



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 191 OF 2019

IN THE MATTER OF: ARTICLES 22 AND 258 (1) OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: ALLEGED THREAT OF VIOLATION OF ARTICLES 3 AND 10 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: ALLEGED THREAT VIOLATION AND CONTRAVENTION OF ARTICLES 19, 20, 21, 22, 23 , 24 , 25 (C), 27, 28, 41, 47, 50, 51 AND 232 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE PUBLIC SERVICE COMMISSION ACT 2017

IN THE MATTER OF: THE EMPLOYMENT ACT 2007

BETWEEN

KUSOW BILLOW ISSACK.....PETITIONER

-VERSUS-

THE MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE GARISSA COUNTY COMMISSIONER.....4TH RESPONDENT

JUDGMENT

1. The Petitioner is challenging termination of his employment by the Respondents on ground that due process laid down by the law was not followed. He was also not paid any salary during the 2 years and 4 months he served as an Assistant Chief, Fafi Sub-County. Therefore, the Petitioner seeks the following prayers:

a. A declaration that the Petitioner’s enjoyment of his rights and fundamental freedoms secured in the Bill of Rights under Articles 25, 27, 28, 41, 47, 50 and 51 of the Constitution have been threatened and infringed or are threatened by the Respondents by failing, neglecting and refusing to consider his appeal for payment of wages and other allowances as they fell due and his appeal relating to the unfair termination of his appointment.

b. A declaration that the termination of the appointment of the Petitioner as Assistant Chief of Fafi Sub-County by the 1st Respondent through its letter dated 27.11.2018 and all the processes flowing from the said letter were unprocedural, illegal and null and void.

c. A declaration that the letter of the 1st Respondent dated 27.11.2018 terminating the appointment of the Petitioner is unjust, unconstitutional and null and void.

d. An order that the Petitioner be reinstated as Assistant Chief Fafi Sub County in line with the letter of appointment dated 11.10.2016 and for that purpose, the Petitioner reports to the office of Assistant Chief Fafi Sub County and perform all those functions and duties allocated to him pursuant to the letter of appointment to resume in the service of the Sub-County in accordance with the law.

e. An order directing the Respondents to pay the Petitioner all unpaid salaries, dues, terminal benefits and allowances from the date of appointment to date.

f. An order that the Respondents to pay the Petitioner all unpaid salaries, dues, terminal benefits and allowances from the date of appointment to date.

g. The Court do find that the Petitioner is entitled to damages for violation of his constitutional rights.

h. An order in the nature of a permanent injunction do issue restraining the Respondents jointly and severally, either acting on their own and/or through their agents, employees, servants and/or any other person acting and or purporting to act under their instructions and/or orders from implementing and enforcing the impugned termination letter dated 27.11.2018 relating to the Petitioner.

i. The Respondents be condemned to pay the Petitioner the costs of the Petitioner.

j. Any other orders, writs and/or directions this Honourable Court deems fit and just to grant.

2. The Respondents opposed the Petition by a Replying Affidavit sworn by Benson K. Giuthua the Director Human Resource Management and Development at the 1st Respondent, on 4.11.2019. The Petitioner thereafter responded to the Replying Affidavit through an undated Further Affidavit.

3. The Petition was disposed of by way of written submissions.

Petitioner's case

4. The Petitioner avers that he was appointed as an Assistant Chief of Fafi Sub-County vide a letter dated 11.10.2016 and thereafter submitted his personal documents to the Human Resource Officer Garissa County before assuming office; that he continued to discharge his duties until 27.11.2018 when the 1st Respondent informed him that the 2nd Respondent had refused confirm his appointment; that he appealed against the decision to both 1st and 2nd Respondents but the appeals were never heard or determined conclusively and instead the 2nd Respondent advertised the position and invited for applications to fill the vacancy even before determining his appeal; and that his demand for payment his salary and allowances was not acted upon.

5. He averred that his termination without being heard, the failure to hear his appeals and pay him was a violation of his rights and fundamental freedoms under Articles 19, 24, 25, 27, 28,41, 47 , 48, 50 and 51 of the Constitution.

