



**Omukwa v National Police Service Commission (Cause E652 of 2020)
[2024] KEELRC 2209 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2209 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E652 OF 2020
JK GAKERI, J
SEPTEMBER 18, 2024**

BETWEEN

GEOFREY MACHUNA OMUKWA CLAIMANT

AND

NATIONAL POLICE SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit by a Memorandum of Claim filed on 16th October, 2020 alleging that his dismissal from employment by the Respondent was unfair and without sufficient cause.
2. The Claimant avers that he was employed as an Administrative Police Constable on 2nd March, 2009 under Personal Number 2008113252 and served diligently for 10 years and was promoted to a corporal on 29th May, 2015.
3. It is the Claimant's case that on 26th January, 2018, he received a letter of dismissal and the dismissal was effective on the same day, appealed to the Respondent vide letter dated 7th February, 2018 but did not receive a response.
4. The Claimant alleges that he was dismissed without due process.
5. The Claimant prays for;
 - i. A declaration that termination of employment was unlawful, illegal and unfair.
 - ii. Reinstatement to the position he was serving and rank and all dues.
 - iii. Damages for unlawful termination.
 - iv. Salary arrears since 26th January, 2018 to date.



- v. Salary arrears during the dismissal period from 26th January, 2018, Kshs.42,660/= and half salary per month upto date, Kshs.682,560.00.
- vi. In the alternative, compensation from date of dismissal until retirement.
- vii. Unpaid NSSF and NHIF.
- viii. Pension.
- ix. Service pay for the years worked.

Respondent's case

6. In its response to the Memorandum of Claim, the Respondent avers that the Claimant was employed on 6th October, 2008 under Personal Number 2008118108 and was stationed at the Security of Government Buildings & VIP Protection Unit, Uhuru Camp as at April 2017.
7. The Respondent avers that on 13th April, 2017, the Claimant hit a fellow officer APC (W) Christine Kisavi, Personal Number 2013070074 stationed at the same SGB Uhuru Camp who became unconscious and was hospitalized for some time and thus committed an offence under Section 88(2) of the [National Police Service Act](#) and it was reported to the Administration Police Service through signal SGB/031/OUT/SIG/VOL. III/70/17 on 14th April, 2017 and also reported to the police but he was not charged as the officer was identified as his wife.
8. It is the Respondent's case that the Claimant was served with a notice to show cause, acknowledged receipt but did not respond, was notified of disciplinary proceedings to answer to the charges on 18th April, 2017 but did not attend thus disobeying lawful command.
9. That proceedings proceeded pursuant to paragraph 33(1) of the National Police Service Standing Orders whereby the Presiding Officer considered the evidence tendered and recommended the punishment of reprimand and reduction of rank under Section 89(1)(a) and (e) of the [National Police Service Act](#).
10. That the Respondent reviewed the recommendation and enhanced the same under Section 89(6) of the Act and dismissed the Claimant.
11. It is the Respondent's case that the Claimant did not suffer irreparably as he works for gain in Nakuru and the [Employment Act](#), 2007 does not apply for the Kenya Police or the Administration Police force.
12. Finally, the Respondent avers that the Claimant was aware of the disciplinary action against him which he acknowledges in his appeal.

Claimant's evidence

13. In support of his claim, the Claimant attached an anonymous letter dated 24th September, 2008 communicating that he had succeeded in the Administration Police recruitment. The letter is unreliable as evidence for want of identity of the addressee.
14. He also attached a copy of the appointment letter with a P/No. 2008118108 dated 2nd March, 2009, Promotion letter dated 29th May, 2015, Letter communicating reduction in rank dated 27th June, 2017, Letter of dismissal dated 7th December, 2017 and a copy of his appeal dated 7th February, 2018 addressed to the Chairman, National Police Service Commission.
15. The Claimant admits that he received the dismissal letter on 26th January, 2018.



16. The Claimant denies having been suspended at anytime but admitted having had an altercation with the wife who was also a police officer and received the letter on reduction in rank and accepted his fate.

