



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**APPEAL NO. 42 OF 2019**

**ERICK NGUGI MBAE.....APPELLANT**

**V**

**NATIONAL POLICE SERVICE COMMISSION .....RESPONDENT**

**(Being an appeal from the judgment of Hon. I. Orange (Mr) Senior Resident Magistrate on 16<sup>th</sup> September 2019 in CMCC No. 479 of 2018)**

**JUDGMENT**

1. Erick Ngugi Mbae (Appellant) sued the National Police Service Commission before the Magistrates Court alleging unfair termination of employment. The Respondent did not defend the suit.
2. In a judgment delivered on 16 September 2019, the trial Court found for the Appellant and awarded compensation and other reliefs together with costs. The Court, however, declined to award reinstatement.
3. The Appellant was dissatisfied and on 14 October 2019 lodged a Memorandum of Appeal contending
  1. THAT the learned Magistrate erred in both law and fact by failing to allow the Claimant time to be heard and table documentary evidence before the trial Court to prove his case.
  2. The Learned Magistrate erred in both law and fact by failing to take into account to declare and grant the Claimant prayers that the Claimant was unlawfully and unprocedurally dismissed from service by the Respondent despite the Respondent not challenging the claim.
  3. The Learned Magistrate erred in law and fact by failing to order the Respondent to reinstate the Claimant with full salary, benefits and continuity of service without victimisation despite the Claimant's prayers having not been challenged by the Respondent.
  4. THAT the Learned Magistrate erred both in law and fact by basing his decision on extraneous matters that were not placed before him.
4. When served, the Respondent filed on 10 December 2019 a replying affidavit sworn by its Chief Executive Officer. During the giving of directions on 6 February 2020, the Court directed the parties to file and exchange submissions.
5. The Appellant filed his submissions on 10 February 2020 while the Respondent filed its submissions on 9 March 2020.
6. The Court has considered the record and the submissions.

**Role of first appellate Court**

7. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
8. The Court will keep in mind the directive.

9. The Appellant condensed the Grounds of Appeal into three in the submissions.

**Whether the Appellant was given a fair hearing**

10. The trial Court made an express finding in the last paragraph of the Judgment that the termination of the Appellant's service was unprocedural, unlawful and unfair.

11. The Court, therefore, finds this ground of appeal as unmerited and frivolous.

**Reinstatement**

12. Among the prayers sought by the Appellant before the trial Court was reinstatement.

13. The trial Court declined to allow reinstatement and according to the Appellant, this was an error of both law and fact.

14. In declining to grant reinstatement, the trial Court referred *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 Ors* (2014) eKLR and found that the working relationship between the Appellant and the Respondent was untenable, and therefore reinstatement would not be possible to implement.

15. Under the common law, specific performance of a contract of service can be ordered in exceptional circumstances. The principle has now been given statutory underpinning in section 49(4)(d) of the Employment Act, 2007 (the Act, however, does not apply to the Police Service).

16. This Court has relooked at the Appellant's witness statement which was adopted as part of his evidence before the trial Court.

17. Apart from making a general statement reiterating that he was seeking reinstatement aside from other prayers, the Appellant did not lay out any evidential foundation for the Court to conclude that there were exceptional circumstances in the case to warrant an order of reinstatement.

18. Further, the trial Court had the discretion on the relief to award and it found that monetary compensation would be appropriate. The Appellant did not demonstrate that the exercise of discretion was erroneous as he had expressly prayed for compensation.

19. Compensation and reinstatement, in the view of this Court, may not be awarded simultaneously.

**Conclusion and Orders**

20. The Court finds no merit in the Appeal and orders it dismissed. Each party to bear own costs of the Appeal.

**Dated, signed and delivered through email in Nairobi on this 24<sup>th</sup> day of April 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellant In person

For Respondent Sarah Muthiga, Legal Counsel, National Police Service Commission

Court Assistant Judy Maina