



**Job Kenyanya Okemwa v Public Service Commission (Cause
199 of 2015) [2024] KEELRC 886 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 886 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 199 OF 2015
MA ONYANGO, J
APRIL 18, 2024
(FORMERLY NAIROBI CAUSE NO. 1004 OF 2014)**

BETWEEN

JOB KENYANYA OKEMWA CLAIMANT

AND

THE PUBLIC SERVICE COMMISSION RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 17th June 2014 and filed in court on the same day, the Claimant seeks for the following reliefs against the Respondent:
 - a. A declaration that the purported dismissal of the Claimant by the Respondent was unconstitutional, evil, invalid, null and void, illegal, unjust, inequitable, unfair and against the rules of natural justice.
 - b. A declaration that the Claimant's fundamental and basic rights under *the Constitution* of Kenya and under the provisions of the *Employment Act* have been infringed and trampled upon by the Respondent with impunity.
 - c. A declaration that the Respondent is in breach of contract and that it be ordered to pay the Claimant up to the period the Claimant would have legally retired.
 - d. General damages for:
 - i. Wrongful dismissal
 - ii. Loss of income
 - iii. Illegal, unprocedural and unfair dismissal from employment



- iv. Mental anguish and psychological torture
 - e. The Respondent to pay any other loss consequent upon the illegal and unfair dismissal
 - f. Interest on (c), (d) and (e) above at court rates from the date of unfair dismissal until retirement
 - g. Costs of this suit
 - h. Any further relief this Honourable Court may deem fit to grant
2. In response to the Claim, the Respondent filed a Memorandum of Reply dated 25th November 2014 wherein it denied that it unfairly dismissed the Claimant from service.
 3. The Respondent avers that the Claimant's dismissal from service was based on information received from the Ministry of Immigration which showed that the Claimant was involved in corrupt activities: that he received money in exchange for issuance birth certificates.
 4. According to the Respondent, although the Permanent Secretary, Ministry of Immigration had recommended that the Claimant be retired in public interest, it opted to dismiss the Claimant due to the prevailing state of insecurity in the country which had been partly attributed to issuance of fake documents to foreigners.
 5. It is the Respondent's case that it is vested with the mandate by *the Constitution* to retain or remove officers from the Public Service and that although the Permanent Secretary had recommended that the Claimant be retired in public interest, the said recommendation was not binding on the Respondent.
 6. The suit was set down for full trial.

The Claimant's Evidence

7. The Claimant testified on 23rd February 2017 as CW1. He adopted his witness statement filed in court as part of his evidence in chief and also relied on his bundle of documents filed in court.
8. The Claimant testified that he was employed by the Respondent on 2nd August 1982 as a Clerical Officer and rose through the ranks to the position of Registration Officer I (Civil) Job Group 'K'.
9. It was the Claimant's evidence that on 7th February 2012 he was interdicted on account of gross misconduct. His employment was thereafter terminated on 20th March 2013.
10. CW1 told the court that as at the time he was interdicted, he was working as District Civil Registrar for Kisii Central combining Marani and Kisii South as registrar of births and deaths. It was the Claimant's evidence that he responded to the interdiction letter as directed. He was later informed that his response was not adequate as a result of which the Respondent was considering retiring him in Public Interest.
11. The Claimant contends that he agreed to retire in Public Interest but was surprised when he was issued with a dismissal letter instead of a retirement letter.
12. It was the Claimant's testimony that he was never asked to show cause why he should not be dismissed from service.
13. The Claimant told the court that the allegations in the interdiction letter were that he issued two serial numbers of birth certificates corruptly. He stated that he never saw the alleged birth certificates. He further testified that although he was accused of corruption was never arrested.
14. CW1 urged the court to order the Respondent to pay his terminal. He testified that he was dismissed from service at the age of 51 years and that he was to retire at the age of 60 years.



