



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 614 OF 2015

FREDRICK ODHIAMBO WALUKWE.....CLAIMANT

-VERSUS-

CABINET SECRETARY, MINISTRY OF

INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENT.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY

OF INTERIOR AND CO-ORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Claimant’s suit is contained in the Amended Statement of Claim filed on 22.10.2019 in which he alleged that the Respondents contemptuously purported to dismiss him unheard, levelling totally fresh charges against him and keeping him on perpetual and unwarranted interdiction for 4 years in contempt of the Court Order of 5.2.2016.

2. The Claimant seeks the following reliefs:

a) THAT the Honourable Court be pleased to issue a declaration that the decision retiring the Claimant in the public interest and indeed the process leading to that decision if any at all is an unfair labour practice, was done unprocedurally, against the applicable laws and the Claimants terms of employment and in contravention of the Claimants constitutional rights to fair labour practices, fair administrative actio and fair hearing.

b) THAT this Honourable Court be pleased to make a declaration that the alleged authorised officer acting on recommendation of the Ministerial Human Resource Advisory Committee has no authority or legal mandate to retire the Claimant in the public interest or make final determination in disciplinary proceedings concerning and against the Claimant being a public officer under grade “Job Group M”.

c) THAT upon prayer 2 being granted the Honourable Court be pleased to make an order for nullification or setting aside the preliminary decision of the said authorised officer retiring the Claimant in the public interest.

d) THAT a mandatory order do issue directed at the Respondents, their agents, servants and those working under them for the reinstatement of the Claimant to his employment, position with full salary and benefits.

e) THAT upon prayer 4 being granted, all the salaries and benefits accruing to the Claimant be paid in full.

f) THAT a permanent injunction do issue against the Respondents, their agents, servants and those working under them from commencing or continuing any disciplinary process originating from or connected to the interdiction letter dated 18th December, 2014 and/or that dated 3rd July, 2018 against the Claimant and to accordingly quash both letters and direct the Respondents to ensure strict compliance with the law in whatever administrative or other decision they may wish to take against the Claimant.

g) THAT the Honourable Court be pleased to find and declare that the Respondents are, in the face of the Court , on the record and proceedings herein, in contempt of this Honourable Court and its Order of 5th February, 2016.

h) THAT the Honourable Court be pleased to award exemplary damages to the Claimant and issue any other order/relief that the Honourable Court may deem fit to grant in the circumstances herein.

i) Costs of this suit and interest on 5 above at prevailing commercial rates.

3. The Respondents filed a Memorandum of Reply admitting that the claimant was employed by the 1st respondent but denied that they violated any of the Claimants rights. They further averred that the 2nd Respondent had no authority and/or power over the said employment relationship and/or conduct of either party to the said contract of employment. They also averred that the 2nd respondent's agents merely executed their statutory mandate and cannot be held responsible for suspension or dismissal of the Claimant by the 1st Respondent. Finally, they averred that the claimant is not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

4. The matter proceeded for hearing on 21.11.2019 and 30.1.2020 when both parties tendered evidence and thereafter filed written submissions.

Claimant's case

5. The Claimant testified as Cw1. He told Court that he is an Advocate of the High Court of Kenya employed as a civil servant at the Immigration Department since 1.9.2003; that he rose through the ranks become Chief Immigration Officer from 2013 and further rose to the position of Principal Immigration Officer in charge of immigration at the Eldoret International Airport in August 2019. He contended that he served diligently and without any blemish for over 12 years in various stations which earned him promotions and commendation from the Director of Immigration Services for exemplary service.

6. He testified that on 3.4.2014, he was deployed in the Passport Vetting Committee Secretariat in addition to his normal duties as an Approving Officer due to his integrity and competence; that while there he did his job professionally and diligently until 18.12.2014 when he was interdicted on ground of alleged misconduct and alleged preliminary investigation report; that he was not involved in the said preliminary investigations and as such the interdiction was without justification and was done in a rush; and finally the same cannot stand the test of substantive and procedural fairness.

