

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 1127 OF 2018

JEREMANO KAMAU KARURI.....CLAIMANT

VERSUS

NAIROBI CITY COUNTY.....1st RESPONDENT

NAIROBI METROPOLITAN.....2ND RESPONDENT

JUDGMENT

The suit was brought vide an amended memorandum of claim dated 28/7/2022. The original memorandum of claim was dated 4/7/2018 and filed on the same date.

The Claimant seeks a declaration:

- (i) That the dismissal from employment by a letter dated 4/7/2012 was unlawful and unfair.
- (ii) That the Claimant was reinstated back to work by the 1st Respondent's confidential report dated 16/6/2011 with full back pay salary from 2/6/2010.
- (iii) That the Claimant be awarded equivalent of 12 months' salary in the sum of Kshs. 231,340.00 arising from the unlawful dismissal on 4/7/2012.
- (iv) That alternatively the Claimant be reinstated to work until he attains the 60 years retirement age.
- (v) Costs and interest of the suit.

The Claimant (CW1) relied on a witness statement dated 12/7/2022 as his evidence in chief.

The evidence by the Claimant is that he was employed by the Respondent as a watchman in the year 1989 and worked continuously until his employment was unlawfully terminated in July 2012. That he had served diligently. That he fell sick while at home and was unable to return to work for some time.

That the Claimant was irregularly charged with the offence of absconding duties. That the matter was investigated by Director Investigations and Information Analysis and that from a confidential report dated 16/6/2021 that came to the attention of the Claimant, the Director Investigation absolved the Claimant from the offence and had recommended that the Claimant be reinstated back to work and paid salary arrears from 2/6/2010 when he was suspended from work pending investigation.

That the 1st Respondent dismissed the Claimant from employment and ignored the report of the Director Investigations.

That the Claimant appealed the decision to dismiss him to the Public Service Commission (PSC), that PSC confirmed the dismissal upon hearing the appeal.

That the Claimant approached court seeking the reliefs set out in the amended memorandum of claim.

Under cross-examination by Advocate Nyaberi for the Respondent, the Claimant said he was employed on 19/7/1989. That he was a day and night watchman. That he was charged with absconding work. That this was not first alleged offence since the time of employment. That the charge was dated 26/7/2010. That the Claimant admitted that he did not report to work from 30/5/2010 until 26/7/2010. That he received the letter of charge upon reporting to work.

The Claimant said that during that time, he was sick, confused and had hallucinations. That he attended hospital at the City County clinic, and the Respondent was aware of his whereabouts during his absence since he had called his immediate supervisor and informed him accordingly.

The Claimant said he was not admitted at the City County Clinic. That the clinic had no admission facility for patients and so he was an outpatient. Claimant said he brought along clinic documents to confirm the treatment he underwent. The Claimant says he attended also Demi Health Centre as an outpatient. That he suffered high blood pressure and hallucinations.

The Claimant said that the Director of Investigations in the letter dated 16/6/2011 confirmed that the Claimant attended the Demi Health Centre as an outpatient. The Claimant said the letter recommended that he be reinstated back to work and that the days the Claimant was away be treated as unpaid leave.

The Claimant said the Director Human Resource was directed by the Town Clerk to implement the decision of the investigations by a letter dated

28/6/2011. That the Director HR ordered the Employee Relationship Manager to implement the directive on 8/7/2011 vide an internal memo.

That the Claimant was not reinstated as directed by the Town Clerk and Director Human Resource.

The Claimant said he was not called before a disciplinary committee but got a letter of dismissal dated 4/7/2012 for absconding work.

That he filed an appeal to PSC. That the appeal was dismissed by a letter dated 18/9/2014 which letter he received on 1/3/2018, four (4) years later.

That the appeal was dismissed for having been filed out of time. The Claimant said he did not receive the letter of dismissal on time hence the delay in filing the appeal. The letter of dismissal had been sent to a wrong address and he was away from the workplace.

The Respondent called Victor Juma to testify in defence of the case. RW1 adduced a witness statement dated 20/5/2025 as his evidence in chief. RW1 relied on the documents filed by the Claimant including the memo dated 16/6/2011 written to the Town Clerk, Mr. Kisya by the Director Investigations.

RW1 said the investigation done was as to whether the Claimant was treated at Demi Health Centre and for how long. RW1 said that the findings were that the Claimant was treated at the health Centre but could not have been admitted since the facility was an outpatient clinic.

That the Claimant was treated for high blood pressure and hallucinations. That the Claimant attended counselling and was advised to take a rest. That the Claimant did not apply for sick leave. RW1 said that the Director Investigations recommended that the Claimant be reinstated back to work and that the days he was absent be treated as unpaid leave.

RW1 said the investigation report which had these recommendations was submitted to the Town Clerk.