15. On cross examination by State Counsel Essendi, CW1 stated that as at the time of his dismissal, he was working in the Ministry of Immigration and Civil Registration. He described his duties as general administration of the office, receiving and approving applications for births and deaths and issuing birth and death certificates.
16. The Claimant testified that he was not aware that officers from Ethics & Anti-Corruption Commission carried out an integrity test in his work station. He also stated that he was not aware that the said officers were issued with fake certificates signed by him.
17. The Claimant admitted that he was aware that retirement in public interest was a recommendation from the Ministry of Immigration and Civil Registration where he worked, and that the said recommendation was rejected by the Respondent.
18. The Claimant was categorical that he was not taken through a disciplinary hearing.
19. On re-examination, the Claimant maintained that he was asked to show cause why he should not be retired in public interest and not why he should not be dismissed from service.
20. It is the Claimant's case that upon being dismissed from service, he applied to the Respondent for review of the decision to dismiss him on grounds that he had agreed to retire in public interest as proposed in the letter issued to him by the Respondent and not to be dismissed.

The Respondent's Evidence

21. The Respondent called Avisi Kiguhi Harold, its Human Resources Management Officer who testified as RW1. He relied on his witness statement on record dated 27th November 2014 as his evidence in chief.
22. On being cross examined by Mr. Ochako, Counsel for the Claimant, RW1 stated that the Claimant was dismissed from Public Service on account of gross misconduct. According to RW1, the allegations against the Claimant were that he was negligent in the performance of his duties as Registration Officer serving as Civil Registration Officer; that he was involved in corrupt practices and that he issued birth certificates after receiving bribes.
23. RW1 stated that birth certificates No. 468149, 468147, 468138 and 468020 which were the basis of the Claimant's interdiction were issued to "applicants" who were officers from Ethics and Anti-Corruption Commission who, unknown to the Claimant, were investigating him pursuant to complaints from members of the public that the Claimant was solicited for bribes in order to render services to the public.
24. The Respondent's witness maintained that the Claimant was given an opportunity to show cause why he should not be dismissed from service as required in the show cause letter. RW1 explained that the Claimant was to be retired in Public Interest based on the allegations of gross misconduct, which proposal the Claimant agreed to. That the Respondent however considered the gravity of the offence and decided to dismiss him from service.
25. According to RW1, the rationale for the decision to dismiss the Claimant was that retiring the Claimant would send a message to the public that a public officer would get away with such a gross offence.
26. RW1 further stated that the Respondent does not always act on the recommendations of Permanent Secretaries. That it considers every case and makes its own independent decision. He stated that a decision to retire a Public Officer in public interest can only be made by the Respondent and not any other person.



27. In re-examination, RW1 testified that the Ministry recommended that the Claimant be retired from service in Public Interest but the Respondent is not bound by the Ministry's recommendation. That the Respondent did not at any point decide to retire the Claimant.

The Claimant's Submissions

28. The Claimant in his submissions framed the issues for determination as:
- a. Whether the Claimant was dismissed fairly and procedurally from service?
 - b. Whether the Respondent was bound by the Ministerial recommendation to retire the Claimant in Public Interest?
 - c. Whether the Claimant is entitled to the prayers he is seeking?
29. On the first issue, the Claimant submitted that he was asked in writing after being interdicted, to show cause why he should not be retired from service in Public Interest, and that he responded but was informed that his response was not satisfactory. Consequently, the Claimant avers that he was asked whether he was agreeable to the suggested retirement and that he signified his acceptance to the employer's suggestion to retire only to be shocked when he was served with a dismissal letter.
30. It is the Claimant's case that he was never asked specifically why he should not be dismissed from service and that had he been asked so, he would have defended himself against the allegations of gross misconduct levelled against him. The Claimant therefore submits that he was never given a fair, equitable and just hearing as dictated by the rules of natural justice.
31. On the second issue, it is the Claimant's submissions that the Permanent Secretary, Ministry of Immigration and Registration of Persons recommended that he be retired in Public interest. He contends that he worked in the Ministry and that the Ministry is the agent of the Respondent. The Claimant argued that it is the Ministry that brought about the issues that led to his dismissal and that it being the agent of the Respondent, its actions were binding on the Respondent, who is the principal. It is the Claimant's further contention that the Respondent was bound by the actions of its agents and that as such, it ought to have accepted the recommendation of the Ministry and retired him on public interest.
32. On the third issue, the Claimant submits that his dismissal was unlawful and wrongful. It is submitted that the Respondent had no evidence against the allegations made against the Claimant to warrant a dismissal. According to the Claimant, no member of the public was called as a witness to buttress the allegation that the Claimant corruptly issued the alleged birth certificates.
33. It is also submitted that the Respondent alleged that undercover Ethics & Anti-Corruption Commission officers investigated the alleged corrupt deals but that no witness was called from the said Commission to prove those allegations.
34. The Claimant argued while placing reliance on the case of *Principal and B.O.G Machakos Teachers College v Wambua Muanga (2016) eKLR* that the Claimant was dismissed without any justification and therefore the dismissal is not only wrongful but is also unlawful.
35. In the end, the Claimant sought for compensation for the alleged unfair termination in the sum of Kshs 50,000,000 for breach of contract, Kshs 4,153,536 for retiring the Claimant at the age of 52 years instead of 60 years, Kshs 4,000,000 for mental anguish and torture, Kshs 5,000,000 as exemplary damages.