7. He further testified that he responded to the interdiction letter within the required time but on 6.3.2015, the respondents abandoned the disciplinary proceedings and served him with a letter notifying him with the decision to retire him in the public interest, and inviting him to raise any mitigating issues only. In his view, the intended retirement was a new cause against him and it violated his constitutional rights to defend himself but he never the less responded to the said notice. He contended that the purported retirement in public interest, being punitive was and capable of denying him future employment He contended further that it was unfair and unlawful because it was not grounded on any valid reason and it was done without following the due process of according him a fair hearing.

8. He further testified that, being dissatisfied with the decision to retire him, he applied and obtained an order of injunction from this Court restraining the respondents from retiring him in the public interest pending the hearing and determination of this suit. The court further ordered that the internal investigations and disciplinary mechanism should continue in accordance with the Public Service Code of Regulations and be concluded within 60 days of the order while he remained on interdiction. However, the court order was ignored and 3 months after the lapse of the said 60 days given by the court, the Public Service Commission (PSC) dismissed him from employment but later rescinded the said dismissal citing the Court order dated 5.2.2016.

9. He further explained that 17 months after the lapse of the said 60 days prescribed by the Court, the 2nd respondent invited him for investigatory hearing but no verdict was given to him. Instead, by the letter dated 27th June, 2018 the Public Service Commission told the 2nd Respondent that the charges he was facing were different from the findings of the investigations report and advised that a fresh show cause letter be served upon him detailing new charges. As result, he received a new show cause letter dated 3.7.2018 citing fresh misconduct allegations, and he responded vide his letter dated 17.7.2018 requesting for full particulars and documents to enable him effectively respond to the new show cause letter but the request was not responded to.

10. He testified that he was not called for any disciplinary hearing but instead he was promoted from Chief Officer to Principal Immigration Officer; that he has always been ready for hearing but due to the delay and the matters raised in his letter dated 17.7.2018 he is no longer ready for any disciplinary hearing because it appears that the respondent have already made up their mind to dismiss him from employment. He stated that three of his colleagues went through the same disciplinary hearing and were dismissed but one of them, Felicina Wanjira Ndirangu was reinstated after successful litigation in Judicial Review case No. 15 of 2016 before this Court. He prayed that the Court awards the reliefs indicated in the claim.

11. On cross-examination, he maintained that he responded to the show cause letter dated 3.7.2016 by asking for information but it was not given to him. He admitted that there was an investigations committee which summoned for disciplinary investigations hearing and he appeared but objected to the proceedings because it was happening outside the time given by the Court. He contended that he asked the committee to seek extension of time from the 60 days given by the court but they failed to do so. He denied being aware of any report from the Directorate of Criminal Investigations (DCI) and contended that if there was any such report, he was not privy to the same.

12. He maintained that his colleagues were reinstated because the disciplinary procedure was not followed and there was evidence to support the charges. He contended that the charges against him were false and maintained that his letter dated 17.7.2018 requesting for information was not responded to. He contended that it is not correct for the respondent to allege that the information requested for cannot be availed to him and stated that he is not aware that the information he was requested for could not be availed. He admitted that the letter by MHRMAC

dated 31.1.2018 stated that there was a finding that he received money through Mpesa, but he maintained that the said allegation was not supported by any evidence.

13. In re-examination, he told Court that the minutes of the MHRMAC dated 31.1.2018 recommended that he be dismissed from service. He stated that had he received a response to his letter dated 17.7.2018 and the requested information, he would have appeared for a hearing.

Respondents' case

14. Mwendu Mutuku, is a Senior Clerical Officer Discipline Section of the 1st respondent and she testified as Rw1. She confirmed that at the time of filing the suit, the Claimant was an immigration officer, Job Group M and now is in Job Group N which was done as a result of promotions done across the board following evaluation by the Ministry of Public Service. She testified that after the evaluation a circular was issued promoting everybody without any interviews including the Claimant.