Respondent's evidence

17. On its part, the Respondent attached a copy of signal SGB/031/OUT/SIG/VOL.III/70/17 dated 14th April, 2017, notice to show cause dated 14th April, 2017, notification of disciplinary proceedings dated 17th April, 2017 slated for the following day at 9.00 am, copy of the Incident Report to the Deputy Inspector General, Administration Police Service dated 18th April, 2017, and copy of Orderly Room Proceedings. The charge is clear that the Claimant willingly and unlawfully struck another officer inflicting serious injuries on her head and was admitted at the Nairobi West Hospital.
18. That the Claimant also disobeyed a lawful command by the Deputy Commandant SGB as he declined to attend Orderly Room Proceedings.
19. The witnesses testified at the hearing but the victim was in a comma in hospital and could not be interviewed as affirmed by PWI, Inspector Maurice Anyira who was stationed at the SGB, Uhuru Camp and the Investigating Officer, Sergeant Joseph Makhisa.
20. PWI testified that the Claimant was then at large.
21. The Presiding Officer found the Claimant guilty as per the charge sheet and recommended heavy punishment as a deterrence, namely; warning letter and demotion which was confirmed by the Confirming Officer and a letter to that effect was issued pending the final decision of the National Police Commission.
22. By letter dated 15th November, 2017, the Chief Executive Officer of the National Police Service Commission informed the Inspector General of Police of the National Police Service the punishment and sanctions imposed on 15 officers from the Administration Police Service including the Claimant for implementation.
23. The Commission resolved that the Claimant be dismissed for the offence committed and the file forwarded to Office of Director Public Prosecutions for further action.
24. A dismissal letter dated 7th December, 2017 was issued and the Claimant acknowledged receipt on 26th January, 2018.

Claimant's submissions

25. Counsel isolated three issues for determination including the uncontested issue of whether the Claimant was an employee of the Respondent.
26. Concerning termination of the Claimant's employment, counsel cites the sentiments of the Court in Josephine M. Ndung'u & others v Plan International Inc [2019] eKLR on the effect of Section 47(5) of the Employment Act, 2007 as regards the burden of the employee.
27. Counsel submits that the Claimant was not served with a notice to show cause or acknowledge the same.
28. That charging the Claimant with two offences was illegal.
29. Counsel argues that the act of dismissing the Claimant was excessive as the Presiding Officer determined the punishment of reprimand and reduction of rank and thus the Claimant was punished twice.



30. According to counsel, the Claimant was charged in absentia and was thus denied the right of defence and the hearing ought to have been deferred till the Claimant was present and urges the Court to find that the hearing conducted on 18th April, 2017 (wrongly stated as 13th April, 2017) was unconstitutional, illegal and unfair.
31. Reliance is also made on the sentiments of the Court in *Wambugu v Kenya Power & Lighting Co. ELRC No. E006 of 2022* where a declaration of unfair dismissal was made.
32. On reliefs, reliance was made on the Court of Appeal decision in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR on the standard of proof as well as Halsbury's Laws of England on the band or range of reasonable responses test.
33. Counsel urges that the Claimant is entitled to the reliefs sought as he established a prima facie case of unfair termination from employment as he did not put in a defence and his appeal was not acted upon.

Analysis and determination

34. The hearing date was taken by consent on 30th January, 2024 and on the material day, neither the Claimant nor his counsel was present.
35. Counsel for the Respondent requested that the suit proceeds by way of the documentation on record, a request the court acceded to and directions on filing and exchange of submissions were issued, 21 days a piece.
36. Rule 21 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provide that;
The Court may, either by an agreement by all parties, or on its own motion proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.
37. It is common ground that the Claimant was an employee of the Respondent under P/No. 2008118108 and served until 9th November, 2017 when his employment was terminated summarily after the Presiding Officer of the Orderly Room Proceedings found him guilty as charged, although the Claimant did not participate in the disciplinary process, invitation notwithstanding.
38. Equally, he did not respond to the notice to show cause or deny having assaulted his wife on the night of 13th April, 2017.
39. The Claimant faults the dismissal on the premise that it was unfair and without sufficient cause.
40. The issues for determination are;
 - i. Whether the Respondent had sufficient cause to dismiss the Claimant.
 - ii. Whether the dismissal was unfair.
41. On the 1st issue, contrary to the Claimant's allegation that he did not commit any disciplinary offence during his 10 years of service and was in fact shocked by the dismissal letter from the Respondent, documentary evidence on record show otherwise.
42. Documents on record leave no doubt that on the night of 13th April, 2017, the Claimant assaulted his wife, Administration Police constable, Christine Kisavi who became unconscious owing to serious internal head injuries and was admitted at the Nairobi West Hospital where she remained for some time and the incident was reported at the Lang'ata Police Station under OB No. 34/14/4/2017.
43. It was also reported to the Deputy Inspector General Administration Police Service.