The Respondent's Submissions

36. In its submissions, the Respondent identified the issues for determination to be:
 - a. Whether the Claimant's interdiction and consequent dismissal was fair, procedural and legal, and
 - b. Whether the Claimant should be reinstated to the service of the Respondent.
37. On the first issue, it is the Respondent's submission that due process was followed before the Claimant was interdicted and subsequently dismissed from service.
38. The Respondent has submitted that by dint of the show cause letter dated 7th February 2012, the Claimant was interdicted on allegations of gross misconduct and culpable negligence of duty and that in the said letter, he was given 21 days to respond to the allegations levelled against him which response he made vide a letter dated 17th February 2012.
39. It is the Respondent's submission that the Ministerial Human Resource Management Advisory Committee deliberated on the Claimant's case and recommended that he be retired on Public Interest but the Respondent rejected the said recommendation and proceeded to dismiss the Claimant from service.
40. According to the Respondent, the Constitutional mandate to retain or remove officers from the Public Service is vested on the Respondent and although in the instant case the Permanent Secretary had recommended that the Claimant be retired in public interest, the same was only a recommendation which was not binding on the Respondent.
41. The Respondent therefore submitted that it lawfully dismissed the Claimant from service for gross misconduct
42. With regard to the second issue, the Respondent submitted that given the nature of the Claimant's conduct at work, the orders of reinstatement if issued will be detrimental and an abuse of the office represented by the Respondent. In support of this position, the Respondent cited the case of Wells Fargo Limited v Cyrus Kioko & 48 others (2015) eKLR.
43. The court was urged to dismiss the Claimant's case for being unmeritorious.

Determination

44. I have considered the pleadings, the evidence tendered in court and submissions of the parties. In my view, the issues that fall for my determination are: -
 - a. Whether the Claimant was dismissed from service on a valid and fair reason; and if so,
 - b. Whether due process was followed in dismissing him from employment;
 - c. What orders should then issue.
45. It is now settled that in matters of termination of employment, the court should consider and determine whether the reasons given by the employer for termination are valid and if there was procedural fairness.



46. To bring the issues in this case into context, it is important that I reproduce the interdiction letter that culminated into the dismissal of the Claimant from the Public Service. It reads:

P/No. 1982063199/166 7th February ,2012

Mr Job K. Okemwa

Thro'

The Director of Civil Registration,

Civil Registration Department,

Nairobi.

Gross Misconduct /culpable Negligence Of Duty And Interdiction

Reports reaching this office indicates that between 29th November and 1st December,2011, integrity tests were carried out at Kisii District Civil Registry by Ethics and Anti-Corruption Commission undercover operatives following allegations of corruption reported by members of the public at the office where you are in charge.

They specifically cited malpractices in the issuance of Birth and Death Certificates where your officers had taken advantage of the increased demand of birth certificates by students in readiness for registration for National Examinations and consequently soliciting for and receiving bribes from them.