15. She contended that the promotion was a benefit but not a merit promotion based on performance. She contended that the Ministry did not respond to the demand letter dated 11.7.2018 because it had already issued the Claimant with a show cause letter and he had not responded; that the Ministry was not able to give the information because the investigations on the M-Pesa transactions were being done by DCI; that the Claimant was invited to disciplinary hearing which he never attended instead his lawyer served them with a letter stating that the matter was in Court.

16. She testified that the Claimant is still on interdiction at half salary. She further testified that although the Court issued an order that the disciplinary process be concluded within 60 days, that was not possible because the authorised officer was required to appoint an investigating officer and the time lapsed before the investigation was concluded.

17. She contended that the DCI forwarded a report to investigations department in the relevant ministry but they, DCI, withheld their file. She further contended that the DCI found that the Claimant received cash of 15,000 from an applicant and a total of Kshs. 92,000 as a result of which the investigating committee recommended for the dismissal of the Claimant. She went on to say that after the dismissal the Claimant lodged an appeal and the same forwarded it to the PSC but the PSC dismissed it.

18. According to Rw1, the Claimant committed misconduct that prejudiced national security and for that reason she urged the Court to vacate the interim order and dismissed the suit.

19. As regards the related case filed by Felicita Wanjiru, JR No. 15 of 2016, Rw1 contended that the Ministry was dissatisfied with the decision and appealed and the appeal is still pending in Court.

20. On cross-examination, she admitted that not everyone in Job Group M was promoted but only those who were qualified. She further admitted that she was unaware whether the Claimant is still on interdiction. She also admitted that the letter dated 17.7.2018 was not responded to.

21. She confirmed that in the related case of Hussein Adan, the Ministry gave information of the date and the amount of the M-pesa transactions involved. She further confirmed that the information the Claimant was seeking in the letter dated 17.7.2014 was different from that in the letter dated 18.12.2014 and the names of the people involved in the M-pesa transactions were different.

22. She admitted that the Report of the Investigations Committee was derived from the DCI's investigations and that DCI's Report can be produced if an Order of the Court is issued. She further admitted that the Ministry did not seek an extension of the time for completing the disciplinary process.

23. She stated that though she was not a member of the investigations committee, but she was aware that the reason and procedure followed are important in the disciplinary process of an employee. She stated that she is further aware that an employer must specify and give details of the offence facing the employee so that he can defend himself effectively.

24. She confirmed that the Claimant appealed against the dismissal and it was disallowed. She further confirmed that the letter dated 27.6.2018 from the PSC to the 2nd Respondent referred the matter back to the PSC for fresh determination.

25. In re-examination, she confirmed that PSC advised the Ministry to reissue a fresh show cause letter to the Claimant after new information was unearthed.

Claimant's submissions

26. The claimant submitted that the purported termination of employment was in violation of section 41 of the Employment Act because it was grounded on alleged bribery and he was not accorded a fair hearing. He contended that he requested for certain information in order for him to prepare his defence but the same was never availed.

27. The Claimant further submitted that the Respondents have failed to provide a report or any irrefutable report precedent to any disciplinary proceedings as required under the Constitution and the statute law and have further failed to demonstrate the basis upon which they purported to mete such a drastic and punitive decision against him. He submitted that the incriminating report by the DCI which formed the basis of the Respondents' investigations committee findings that he was culpable of the allegations levelled against him was never availed before the Court. He argued that failure to produce the report denied the Court the opportunity to appreciate the soundness of the alleged report.

28. He contended that the actions by the respondents against him contravened of sections 41 of the Employment Act, Articles 41 and 50 (b) of the Constitution, section 4 of the Fair Administrative Action Act , Regulation 36 of the Public Service Commission Regulations 2005 and Rule 16 of Public Service Commission Disciplinary Manual, 2008.

29. He relied on the the decision in the related case of **Felicina Wanjira Ndwiga v Public Service Commission and another JR. No. 15 of 2016** where the court held that the applicant had requested for information needed to prepare her case but no information was provided thus the Applicant's right to fair administrative action was infringed upon.

30. He submitted that the Respondents had no transparent cause against him which could be exposed to scrutiny and were merely intent on getting rid of him from the public service on mere suspicions and speculations and on the respondents' subjective inclinations hence the use of the unknown ground of 'retirement in the public interest'.