Respondents' case

6. The Respondents averred that after his appointment the Petitioner filled the Public Service Commission Application for Employment Form on 7.11.2016 but did not declare that he had previously been engaged as a Police Constable by the General Service Unit (GSU) from 2001 to 2007, and that he was dismissed grounds of desertion of duties. They further averred that during the interview, the Petitioner also did not disclose to the panel that he had previously worked elsewhere in the public service.

7. They contended that upon realizing that the Petitioner had previously been engaged by the Public Service Commission (PSC), the 1st Respondent wrote to the PSC requesting for approval of reappointment of the Petitioner in order to facilitate payment through the IPPD system. However, the PSC declined this request vide a letter dated 2.5.2018 and its decision was communicated to the Petitioner in a letter dated 27.11.2019.

8. They contended that the Petitioner's appeal was discussed in the Ministerial Human Resource Management Advisory Committee (MHRMAC) meeting of 19.3.2019 where it was recommended that his case be forwarded to the PSC to determine how to treat the period worked without pay.

9. They contended that the PSC requested the Authorized Officer to provide information on the circumstances under which the Petitioner was re-engaged without its approval. By the letter dated 26.8.2019, the Garissa County Commissioner responded that the Petitioner was interviewed by the panel but he did not disclose that he had worked in the public service.

10. The respondents maintain that the Petitioner is guilty of material non-disclosure for failing to inform this Court that he did not indicate that he had been previously engaged and later dismissed from public service.

11. In response to the Replying Affidavit, the Petitioner averred that during the interview he was asked whether he had worked with the PSC and he replied in the affirmative. He admitted that he indicated in the PSC Application Form that he had not previously worked with the PSC.

Petitioner's submissions

12. The Petitioner submitted that there is no evidence to prove that he did not disclose that he had worked in the public service. He argued that neither the minutes of the interview nor any other record with respect to the interview were annexed to the replying affidavit to support this allegation.

13. He argued that he did not have any other work experience other than the 6 years of service at the GSU and had he not disclosed his prior engagement, he would have had no work experience required to secure the appointment. He further argued that as per the letter dated 5.10.2017, the 1st Respondent was aware that he had worked in the public service.

14. He submitted that the Respondents did not dispute the non-payment of his salaries hence it would be proper and convenient to conclude that this was an unfair labour practice and he is entitled to all salaries and withheld allowances. He cited Article 23 (3) of the Universal Declaration of Human Rights and submitted that payment for work done has a correlation with the inherent dignity of a person. He further relied on **Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR** where the Court found that that an employee who offers their labour and does not receive a salary is reduced to inhuman conditions.

15. He cited Article 236 (b) of the Constitution to submit that his employment was terminated without being given an opportunity to defend himself against the allegations. He relied on **Narok County Government & ano v Richard Bwogo Birir & ano [2015] eKLR** where the Court of Appeal held that a decision in breach of the rules of natural justice is not cured by holding that the decision would have been right if the principle of natural justice had not been violated.

16. He relied on Article 47 of the Constitution, section 4 (3) of the Fair Administrative Action Act and section 41 (1) of the Employment Act to submit that an employee must be given an opportunity to make his presentations before a decision to terminate his employment is reached.

17. In support of this submission, he relied **Loice Otieno v Kenya Commercial Bank [2013] eKLR** where the Court held that an employer who summarily dismisses an employee without a hearing runs afoul of section 41 (2) of the Employment Act. He further relied on **Selvarajan v Race Relations Board (1976) 1 All ER 12** that a person who is adversely affected by a report should be informed of the case against him and afforded a fair opportunity to answering it.

18. He relied on Section D (18) & (20) of the Public Service Human Resource Manual 2016 to submit that he was neither issued with a notice nor paid salary in lieu of notice. He further submitted that his termination was unfair under section 45 (2) (c) of the Employment Act since it was not in accordance with the mandatory procedures set out in section 41 of the Employment Act, and also because he was not issued with a certificate of service.