In some of the cases which were unearthed during the tests, the undercover officers applied for birth certificates while posing as ordinary members of the public where you in particular initially rejected their applications, citing various documents missing but referred them to a Mashauri café to buy other forms. The said café was crowded with other applicants who were filing forms with the assistance of a person one Mr Edward. The said Edward informed the undercover officers the reason referred to the café by you as the officer in charge. It was then ascertained that Edward was the broker who was being used by you in their corrupt dealings.

The said broker informed undercover officers that he required Kshs. 2,450. 450 for the three applications for the birth certificates and Kshs 2,000 to facilitate faster processing.

After Mr. Edward received the benefit, the undercover officers received the birth certificates the following day Nos. 468149, 468147. 468138 signed by you despite the fact that you had earlier rejected their applications citing various missing documents. These certificates were collected from another broker namely a Mr. Maina who further demanded Kshs.450.00 at Mashauri café where no official receipt was issued.

Further, to confirm the veracity of the allegations made by the members of the public, you were personally approached by an undercover officer who had also applied for a birth certificate where you demanded Kshs.2,000.00 to facilitate faster processing. The undercover officer negotiated and you agreed to receive Kshs. 1,650.00 and it was after receiving the money you processed and issued birth certificate No.468020 the same day.

We would wish to refer you to Part VI Section 44, Sub-Section 3 and 4 (c) of the *Employment Act*, 2007 which outline the circumstances under which an employer may dismiss an employee from the service:-



- i. that subject to the provisions of this act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract or service;
or
- ii. If an employee wilfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly perform any work which from its nature it was his duty, under his contract to have performed carefully and properly.

As a consequence, it is being contemplated to dismiss you summarily on account of gross misconduct and culpable negligence of duty but before this cause of action is taken, you are requested to submit your representations to this office for consideration within a period of twenty one (21) days from the date of this letter, failure to which we shall proceed with the disciplinary proceedings without any further reference to you.

Due to seriousness of these offences, you are hereby interdicted from performing the functions and duties of your public office with immediate effect. During the period of your interdiction, you shall be drawing not less half (1/2) of your basic salary and will be reporting do the District Commissioner, Kisii Central once a week until this case is finalized.

Signed

J.K. Gichumu Mrs)

For: Permanent Secretary

47. The Claimant was thereafter issued with the interdiction letter reproduced hereunder:

Ref. P/NO. 82063199(36) Date 9th February, 2012

Mr Job K Okemwa

District Civil Registrar

Kisii Central District

Box 879

Kisii

Re: Interdiction

This is in reference to letter ref No. 19820631199/116 dated 7th February, 2012 from the Permanent Secretary, Ministry of State for immigration and Registration of Persons concerning the above subject.

In compliance with the decision of the Permanent Secretary, you are hereby Instructed to hand over the duties and responsibilities of your office to Mr. Wilson Sandagi Isagi - P/No. 2008018811 - Civil Registration Officer II.

You will thereafter be reporting to the DC as directed.

By copy of this letter, the District Commissioner, Kisii Central will confirm to the office of the Permanent Secretary that the directives have been complied with.

Signed

Mrs. J.W. Mugo, HSC



Director, Civil Registration
Copy to: Permanent Secretary
Ministry of State for Immigration
& Registration of Persons
Nairobi
District Commissioner
Kisii Central District

48. In response, the Claimant wrote a detailed letter dated 17th February 2012 in his defence to the allegations levelled against him.
49. Subsequently, vide a letter dated 13th September, 2012, the Ministry of State for Immigration and Registration of Persons issued the Claimant with the letter dated 12th September 2012 which reads:

Ref No. P.No. 1982063199/126 12th September 2012

Mr. Job Kenya Okemwa

Thro'

The Director of Civil Registration,

Civil Registration Department,

Nairobi

Retirement From The Service In The Public Interest

This is to inform you that after due consideration of your representations contained in your letter dated 17th February 2012, the Authorized Officer, has on recommendation of the Ministerial Human Resource Management Advisory Committee decided that you should be retired from service in the Public Interest since as the District Registrar, it was your responsibility to ensure malpractices in the issuance of Birth Certificates recorded in your office did not occur. You also did not make an effort to curb the malpractices detected in that office since you failed to provide evidence to refute the allegations made against you.

