



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1398 OF 2015**

**[Formerly Nairobi H.C.C.C No. 620 of 2011]**

**BETWEEN**

**SAMUEL OCHICHI BUTI [suing as Personal Representative of**

**the estate of the late FRED OMARI MASESE].....CLAIMANT**

**VERSUS**

**THE HON. THE ATTORNEY- GENERAL.....RESPONDENT**

Rika J

Court Assistant: Emmanuel Kiprono

Wambua Kigamwa & Company Advocates for the Claimant

Christine Oyugi, Senior Litigation Counsel for the Respondent

### **JUDGMENT**

1. The Original Claimant Fred Omari Masese, is unfortunately dead. His Father Samuel Ochichi Buti, was appointed his Son's Personal Representative by the High Court of Kenya, where this Claim originated. The Claim was transferred to the E&LRC by the High Court on jurisdictional ground. Buti substituted his Son, and testified on 5<sup>th</sup> February 2021 closing the Claimant's case. Superintendent of Police dealing with Staff issues at General Service Unit Head Office, Ibrahim Akhenda, gave evidence for the Respondent, closing the hearing on 5<sup>th</sup> February 2021.
2. Masese was employed as a Police Officer on 7<sup>th</sup> July 2007. He was deployed to the General Service Unit [GSU]. He was summarily dismissed from Police Service, with effect from 11<sup>th</sup> October 2008.
3. He complains in his Statement of Claim, that he was dismissed unfairly. He did not have warnings; the orderly room proceedings were biased; the panel had an interest in the matter; he was condemned unheard; there was no complaint against him, from any member of the public; the Respondent exceeded its mandate in dismissing the him; and he was not issued notice before termination.
4. He seeks 3 months' salary in lieu of notice; 10 months' salary in damages for loss of employment; declaration that orderly room proceedings and summary dismissal are a nullity in law; costs; and interest.
5. His Father told the Court that it was alleged his Son extorted money from the public while in his uniform. Police arrested him and took him to Embakasi Police Station. The GSU took him from Embakasi. He was sacked by the GSU. Police retook Masese, but by then, he had already been dismissed by the GSU. Masese, according to his Father, was not given a hearing. There was no enquiry.
6. Cross-examined, the Father told the Court that he was familiar with his Son's letter of appointment. It contained a clause on probationary service of 2 years. Termination was on 11<sup>th</sup> October 2008, before probation ended. Police investigated and found nothing on Masese. He had earlier been charged for leaving his camp without permission. Secondly he had been charged with being absent without the leave of his Employer. The last charge which led to dismissal was that he extorted money from the public. Redirected, the Father insisted that termination

was unfair, as the Claimant was not found guilty of extorting money.

7. Superintendent Akhenda confirmed that Masese was employed as a Police Officer on 7<sup>th</sup> July 2007. He was under probation of 2 years, to end in 2009. He had accumulated convictions while still on probation. The last charge related to extortion. He extorted money from the public while wearing military fatigues. Previously he had been convicted for absence without leave, and leaving his camp without permission. He was subjected to GSU administrative process. He was given notification and subjected to orderly room proceedings. He signed notification. The proceedings documents are on record. He was accorded a fair hearing.

8. Cross-examined Superintendent Akhenda told the Court that Masese extorted money. The Police arrested him and called the GSU. The GSU relied on information given by the Police. Akhenda was not aware if the Police preferred charges against Masese. He was not compelled to sign any document by the GSU. The OB showing that the Claimant was at one time absent without leave, was not availed to the Court. Akhenda did not know if the Claimant requested to have a colleague accompany him, to the orderly room proceedings. No member of the public gave evidence. Termination took place 3 days after the allegations. Redirected, Superintendent Akhenda told the Court that the Claimant had been taken through 2 previous orderly room proceedings. He was found guilty and fined in either case. The fine is normally deducted from the salary of convicted Police Officers.

**The Court Finds: -**

9. It is not contested that the Claimant, Officer Masese was employed in the Police Service, and deployed as a GSU Officer. It is also agreed that he was dismissed from service effective 11<sup>th</sup> October 2008.

10. His letter of appointment indicates he was to serve probation of 2 years, which could be extended by the Employer. At the time of termination, he was still on probation.

11. It is also clear from the record that the Claimant was charged on 10<sup>th</sup> October 2008 with the offence of conduct prejudicial to good order and discipline. He was found by General Duty Constables wearing military jungle smoke jacket, extorting money from the public. The Claimant pleaded guilty to this charge.

12. Having pleaded guilty, it is difficult to understand why the Claimant should complain that he was not heard. There was no need for the Police who arrested him, to charge the Claimant with the same offence, having handed the Claimant to the GSU, where he was given the benefit of orderly room proceedings, and conceded the offence.

13. His short stint of little under 2 years in the service, had a disproportionate share of disciplinary lapses. He had accumulated 3 convictions within a period of 1 year and 4 months. The Respondent has exhibited records from the previous orderly room proceedings. What would be the use of exhibiting OB showing that the Claimant was AWOL? There is a record of proceedings and conviction. He was still on probation when all the successive convictions took place. The Respondent was within its right to terminate the Claimant's contract, before the 2 years of probation lapsed. Even if he was not dismissed on 11<sup>th</sup> October 2008, there would have been strong grounds for the Respondent, to decline his confirmation at the end of probation. Section 42 of the Employment Act, and the decisions invoked by the Respondent on probationary contracts, do not apply to the Claimant's contract. But, there was a probationary clause, allowing the Respondent to terminate the Claimant's contract while on probation, or by denying the Claimant confirmation upon probation. The Respondent cannot be faulted for ejecting the Claimant from Police Service. The late Masese was clearly an Officer unsuited for the role.

14. The Claimant in his Submissions concedes that the Employment Act does not apply to Police Officers. He goes on to urge the Court to exercise its jurisdiction under Section 12 [3] of the Employment & Labour Relations Court Act, and award *“ declaratory order, compensation and other appropriate relief the Court may deem fit to grant. We pray that the Court considers an award of KShs. 2,000,000.”*

15. The Remedies sought in the Claim are not the same pursued in the Closing Submissions filed by the Claimant. The framing of the Remedies in the Statement of Claim, suggest the Claim was made pursuant to the Employment Act, but upon realization that the Act does not apply to Police Officers, the Claimant shifted his position in the Submissions, abandoning his Pleadings, and bringing in through Submissions, prayers not in the Statement of Claim.

16. The Court does not exercise its jurisdiction under Section 12 [3] of the Employment and Labour Relations Court Act in a vacuum. It must be shown by a Claimant, seeking specific remedies, what substantive law those remedies are anchored on. The Act states that compensation is to be granted in circumstances contemplated under the E&LRC Act, or any written law. The Claimant has not, in the absence of the Employment Act 2007, shown the Court what substantive law he relies on, in pursuit of the remedies variously sought on the Statement of Claim and in the Closing Submissions.

**IT IS ORDERED: -**

**a. The Claim is declined.**

**b. No order on the costs.**

**DATED, SIGNED AND RELEASED TO THE PARTIES, AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 16<sup>TH</sup> DAY OF JULY 2021.**

**JAMES RIKA**

**JUDGE**