



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO 2012 OF 2014**

**EZEKIEL OTIENDE.....1<sup>ST</sup> CLAIMANT**

**MOSES OKOTH OLOO.....2<sup>ND</sup> CLAIMANT**

**HUMPHREY MARETE.....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**THE PRINCIPAL SECRETARY MINISTRY**

**OF INTERIOR AND INTERNAL COORDINATION.....RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The claimants pleaded that by letters dated 24<sup>th</sup> January, 2014 the 1<sup>st</sup> Respondent's Principal Secretary informed them of their interdiction on grounds of gross misconduct and were put on half salary for the period of interdiction. The letter further stated that the 1<sup>st</sup> respondent was contemplating dismissing them from service on account of gross misconduct and therefore requested them to make representations within a period of 21 days.
2. According to the claimants, the alleged misconduct occurred on 28<sup>th</sup> November, 2013 around 10 47 hours and the claimant's being duty officers attended to under cover officers from EACC who were assigned to undertake integrity test at Lunga Lunga Border Control Point and while so attending they requested for their identity cards and Kshs 500 in order to issue temporary entry permits but never issued government receipts for the same. The letter further informed them that failure to issue a receipt amounted to stealing by servant and was punishable under the criminal procedure code.
3. The claimants responded to the 1<sup>st</sup> respondent's letter of interdiction and explained that they were not on duty on 28<sup>th</sup> November, 2013. The claimants further provided copies of the occurrence book and PISCES where attendance was recorded and the same indicated that they were not on duty on the material date. The claimants further produced a letter dated 17<sup>th</sup> March, 2014 from the Chief Immigration Officer Lunga Lunga to Assistant Director of Immigration Services Coast Region where he stated that the claimants were not on duty on the material day.
4. Through a letter dated 30<sup>th</sup> July, 2014 the 1<sup>st</sup> respondent informed the claimants of the decision to dismiss the claimants from service on account of misconduct and informed them of their right of appeal within 42 days which they did and the appeals were disallowed thereby upholding the decision to dismiss them. According to the claimants the dismissals did not make any reference to the response provided by the claimants, the evidence presented and the letter by the Chief Immigration Officer Lunga Lunga exonerating the claimants.
5. The respondent in response to the memorandum of claim on their part pleaded that the claimants were interdicted from performing their duties following a report from undercover EACC's carrying out random integrity tests on immigration officials at various border points in the country. According to the respondent on 28<sup>th</sup> November, 2013 undercover officers from EACC posed as transborder travellers and approached the claimants and made enquiry on how they could be issued with temporary permit to enable them cross the border from Kenya to Tanzania. They produced their identity cards and Kshs 500 and that the claimants processed the permits but neither gave back the Kshs 200/= change nor issued a government receipt for payment.
6. Arising from these developments the respondent referred the claimants to the relevant provisions of the Employment Act which they had contravened and charged them with gross misconduct and were requested to make representations for consideration within 21 days failure to

which the case would be finalized without any further reference to them.

7. The respondent further stated that upon consultations, the Director of Immigration observed that the attached PISCES productivity report contained names of passengers who were cleared to cross the border to Tanzania in accordance with regulations however one could selectively generate data from the PISCES, information of interest for a particular time leaving out the rest. In this particular case, the PISCES productivity report attached did not exonerate the claimants.

8. The respondent further averred that the examination of the Occurrence Book revealed that the charged officers were not on duty on the day they are alleged to have committed the offence however the book was always available to any officer on duty and one could not rule out or establish the level of manipulation to serve a particular situation of interest. The respondent further pleaded that it was not known whether it was coincidence or default that the charged officers were all out of the duty station on the day they were each accused of committing the alleged offence.

9. According to the respondent this appeared to have been a well calculated move in the claimant's defense to defeat the cause of justice. The respondent further pleaded that the EACC could not have been wrong since all the incidents involving the claimants were audio and video recorded which clearly indicated the time when the offences were committed.

10. In his oral evidence in court, Mr Ezekiel Otiende, the 1<sup>st</sup> claimant repeated most of the averments in the statement of claim and further stated that he was employed in 2007 and 2<sup>nd</sup> and 3<sup>rd</sup> claimants were employed in 2007 and 2005 respectively. He was employed as Immigration officer I while the 2<sup>nd</sup> claimant was Senior Immigration Officer and the 3<sup>rd</sup> Immigration Officer I. It was his evidence that temporary permits had no receipts because they were themselves accountable documents. The fee payable was indicated on the face of the permit itself. He denied that they were issued with any show cause prior to dismissal. He further complained that they were never given an opportunity to explain themselves. The claimant however admitted that they received interdiction letters and responded to the same.