However, before the contemplated action is taken to retire you in the public interest you are requested to submit representations of a personal nature stating if you have any objection to the proposed retirement within a period of twenty one (21) days from the date of this letter, failure to which we shall proceed, to retire you from the service without any further reference to you

It should be noted that if you are agreeable, you will be eligible to draw all your pension benefits as provided for in the [Pensions Act](#).

In the meantime, you shall continue to be on interdiction until this case is determined.

Signed

R.w. Hunja(mrs)

For: Permanent Secretary



50. The Claimant responded to the above letter vide a letter dated 3rd October 2012 as follows:

The Permanent Secretary
Ministry of State for Immigration & Registration of Persons,
Box 30395-00100,
Nairobi.

Through,
The Director of Civil Registration,
Box 49179-00100,
Nairobi.

Dear Sir,

Re: Retirement From The Service In The Public Interest

I am in receipt of your letter today 3rd October 2012 ref. P/No. 1982063199/126 dated 13th September 2012 on the above subject.

I have read the contents therein and after careful consideration and owing to my detailed defense of the accusations levelled against my person in my letter dated 17h Feb 2012 ,1 have no further submissions to make and therefore I Hereby AGREE to the offer of the proposed retirement in line with the said [Pensions Act](#).

Signed

J.K. Okemwa

NO. 1982063199

51. While the Claimant was still waiting to be issued with the letter of Retirement in Public Interest, the Ministry of State for Immigration and Registration of Persons, sent him a dismissal letter dated 20th March 2013 reproduced hereunder:

Ref. No. P/NO.1982063199/130 26th March, 2013

Mr. Job Okemwa Kenyanya

Thro'

The Director of National Registration(Civil)

Department of Civil Registration

Nairobi

Dismissal From The Service

This is to inform you that the Public Service Commission has:

- a. Rejected our recommendations that you be retired from service in the Public interest; and
- b. Decided that you be dismissed from service with effect from 3rd October 2011 on account of gross misconduct as the Investigation Report confirmed that



you participated in the illegal issuance of birth certificates at a facilitation fee of Kshs 2,000

However, in accordance with the service regulations, you are at liberty to apply for a Review of this decision to the Public Service Commission through this Ministry within a period of one (1) year from the date of this letter.

In the meantime you are requested to return the endorsed Declaration for officers leaving the service form and Declaration of Assets and Liabilities form duly signed and witnessed together with the Civil Servants Identity Cards to this office as soon as possible for Cancellation.

Signed

R.W. Hunja(mrs)

For: Permanent Secretary

52. The Claimant objected to his dismissal vide a letter dated 25th March 2013.
53. With that background, I now proceed to address the first issue for determination.
54. Section 45(2) of the *Employment Act* is to the effect that termination of employment by an employer is unfair if the employer fails to prove that it had valid reason and that it followed due procedure. In any legal proceedings on employment claims, the burden of proof of valid reason for termination is on the employer as stipulated in Section 43 of the Act.
55. Section 43(2) of the *Employment Act* defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee.
56. In the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R. 91 Lord Denning observed;

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”
57. In the instant case, from the content of the Show Cause Letter dated 7th February 2012 and titled “Gross misconduct /Culpable negligence of duty and Interdiction”, the Claimant was accused of negligence and corruption which amount to gross misconduct. It is the Respondent’s case that officers from Ethics and Anti-Corruption Commission conducted investigations at the station where the Claimant was in charge after public outcry. That his office solicited facilitation fees of Kshs. 2,000 in order to process birth certificates for members of the Public.
58. It would appear that thereafter the Ethics & Anti -Corruption officers submitted its report to the Ministry of State for Immigration and Registration of Persons which made a decision to interdict the Claimant.



59. The Ministerial Human Resource Management Advisory Committee is the body authorized under the Public Service Commission Regulations to deal with disciplinary hearing and make recommendations to the Respondent as provided in Regulation 22 of the Public Service Commission Regulations.

