



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. NO. 325 OF 2014

APC DANIEL NAMUNYU OBINGO.....CLAIMANT

-VERSUS-

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The suit herein is contained in the amended statement of claim dated 27.11.2019 in which the Claimant alleges that his employment was unlawfully terminated without being heard. It seeks the following reliefs:

- (a) A declaration that the Claimant termination of employment is wrongful, null and void.
- (b) Reinstatement of the Claimant to his rightful position and grade and reinstatement of the Claimant's salary with immediate effect.
- (c) Damages for unfair treatment
- (d) Costs of the suit and interest
- (e) Any other relief that the Honourable Court may deem just and expedient to grant.

2. The Respondents defence is contained in its Reply to the Amended Claim dated 10.2.2020 in which it denied the alleged unlawful termination of the Claimant's services. It averred that the Claimant and 7 other officers misconducted themselves while on duty between 28.10.2013 and 30.10.2013 and on 3.11.2017, they were charged with seven counts pursuant to section 88(2) in Orderly Room Proceedings at the Rapid Deployment Unit (RDUS Headquarters) It further averred that the Claimant and the 7 other colleagues attended the proceedings but refused to be taken through the same and further refused to appoint an officer to accompany them or even to call witnesses. It is also averred that after the Claimant failed to defend himself he was found culpable and was dismissed with effect from 12.11.2013. Finally it averred that Claimant is not entitled to the reliefs sought since the dismissal was lawful.

EVIDENCE

3. The Claimant testified as CW1 and told the court that he was employed by the Respondent as an Administration Police on 11.7.2008 and worked until 4.2.2014 when he received termination letter dated 29.11.2013 citing 7 reasons including insubordination, negligence use of inappropriate language, threat, absence and false accusation against the Commander of the RDU.

4. The Claimant dismissed all the cited misconduct as false. He testified that on 2.11.2013 the Commanding Officer RDU arrived at Todoyang and called his names out and those of the officers who he accused of misconduct. Thereafter he disarmed them before being taken back to Nairobi.

5. On arrival, they were ambushed with an Orderly Room Proceedings without any prior notice. That they were also not served with the charge sheet, witness statements, despite request; that no witnesses were called to testify against them; and finally the Presiding Officer never gave them time to defend themselves.

6. The Claimant stated that after the said proceedings, he remained on duty roaster and continued with his work at RDU Headquarters until 4.2.2014 when he received the termination letter. However, his salary was stopped immediately after the Orderly Room Proceedings. Therefore he prayed for reinstatement with full benefits because the termination was unlawful and unfair.

7. On cross-examination the Claimant confirmed that he was deployed to Todoyang on 26.10.2013 and left Nairobi on the same day with other officers. He confirmed that on the way there arose some differences among the officers and on arrival at Todoyang on 29.10.2013 ten officers, him included were ordered to return to Nairobi. The journey took another 3 days and they arrived on 2.11.2013

8. He further testified that on arrival they were summoned to Order Room Proceedings by the Presiding Officer but he (CW1) did not attend. Two of the other officers attended the proceedings and demanded for the charge sheet and witness statements but they were not supplied and they declined to participate in the proceedings.

9. Thereafter no decision was given to him until 4.2.2014 when he received dismissal letter. He confirmed that he never appealed against the dismissal.

10. On being shown copy of Orderly Room Proceedings, dated 3.11.2013, he contended that he was charged in absentia. He denied that he refused to attend the proceedings and contended that he was never served with any charge sheet and witness statements by the Presiding Officer. He further denied that he refused to plead and to call any person to represent him.

11. He contested that he was given a dismissal letter dated 1.11.2013 effective 12.11.2013 after working for 3 months. He contended that his rights were violated by the failure to pay him salary for 3 months.

12. On re-examination he contended that he arrived in Nairobi on 2.11.2013 at 8 p.m and he was not notified of any Orderly Room Proceedings scheduled for 3.11.2013 at 8. a.m. He reiterated that no Orderly Room Proceedings took place as he was never served with any invitation to attend nor was she served with any charge sheet and witness statements.

13. He further stated that after 3.11.2013 he was assigned stand by duties but when he went to the bank he found no salary for 3 months. He contended that his dismissal letter was dated 29.10.2013 meaning he was dismissed before the date of the Orderly Room Proceedings (3.11.2013). He maintained that his rights were violated by being denied his salary for the 3 months worked before receiving the dismissal letter.

SUBMISSIONS

14. The Claimant submitted that his dismissal from service was wrongful and unlawful because the Respondent blatantly violated his rights as embodied in the Constitution and the Employment Act in that he was dismissed without prior notice or being accorded a fair hearing. He contended that his dismissal violated the rules of natural justice as he was never given any opportunity to rebut any evidence lined up against him in support of the alleged misconduct. Further, he contended that he was never served with the charges and the witness statement and he was not afforded time to prepare his defence. Finally, he contended that the outcome of the proceedings was delayed for months while his salary was stopped immediately.

15. In addition he submitted that all the grounds for the termination contained in the dismissal letter dated 29.11.2013 were never substantiated. In his view, the whole process was marked with irregularities and violations of the law, and as such he is entitled to the relief sought in his suit.

