



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 213 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**DICKSON NJIRU KIVARA.....CLAIMANT**

*VERSUS*

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGMENT**

On 5<sup>th</sup> May 2009, the Claimant filed his claim vide his Complaint dated 28<sup>th</sup> April 2009. He is suing the defendant for unlawful termination of services and seeks the following reliefs:

- a. General damages for termination of services.
- b. Declaration that the Plaintiff is entitled to his terminal benefits from the Defendant.
- c. Interest on (a) above.
- d. Cost.

The Defendant in the Statement of Defence dated 2<sup>nd</sup> July 2009 and filed on 8<sup>th</sup> July 2009 denies the allegations as set out in the Complaint and prays that the suit be dismissed with costs as it is bad in law.

**Claimant's Case**

The Claimant was dismissed vide the letter dated 14<sup>th</sup> May 2006. His appeal against the decision failed. It is the Claimant's case that the summary dismissal was unlawful and disproportional vis-à-vis the offence allegedly committed by the Claimant.

**Respondent's Case**

The Respondent avers that the Claimant's dismissal from service was done lawfully within the provisions of the force regulations after the Claimant was found guilty of misconduct while on duty and for engaging in acts that amounted to gross derogation of duty. Further that the Plaintiff was afforded all opportunities and facilities to present his case before the decision to dismiss him was made.

The Claimant's right to gratuity and pensions was terminated as the same is predicated upon lawful and

regular retirement from service.

## **Evidence**

The Claimant testified that he was employed by the government on 30<sup>th</sup> July 1988 in the department of police and attached to the presidential escort band.

On a certain date, there was inter-governmental meeting at the KICC. He worked on that day. An inspection had been done to ensure that they could perform and he was okay. After 3 days, Chief Inspector Wambura told him that he had a case to answer on account of drunkenness on 7<sup>th</sup> May 2006 and should report to the office. He was issued with a notice of intended orderly room proceedings and an evidence note. The evidence indicated that his eyes were red and the Chief Inspector thought he was drunk.

He was not taken through the orderly room proceedings. On the first day he was taken to Highridge Camp up to 9 pm. On the second day, he was detained until midnight. On the third day, he was kept until 1 am. After the third instance he decided to sign so that there could be orderly room proceedings. However, the Claimant was issued with a letter of dismissal. The Claimant testified that he had entered a plea of not guilty but had not been allowed to present his case.

On 17<sup>th</sup> May 2006, the Claimant appealed against the dismissal but did not receive the outcome of the appeal.

The Claimant denied being drunk on the date in question and testified that he was not taken to hospital for testing of his alcohol level. He admitted to being issued with previous warnings on account of drunkenness but alleged that they had all been fabricated.

He stated that his salary at the time of termination was Kshs.20,625 He prayed to be reinstated or in the alternative, to have his dismissal converted to normal retirement. He also prayed for damages.

Upon cross-examination, he stated that he was not taken through orderly room proceedings but when asked to read his Appeal he stated that: "The witnesses were not called in my presence at the orderly room proceedings." However, he countered that by saying that he was absent when they gave evidence. According to the Claimant, the defaulter sheet is supposed to be issued before orderly room proceedings. The Claimant stated that he delivered his appeal personally but did not follow up since he was not allowed to go to the office. He revealed that he had also been charged with offence of breaking out of police lines. He had received warning letters for lack of seriousness in his job which warned him that he risked dismissal. He contradicted himself by testifying that his letter of dismissal indicated the reasons he was dismissed but later recanted and stated that there was no reason for dismissal. He stated that the witnesses who testified in the orderly room proceedings testified in his favour and that he was unaware that there were witnesses who testified against him.

During re-examination, the Claimant stated that there had been no disciplinary hearing in his case and stressed on the fact that no proceedings had been attached.

RW1, **Samuel Jona** a Commissioner of Police, testified that the Claimant was charged in orderly room proceedings. There were four witnesses him being one of them. The Claimant was present and even cross-examined them. On 7<sup>th</sup> May 2006, the Claimant attended a function which was being officiated by the president. At the time of inspection, the Claimant had been sober but when they arrived at KICC the Claimant was drunk.