60. Regulation 22(2) provides:

Any authorized officer exercising the powers conferred on him by this regulation shall act in accordance with these Regulations and any other relevant provisions of the law for the time being in force.

61. In the recommendations in respect of the Claimant by the Ministerial Committee to the Respondent by letter dated 16th October, 2012 which was produced by the RW1, the Committee stated:

Following these comments and recommendations his case was discussed in the

Ministerial Human Resource Management Advisory Committee meeting held on 19th June, 2012 but after deliberations, was unable to make an appropriate recommendation in the absence of the video clip which captured these incidents.

As a consequence, the Secretariat vide a letter dated 3rd July, 2012 requested the Secretary, Ethics and Anti-Corruption Commission to forward the video clip to enable the Committee finalize this case.

When the video clip was forwarded to this Ministry, the case against the charged officer was discussed in the Ministerial Human Resource Management Advisory Committee meeting held on 20th July, 2012 in which after lengthy deliberations and viewing of the video clip noted that it was inaudible hence it was difficult to relate the allegations contained in the Integrity Test Report and information from the video clip.

Consequently, it was recommended that since the charged officer as the District -Head bore the greatest responsibility for the malpractices recorded in the District Civil Registry, Kisii Central/ he be retired from the service in the public interest. The minutes of this meeting were confirmed on 28th August, 2012, and approved by the Authorized Officer on 31st August, 2012.

As provided for in the service regulations the charged officer was informed of line intention of the government to retire him from the service in the public interest and requested to submitted representations of personal nature, if he had any, objection(s) to the proposed retirement from the service in the public interest.

The charged officer vide his letter dated 3rd October, 2012 agreed to proceed on retirement in the public interest.

In compliance with the service regulations, you are requested to table this case before the Commission and obtain the necessary authority to retire the charged officer from the service as recommended by the MHRMAC and approved by the Authorized Officer. [Enclosed is his personal file for your perusal and return].

62. It is clear from these recommendations that the Committee found no valid grounds for dismissal of the Claimant and recommended his retirement in public interest. It is noteworthy that the Committee report states that there were no previous disciplinary issues against the Claimant who had worked for the Respondent for over 30 years.



63. In the Respondent's Memorandum of Reply, it states that upon review of all facts relating to the case and taking into account the prevailing state of insecurity in the country which had partly been attributed to issuance of fake documents to foreigners, the Respondent decided to dismiss the Claimant as opposed to retiring him in public interest.
64. This is not a valid reason for dismissal. An employer cannot dismiss an employee because of generalized perceptions. It is evident that the factors the Respondent took into account were irrelevant and did not constitute valid reason for dismissal of the Claimant.
65. The next limb that I need to address is whether there was procedural fairness in the dismissal of the Claimant. The Claimant was dismissed from employment by letter dated 20th March 2013. The letter states that the dismissal is with effect from 3rd October, 2011. A dismissal cannot be backdated and can only take effect from the date of communication of the decision to the employee.
66. Further, during the hearing of this case the Respondent did not produce before the court the evidence used to decide that the Claimant should be dismissed from service. The only document produced was the report of the Ministerial Human Resource Management Advisory Committee which reached the conclusion that
- “...it was difficult to relate the allegations contained in the Integrity Test Report and information from the video clip.” And “Consequently, it was recommended that since the charged officer as the District Head bore the greatest responsibility for the malpractices recorded in the District Civil Registry, Kisii Central, he be retired from the public service in the public interest.”
67. The Respondent did not prove that it had any other evidence other than what was before the Ministerial Human Resource Management Advisory Committee that justified its departing from the recommendation of the Committee and imposing a higher punishment than that recommended by the Committee.
68. At the time of dismissal of the Claimant the Regulations in force were the Public Service Commission Regulations 2005 which provided for the procedure for dismissal of a Public Officer from Service.
69. Part IV of the 2005 Regulations is on Discipline. Regulation 23 provides for interdiction as follows:
- 23.
- (1) If in any case an authorized officer is satisfied that the public interest requires that a public officer should cease forthwith to exercise the powers and functions of his public office, he may interdict the public officer from the exercise of those powers and functions, provided proceedings which may lead to his dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against him.
 - (2) A public officer who is interdicted shall receive such salary, not being less than half his salary, as the authorized officer shall think fit.
 - (3) Where disciplinary or criminal proceedings have been taken or instituted against a public officer under interdiction and such public officer is neither dismissed nor otherwise punished under these Regulations, the whole of any salary withheld under paragraph (2) shall be restored to him upon the termination of such proceedings.