19. He argued that sections 49 (3) & (4) of the Employment Act provide for reinstatement as one of the remedies for unfair termination and the factors to consider in granting this remedy. He submitted that he has been unemployed since 2018 and there are very few opportunities for him to secure a comparable or suitable employment. Therefore, he urged the Court to issue a reinstatement order or else he will be subjected to untold suffering and to unemployment for the longest period.

20. He relied on the Court of Appeal decisions in **Kenya Airways Limited v Aviation Allied Workers Union Kenya & 3 Others [2016] eKLR** and **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** on reinstatement.

21. He submitted that reinstatement would neither be impracticable nor prejudicial to the Respondents because as an Assistant Chief he would interact more with the public than with his employer. He submitted that the minimum interaction factor was considered in the reinstatement order issued by the Court of Appeal in **Judicial Service Commission v Hon. Joseph Riitho Ndururi [2021] eKLR**.

22. He maintained that courts can order reinstatement of an employee who is dismissed unfairly if it is the only effective remedy and relied on **Benjamin Langwen v National Environmental Authority [2016] eKLR** and **Samuel Nguru Mutonya v National Bank of Kenya Limited [2017] eKLR** for emphasis.

23. He submitted that reinstatement is the only effective remedy that can meet the ends of justice in this case. He further submitted that the office of Assistant Chief is still vacant and the 3 year limit under section 12 (3) of the Employment and Labour Relations Court Act has not lapsed.

24. Finally, he submitted that he has made out a case for grant of the prayers sought and the Respondents should be ordered to comply with the Constitution and the Employment Act.

Respondents' submissions

25. The Respondents submitted that the suit does not raise any constitutional issues and it ought to have been filed as a regular employment dispute under section 12 of the Employment and Labour Relations Court Act.

26. They argued that the right to fair labour practices has been given effect by the provisions of sections 41 – 49 of the Employment Act. Therefore, a litigant cannot by-pass the Employment Act and seek to establish a cause of action under Article 41 of the Constitution unless the cause of action is based on challenging the constitutionality of those sections. In support of this position they relied on the decision in **Barbara De Klerk v Cape Union Mart International (PTY) Ltd Case No. C620/2011 [2012] ZALCCT 22** and **Minister of Health & ano v New Clicks SA (PTY) Ltd & Others 2006 (2) SA 311**.

27. They also relied on the Supreme Court decision in **Communication Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR** where it cited South Africa's Constitutional Court in **S v Mhlungu 1995 (3) SA 867 (CC)** and held that the issue before the trial Court was a plain copyright-infringement claim and was not properly laid before the Court as a constitutional issue.

28. They further cited the Court of Appeal's finding in **Sumayya Athmani Hassan v Paul Masinde Simidi & ano [2019] eKLR** where it cited the Supreme Court's decision in the **Communication Commission of Kenya case [supra]** and the **Barbara De Klerk case [Supra]**.

29. They cited section B 14 of the Human Resource Policies and Procedures Manual 2016 to submit that though it was their duty to investigate his previous employment, the 1st Respondent did their part by going through the Petitioner's PSC Application for Employment Form and asking him about his previous engagement.

30. According to the respondents the Petitioner chose to conceal the information of his previous engagement and only provided a certificate of discharge after he was terminated from employment. They submitted that the duty of disclosure must be held with high regard. For emphasis, they relied on **Sita Steel Rolling Mills Limited v Jubilee Insurance Company Limited [2007] eKLR** and **Michael Chege Ndishu v Dedan Kimathi University of Technology [2019] eKLR** where the Courts held that the non-disclosure is actionable as negligent and it is breach of the employee's terms of service.

31. They argued that reinstatement is discretionary and the Petitioner has not proved that his case meets the factors under section 49 (4) of the Employment Act. They relied on the **Kenya Airways Case [Supra]** where the Court held that the remedy of reinstatement should not be given except in very exceptional circumstances.