RW1 said by that time the matter was under the disciplinary committee and the committee awaited the report of investigations.

RW1 said that the Disciplinary Committee disagreed with the recommendation by the Director Investigations.

RW1 said the Town Clerk did not implement the recommendation. That the matter was left to the disciplinary committee to handle and decide.

RW1 said the committee invited the Claimant to appear before the Committee for a hearing. That the committee decided to dismiss the Claimant. That the members of the committee included the Director Human Resource; Departmental Heads from each department and the chairperson of the committee was the Town Clerk.

RW1 said the Claimant was given a fair hearing. That the Claimant responded to the notice to show cause (NTSC) before he appeared before the committee.

RW1 said the Claimant appealed the decision to the PSC. That the appeal was heard by filing of submissions. The Claimant was not summoned to attend the appeal hearing. That the dismissal was upheld by the PSC.

Under cross-examination RW1 said notice to show cause was issued on 26/7/2010. RW1 said Claimant's salary had been stopped. RW1 said Claimant replied to the notice to show cause on 23/8/2010. That director was mandated to investigate the case by a letter dated 16/12/2010. RW1 said Director found that the Claimant was treated as an outpatient. RW1 admitted that the Director Investigation recommended that the Claimant be reinstated back to work.

That the recommendation was taken to the Town Clerk who chaired the disciplinary committee and Director Human Resource was the secretary to the committee. RW1 admitted that the Director Human Resource was directed by the Assistant Town Clerk Mr. Doiti to implement the recommendation of Director Investigation by a memo dated 16/6/2011. That the Director Human Resource marked the memo for attention of the Chief Human Resource Officer, Employee Relations to study and execute. RW1 admitted that the Human Resource Director instructed that the Claimant be reinstated back to work as per the recommendation of the Director Investigations and Information Analysis.

RW1 said the disciplinary committee met on 3/8/2011 and gave the Claimant opportunity to be heard; one year and a month later. RW1 admitted that all this time, the Claimant had no salary.

RW1 was unable to produce a letter inviting the Claimant before the disciplinary committee for hearing. RW1 was however able to produce a letter dated 4/7/2012 inviting the Claimant to appeal. RW1 did not produce any minutes of the alleged disciplinary hearing held on 3/8/2011. RW1 said the decision by the PSC dismissing the appeal by the Claimant was sent to the Claimant on 1/10/2014. This was more than two (2) years later. (Emphasis added)

RW1 was unable to counter the Claimant's contention that he did not receive the letter from the PSC until March 2018, when it was given to the Claimant by M/s. Lilian Maina for Human Resource Manager and the Claimant was advised to apply for the review of the PSC decision. RW1 said the Claimant applied for review on 10/12/2018. RW1 admitted that PSC made its decision on review on 15/7/2019.

RW1 said the delay may be explained by the fact that PSC communicated through the Board. RW1 said that the dismissal of the Claimant followed a fair procedure and the suit be dismissed.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence by CW1 and RW1. The issues for determination are: -

- (i) Whether the Respondent dismissed the Claimant from employment following a fair procedure.
- (ii) Whether the Claimant is entitled to the reliefs sought.

The following facts have been proved by the Claimant on a balance of probability: -

(i) That he was employed by the Respondent on 19/7/1989. That he served the Respondent without a blemish until he failed to report to work from 30/5/2010 until 26/7/2010. That the Claimant suffered high blood pressure and hallucinations and that he was during this period treated as an outpatient at Demi Health Clinic. That the Claimant also attended counselling and had been advised to rest. That the Claimant had verbally informed his supervisor of his predicament but did not apply for sick leave.

That upon his return the Claimant was charged with the offence of absconding work and was suspended from employment without pay.

That the Claimant was served with a notice to show cause to which he responded explaining his sickness and the treatment he underwent as an outpatient hence his inability to report back to work as Claimant admitted that he did not apply for leave as he was confused and not in a fit and stable state of mind to do so.

That the disciplinary committee of the Respondent mandated the Director Investigations to investigate the matter of the abscondment of the Claimant.

The Director Investigations filed a report in which he found that the Claimant was indeed treated as an outpatient for high blood pressure and hallucinations during that time of his absence.

That the Director Investigations recommended that the Claimant be reinstated to his work with back pay.

It has also been proved that the Deputy Town Clerk, upon receiving the report from the Director Investigations directed the Director Human Resource to implement the recommendation by the Director Investigation and reinstate the Claimant with arrear salary from the date of suspension.

It has also been proved that the Director Human Resource directed his assistant to implement the decision.

It came to pass that the decision was not implemented. RW1 did not prove that the Claimant was called before the disciplinary committee to be given a hearing before the committee refused to implement the decision by the Director Investigations that the Town Clerk and the Director Human Resource to have the Claimant reinstated to his job and paid arrear salary.