16. Despite the failure to call any witnesses before the close of the hearing, the Respondent filed written submissions urging the court to dismiss the suit. It submitted that the Claimant was made aware of the Orderly Room Proceedings and that he did admit during cross examination that he attended the proceedings but refused to participate in the same. It further submitted that if the Claimant felt the need for an adjournment, he should have applied for the same instead of refusing to attend the hearing or participate in the same.

17. In addition, the Respondent submitted that the allegations that the Claimant was dismissed before the date set for the Orderly Room Proceedings, is not correct and clarified that the termination letter was dated 29.11.2013 and the effective date was 12.11.2013.

18. Referring to the letter dated 30.12.2013 by the Claimant's Advocate, the Respondent submitted that the Claimant refused to participate in the Orderly Room Proceedings deliberately.

19. As regards the alleged violation of the Claimant's Constitutional rights, the Respondent submitted that no such violation was done and the Claimant has not proved any by evidence.

20. As regards the reliefs sought, the Respondent submitted that reinstatement cannot issue since section 12 of the ELRC Act bars reinstatements if 3 years have lapsed after the separation. In addition, it submitted that the reliefs founded on the Employment Act cannot issue because the Act does not apply to the National Police Service among other disciplined forces by dint of section 3(2) (b) of the Act.

ISSUES FOR DETERMINATION AND ANALYSIS

21. Having considered the pleadings, evidence and submission, there is no dispute that the Claimant was enlisted to serve as an Administration Police Officer on 11.7.2008 until 12.11.2013 when he was dismissed from the service for misconduct. It is also clear, that the dismissal was communicated vide the letter dated 29.11.2013 and it was not served upon the Claimant until 4.2.2014.

22. The issues for determination are:

- (a) Whether the dismissal was wrongful, null and void.

(b) Whether any reliefs should issue.

23. Article 236 of the Constitution protects any public officer from removal from office without following due process. In my view due process entail fair administrative action as contemplated under Article 47 of the Constitution and amplified by the Fair Administrative Action Act among Other Statutes Regulations. The upshot of the Fair Administrative justice being that there must be a justification for the action to be taken and that a fair procedure is to be followed.

THE REASON

24. The reasons for the dismissal of the Claimant are set out in the dismissal letter but the Claimant denied all of them in his evidence before this court. He further contended that he was never served with any charge sheet and witness statements on 3.11.2013 and he declined to participate in the Orderly Room Proceedings.

25. The Respondent did not call any witnesses to rebut the evidence by the Claimant. No copy of the charge sheet and testimonies by witnesses at the Orderly Room Proceedings were adduced. Consequently, I find that the reason cited for the dismissal in the dismissal letter to be unsubstantiated and therefore invalid.

PROCEDURE FOLLOWED

26. The Claimant testified that he left Nairobi to Todoyang on 26.10.2013 and arrived on 29.10.2013; that on the said day he was disarmed and ordered to return to Nairobi and arrived on 2.11.2013 at 8 p.m. He denied that he had been notified of Order Room Proceedings scheduled for 3.11.2013. He contended that he was not served with any charge sheet and witness statements. He further averred that the time was too short after 6 days journey which made him not ready for the Orderly Room Proceedings.

27. The said evidence was not rebutted by the Respondent who failed to call any witness before the close of the hearing. Considering the circumstances of the case, including the fact that the Claimant had reported back after 6 days journey, the failure to serve him with prior notice of the intended proceedings, and failure to serve him with the charge sheet and the witness statements in order to prepare his defence, I find that the procedure followed before the dismissal was not fair.

28. A police officer's constitutional rights should not be swept under the carpet during Orderly Room Proceedings. This court is of the view that fair hearing is not an option before administrative action is taken against any person whether an officer of the Police or not. The Constitution applies to and binds all government organs and persons who exercise administrative powers over another.

29. Any disciplinary process, that does not give sufficient notice of the hearing, provide the charges and supporting evidence before hand in order for the intended Respondent to prepare his defence does not pass the test of fairness. The foregoing infringement is worsened by the delay in delivering the decision by the decision maker like in this case.

30. Having found that the Respondent has not rebutted the evidence by the Claimant which show that the impugned dismissal was substantively and procedurally unfair, I proceed to hold that the dismissal was unfair, wrongful and unlawful. In so holding, I do appreciate the provision of section 3(2)(b) of the Employment Act which is to the effect that the Act does not apply to officers of the Kenya Police like the Claimant herein.

RELIEFS

31. In view of the finding and holding above, I make declaration that the termination of the Claimant's employment was wrongful but not null and void. The reality on the ground is that the Claimant was dismissed and fully discharged from the Police Service vide the letter dated 1.11.2016.

32. The prayer for reinstatement cannot issue at this juncture. As correctly submitted by the Respondent, section 12(3) (vii) of the ELRC Act bars reinstatement of an employee if 3 years have lapsed after the separation.

33. In addition I find the prayer for damages for unfair treatment not well founded because the the unfair treatment is not precisely pleaded. Consequently, I decline to award the damages sought.

34. In the end I enter judgment declaring that his dismissal from service was wrongful and unlawful. I further award him cost plus interest.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH 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