31. He further argued that his purported dismissal by the Respondents on 30.6.2016 was in contempt of the Court Order dated 5.2.2015 and therefore a nullity because of the failure to complete the disciplinary proceedings against him within 60 days as ordered by the Court. He submitted that the alleged bureaucratic hurdle cited as the reason for the failure to comply with the said Order should be ignored because nothing barred them from applying to the Court for extension or variation of the order if indeed they encountered any hardship.

32. For emphasis he relied on the case of **Margaret Ayuma Katungu v The Hon Attorney General Cause No. 2142 of 2012** where the Court held that the otherwise lawful interdiction of the Claimant was rendered unlawful by the delay in concluding the case of the Claimant and because the respondent disobeyed a Court order. He further relied on **Kithinji Kiragu v Dennis Mugendi & 6 Others [2017] eKLR** where the Court held that Court orders must be obeyed or else any transactions done in breach of the Order will be rendered void.

33. Finally, he submitted that he has demonstrated his case on a balance of probability that the disciplinary process fell below the procedural and substantive fairness and disregarded the relevant laws, regulations and court orders. He therefore prayed for the reliefs sought in his suit including compensatory damages of Kshs. 4,000,000 given that he is a professional.

Respondents' submissions

34. The Respondents submitted that reason for summary dismissal was stated in the interdiction letter dated 18.12.2014 and the Claimant, in his letter dated 31.12.2014 showed that he knew the reason for his termination. They relied on section 44 of the Employment Act and submitted that the Claimant was on interdiction for gross misconduct from the occurrences following the forensic analysis of the Mpesa transactions belonging to Hussein Adam in which the Claimant received Kshs. 92,000.

35. They submitted that the fact that the Claimant received the amount as inducement to issue passports to unqualified applicants amounted to gross misconduct under section 44 (4) (c) and (g) of the Employment Act. They relied on **Naqvi Syed Qmar v Paramount Bank Limited [2015] eKLR** that under section 44 (4) of the Employment Act, an employer has a right to dismiss an employee who carelessly improperly performs his role.

36. They relied on **section 22 (1) (b) of the Public Service Commission Regulations 2005 and Regulation 35 (6) of the Public Service Commission Regulations, 2005** and submitted that the reason for forwarding the report to the Public Service Commission was to enable the Commission make a decision based on the evidence and statements.

37. They submitted that the 1st Respondent notified the Claimant of the intention to interdict him and gave him the opportunity to make representation vide the letter dated 18.12.2014. They argued that the Claimant made his representations in his letter dated 31.12.2014 and they considered the representations before coming to the decision to terminate the Claimant.

38. They relied on **Regulation 35 of the Public Service Commission Regulations 2005** and submitted that the Claimant was afforded the opportunity to be heard in accordance with the law and the PSC Regulations. They cited the case of **Judicial Service Commission v Gilbert Mwangi Njuguna & another [2019] eKLR** where the Court of Appeal held that based on the exchange of letters, they were satisfied that the 1st Respondent was given an opportunity to be heard in relation to the complaints levelled against him. Therefore the respondents submitted that the exchange of letters between the Claimant and Respondent is proof that the Claimant was given an opportunity to be heard.

39. They relied on **Attorney General & another v Crispinus Ngayo Musundi [2017] eKLR** where the Court of Appeal cited with approval the decision in **R v Immigration Appeal Tribunal ex parte Jones [1988] 1 WLR 477, 481** that the hearing does not necessarily have to be an oral hearing in all cases and that whether an oral hearing is necessary depends upon the subject matter and circumstances of a particular case.

40. They maintained that the Claimant's termination was fair because they had a valid reason being that the Claimant's gross misconduct and fair procedure was followed. They submitted that the letters of interdiction informed the Claimant of the period within which submit his representation for consideration.