He stated that one of the Claimant's colleagues was too drunk and was given permission to go back to the vehicle. The Claimant and another officer were not too drunk and performed their duties because their equipment was to be used in playing the National Anthem.

The Claimant appealed against the dismissal, which appeal was dismissed by the Appeal Board on 23<sup>rd</sup> February 2007. The Claimant was informed of the outcome of appeal on 28<sup>th</sup> February 2007.

RW1 testified that the Claimant had previously been accused of 6 offences: 2 accounts of drunkenness, disobeying lawful command and using abusive language to a police officer above his rank.

He testified that the Claimant had attended a performance course at Kiganjo which is a rehabilitation course to reform a person with a bad record.

RW1 testified that he was unaware of any fabrication of the Claimant's charges. He denied there being any malice between him and the Claimant.

Upon, cross examination RW1 testified that he had noticed the Claimant was drunk and reported the matter. An inspection was carried out and it was found that only one officer, PC Muila was drunk. The Officer was removed from the site of duty and did not perform his duty for the day. A second inspection was carried out and only PC Muila's name was produced. However, those in charge of the inspection wanted more names for those who were drunk and that is when the Claimant's name was called. RW1 inspected the Claimant and found that although he was drunk, it was not to the extent that would hinder him from performing his duties. RW1 testified that he did not send the Claimant back. The Claimant performed his duties on that day and for two consecutive days. RW1 admitted that no medical exam had been done. He asserted that there had been orderly room proceedings and 4 witnesses were called and the Claimant was given the opportunity to call his witnesses but stated that he would not be calling any. According to him, the orderly room proceedings took place on 11<sup>th</sup> May 2006 and the Claimant was found guilty and convicted. Judgment was passed on the same day and file sent to the senior officers for sentencing. He stressed on the gravity of the offence of drunkenness while on duty which results in dismissal. He denied the assertion that there had been malice and that the Claimant's case had been casually handled.

Upon re-examination, RW1 denied that there was malice and reiterated that the purpose of a performance enhancement was to improve performance of poor performers. He stated that the other officers who were found drunk were no longer in service. He stated that the band was serious because it performed for the President and international visitors. He also stated that previous offences against the Claimant had not been malicious.

### **Claimant's Submissions**

The Claimant in his submissions dated 27<sup>th</sup> September 2018 and filed on 1<sup>st</sup> October 2018, submitted that from the evidence adduced, it was clear that the Claimant's issue was handled casually by the Respondent despite the seriousness it deserved. The Claimant was not given the chance to defend himself nor was he informed of his offence save for the sham orderly room proceedings. If the Respondent acted in good faith, then they should have notified or confronted the Claimant with the accusation of being drunk on duty while he was at the function instead of 4 days later.

The Claimant submitted that the reason for termination was unfair and that his employment was not terminated in accordance with the procedure. To reinforce this argument, the Claimant relied on section 44(4) of the Employment Act 2007 which outlines the grounds that justify summary dismissal and which also provides an employee with the right to an opportunity of disputing the truthfulness of the accusation levelled against him. He also relied on section 45(2) of the Act which specifies what amounts to unfair termination.

The Claimant submitted that his dismissal was unlawful, unprocedural and unfair and urged the court to award the prayers sought in the Plaintiff.

### **Respondent's Submissions**

The Respondent in the submission dated 19<sup>th</sup> October 2018 and filed on even date, submitted that the act of the Claimant was subject to disciplinary actions under the Force standing orders.

The Respondent also submitted that the petition and application placed before the Court was premature because the Petitioner's appeal over his dismissal by the 3<sup>rd</sup> Respondent is still before the Public Service Commission and any determination over the same by the Honourable Court would have an influence on the commission to incline towards a certain direction without any objectivity.

The Respondent relied on the case of ***Industrial Court Cause Number 1200 of 2012: Professor Gitile J. Naituli vs. University Council, Multimedia University of Kenya*** [unreported], where Rika J. held that the Employment Act and the Industrial Court Act seek to protect the weaker of the two parties in an employment relationship, not to deprive the employer of the management prerogative altogether.

The Respondent also relied on the case of *Aviation and Allied Workers Union V Kenya Airways Limited* [2012] eKLR where Ongaya J. held that the court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly terminate the employment relationship.