- (4) If any punishment other than dismissal is inflicted, the public officer may be refunded such proportion of the salary withheld as a result of his interdiction, as the Commission shall decide.
- (5) A public officer who is under interdiction may not leave his station without the permission of the authorized officer or of any public officer who is empowered to give such permission on behalf of the authorized officer.
- (6) For the purpose of this regulation and regulation 24, "salary" means basic salary and, where applicable, includes inducement or overseas allowance.

70. Regulation 36 on retirement in public interest provides:

36.

- (1) 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 service of the public officer be terminated on grounds which cannot suitably be dealt with under any other provision of these Regulations, 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.
- (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 any public officer, forward to the Commission the report on the case, the public officer's reply and his own comments, and the Commission shall decide whether the public officer should be required to retire in the public interest.
- (3) Where a public officer is retired in the public interest, the authorized officer shall furnish the Pensions Branch of the Treasury with full details of the case.

71. The Claimant submitted that the Respondent did not follow the due process in dismissing him from employment. Also, it is the Claimant's contention that his dismissal was unfair on the basis that the Ministry had recommended that he be retired from service in public interest but that the Respondent opted to instead, dismiss him.

72. It is not in dispute that the Permanent Secretary, Ministry of State for Immigration and Registration of Persons recommended that the Claimant be retired in public interest on account of the allegations levelled against him and that the Claimant indicated he had no objection.

73. Regulation 36(2) of the 2005 Regulations reproduced above provided that it is the Commission that shall decide whether the public officer should be retire in the public interest after receiving a recommendation from the Authorized officer, in this case the Ministerial Advisory Committee.

74. The Claimant was issued with a notice to show cause and thereafter interdicted. From the evidence on record, the Claimant was never invited for a hearing in terms of section 41 of the *Employment Act* after being invited to respond to the show cause letter.

75. It is material to note that the Regulations under which the Claimant's case was dealt with by the Respondent are for 2005. The *Employment Act* came into force on 2nd June 2008. Section 3(3) of the Act provides that the Act binds the Government.



76. Section 41 of the Act is couched in mandatory terms and provide:

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

77. In the instant case the Claimant was only invited to respond to the show cause letter. He was never invited for a hearing. He was never even shown the evidence that was used against him. The Respondent did not give the Claimant a hearing before departing from the recommendations of the authorized officer who recommended retirement in public interest.

78. Under section 45 of the *Employment Act* a termination of employment is unfair if the employer fails to prove that the reason for termination is invalid, or that the employment was terminated in accordance with fair procedure.

79. In the instant case as I have found above, the Respondent did not prove fair procedure or valid reason for termination. The termination was therefore unfair under section 45(2) of the *Employment Act* and I declare accordingly.

Remedies

80. The Claimant prayed for general damages for wrongful dismissal, loss of income, unfair dismissal and mental anguish. In my view the most appropriate remedy is to put the Claimant in the situation he would have been in had the Respondent not mishandled up his case. He was entitled to be retired in public interest having been given the proposal which he accepted.

81. I will thus order that the Claimant be retired in public interest with effect from the date on which he received the letter of dismissal. I further order that all his salaries and allowances withheld as a consequence of his interdiction up to the date he received the letter of dismissal be released to him.

82. He will be paid his pension from 20th March 2013. He will further be paid salary in lieu of notice. Interest shall accrue from the date of the original judgment of this court being 4th October, 2018.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 18TH DAY OF APRIL, 2024

MAUREEN ONYANGO

JUDGE