41. They submitted that the summary dismissal was grounded on Article 20 (1) and 4 (1) of the Constitution. They relied on the case of **Thomas Sila Nzivo v Bamburi Cement Limited [2014] eKLR** where the court held that the Claimant had failed to adduce evidence in support of the unlawful termination under section 47 (5) of the Employment Act.

42. They submitted that the Claimant did not call Mr. Hussein Adan as a witness to justify that the monies received were loans. It was therefore their submission that there was a just reason for the claimant's dismissal.

43. With respect to the decision in **JR No. 15 of 2016**, they submitted that a court is bound by the decisions of a court superior to it and that

decisions of a concurrent court are only persuasive in nature. They further cited **Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others [2013] eKLR** where the Supreme Court held that the rule of precedent promotes predictability, and enhances fairness by treating all cases alike.

44. They denied that they were in contempt of the Court Order issued on 5.2.2016 and argued that the Claimant was reinstated in the interim vide the order issued on 4.10.2018 pending the determination of the Claim.

45. On reliefs sought, they relied on section 49 (4) of the Employment Act and submitted that it would be impractical to reinstate the Claimants to his former job. For emphasis, they cited **Kenya Airways Limited v aviation and Allied Workers Union Kenya & 3 Others [2014] eKLR** that one of the factors in determining reinstatement is practicability.

46. With respect to pension, they submitted that **Regulation 28 of the Public Service Commission Regulations 2005** provides that a public officer who is dismissed forfeits all rights or claims to pension, gratuity, annual allowance or other retiring allowance.

47. They further relied on section 5 of the Pensions Act and submitted that the right to pension is not absolute and in cases where a public officer is dismissed from service and the Court finds that the reason and procedure was proper, a claimant is not entitled to pension.

48. They cited the Court of Appeal decision in **Attorney General & another v Crispinus Ngayo Musundi [2017] eKLR** where the Court relied on Regulation 28 of the Public Service Commission Regulations, 2005 (repealed) and found that the Respondent was not entitled to the terminal benefits granted.

49. On the issue of costs of the suit, they relied on the case of **Kennedy Maina Mirera v Barclays Bank of Kenya Limited [2018] eKLR** to urge that the Claimant would only be entitled to costs at the discretion of the Court in the event he discharges the burden that the dismissal was wrongful. In their view the claim lacks merit and should be dismissed with costs.

Issues for determination and analysis

50. There is no dispute that the Claimant was dismissed from service on 30.6.2016 for alleged gross misconduct but later the dismissal was rescinded and the claimant remained on interdiction until 3.10.2018 when the court lifted the same and directed him to resume work. There is further no dispute that the claimant resumed work and in 2019 he was promoted to Principal Immigration Officer in charge of Eldoret International Airport. The issues for determination are:

- a. Whether the Claimant's interdiction and the subsequent dismissal and the proceedings leading thereto were unfair and unlawful.
- b. Whether the Claimant is entitled to the reliefs sought.

Whether the interdiction, dismissal and the process was unfair and unlawful.

51. The crux of this dispute is the Claimant's interdiction letter dated 18.12.2014. It stated that the outcome of preliminary investigations of forensic analysis of M-pesa transactions of Mr. Hussein Adan who was a member of the Vetting Committee indicated that he transacted funds to members of the Committee and that the Claimant had received Kshs. 92,000. The letter further stated that there was an intention to dismiss him for gross misconduct.

52. The Claimant extensively responded to the letter vide his letter dated 31.12.2015. On 6.3.2015, the Claimant received a letter of intention to retire him from service in the public interest as a recommendation from MHRMAC. He responded to this letter vide his letter dated 23.3.2015 wherein he raised his concern that the reasons for the contemplated retirement in public interest were not explained to him and that the allegations in the interdiction letter were yet to be made known to him.

53. On 5.2.2016, the Court ordered that the Claimant be on interdiction and that internal investigations and disciplinary mechanism do continue in accordance with the Public Service Code of Regulations and the same be concluded within 60 days of the Order.

54. On 30.6.2016, the 1st Respondent informed the Claimant that the PSC had disallowed the decision to retire him from public service and decided that he be dismissed on account of gross misconduct.