There is no evidence adduced by the Respondent to cast in doubt that the Claimant suffered an illness of mind which kept him from work at the material time and which illness caused him not to apply for sick leave during that time

The Respondent failed to produce any letter inviting the Claimant to alleged hearing nor did the Respondent produce minutes, evidencing the alleged disciplinary hearing. It is pertinent to note that the Respondent had letters with regard to the appeal process which is not in dispute but had no letter or minutes regarding the disputed disciplinary hearing.

The Claimant has proved that he had a valid reason to be away from work at the material time and his absence was vindicated by Director Investigations who recommended his reinstatement and payment of arrear salary.

The Claimant has also proved that the Respondent did not subject him to a disciplinary hearing and that the alleged communication from the said disciplinary committee was more than a year from the date the Claimant had been charged with the offence of abscondment.

The Claimant got the letter of dismissal on 8/9/2014, way out of the 90 days period in which to appeal. The Claimant appealed out of time to PSC and the appeal was dismissed for being filed out of time. The Claimant got the letter dismissing the appeal on 1/3/2018. The process took about six (6) years to complete hence this suit was filed on 4th July 2018.

It is the court's finding that the disciplinary and appeal process the Claimant was subjected to was inordinately delayed as to amount to a denial of justice. The process violated sections 36, 41, 43 and 45 of the Employment Act, 2007 for lack of a valid reason and for following unfair procedure. The

court finds that the dismissal of the Claimant from employment was unlawful and unfair.

Remedies

The Claimant seeks for payment of arrear salary from the date his salary was suspended on 23/8/2010 until the date of his due retirement at 60 years upon an order by this court to be reinstated to his employment.

The court finds that the Claimant was dismissed on 4/7/2012. A lot of time has passed since then and this is not a suitable case for reinstatement of the Claimant to his employment. The Claimant is however entitled to an award of both special and general damages set out in the amended memorandum of claim as follows: -

Arrear salary

(a) The court is of the considered view and finding that the Respondent did not pay the Claimant salary unlawfully from date of suspension which was 23/8/2010 to the date of dismissal which was 4/7/2012. The Claimant is entitled to payment of that unpaid salary in arrears at the rate of Kshs. 20,945 in the sum of Ksh. 468,469.80(22 months, 11 days x 20,945).

The claim for payment of arrear salary from 16/6/2011 to the date of judgment is without merit and is dismissed.

Pension

(b) The Claimant is entitled to payment of pension that accrued from date of employment in 1989 to the date of dismissal on 4/7/2012. The Respondents to cause the pension to be processed accordingly.

Compensation

The Claimant was unlawfully and unfairly summarily dismissed from employment for no fault on his part. The Claimant who had suffered mental illness had been recommended for reinstatement by the Director Investigations with effect from 16/6/2011. The Respondents unlawfully ignored a lawful recommendation to the loss and detriment of the Claimant. The Claimant suffered violation of legitimate expectation. This is an aggravating circumstance in this matter. The Claimant had served the Respondent without blemish from 1989 up to the date of suspension in 2012 a period of over thirty-three months. The Claimant suffered a very prolonged period undergoing unfair disciplinary process and without a salary. The Claimant could not possibly get alternative employment due to his advanced age and sickness. The Claimant was not compensated for the loss of a stable employment in public service. The court has considered the case of **Kenfreight (EA) and Benson K Nguti (2018) eKlr** where the Supreme Court held that:

'Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the Employment Act. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4) (a) to(m)'

The factors under section 49(4) includes, inter alia;

(a) the wishes of the employee;

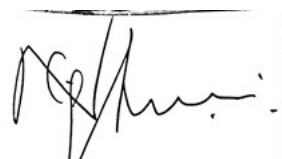
- (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
- (c) the practicability of recommending reinstatement or re-engagement
- (g)The opportunities available to the employee for securing comparable or suitable employment with another employer

The Court having considered the above case and the circumstances listed awards the Claimant the maximum compensation for unlawful and unfair termination in the sum of Kshs. 251,340.00.

In the final analysis judgment is entered in favour of the Claimant against the 1st Respondent as follows:

- (a) Arrear salary in the sum of Kshs. 468,469.80 (22 months and 11 days x 20,945)
- (b) Compensation for unfair termination in the sum of Kshs. 251,340.00
- Total award: Kshs. 719,809.00**
- (c) The 1st Respondent to cause the Claimant's pension to be processed and paid.
- (d) Interest at court rates from date of judgment till payment in full.
- (e) Costs of the suit.

Dated at Nairobi this **13th Day of November 2025.**



Mathews Nduma
JUDGE

Appearance:

Claimant in person

Mr. Nyaberi for 1st Respondent

Mr. Odukenya for 2nd Respondent

Mr. Kemboi – Court Assistant

ORIGINAL