The Respondent also relied on the case of *Francis Mbugua vs. Commissioner of Police & 2 Others* [2013] eKLR where the court expressing agreement with the decision in the case of ***Elory Kraneveld vs. the Attorney General & 2 Others, Nairobi Petition No. 153 of 2012; at Paragraph 9, 10*** held that:

“Whereas every person has right to the protection of the Constitution, it is not in all cases that orders as prayed should be granted. I say so because the petitioner has conveniently forgotten that the Constitution must be read holistically for its real meaning and import to be discerned. Our judicial system is not one where a Judge is granted such powers as to investigate criminal complaints. That power lies in Article 157 (4) of the Constitution. Further, whether or not the investigations leading to the petitioner's arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him. The petitioner has literally jumped the gun because he has presented his defence of innocence not before the trial Court but this Court. His actions are premature.”

The Respondent submits that the Claimant committed an offence which is subject to a disciplinary action as per the service act and regulations and therefore prays that the suit be dismissed with costs to the Respondent.

### **Determination**

Upon considering the evidence on record and the submissions by the parties, the issues for determination are the following –

1. Whether there was reasonable cause to commence disciplinary proceedings against the Claimant.
2. Whether orderly room proceedings took place and if so, whether the court can interfere in disciplinary proceedings.
3. Whether a determination of this Honourable Court will influence the matter before the Public Service Commission
4. Whether the Claimant's termination was unfair and unlawful.
5. Whether the Claimant is entitled to the prayers sought.

### **Whether there was reasonable cause to commence disciplinary proceedings against the Claimant.**

The Police Regulations made under Section 656 of the Police Act sets out offences against discipline

among them the following –

**3. (5) is guilty of drunkenness; or**

**(6) drinks intoxicating liquor when on duty ...**

During trial, RW1 submitted that drunkenness while on duty is a serious offence in the police service which could lead to termination of service. The Claimant testified that after an inspection on that material date, he was found to be okay and was allowed to perform. This was reiterated by RW1. However, RW1 stated that the alcohol level of the Claimant was low hence the reason why he was allowed to work.

Upon cross examination, RW1 conceded that no medical tests were carried out to ascertain that the Claimant was indeed drunk. All the Respondent relied upon to come to that conclusion was the facial expression of the Claimant, the redness of his eyes, and his history of being a drunkard.

Although it is not necessary to subject an employee to medical test to prove drunkenness which would in any even require consent of the employee, the evidence on record does not prove that the claimant was drunk or took intoxicating liquor when on duty.

**Whether orderly room proceedings took place and so, whether the court can interfere in disciplinary proceedings.**

During trial, the Claimant testified that he never attended disciplinary proceedings. It was his testimony that he was forced to sign a document so that orderly room proceedings could begin but once he signed it, he was issued with a dismissal letter instead. However, RW1 insisted that there had been orderly room proceedings but did not adduce any evidence of the proceedings.

The Respondent has relied on the case of Aviation and Allied Workers Union vs. Kenya Airways Limited [Supra] where it was held that the court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly terminate the employment relationship. The Respondent also relied on the case of Francis Mbugua vs. Commissioner of Police & 2 Others [Supra] where the court held that:

“... Our judicial system is not one where a judge is granted such powers as to investigate criminal complaints. That power lies in Article 157 (4) of the Constitution. Further, whether or not the investigations leading to the petitioner’s arrest disclosed an offence is not for this court to determine as I am not seized of the evidence to be presented against him. The petitioner has literally jumped the gun because he has presented his defense of innocence not before the trial Court but this Court. His actions are premature.”

It was however the onus of the respondent to prove that Orderly Room Proceedings were conducted in the manner provided in the relevant provisions of the regulations. These decisions do not apply to the case herein as the Respondent failed to adduce evidence of the orderly room proceedings that allegedly took place. All that has been adduced is a defaulter sheet and evidence note which are not conclusive evidence that disciplinary proceedings indeed took place. Although I concur with the holding in Aviation and Allied Workers Union V Kenya Airways Limited [Supra] and Francis Mbugua vs. Commissioner of Police & 2 Others [Supra] concerning the issue, the circumstances of this case are different, as to warrant the court’s intervention because not doing so would amount to assisting the Respondent in perpetuating an injustice and an infringement of the Claimant’s rights.