55. Rw1 testified that the disciplinary process could not be concluded within 60 days as the authorised officer was required to appoint an investigating officer before the hearing could be done and that the time lapsed before the investigation was concluded.

56. In a Memo dated 10.5.2017, the Director Human Resource Management and Development informed the Principal Secretary of the appointment of an investigation committee in respect of the Claimant's case. The Respondents produced excerpts of the Minutes of the MHRMAC held on 31st January, 2018 which Rw1 stated that the findings of this Committee were dependent on the DCI's report. The PSC had on 27.6.2018 required that a fresh show cause letter be issued and on 3.7.2018, the Claimant was issued with a letter of interdiction by the 1st Respondent stating that he had solicited money through Mpesa from Ms. Lul and received money from Hussein Adan.

57. Despite the Respondents stating that the interdiction and the dismissal of the Claimant was on account of gross misconduct and having received money from Mr. Hussein Adan, the investigations report which resulted to drastic measures was not produced in Court. Further, the included allegations that the Claimant solicited funds from Ms. Lul were not proved considering that these two allegations were different.

58. Rw2 stated that the DCI's report could be produced should the Court issue a Court Order. This position is contrary to section 43 of the

Employment Act which requires that an employer must prove the reason for termination. This said reason would only be considered valid if the Respondents produced the evidence that led to the adverse actions being taken against the claimant including the investigations report by DCI and containing Mpesa statements if any. I therefore find that the Respondent has not proved that there was a valid reason for the interdiction and the subsequent dismissal of the Claimant as required under section 45 of the Employment Act.

59. In respect of procedural fairness, 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.”

60. The Court Order issued on 5.2.2016 required that disciplinary process against the Claimant be concluded within 60 days but this was not the case. The Respondents herein did not seek extension of the said Order thus the disciplinary process by the 1st Respondent and the PSC was done without leave of the court after the lapse of 60 days and the Claimant was not furnished with all the requested documents to enable him respond to the allegations made against him.

61. The Claimant referred to **JR 15 of 2016 Felicina Wanjira Ndwiga v Public Service Commission & another** with similar facts to this case, but Rw1 stated that they were dissatisfied by the decision and thus lodged an appeal.

62. I have carefully considered the material placed before the court and it is clear that the instant case is also similar to **Jacinta Wanjiku Keru & another v Ministry of Interior and Coordination of National Government & 2 others [2020] eKLR** where the Onyango, J held:

“As submitted by the Claimants, the facts in this case are similar to 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.

...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.”

63. The Respondent relied on Regulation 35 of the Public Service Commission Regulations, 2005 and submitted that the Claimant was afforded the opportunity to be heard.

64. Notably, the Claimant at the commencement of the disciplinary process was a Chief Immigration Officer, in Job Group M and not L. Thus, the regulation applicable to him was Regulation 33 of the Public Service Regulations 2005 which provides:

“(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, would, in his opinion, justify any of the punishments in regulation 25 (1), he shall, after such preliminary investigation and consultation as to the terms of the charge or charges as he considers necessary, forward to the public officer a statement of the charge or charges framed against him together with a brief statement of the allegations, in so far as they are not clear from - the charges themselves, on which each charge is based, and shall invite the public officer to state in writing, should he so desire, before a day to be specified, any grounds on which he relies to exculpate himself.

(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 forward to the Commission copies of the statement of the charge, or charges, the reply, if any, of the public officer and the authorized officer's comments thereon. (3) If, on consideration of the statement of the charge or charges, the reply, if any, of the public officer, and the comments of the authorized officer, the Commission is of the opinion that no further investigation is necessary, it shall forthwith decide on the punishment, if any, which should be inflicted on the public officer, or whether he should be retired in the public interest. (4) If the Commission, on consideration of the submissions by the authorized officer, is of the opinion that the matters should be further investigated, it shall direct the authorized officer to conduct such further investigation.

(5) 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.

(6) If, during the course of the investigation, the grounds for the framing of additional charges are disclosed, the authorized officer shall follow the same procedure as was adopted in framing the original charges.