32. They also relied on **R v British Broadcasting Corporation- Ex Parte Lavelle (1983) 1 WLR** and **Republic v Judicial Service Commission Ex -parte Stephen Pareno [2004] eKLR** on reinstatement.

33. They submitted that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent future infringement. They argued that since the circumstance surrounding this case is the fact that the Petitioner did not disclose very important information, he should be estopped from crying foul. They therefore urged the Court to dismiss the Petition dismissed with costs.

Issues for determination and analysis

34. The undisputed fact is that the Petitioner was employed as the Assistant Chief for Mansabubu Sub-Location, Fafi Sub-County from on 11.10. 2016 to 27.11.2018 when he was dismissed. It is further not in contest that the petitioner was never paid salary and allowances during the whole period of service.

35. The issues for determination are:

- a. *Whether the petition meets the competence threshold.*
- b. *Whether the Petitioner's constitutional rights were violated through withholding of his salary.*
- c. *Whether the Petitioner's constitutional rights were violated through unfair termination of his employment.*
- d. *Whether the Petitioner is entitled to the reliefs sought.*

Whether the petition meets the competence threshold.

36. The respondents submitted that this petition is an abuse of court process because the dispute could have been dealt with as a normal suit under the provisions of Section 41 – 49 of the Employment Act. They argued that the remedies sought herein could still have been sought through a normal suit without resorting to constitutional petition.

37. However the petitioner has pleaded the provisions of the Constitution and the manner in which they were breached. The provisions include Article 27, 28, 41,47,48,and 50 of the Constitution of Kenya which provide for the freedom from discrimination, right to human dignity, right to fair Labour practices, right to fair administrative action and right to fair hearing respectively. He pleaded that he was denied protection of the law by being dismissed after 2 years' service without any hearing; that he was treated without dignity by being denied salary for the said period; and that he was dismissed without following due process.

38. Having considered the foregoing matters, I am satisfied that the petition meets the competence threshold laid down in the case of **R v Anarita Karimi Njeru** that a party wishing to file a Constitutional reference claim, must plead with precision, the provision of the constitution which he alleges to have been breached and the manner in which the same has been breached. It must be appreciated that the Kenya Constitution has included labour rights in the Bill of Rights and therefore the duality of the procedure for accessing this Court cannot be ignored.

39. I gather support from Article 22(1) of the Constitution which provides as follows:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.”

Whether the Petitioner's constitutional rights were violated through withholding of his salary.

40. The petitioner contended that his right to be treated with dignity was infringed by the respondents by being denied his salary for 2 years. He further argued that although he continued working for all that time he was never paid any salary, despite persistent demand, and as such

his ability to provide for his family was curtailed and consequently he was subjected to undignified living, degrading treatment and mental anguish. For emphasis he relied on **Article 23(3) of the Universal declaration of Human Rights** which provides for right to just and favourable remuneration which ensures the employee and his family have existence worthy of human dignity. He also relied on **Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR** where the Court held that the failure to pay salary to employees after rendering their services is subjecting them to degrading, inhuman and torturous conditions.

41. The respondents did not deny that the petitioner was appointed Assistant Chief with effect from 26.10.2016 and worked until his dismissal vide the letter dated 27.11.2018. The respondents agree that the petitioner was never added into the integrated Payment System and therefore no salary was paid to him during that period.

42. Having considered the above admission by the respondents that the petitioner worked without pay for over 2 years, I agree with the petitioner that he was subjected to inhuman treatment akin to slavery or servitude. He was denied the wherewithal to afford a dignified living for himself and his family for 2 years. Consequently, I find and hold that the petitioner's right to human dignity under Article 28 of the Constitution was violated by the respondents through the withholding of his salary for the whole period of his service as Assistant Chief.

Whether the Petitioner's constitutional rights were violated through unfair termination.

43. The petitioner contended that his constitutional rights were violated by the respondents when they terminated his employment without following the due process of the law. He contended that he was not accorded hearing as required under section 41 of the Employment act and Article 47 and 50 of the Constitution and by so doing he was discriminated contrary to Article 27 of the constitution which provides for equal protection and benefit.