11. It was his evidence that they were not on duty on the dates the offences were alleged to have been committed. According to him he was on off-duty and was in Umoja Nairobi where he lived while the 3<sup>rd</sup> claimant was on leave. According to Mr Otiende PISCES was a computerized system which was introduced to check security and staff performance. It captured details of passports automatically and that each officer had an account with personal password. It showed the name and details of the officer who served the customer. He stated further that it was not possible to manipulate PISCES.

12. Concerning the video, he stated that he was never shown the video prior to interdiction. In cross examination he stated that he sought permission to be off-duty from the officer in charge and that the permission was verbally given. Regarding the Occurrence Book (OB), he stated that the same was kept in the Officer-In Charge's office and to access the same you needed the permission of the In-charge.

13. The respondent's witness Mr John Muturi stated that on 23<sup>rd</sup> November, 2013 he tested a video camera and gave it to a team of undercover officers to conduct integrity test at Lunga Lunga since EACC had received reports that the immigration officers at the border posts were misbehaving. The team conducted three integrity tests. One on 20<sup>th</sup> November, another on 22<sup>nd</sup> and the last on 28<sup>th</sup> November. The three officers all failed integrity tests. The undercover officers returned to EACC offices and he downloaded the videos and prepared a report he also prepared DVDs which he produced in court.

14. In cross-examination he stated that he did not personally go to Lunga Lunga and that he has never met the claimants. According to him, the claimants' faces as captured by the video were clear and he could positively identify them if he saw them. He further stated that from the video clip he did not hear the undercover officers ask for change and further that he did not have the sample receipts which was supposed to be issued.

15. The respondent's second witness Mr Mutuku stated that he was the respondents Human Resource Officer working in the discipline section. It was his evidence that the immigration department had requested EACC to conduct random integrity tests and when the respondent received the report from EACC it concluded there was misconduct and interdicted the claimants and also issued them with a show cause letter. The claimants responded to the show cause letters which were forwarded to the claimants Head of Department for comments. The report was then forwarded to the Ministerial Human Resource Committee who recommended that the claimants be dismissed.

16. The basis upon which the claimants were dismissed was that on the material dates while in the course of their duties received Kshs 500 from undercover EACC officials as fees for processing temporary entry permits to Tanzania but failed or inappropriately ignored to issue official receipts for the payments. This was considered by the respondent as theft by the claimants for which they could have faced prosecution. The claimants were consequently interdicted and asked to show cause within 21 days why they should not be dismissed.

17. The claimants made their response but the respondent felt their explanation was not satisfactory and proceeded to dismiss them. The claimants in their defence, denied any involvement in the alleged infractions and in fact vehemently stated that they were not at work on the material dates alleged. They attached productivity reports and OB extract to support their contention that they were not on duty on the alleged dates. The claimants further produced a letter from Chief Immigration Officer Lunga Lunga Mr Rono to vouch for their allegation that they were not at work.

18. The respondent however refuted the claimants alibi defence and alleged that the PISCES productivity report and the OB extracts could be manipulated to suit a particular purpose. The respondent however neither alleged that the claimants manipulated the PISCES report and OB extracts to suit their purpose nor showed or produced to court any evidence to show how the productivity report or OB extract could be manipulated.

19. The court had the opportunity to view the alleged video recording made by the EACC's undercover detectives but the said video was of poor quality both in visuals and sound. One could not clearly identify the people in the clip both in voice and visuals in order to match the

same with the claimants. The video recording in the circumstance was unreliable and did not have any evidentiary value.

20. Under section 43(1) of the Employment Act, the employer is required to prove the reasons for the termination and where such employer fails to do so, the termination shall be deemed to be unfair within the meaning of section 45 of the Act. From the above observations the court is not persuaded that the respondent proved the reasons for the termination of the claimant's services. The termination is therefore found to have been unfair within the meaning of section 45 of the Act.

21. The claimants sought an order for reinstatement to employment however considering the period that has lapsed since the impugned termination took place, it would not be reasonable and convenient to order for reinstatement at this stage. The court will however award each of the claimants twelve months salary as compensation for unfair termination of employment. The claimants shall further have costs of the suit.

22. The claimants never pleaded their exit salaries nor attached payslips, however the twelve months compensation shall be computed based on the claimants' salaries as at the time they were terminated.

23. The award shall attract interest at court rates from date of judgement and shall further be subject to taxes and statutory deductions. Parties to compute the quantum of the award as above and return to court on 11.3.2019 for recording of final orders.

24. It is so ordered.

**Dated at Nairobi this 25<sup>th</sup> day of January, 2019**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 25<sup>th</sup> day of January, 2019**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**