(7) After conducting the investigation, the authorized officer shall 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; and the report of the investigation under this regulation shall include –

(a) a statement whether the charge or charges against the accused public officer have been proved and the reasons therefor;

(b) details of any matters which may aggravate or alleviate the gravity of the case; and

(c) a summing up and such general comments as will indicate clearly the opinion on the matter being investigated; but the report of the investigation shall not make any recommendation regarding the form of punishment to be inflicted on the accused public officer.

(8) The Commission, after consideration of the report, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the authorized officer who shall conduct the investigation for a further report.

(9) The Commission shall decide on the punishment, if any, which should be inflicted on the public officer, or whether he should be retired in the public interest.

10) The provisions of this regulation shall apply to a public officer in Job Group M or above.”

65. This regulation did not have the requirement that the Claimant was to be invited for an oral hearing which was contrary to section 41 of the Employment Act. However, the said regulation was made before the Employment Act 2007 and as such it did not provide for the oral hearing contemplated under section 41 of the Employment Act. It is therefore obsolete and not applicable to this case in as far as it is inconsistent with express provisions of the Act and the Constitution. Consequently, I find that the failure to accord an oral hearing to the claimant in the presence of a fellow employee as envisaged under section 41 of the Act rendered the summary dismissal procedurally unfair. Although it has been argued that exchange of correspondences constitutes a hearing, in my view that can only be an exception and not the general rule. The correct position is that oral hearing in the company of a fellow employee is a right expressly provided by the law and unless the employee waives it, the employer and the court for that matter cannot take it away save where the employee admits the charges in the correspondences exchanged.

66. In addition, I do not find that the exchange of letters was sufficient since fairness would still not be achieved in the absence of documents requiring the Claimant to adequately respond to the charges. This was therefore contrary to the principles of natural justice. The Court of Appeal, in **Regent Management Limited v Wilberforce Ojiambo Oundo [2018] eKLR** held:

“We are at a loss as to why the appellant refused to grant the respondent certified copies of the documents requested even at his own expense. In our view, these documents were integral to the respondent preparing his defence. By only availing the documents for his perusal at its premises for a number of hours was not adequate. It is also not clear whether the appellant considered the respondent’s appeal.

For the reasons outlined above we concur with the learned Judge that the respondent’s dismissal was unfair.”

67. The Fair Administrative Action Act had its commencement date as June 2015 which was the period during which the disciplinary process was to have been concluded as ordered by the Court on 5.2.2016. Thus, any subsequent disciplinary process was to adhere to the provisions of the that Act after its commencement. It is my finding that the entire disciplinary process against the Claimant was contrary to the provisions of section 41,43 and 45 of the Employment Act.

68. Finally, on the issue of procedure, I agree with the claimant that his dismissal and continued disciplinary process against him in violation of the court order dated 5.2.2016 was and still is unlawful, unfair and a nullity.

69. As regards the delay in concluding the disciplinary process, I find that the proceedings against the claimant have taken too long contrary to Article 47 of the Constitution which provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In this case the respondents served the claimant with interdiction letter on 18.12.2014; after one year, they served him with notice of intended retirement in public interest; thereafter served him with summary dismissal letter, after protest from the claimant, they rescinded the dismissal and opened new charges; in October 2018 they reinstated him to work and in 2019 they promoted him; they are still determined to continue with the disciplinary process against the claimant six years after commencement. The court agrees with the claimant that such prolonged disciplinary proceedings are procedurally unfair and also violates his rights to fair labour practices as envisaged under Article 41 of the Constitution.

Reliefs

70. I have already found that the disciplinary process was procedurally and substantially unfair and unlawful by dint of Article 47 and 236 of the Constitution and amplified by section 45 of the Employment Act and Fair Administrative Actions Act. Article 236 (2) provides that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. Accordingly, I make declaration that the decision to retire the claimant in the public interest and the process leading to that decision was unfair and in contravention of his right to fair labour practices, fair administrative action and fair hearing.

