



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 575 OF 2017

JACINTA WANJIKU KERU

CLAIMANT

VERSUS

MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

CONSOLIDATED WITH CAUSE NO. 577 OF 2017

MARGARET ADHIAMBO OBARA

CLAIMANT

VERSUS

MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGEMENT

Vide their Amended Statements of Claim filed on 19th March 2018, the Claimants, acting in person aver that the respondents wrongfully dismissed them. They aver that they gave a plausible explanation with respect to the M-pesa amounts received from Mr. Hussein Adan Somo as being friendly loans and not as an inducement for the issuance of passports as alleged by the Respondents.

They contend that they were never taken through a disciplinary hearing by the Ministerial Human Resource Management Advisory Committee (MHRMAC) which recommended their retirement on grounds of public interest. Further, the Public Service Commission, the 2nd Respondent herein, did not serve them with any new findings which led it reject the recommendations of MHRMAC and instead resolved to dismiss them.

They seek the following reliefs:

- a) A declaration that the dismissal of the Claimant by the 1st Respondent by a letter dated 18th March 2016 was wrongful, illegal and unconstitutional.
- b) An order for reinstatement or in the alternative
- c) The Claimants' summary dismissal be substituted with normal termination
- d) The Claimant be paid all accumulated salaries from the date of

interdiction up to the date of judgment of this Court.

i) 1 month's salary in lieu of notice Kshs.71,880

ii) 12 months' compensation for wrongful dismissal

12 x 71,880 Kshs.862,560

Subtotal Kshs.934,440

e) Pension

f) Costs and Interest from the date of filing the suit.

a) A declaration that the dismissal of the Claimant by a letter dated 18th March 2016 be declared unlawful, wrongful, unfair and unconstitutional.

b) Summary dismissal of the Claimant be substituted with a normal termination

c) An order for reinstatement of the Claimant or in the alternative be paid as follows:

i) 1 month's salary in lieu of notice Kshs.65,600

ii) 12 months' compensation for wrongful dismissal

12 x 65,600 Kshs.787,200

Subtotal Kshs.852,800

d) All accumulated salaries from the date of interdiction up to the date of the judgment of this court.

e) Pensions

f) Costs and interest from the date of filing this suit.

The Respondents in their responses to the Claim aver that the Claimants were given an opportunity to make their representations within 21 days as required by the Regulations. They aver that the claimants were dismissed on grounds of gross misconduct and that such grounds do not elicit disciplinary proceedings but require the employer to hear and consider any representations which the employer make before dismissal.

They aver that the Public Service Commission Act provides for various types of penalties to be instituted against a public officer including dismissal from service and retirement and gives the Commission discretion to decide the most appropriate penalty depending on the degree of misconduct alleged.

Claimants' case

MARGARET ADHIAMBO OBARA testified as CW1 on behalf of the Jacinta Wanjiku Keru and herself. She testified that in October 2013 Jacinta was appointed to represent Civil Registration Department to assist the passport making Committee in verifying passport applicants. She testified that in March 2014, she was appointed to represent the Department of National Registration Bureau to join the passport vetting Committee and assist in the verification of finger prints.

CW1 testified that by a letter dated 18th December 2014, from the 1st Respondent they were interdicted together with two other employees Felicine Ndwiga and Fredrick Odhiambo Walukwe. She testified that the claim was that they had received money, via M-pesa, from one of the Committee members of the Passport vetting Committee. She testified that the reason for the interdiction was based on the forensic report against the Supkem Representative to the Committee, Mr. Hussein Adan Somo.

She testified that the report did not mention some of the vetting committee members namely Mr. Omondi who was the Chairman and Mr. Boto and Mr. Ndunda. She testified that they responded to the letter of interdiction and explained that the money received from Mr. Hussein Adan was a friendly loan. She testified that this position is confirmed by the affidavit of Mr. Hussein Adan.