**Whether a determination of this Honourable Court will influence the matter before the Public Service Commission**

The Respondent has submitted that the Claimant’s appeal over his dismissal by the Respondent is still before the Public Service Commission and any determination over the same by this Honourable Court would have an influence on the Commission to incline it towards a certain direction without any

objectivity. The Respondent did not plead this fact in its Statement of Defence and there was no evidence adduced in trial to prove this fact. The issue was only raised in the Respondent's submissions, which is tantamount to introduction of new facts. As such, the Claimant has not had the opportunity to give evidence and submit on the same. Consequently, the court cannot make a determination on that issue as it was not pleaded.

In any event, if any response was expected from the Public Service Commission, it was long overdue as this claim was filed three years after the dismissal. It is foolhardy to expect a determination on an appeal more than three years later.

### **Whether the Claimant's termination was unfair and unlawful**

The Claimant submitted that his employment was not terminated in accordance with the procedure.

The case was filed in 2006 before the enactment of the Employment Act. Further, the Employment Act, 2007 and even the repealed Employment Act (1976) would not apply to the claimant who is a member of the disciplined forces and subject to the disciplinary procedure for members of the disciplined forces as provided in the relevant legislation, in the case of the claimant, the Police Act, Cap 84 of the Laws of Kenya.

During trial, RW1 insisted that there had been orderly room proceedings but failed to adduce evidence of the said proceedings. Unfortunately neither the claimant nor the respondent submitted to the court the provisions that govern the Orderly Room Proceedings. It is however evident from the evidence that a police officer is supposed to be subjected to Orderly Room Proceedings within 24 hours of commission of the alleged offence. In the claimant's case, RW1 testified that this was not possible as there was no transport.

The charge against the claimant was that –

*“Is guilty of drunkenness No. 56793 PC Dickson Njiru (Defaulter) on the 7<sup>th</sup> day of May 2006 at KICC Nairobi within Central Division of Nairobi Area you were found guilty of drunkenness by appearing on official duty while drunk”*

There is no record of what transpired at the hearing. It was the responsibility of the respondent to submit the same to court to controvert the claimant's averments, first that he was not drunk on 7<sup>th</sup> May 2006 while on duty at KICC and secondly, that he was not taken through Orderly Room Proceedings.

In the circumstances, I find that there was no proof of the offence against the claimant and further that there were no valid orderly room proceedings.

### **Remedies**

The Claimant is seeking the following prayers:

- a. General damages for termination of services.
- b. Declaration that the Plaintiff is entitled to his terminal benefits from the Defendant.
- c. Interest on (a) above.
- d. Cost.

The prayers by the claimant are all unavailable to him as his employment was terminated in 2006 before the enactment of the Employment Act 2007 and because persons in the police service are not subject to the Employment Act.

Section 3(2) of the Employment Act, 2007 provides as follows –

**(2) This Act shall not apply to—**

- (a) the armed forces or the reserve as respectively defined in the**
- (b) Armed Forces Act (Cap. 199);**
- (c) the Kenya Police, the Kenya Prisons Service or the Administration**
- (d) Police Force;**
- (e) the National Youth Service; and**
- (f) an employer and the employer’s dependants where the dependants**
- (g) are the only employees in a family undertaking.**

Section 1(2) of the repealed Employment Act (1976) provides as follows –

**2) The provisions of this Act shall not apply to -**

- (a) the armed forces or the reserve as respectively defined in the Armed Forces Act (Cap 199);**
- (b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force;**
- (c) the National Youth Service; or**
- (d) such person or class of persons, such trade or industry, or such public body, as the Minister may, by order, exempt from all or any of those provisions of this Act,**

Having found the disciplinary process wanting and the charges against the claimant not proved, further taking into account the claimant’s long service of 17 years, further taking into account the fact that the claimant has been out of service for more than 10 years, I order that the dismissal be reduced to a normal discharge with full benefits.

I further order payment of Kshs.1 million as damages to the claimant.

The respondent shall pay the claimant’s costs of this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**