71. With respect to prayer 2, Regulation 33 (9) of the Public Service Commission Regulations, 2005 provides;

“The Commission shall decide on the punishment, if any, which should be inflicted on the public officer, or whether he should be retired in the public interest.”

72. The Claimant was in Job Group M, thus it was the mandate of the PSC to retire him on public interest and not MHRMAC. Therefore, prayer 2 should be allowed. Consequently, I make declaration that the authorised officer acting on the recommendation of the MHRAC has no legal mandate to retire the claimant or make a final determination in disciplinary proceedings concerning and against the claimant who was a public officer under job Group M.

73. For the foregoing reasons, I grant prayer 3 by nullifying or setting aside the preliminary decision by the Authorized officer to retire the claimant in the public interest. The claimant has already been reinstated to work after the court lifted his interdiction on 3.10.2018 and no appeal was preferred against the said orders. Instead the claimant was allowed back to work and even got a promotion. Consequently, and for avoidance of any doubt, prayer 4 and 5 are granted whose effect is to confirm the interim order of reinstatement without loss of benefit given on 3.10.2018. The reinstatement is practical because the claimant is still in officer though not in the Passport Vetting Committee.

74. With regards to prayer for permanent injunction, it is now trite law that the court does not intervene in internal disciplinary proceedings before they are concluded. However, that is only a general rule which is subject to prove that the process is proceeding unfairly and contrary to the employee’s rights as protected under the Constitution, statute law, the employer’s HR Policy and Procedures Manual and the contract of service of the employee negotiated individually or collectively. In this case, I have already made a finding of fact that the disciplinary proceedings herein has delayed for 6 years, they are proceeding in contempt of court order dated 5.2.2016 and the claimant’s rights under the constitution and the Employment Act have already been violated. Consequently, I grant the prayer for permanent injunction restraining the respondent from commencing, or continuing with any disciplinary process originating from or connected to the interdiction letter dated 18.12.2014 and/or 3.7.2018 against the claimant in so far as the same is proceeding in contempt of the Court order dated 5.2.2016 and contrary to his rights under the Constitution and the said statute law.

75. I gather support from **Mulwa Msanifu Kombo v Kenya Airways [2013] eKLR** where Mbaru J held that: -

“... this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in appropriate cases it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result in unfair imposition of a punishment against the employee. The court will intervene ... if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rule of natural justice or, if the procedure is in clear breach of the procedure agreed or legislated or employer’s prescribed applicable or policy standards, or if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case.”

76. In **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, Ndolo J held as follows regarding court’s intervention in disciplinary process at the shop floor: -

“... the Court will intervene not stop the process altogether but to put things right.”

77. Again in **Geoffrey Mworira v Water Resources Management Authority [2015] eKLR** Ongaya J expressed himself as follows: -

“The court will sparingly interfere in the employer’s entitlement to perform any human resource functions such as ... disciplinary control ... To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the constitution or legislation; or in breach of the agreement between the parties; or in manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

78. As regards the order that the respondents are in contempt of court, there is no dispute that on 5.2.2016, this Court ordered the respondents to finalize the internal disciplinary process for the claimant within a duration of 60 days from the date of the said order but they did not comply and instead after the lapse of the said time, they summarily dismissed him and later rescinded the dismissal and charged him with fresh charges of corruption. It is also evident that they kept the claimant under interdiction for years until 3.10.2018 when the court lifted the interdiction and the claimant resumed work. The respondents’ determination to continue with the disciplinary process after the lapse of the said 60 days ordered by the court is obviously in contempt of court. The reason for the foregoing view is that the respondent did not appeal against the said order or apply for review or varying of the order with a view to extending the period beyond the 60 days.

79. The prayer for exemplary damages is declined because the claimant has since filing of the suit been reinstated to his position as Chief Immigration Officer and later give promotion to the position of Principal Immigration Officer in Charge of Eldoret International Airport.

80. Finally, though costs should follow the events, I will direct each party to bear his or her own costs because as already observed above, the parties are enjoying their employment relationship once again.

Dated, and delivered at Nairobi this 17th day of December 2020.

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