She testified that they received their dismissal letters on 18th March 2016 and they appealed to the Public Service Commission, the 2nd Respondent herein, who gave its verdict on 17th November 2016. She testified that their appeals were disallowed. She testified that two of their colleagues who had been dismissed filed Judicial Review No. 15 of 2016 and Cause No. 614 of 2015 and were reinstated.

She testified that the MHRMAC minutes were not produced in Court and the meeting was conducted in their absence. She testified that no disciplinary hearing took place save for the exchange of letters.

In cross-examination, she testified that her role was to verify finger prints of applicants who had applied for passports while Jacinta Wanjiku Keru's role was to verify death and birth certificates. She testified that during her appointment she was informed that the Committee was to vet applicants from border areas meaning all border districts, non-indigenous Kenyans and all Africans with Muslim names.

She testified that she could not recall if the Committee had any regulations governing its conduct. She testified that the Committee sat on a weekly basis. She further testified that they had all applicants' documents which were annexed to the applications and the applicants from the areas mentioned above appeared before the Committee.

She testified that she knew Mr. Hussein Adan after she joined the Committee in March 2014. She testified that they paid the friendly loan over a period of time via cash and M-pesa. She testified that the Report contained names of 4 out of the 7 members who had received loans. She testified that she only saw in the Report that they had been given money on the same day and that she did not know that Mr. Adan had sent all of them money. She testified that she was not being bribed by Mr. Adan and that by receiving money she was maintaining public confidence.

Respondent's Case

MWENDE MUTUKU a Clerical Officer in the Discipline Section of Immigration and Citizen Services testified as RW1. She testified that the Claimants' discipline cases were reported by the Director Immigration Services to the Human Resource Section that they had committed gross misconduct and that is when the HR Section began the administrative discipline process.

She testified that the Claimants responded to the show cause letters in their letters dated 2nd January 2015 and 5th January 2015. She testified that after their responses were received, their cases were presented to the MHRMAC, which recommended that they be retired in public interest.

She testified that the Claimants responded to the notices to retire them in public interest on 22nd March 2015 and 27th March 2015 and the case was forwarded to the 2nd Respondent with the recommendation of the Authorised Officer to retire them on public interest. However, the 2nd Respondent rejected the Authorised Officer's recommendation and instead recommended that the Claimants be dismissed on account of gross misconduct.

She testified that the 2nd Respondent requested for comments and recommendations from the department and that this could only happen after the cases were submitted to the MHRMAC which sat on 10th June 2016. She testified that the recommendations were upheld on appeal.

She testified that Mr. Hussein Adan who was mentioned by the Claimants is not an officer at the immigration office but a representative of SUPKEM. She testified she was not in a position to respond on whether Mr. Hussein grants loans to persons at the Ministry. She testified that the decision and recommendations followed due process.

In cross-examination, she testified that she was not in a position to respond if the 2nd Respondent had new evidence to justify the change of retirement to dismissal. She testified that there was no oral hearing and that she was not aware if there were independent investigations by the 2nd Respondent.

She testified that she was not aware that the Forensic M-pesa investigations were done selectively. She did not know why the Claimants were not charged in a court of law in spite of the 2nd Respondent stating that they were a threat to national security by issuing passports to non-vetted persons.

She testified that Mr. Hussein Adan was not apprehended because he was not a member of staff. She testified that she did not know why the affidavit of Mr. Hussein and the legal issues in the appeal were not considered because the decision was made by the 2nd Respondent. She stated that the forensic analysis omitted Mr. Boho and Mr. Ndunda. She testified that in respect of the reinstated employee, the Ministry has since appealed against those decisions.

In re-examination, she testified that at the time of the claimants' disciplinary process, the Code of Regulations did not provide for an oral hearing.