44. Article 47 of the constitution provides for the fundamental right to fair administrative action as follows:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

45. The foregoing provision has been amplified by the Fair Administrative Actions Acts (FAAA) among other statutes. Section 2 of the FAAA defines administrative action to include –

“(i) the power, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

46. Sections 4 (1) (2) and (3) of the Act provide as follows–

a. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

b. Every person has the right to be given written reasons for any administrative action that is taken against him.

c. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

i. prior and adequate notice of the nature and reasons for the proposed administrative action;

ii. an opportunity to be heard and to make representations in that regard;

iii. ...”

47. In addition, Section 41 of the Employment Act provides:

“(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.”

48. In view of the foregoing provisions of the law, it is obvious that the termination of the petitioner's employment as Assistant Chief amounted to an administrative action and it required to be grounded on valid reason and arrived at after following a fair procedure as set out under section 4 of the FAAA, section 41 of the Employment Act and the PSC Regulations.

49. The Respondents contended that the Petitioner did not disclose that he had been employed as Police Constable by the GSU from 2001 to 2007 when he was dismissed from service on grounds of desertion.
50. The Petitioner denied not disclosing his previous engagement by arguing that when asked, at the interview, whether he had served in the public service, he responded in the affirmative.
51. The Respondents produced the Petitioner's PSC Application Form dated 7.11.2016 where the Petitioner ticked "[No]" that he had never been dismissed from employment which is contrary to the fact that he had been dismissed from the GSU.
52. The Petitioner also ticked "[Yes]" on whether he has been interviewed by the PSC before and in this category he was specific that it was with respect to the position of Assistant Chief. Additionally, in the section of his Employment Details, the Petitioner did not fill any information.
53. In the letter dated 14.8.2019, the Deputy County Commissioner Fafi Sub-County, stated that the Petitioner admitted that he had lied to the interview panel and admitted that he had been employed by the GSU. Further, the Petitioner submitted his clearance form from GSU together with his appeal against the dismissal.
54. It is evident that the particulars of the Petitioner's previous employment with the GSU, which were only known to him, were never disclosed to the 1st Respondent before his appointment.
55. The Petitioner was being employed in the public service, therefore the guiding principles of leadership under Article 73 (2) of the Constitution had to be met. The Petitioner's personal integrity was to be demonstrated by him providing accurate information for his engagement as an Assistant Chief. However, his non-disclosure meant that he did not meet the test for leadership under Chapter 6 of the Constitution. It was also a misconduct justifying dismissal upon discovery by the employer. Therefore, there was a genuine and a valid reason for the 2nd Respondent's refusal to re-engage him in the public service.
56. With respect to procedure, the Petitioner averred that he was not afforded an opportunity to defend himself before the decision to dismiss him was made.
57. The Respondents averred that the decision to dismiss him was communicated to the Petitioner vide the letter dated 27.11.2018; that he appealed against the decision on 26.10.2016; and that his appeal was discussed in the MHRMAC meeting held on 19.3.2019 where the termination was upheld but recommendation made that the matter be forwarded to the PSC to advise on the period the Petitioner worked without pay.
58. The decision to terminate employment of the Petitioner was an adverse action against him. Regardless, of his failure to disclose his previous employment record, the principles of natural justice under Article 47 and 50 (1) of the Constitution needed to be observed by according him a hearing before the Respondents made the impugned decision.
59. The right to hearing before dismissing an employee is no longer an option as demonstrated by the numerous judicial pronouncements from the subordinate courts to the Supreme Court. In **Kenfreight (EA) Limited V. Benson K. Nguti [2016]eKLR**, the Court of Appeal held that:-

"It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure....."

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service".

60. The foregoing was upheld by the Supreme Court in **Kenfreight (E.A) Limited v. Benson K. Nguti[2019]eKLR** when it held that:

"Had the appellant complied with the requirements of section 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree."