44. The incident precipitated the notice to show cause dated 14th April, 2017 which the Claimant refused to receive or acknowledge or respond to and subsequently led to the Orderly Room Proceedings on 18th April, 2017.
45. Strangely, the Claimant has not controverted the Respondent's evidence of what transpired from the night of 14th April, 2017 to the date of dismissal as neither the witness statement nor any of the documents attached explain why he did not respond to the notice to show cause, or attend the hearing, yet he was invited.
46. More significantly, the Claimant admits that he had an altercation with the wife, a police officer at the SGB unit.
47. According to the Claimant, the fighting or the incident occurred outside the work premises and work schedule. In other words, it was an in-house domestic matter.
48. The foregoing is also reinforced by the fact that the Claimant did not object or respond to the letter dated 27th June, 2017 which communicated the decision of the Claimant's unit prior to consideration by the board. He neither contested the charges nor the decision, a tacit admission of wrong doing.
49. The Claimant appear to have forgotten that he is a public officer and a member of the Kenya Police Service and thus subject to all the laws of the land and those applicable to him as a Police Officer and Public Officer.
50. Assaulting another person is a criminal offence under the Penal Code as well as the [National Police Service Act](#).
51. Use of violence against women or any other person is unlawful and the Claimant had no reason to express his anger in such a primitive manner.
52. Indeed, the Board of the National Police Service Commission resolved that the case be forwarded to the Office of Director of Public Prosecutions for further action.
53. This ground alone is a sufficient justification for the Claimant's dismissal from employment.
54. Although Counter III was not particularised in the notice to show cause or the notification of the Disciplinary Proceedings, it was an obvious consequence of Count I and II as the Claimant disobeyed a lawful command and provided no explanation.
55. For the foregoing reasons, it is the finding of the court that the Respondent has on a preponderance of probabilities demonstrated that it had sufficient cause to dismiss the Claimant from employment.
56. On due process, the Claimant avers that the tenets of Article 47 of [the Constitution](#) of Kenya, 2010 were not complied with and the dismissal was arbitrary and unlawful.
57. Puzzlingly, neither the witness statement on record nor the appeal letter dated 7th February, 2018 make reference to the manner of dismissal.
58. Indeed, the Claimant has not faulted the procedure used by the Respondent on any score.
59. In a nutshell, evidence on record show that after the incident was reported to the employer and the police, the employer issued a notice to show cause on the same day and the Claimant was accorded 3 days to respond but refused, neglected or failed to do so.
60. He was notified of the Orderly Room Proceedings scheduled for 18th April, 2017 but neither acknowledged receipt nor respond to the notice whose receipt he did not deny in evidence.



61. Finally, as adverted to elsewhere in this judgment, the Claimant did not attend the Orderly Room Proceedings on 18th April, 2017 at 9.00 am.
62. The notification stated the charge the Claimant was to confront and informed him that he was free to call any witness and would be provided with the assistance he required in defence of the charge.
63. Finally, the notification was emphatic on the date of hearing time and venue.
64. The Record of the Orderly Room Proceedings is clear that the hearing commenced at 14.40 pm on 18th April, 2017 and the Claimant was not present.
65. The charges were read out, evidence adduced and a decision made and communicated to the Claimant and informed of the right to appeal and appealed.
66. Strangely, records availed by the Respondent reveal that although the Claimant's appeal was deliberated upon by the Unit Disciplinary Appeal Board, it had not been heard by 28th June, 2022, long after the Claimant had filed the instant suit.
67. The totality of the evidence on record is that the Respondent observed due process in the dismissal of the Claimant save for the appeal.
68. In conclusion, it is the finding of the Court that the dismissal of the Claimant from employment by the Respondent was neither unlawful nor unfair.

Appropriate Relief

i. Declaration

69. Having found that the dismissal was neither unfair nor unlawful, the declaration sought is unmerited and is declined.

ii. Reinstatement

70. This remedy is unavailable on account of the provisions of Section 12(3)(vii) of the *Employment and Labour Relations Court Act* as the Claimant has been out of employment for more than three (3) years.

iii. Damages for unlawful termination

71. Having found that the dismissal was neither unfair nor unlawful, the relief sought is unavailable and is declined.

iv. Salary arrears since 26th January, 2018 to date

72. This claim has not been evidentiary proven by the Claimant and is unmerited.
73. Relatedly, it is a claim for anticipatory earnings which the Claimant has not justified and is declined.

v. Salary arrears during the dismissal period

74. This claim is unclear to the Court as it appears to be similar to (iv) above.
75. In the absence of particulars, the claim is declined.

vi. Compensation

76. Being the alternative to reinstatement, the remedy is unavailable in light of the holding above.



vii. Unpaid NSSF and NHIF

77. This prayer lacks particulars and is dismissed.

viii. Service pay for the years worked

78. All public officers are members of the NSSF and the Claimant has not demonstrated that he was not a member of the fund.

The prayer lacks supportive evidence and is declined.

79. In the upshot, the Claimant's suit against the Respondent lacks merit and is dismissed.

PARA 80.

In the circumstances, it is only fair that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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