JOHN KIMANI NJORIO an assistant Director at the 2nd Respondent testified as RW2. It was his testimony that after receipt of the recommendations on the claimants' case, PSC decided that the Claimants be dismissed on account of gross misconduct. He testified that the PSC considered the recommendations of MHRAC and the case in totality but did not agree with the recommendations

of the Authorised Officer.

He testified that the 2nd Respondent considered the Claimants' appeals and found that no new grounds had been raised in the appeal thus it upheld the earlier decision. He testified that decision by the 2nd Respondent was made within the provided time frame. He testified that the disciplinary process began on 2014 before the Fair Administrative Action Act and the Claimants were not given an oral hearing as the Act cannot be applied retrospectively.

In cross-examination, he testified that the show cause letter constituted an interdiction as it was a preliminary process as per the PSC Regulations.

He testified that no new evidence was provided. He testified that there were no other investigations by the 2nd Respondent because it did not find it necessary. He testified that the 2nd Respondent has discretion to agree or not agree with the authorised officer's recommendations.

He testified that according to the investigations there was no proof that the money given to the Claimants was to induce them to decide favourably in undeserving cases. He testified that according to the 2nd Respondent, the affidavit of Hussein Adan did not explain the offences and it was brought after the fact. Further, the information in the affidavit was what was in reply to the notice to show cause and did not raise any new aspects.

He testified that the 2nd Respondent's decision on the appeal was not delayed as they were made a month after receiving advice from the authorised officer.

Claimants' Submissions

The Claimants submitted that the letter dated 26th October 2016 disallowing their appeals did not give any reasons or grounds why the appeals were dismissed despite raising weighty legal issues on fair hearing mandated by the Constitution, Fair Administrative Action Act and the Public Service Disciplinary Manual (May 2016).

They submitted that prior to their dismissal, there was no formal disciplinary hearing accorded to them, either by MHRMAC or by the 2nd Respondent. They submitted that they did not commit any offence that would warrant their summary dismissal and that the allegations against them were malicious and unfounded.

They submitted that the 2nd Respondent communicated the outcome of the appeal on 26th October 2016 thus they request the Court to treat this date as the operative date of running of the three

years stipulated under section 12 of the Employment Act.

The Claimant in Cause No. 575 of 2017 submitted that she had served the government for 37 years with clean records of employment and would have attained retirement age in the month of August 2019. The Claimant in Cause No. 577 of 2017 urged the Court to reinstate her, in the alternative as her retirement would have been on 9th November 2021.

They submitted that two members of the committee who faced similar charges filed their suits and have been reinstated into service. The Court in **Judicial Review No. 15 of 2016 Felisina Wanjira Ndwiga** held that the Applicant's dismissal was unfair and the process was flawed and reinstated the applicant into service. The Court in **Cause No. 614 of 2015 Fredrick Odhiambo Walukwe v Cabinet Secretary Ministry of Interior and Coordination** reinstated the Claimant at the interlocutory stage. In addition, in **Cause 1501 of 2015** the Court reduced summary dismissal into normal termination.

In conclusion, the Claimants submitted that the Respondents' witnesses were not consistent in their evidence as RW1 was not able to respond to any question whereas RW2 was evasive. They argued that from the evidence, it was clear that they were not given an oral hearing as no minutes were produced by the Respondents.

They submitted that the preliminary process commenced by the show cause/interdiction letter did not constitute disciplinary hearing as envisaged under Article 47 of the Constitution. They submitted that the Fair Administrative Action Act 2015 cannot apply retrospectively.

They submitted that the rejection of an authorized officer's decision to retire the Claimants on public interest rendered the evidence of the Respondents as hearsay because the same could not be rejected in the first instance and subsequently admitted as grounds to dismiss them from service.

In their further submissions, they submitted that MHRMAC's recommendations are persuasive in nature and do not bind the 2nd Respondent. They submitted that the Fair Administrative Action Act was in force at the time and the Respondents deliberately ignored and continued to occasion injustice to them. They maintained that the Respondents' breached their rights to fair hearing.

Respondent's Submissions

The Respondent submitted that they had proved the reason for the Claimants' dismissal under Section 43 of the Employment Act. They further submitted this reason was clearly stated in the interdiction letter dated 18th December 2014 and that the claimants in their letters dated 2nd January 2015 and 5th January 2015 knew the reason for their dismissal.

They relied on section 44 of the Employment Act and submitted that the Claimants were on interdiction for gross misconduct from the occurrences following the Forensic Analysis of M-pesa transactions belonging to Hussein Adan. They submitted that the fact that the Claimants received amounts as inducements to issue passports to unqualified applicants amounted to gross misconduct as provided under Section 44(4)(c) and (g) of the Employment Act. They relied on the case of **Naqvi Syed Qmar v Paramount Bank Limited and Another [2015] eKLR**.

It is their submission that Section 22(1)(b) and Regulation 35(6) of the Public Service Commission Regulations 2005 were applicable at the time of the disciplinary proceedings. They submitted that Regulation 35 of the Public Service Commission Regulations 2005 set out the disciplinary proceedings of a public officer and averred that the Claimants were afforded the opportunity to be heard.

They submitted that the Fair Administrative Action Act came into force after the disciplinary process against them had started therefore the requirement for an oral hearing and the argument that they were not accorded a fair hearing under the Act does not stand. They relied on the decision of the Court of Appeal in **Attorney General & another v Crispinus Ngayo Musundi [2017] eKLR** where the court cited the case of **R v Immigration Appeal Tribunal ex-parte Jones [1988] 1WLR 477, 481** that a hearing does not necessarily have to be an oral hearing in all cases.

With respect the decisions in **Judicial Review Application No. 5 of 2016** and **Cause No. 614 of 2015**, the Respondent submitted that these decisions being from courts of concurrent jurisdiction are only persuasive and not binding. They relied on the Supreme Court decision in **Jasbir Rai & 3 Others v Tarlochan Singh & 4 Others [2013] eKLR**.

They submitted that it is impractical to reinstate the Claimants and relied on the decision of the Court of Appeal in **Kenya Airways Limited v Aviation and Allied workers Union Kenya & 3 Others [2014] eKLR**. They submitted that under Regulation 28 of the Public Service Commission Regulations, 2005 and section 5 of the Pensions Act, the right to pension is not absolute and where a public officer is dismissed from service and a court finds that the reason for termination was proper, the Claimants are not entitled to pension.

They submitted that under Section 47(5) of the Employment Act the burden of proving that the dismissal was wrongful rests on the employee while the burden of justifying the grounds of wrongful dismissal rests on the employer. They submitted that in the interest of justice the Claimants would only be entitled to costs at the discretion of the Court in the event they discharge the burden that of dismissal was wrongful.

Determination

The issues for determination are:

1. Whether the Claimants' dismissal was wrongful
2. Whether the Claimants are entitled to the reliefs sought.

Whether the Claimant's dismissal was wrongful

The Claimants' herein were interdicted on 18th December 2014 as a result of the outcome of the preliminary investigations of a forensic analysis of M-pesa transactions of Mr. Hussein Adan who transacted funds to members of the Passport Vetting Committee for unknown reasons between 4th May 2014 and November 2014.

It is the Claimants' case that they did receive money from Mr. Hussein Adan under personal arrangements and for personal reasons. The Claimants contend that it was not proved that there was a syndicate among committee members that was inducing members with money to compromise them or for passports to be issued to wrong applicants. Indeed, the Respondents' witnesses failed to link the receipt of funds by the Claimants to the issuance of passports to undeserving applicants.

At page 53 of the MHRMAC minutes dated 3rd November 2015, it is indicated that:

“(f) These findings showed the existence of a syndicate where members of the Committee are induced with money so as to compromise them. This is a very serious lapse in our national security considering the much insecurity confronting the country for this led to the issuance of passports to undeserving applicants. In the foregoing, it was evident that there was a sinister motive in the transactions.

...

(h) From investigations, it was clear that the officers received money which they could not clearly explain what the money was for. The law requires that the prosecuting office must prove a case beyond reasonable doubt for a conviction to be secured in a Court of law.

(i) In the foregoing, what we have at hand appears not to hold strong evidence to be tendered in Court of law as the sender of the money Hussein Adan the Supkem Representative could not be relied upon as he was also a suspect in our investigations.”

[Emphasis added]

I do not find that the Respondents have proved that there was a valid reason to dismiss the Claimants as required under Section 43 of the Employment Act.

In its communication to the Claimants, the 1st Respondent indicated that the 2nd Respondent had rejected its decision retiring them from service in public interest. Further, the 2nd Respondent had decided that the Claimants be dismissed on account of gross misconduct as they were a threat to national security because it had been confirmed that they received Kshs.108,000 and Kshs.105,000 from

Hussein Adan as inducement.

As submitted by the Claimants, the facts in this case are similar two suits that have been decided by different Courts. In **Cause No. 614 of 2015 Fredrick Odhiambo Walukwe v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 2 Others**

a Ruling was delivered by Aboudha J. on 5th February 2016 while in **Judicial Review No. 15 of 2016 Felisina Wanjira Ndwiga v Public Service Commission & The Hon. Attorney General where Wasilwa J.** delivered Judgment on 21st September 2017.

Both RW1 and RW2 testified that the Claimants were not accorded an oral hearing. RW1 testified that, at the time of the disciplinary hearing the Code of Regulations did not provide for an oral hearing. From the minutes of the MHRMAC held on 3rd November 2015, the Committee never summoned the Claimants herein and only considered their written representations in response to the notice to show cause. RW2 testified that the 2nd Respondent did not have any new evidence leading to its recommendation to dismiss the Claimants.

The Claimants were in Job Group L thus the applicable provision to their disciplinary proceedings was Regulation 35 of the Public Service Commission Regulations, 2005 which provided:

1. Where an authorized officer considers it necessary to institute disciplinary proceedings against a public officer to whom this regulation applies on the ground of misconduct which, if proved, in his opinion, justify any of the punishments mentioned in regulations 25(1), he shall, after such preliminary investigation as he considers necessary, forward to the public officer a statement of the charge or charges against him with brief allegations, in so far as they are not clear from the charges themselves, on which each charge is based.

2. If the public officer does not furnish a reply to a charge or charges forwarded under paragraph (1) within the period specified, or if in the opinion of the authorized officer he fails to exculpate himself, the authorized officer shall forthwith decide and inflict on the public officer any of the punishments prescribed under regulation 25(1) except, dismissal or reduction in rank or seniority.

3. If the authorized officer, on consideration of the charge or charges against the public officer, the public officer's reply and the grounds, if any, on which the public officer relies to exculpate himself, is of the opinion that the matter should be further investigated, the authorized officer shall conduct such further investigation.

4. Any investigation carried out under this regulation shall be undertaken by public officers senior to the accused public officer who have not, directly or indirectly, dealt with the case before.

5. If, in the opinion of the authorized officer, a punishment should be inflicted on the public officer, the authorized officer shall forthwith decide and inflict on the public officer any of the punishments prescribed under regulation 25 (1), except dismissal or reduction in rank or seniority.

6. Where, in any case under this regulation, it is the opinion of the authorized officer that the punishment to be inflicted is dismissal or reduction in rank or seniority, the authorized officer shall forward to the Commission the record of the disciplinary proceedings together with his comments thereon and the Commission shall decide the punishment, if any, which should be inflicted on the public officer, or whether he should be retired in the public interest: Provided that if, in the opinion of the Commission, further investigation is necessary before making a decision in the matter, the Commission shall direct the authorized officer to conduct such further investigation and forward a report of the investigation to the Commission together with the record of the charges framed, evidence led, the defence and other proceedings relevant to the inquiry.