61. Having considered the evidence, submissions, judicial precedents and the law, I find and hold that the respondents violated the petitioner's right to fair administrative action and fair hearing as enshrined under Article 47 and 50 of the Constitution by terminating his employment without a fair hearing. The said action also violated petitioner's fundamental freedom from discrimination under Article 27 of the Constitution by denying him equal protection and benefit of the law that safeguards employees from unfair termination of their employment.

62. Finally, I find that the respondents' failure to pay salary to the petitioner for over two years and then terminating his employment without according him a hearing amounts to violation of his right to fair labour practices under Article 41 of the Constitution of Kenya.

Whether the Petitioner is entitled to the reliefs sought

63. In view of the matters aforesaid, I find that the petitioner is entitled to some of the reliefs sought. He is entitled to declaration that his rights under Article 27, 28, 41, 47 and 50 of the Constitution of Kenya were violated by the respondent by failing to pay his salary as they fell due and by dismissing him without giving him a fair hearing. He is also entitled to a declaration that the termination of his appointment as Assistant Chief vide the letter dated 27.11.2018 violated his rights under the Constitution.

64. The Petitioner sought reinstatement contending that it was the only effective remedy. Section 49 (4) (b), (c) and (k) of the Employment Act provides that while deciding on the remedy to award, the Court ought to take into account the extent to which the employee contributed to the termination; practicability of reinstatement or re-engagement among others.

65. The Petitioner's non-disclosure of his previous engagement at the GSU was the reason for his termination. Therefore he contributed to the termination. The said concealment was also a sign of dishonest and lack of integrity on his part which is incompatible with public service by dint of Chapter 6 of the Constitution. In the circumstances, the prayer for reinstatement must fail because it is impracticable.

66. The Petitioner argued that he never received his salary for the 2 years and 4 months he worked. The Respondents did not deny that claim but only stated that by the letter dated 7.6.2019, MHRMAC sought advice from PSC on how it would treat the period the Petitioner had worked and not received his salary.

67. Under Article 41 (2) (a) of the Constitution and section 17 of the Employment Act, the petitioner became entitled to the salary and allowances of an Assistant Chief upon his appointment vide the letter 11.10.2016. Therefore, he is entitled to his salary and allowances for the 2 years and 4 months worked.

68. However, the Petitioner did not indicate how much he was entitled to or how the Court should assess the amount due and owing. Consequently, the 1st and 2nd Respondents shall assess and pay him the withheld salary and allowances according to the salary scale as at the time of his service from 11.10.2016 to 27.11.2018.

69. The Petitioner sought damages for breach of his constitutional rights. I have already found that Petitioner's rights under Article 27, 28, 41 (2) (a), 47 and 50 of the Constitution were violated. In **John Gakuo & ano v County Government of Nairobi & 3 others [2018] eKLR** the Court of Appeal substituted an award of Kshs. 904,448 for Kshs. 1, 500,000 as damages for breach of the appellants right to fair administrative action. Again in **Ol Pajeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** the Court of Appeal awarded Kshs. 7,500,000 to the employee as damages for racial discrimination in the payment of salary.

70. In consideration of the foregoing binding precedents and all the circumstances of this case, including the fact that the petitioner contributed to the termination through misconduct, I find that an award of ksh.1, 000,000 is a reasonable compensation.

71. In view of the foregoing award, and the petitioner's misconduct, I decline to award him any further compensation for unfair termination under Section 49 (1) (c) of the Employment Act.

72. The Petitioner submitted that he was not issued with notice prior to his termination or paid salary in lieu of notice. However the Petitioner did not seek any prayers with respect to these claims and therefore the said new claims are declined because they were not pleaded in the petition.

73. In the end, I enter judgment for the petitioner, in terms of the declarations and financial award made herein above. I also award him costs plus interest at court rates from the date hereof. The financial award shall be subject to statutory deductions. All other prayers not expressly granted above are declined.

Dated, signed and delivered in Nairobi this 19th day of August, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE