases involving dismissal of a civil servant the laid down procedure must be strictly followed.

By Regulation 22(1) the public service commission has power to delegate powers relating to discipline to authorized officers - that the permanent secretary who exercises supervision over the department concerned. The case of Chiefs, Assistant Chiefs and all members of subordinate service is dealt with by Regulation 22(1) (c) By regulation 22(v)(c) the authorized officer is given power to inflict any of the punishment to chiefs, assistant chiefs, subordinate staff mentioned in regulation 26(1) in accordance with regulation 39.

Regulation 26(1) specifies the punishments which may be inflicted and regulations 26(2) provides: Nothing in this regulation shall limit the powers conferred by these regulations to require a public officer to retire from Public Service on the grounds of public interest.

Regulation 39 read in the marginal note: "Disciplinary proceeding against Chiefs, Assistant Chiefs and members of subordinate service.

"Regulation" 39(1) prescribes how the disciplinary proceedings shall be conducted. It requires that-

1. The authorized officer should notify the public officer of the charge or charges against him

before any punishment is inflicted

2. The authorized officer to give the public officer a full opportunity of exculpating himself be specified in the notification before punishment is inflicted

3. Alternatively, if 1 and 2 above are not practicable, the public officer to be called before two or more senior public officers of the ministry or department concerned and informed verbally of the charge or charges against him and given the opportunity of exculpating himself.

Regulation 4 deals with retirement of public officers on the grounds of public interest Regulations 40(1) PROVIDES:

“if an authorized officer after having considered every report in his possession made with regard to a public officer, is of the opinion that it is desirable in the public interest that the services of such public officers should be terminated on the ground which cannot be suitably be dealt with under any other provisions of these regulation he shall notify the public officer, in writing specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the public officer

AND 40(2):

“if after giving the public officer an opportunity of showing cause why he should not be retired in the public interest, the authorized officer is satisfied that the public officer should be required to retire in the public interest he, shall, in the case of public officer to whom regulation 34 or 36 apply, forward to the commission the report on the case; the public officer’s reply and his own recommendation and the commission shall decide whether the public officer should be required to retire in the public interest”

And: 40(3)

“where the public officer is one to whom regulation 34 or 36 does not apply, the authorized officer, if satisfied as aforesaid may himself retire the public officer in the public interest”

It is clear from Regulation 40 that a public officer is retired on public interest at the instance of the authorized officer and on grounds which cannot suitably be dealt with under any provision of the public service Commission Regulations.

Mr. David Kiilu Mativo (DW1) the District Commissioner of Nyambene District at the material time testified, inter alia, that:

(i) That he recommended the dismissal of the three plaintiffs to the provincial commissioner because they failed to curb the destruction of the forest.

(ii) It is the Permanent Secretary who appoints chiefs and Assistant Chiefs and that the public service commissioner has delegated power to dismiss them to the permanent secretary and the permanent secretary is not required to forward case of dismissal of Chiefs to the public service commission.

(iii) That he informed the plaintiffs of the accusations against each and gave them an opportunity to defend themselves before he made recommendation for dismissal

(iv) That he submitted the report on the plaintiffs to the provincial Commissioner (vi) All letters sent to plaintiffs were forwarded to the Permanent Secretary who by a letter dated 3.6.96 authorized retirement of Albert Chokera and John Kobia Mukiira on public interest with full benefit after considering their past service as teachers. The permanent secretary also authorized the termination

of the services of Raphael Kaikemia Imuti

(vii) That Albert Chokera and John Kobia Mukira refused to collect their full benefits saying that they were appealing.

The respective letters of interdiction to Albert Chokera and John Kobia Mukiira dated 15.4.96 specify the grounds of disciplinary action in detail and give each 21 days to defend himself in writing. Each defended himself in writing and it is clear from the correspondence that the defence of each was considered and rejected.

Similarly the letter of interdiction dated 15.4.96 specified the grounds of disciplinary action against Raphael Kailemia Imuti and he was given 21 days to defend himself in writing. He defended himself in writing but his defence was rejected.

It is clear from the letter dated 3.6.96 from the Permanent Secretary Provincial administration that he is the one who authorized the action taken against each plaintiff.

It is evident from the evidence of first defendant (DW1) and the correspondent that disciplinary action was being taken against each plaintiff for a specific misconduct - causing the destruction of the forest,. It is also clear from the evidence of DW1 and the correspondence that the punishment contemplated was dismissal from service and that is what DW1 recommended to the Provincial Commissioner and to the Permanent Secretary (authorized officer).

Each plaintiff was given an opportunity to defend himself in writing and each admits so. Each defended himself and the correspondence show that defence of each was rejected.

I am satisfied that the disciplinary action against each plaintiff was initiated under regulations 22(1) as read with regulation 26(1)(c) and 39 and that the procedure in regulation 39 was followed in respect of each plaintiff. The disciplinary action against each plaintiff was not initiated or contemplated under regulation 40(1) and although Albert Chokera and John Kobia Mukira were retired in the public interest that was only a punishment which the authorized officer deemed fit in the circumstances of each of the two and which punishment is authorized by Regulation 39(2).

Each Plaintiffs case is based on the breach of regulation 40 which nearly does not apply for the reasons stated above. As the backbone of each plaintiffs case is the breach of Regulation 40 which does not apply in their case and as I have found that Regulations nos 22(1)(C), 26 and 39 which apply to each of them were complied with then each of the plaintiffs case has no merit.

Each plaintiff deny that he was guilty for the misconduct of allowing the destruction of the forest. They testified that the disciplinary action was taken for political reasons.

Both DW1 and Mr. Benjamin Gachichio (DW2) the District Officer in charge of the Division at the material time testified that there was infact destruction of the forest which destruction each plaintiff failed to curb in his respective area. Each plaintiff admits that there was infact destruction of forest but that each was taking appropriate action to protect the forest. Both DW1 and DW2 visited the arears affected. Correspondence show that complains of destruction of forest were there even before the disciplinary action was taken. There is evidence that after the services of plaintiffs were terminated and new Chiefs appointed to replace them the destruction of forest stopped.

Both DW1 and DW2 as officers in the field were satisfied that each plaintiff was guilty of the misconduct of allowing the destruction of the forest. There is no concrete evidence on which I can find that their assessment was wrong. In any case, plaintiffs case as pleaded is not that they were not guilty of the misconduct alleged. Indeed there is no avornment in the plaint that none of them is not guilty of the misconduct. Further, no issue as to whether or not each plaintiff has caused the destruction of the forest was framed. Their case as pleaded is that the laid down machinery leading to their retirement was not followed.

It is for the above reasons that I dismiss each plaintiff's case with costs.

E. M. Githinji

Judge

28.7.2000

Mr. Mugambi absent

Mrs Hiranth absent

John Kobia present

other plaintiffs absent

c/c Njoroge

Court: Judgement read.

E. M. Githinji

Judge