7. The provisions of this regulation shall apply to a public officer in Job Group L or below, who has qualified for pensions benefits under the pensions legislation.

This provision did not provide for right for an oral hearing. However, as at the time of the cause of action, Section 41 of the Employment Act had been enacted and it was mandatory for the Claimants to be invited to a disciplinary hearing. Section 41 of the Employment provides:

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.”

In the **Felisina Wanjira Ndwiga case [supra]** Wasilwa J. held:

“The actual disciplinary process however as enumerated in the manual does not however provide for a hearing process and when that process is to be effected. Whereas the employee is expected to be given an opportunity to defend himself, the rules provide for an investigation and a report by a committee and thereafter consideration by Ministerial Human Resource Advisory Committee(MHRAC). The exact time when an employee is to make his or her oral submission or defence is excluded.

It is my observation that the Public Service Commission (PSC) Discipline Manual lacks proper guidance on oral disciplinary hearing process and this is what the applicant herein was subjected to.”

From the foregoing, I find that the Claimants' dismissal which substituted their retirement on public interest was wrongful. Their dismissal was contrary to Sections 41, 43 and 45 of the Employment Act. The provisions of the Employment Act are binding on the Government and provide minimum terms which cannot be derogated as provided in 3(3), 3(6) and Section 26 of the Act.

With respect to the applicability of the Fair Administrative Action Act, I find that at the time of the disciplinary meeting by the MHRMAC on 3rd November 2015, this Act was applicable as its date of commencement was 17th June 2015. Even if the Act was not in force, the Constitution provides for fair administrative action at Article 47. It is the same provisions that are embodied in Section 41 of the Employment Act.

Reliefs

Having found that the claimants' dismissal was wrongful, the claimants are entitled to a declaration that the letter dated 18th March 2016 was wrongful, illegal and unconstitutional.

With respect to reinstatement, this claim is not tenable for reason that 3 years have passed since the dismissed from office on 18th March 2016. Section 12(3)(vii) of the Employment and Labour Relations Court Act provides for reinstatement only within 3 years of termination. I will substitute the dismissal with retirement in public interest as recommended by the MHRAC as there is no provision for normal termination. In so doing I have considered the fact that the Public Service Commission had no valid grounds to depart from the recommendation of MHRMAC without additional evidence or hearing the claimants who had already been served with notices to show cause why they should not be retired in public interest. I have further considered their long service which the respondents did not state had any history of misconduct, and the fact that if dismissed, the claimants would lose pension after working for 37 years.

The claims for salaries from the date of interdiction to judgment date fails. I however award them salary withheld from date of interdiction to date of dismissal.

Notice will be paid for in accordance with the provisions for retirement.

The claimants are entitled to pay in lieu of leave as prayed, the respondent having not contested the same.

The Claimants herein had served the Respondents for 37 years. Taking into account their length of service in the public service and the provisions of Section 49(4)(e) of the Employment Act, the Claimants are each awarded 12 months' gross salary as compensation.

In conclusion, the claimants are awarded the following –

Jacinta Wanjiku Keru

1. Summary dismissal reduced to retirement in public interest
2. Salary withheld during interdiction (22,490 x 15) Kshs.344,100
3. Pay in lieu of notice Kshs.71,880
4. Compensation Kshs.862,560

Total Kshs.1,278,540

5. Pension to be paid according to Pensions Act.
6. Costs
7. Interest at court rates from date of judgment.

Margaret Adhiambo Obara

1. Summary dismissal reduced to retirement in public interest
2. Salary withheld during interdiction (19,800 x 15) Kshs.297,000
3. Pay in lieu of notice Kshs.65,600
4. Compensation Kshs.787,220

Total Kshs. 1,149,800

5. Pension to be paid according to Pensions Act.

6. Costs

7. Interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF JULY 2020

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE