



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 294 OF 2018

JOHN SIGURA OTIDO.....CLAIMANT

- VERSUS -

ENERGY REGULATORY COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 10th April, 2019)

JUDGMENT

The claimant filed the memorandum of claim dated 13.03.2018 through Mandala & Company Advocates. The claimant filed an amended memorandum of claim on 23.04.2018. The claimant prayed for judgment against the respondent for orders:

- a. That the respondent do immediately pay the claimant his entitlements as specified in the claim at paragraph 8A upon being reinstated unconditionally thus:
- i. Unpaid ½ salary and all allowances from 06.09.2017 up to 11.04.2018.
 - ii. Unpaid full salary as from 11.04.2018 to date and upon reinstatement.
 - iii. A one month's salary in lieu of notice being Kshs. 236, 500.00
 - iv. Unpaid ½ salary for 6 months at Kshs. 88, 400.00 as provided for under section 49(1) (c) of the Employment Act being Kshs. 530, 400.00.
 - v. Unpaid Airtime of Kshs. 3, 500.00 per month for 6 months being Kshs. 21, 000.00.
 - vi. Compensation for unlawful interdiction and dismissal of 12 months' gross salary.
 - vii. Costs of the claim and interests thereon from the date of filing.
- b. Any other relief that the Court may grant under the circumstances.
- c. Reinstatement and in alternative and without prejudice to the foregoing the respondent be ordered to fully compensate for unfair, unlawful and wrongful termination of the employment services of the claimant with all attendant benefits as pleaded.
- d. Payment of full salary and allowances from 11.04.2018.

The respondent filed the response to the claimant's amended memorandum of claim on 02.05.2018 through Ogetto, Otachi & Company Advocates. The respondent prayed that the claim is dismissed with costs.

The respondent is a public body established under the Energy Act, 2006 with the mandate to regulate the energy sector in Kenya. There is no dispute that the claimant was employed by the respondent as the Head of Security effective sometimes in 2015. The claimant was interdicted from duty by the letter dated 06.09.2017 on account of reports received from some licensees about the claimant's conduct which implied that the claimant may have violated the law and regulations governing his employment. The letter stated that the complaints pointed at instances of extortion and intimidation of licensees while in the course of assigned duties. The letter imposed an interdiction upon the claimant effective 06.09.2017 in order that investigations are carried out. The interdiction was on 50% payment of basic monthly salary subject to

statutory deductions. The claimant was also to be paid house allowance, commuter allowance and medical benefits at full entitlement until investigations are completed.

The claimant denied that he ever received the show-cause notice dated 12.03.2018 and he had seen it for the first time in Court. The show cause notice required the claimant to exculpate himself with respect to the following allegations:

- a. On 15.12.2016 while in Kisumu County he had gone to the premises of Multi Energy Limited, forcefully entered the premises, harassed one of the directors, caused police to arrest one of the directors and the director, allegedly, wrongfully charged in Court whereas the company allegedly had a valid licence. Further through an emissary the claimant solicited for bribe of Kshs. 400, 000.00 in exchange of a promise to terminate the case he had initiated against the director of the said Multi Energy Limited. Whereas the claimant denied receiving the show cause letter or notice, with respect to that allegation he testified in Court that he obtained the respondent's usual authority to travel to Kisumu within performance of his enforcement and compliance duties; once in Kisumu he involved the police and county officials in visiting the premises of Multi Energy Limited; it turned out that the company operated without a valid licence issued by the respondent but had a licence for its Nairobi Industrial Area business; and accordingly criminal charges were preferred in accordance with applicable law. He further testified that the Directorate of Criminal Investigations (DCI) had exculpated him after relevant investigations.
- b. On 06.03.2017 at 6.00pm the claimant had gone to Crescent Energy Limited in Kiambu County without the supervisor's authority, harassed a director of the licensee, accused him of not having the requisite licence, and through an emissary solicited for a bribe from the director of the licensee.
- c. On 30.06.2017 while in Nairobi the claimant went to the licensed premises of Moto Gas Company Limited Kenya without the respondent's authority and in company of unauthorised persons and demanded release and to take possession of a truck of LPG product that had been forfeited under Case 7869 of 2016 in the Chief Magistrate's Court at Thika and when the licensee declined, the claimant through an emissary demanded and received a bribe of Kshs. 150, 000.00 from the owner of the LPG promising to facilitate the release of the LPG.
- d. On Sunday 14.05.2017 while in Nairobi the claimant visited unlicensed premises of Junewa Enterprises in Nairobi West a distributor of a licensee named Hunkar Trading Company Limited, the claimant summoned one Hamid to do inspection without an inspection notice having been served, Hamid carried out the inspection and cleared the licensee, the claimant remained behind and with unknown persons solicited for a bribe of Kshs. 300, 000.00 so as not to arrest the staff for undisclosed offence, the bribe was declined and the claimant reported the matter to the police who were arrested, and later the claimant forced the director of Hankar for Kshs.300, 000.00 for the staff to be released, and forced the staff to forfeit Kshs. 20, 000.00 paid as cash bail to the police.
- e. On 27.03.2017 while in Mombasa County the claimant went to the licensed premises of Solutions East Africa Limited without the authority of his immediate supervisor and took control of an LPG bulk delivery truck off the Mombasa-Malindi road and ordered the driver to drive back to the licensee's premises in Shanzu. Once at the licensee's premises the claimant was unruly and forcefully entered the premises and carried out an inspection without having given a requisite notice.
- f. On 23.02.2017 while in Kiambu County the claimant went to the unlicensed premises and demolished the site in company of persons unknown to the respondent's management. The demolition was without prior authority of the immediate supervisor and was contrary to the safety rules - and no report on the same had been provided.

The letter concluded that the claimant's actions as was alleged were contrary to the Energy Act, 2006; the Public Officer Ethics Act, 2003; Employment Act, 2007; Anti-corruption and Economic Crimes Act, 2003; Leadership and Integrity Act, Chapter 182; the respondent's Human Resource Policies and Procedures Manual 2012 and other policies and guidelines. The letter stated that the termination from employment was therefore contemplated and the claimant was to reply in 7 days. The letter was signed by one Robert Pavel Oimeke, Director General.

The claimant denied that he received the letter dated 26.03.2018 inviting him to attend a disciplinary hearing scheduled for 04.04.2018.

The respondent's case is that the claimant failed to reply to the show-cause letter and also failed to attend the disciplinary hearing despite the letters being delivered to him.

By the letter dated 11.04.2018 it was conveyed by the respondent to the claimant that at the 89th meeting held on 11.04.2018 the respondent deliberated the matter and confirmed the claimant was guilty of all the charges contained in the show cause letter. The claimant was consequently summarily dismissed from the respondent's employment effective 11.04.2018. The respondent would pay the claimant's terminal benefits and pension in accordance with section 11.11.6 of the Human Resource Policies and Procedures Manual, June 2017. The claimant received the letter during the pendency of the present suit.

The claimant's testimony was that the show-cause letter had never been delivered to him except as served in the present Court proceedings. He denied signing the delivery book on 17.11.2017 purportedly delivering the letter to him. He confirmed that he had received the interdiction letter. The claimant also denied that he had received the invitation letter for the disciplinary hearing. He denied that P.O.Box 11197 – 00100 to which the invitation letter had been posted to by registered mail was his personal address as it was not on his CV. The CV on record had that address and the claimant denied receiving the letter.

The respondent's case was that the claimant was given sufficient notice of the allegations; he was given an opportunity to present his case, he failed to attend the disciplinary hearing as invited to do; instead he moved to Court and filed a previous suit to challenge the interdiction; he failed to get the injunctive relief in that previous suit; and he moved to file the present suit. Further the respondent's case was that the claimant was aware of the disciplinary hearing but he ignored the invitation. It was urged that the claimant's suit be dismissed with costs.

The 1st issue for determination is whether the respondent followed due procedure in dismissing the claimant's employment. Respondent's witness No. 1 (RW1) was one Elizabeth Njau, the respondent's Head of Human Resource and Administration Department and the claimant's immediate supervisor at all material times. She stated that she prepared the show-cause letter and it was dispatched to the claimant. She confirmed that under the Human Resource Manual the show-cause letter was to be issued by the claimant's immediate supervisor as opposed to by the Acting Director General as was done in the instant case and she stated, **"That was in total disregard of the Human Resource manual. After notice to show cause by myself he was to reply within stipulated time then invited for disciplinary hearing. There was no recommendation by myself that Director General forms investigation Committee or the Human Resource Manual."** In cross-examination, RW1 stated that for an officer in scale ERC 6 like the claimant, it was for RW1, as Head of Human Resource, to recommend to the Director General to form investigation committee in view of allegations as may be levelled. RW1 stated that the Director General could not form a committee to investigate the claimant and concluded, **'So I say in claimant's case Director General could not form the investigation committee.'**

Clause 11.6.1 of the respondent's Human Resource Policies and Procedures Manual provides that the formal disciplinary procedure starts with a **"show cause letter"**. The clause provides that the employee will be informed in writing by the supervisor of the nature of the complaint or allegation. The employee will be required to submit his response at least within 7 days. Clause 11.6.3 states that where the supervisor is satisfied with the response, the matter is deemed as closed. Clause 11.6.4 provides that where the supervisor is not satisfied with the response, a report on the same shall be made to the Director General with appropriate recommendations on disciplinary action. Clause 11.7.1 then states, **"Upon receipt of the supervisor's report and recommendations, the DG shall (in the case of employees in the positions of ERC 7 to ERC 11) appoint an Ad hoc disciplinary committee that shall consider the matter and make recommendations to the Human Resource Advisory committee, which shall then review and make recommendations to the DG. For employees in positions ERC 2 to ERC 6, the DG shall refer the matter to the Commission."** After the disciplinary hearing, the relevant committee in clause 11.7.5 shall prepare a report consisting of background information leading to the relevant incident; input from the witnesses; the employers response to the allegations; an analysis of facts; a statement that all the entitlement of employee facing the disciplinary action have been observed; and the conclusion as to whether or not misconduct has taken place. Clause 11.7.6 provides that if an investigation is deemed necessary prior to hearing, the committee shall initiate and conduct such an investigation. Clause 11.7.7 provides that if an investigation is conducted, the employee facing disciplinary action shall be supplied the entire report and evidence prior to a hearing.

The Court has considered the cited provisions of the Manual against the evidence on record. The evidence is that RW1 as the claimant's immediate supervisor never issued a show-cause letter as prescribed in the Manual. Thus, RW1 as the supervisor never addressed her mind to the case as irregularly levelled against the claimant and as prescribed in the Manual. It is also clear that the claimant was interdicted to pave way for investigation. However, there was no evidence that there was a relevant committee appointed to undertake the relevant investigation and there was no investigation report supplied to the claimant prior to the alleged disciplinary hearing. As testified by RW1, the Court returns that the procedure as adopted against the claimant was in total disregard of the provisions of the respondent's Manual and it amounted to unfair procedure.

Thus, to answer the 1st issue for determination the Court returns that the respondent breached the agreed disciplinary procedure as was prescribed in the Manual. While making that finding the Court returns that whether the claimant received or did not receive the show-cause notice and the invitation to the disciplinary hearing, it was clear that the disciplinary process had been commenced and continued in a manner that was irreparably irregular and a finding on the disputed service of the two documents will not cure the well established procedural unfairness. Accordingly the procedure was unfair and the claimant has satisfied the burden of proving the unfair termination as per section 47(5) as read with 45(2) (c) of the Employment Act, 2007.

The 2nd issue for determination is whether the respondent has established that as at termination it had a valid reason to terminate the employment of the claimant as per section 43 and 45(2) of the Act. Under section 47(5) it was for the respondent to discharge the burden of justifying the reasons for termination. First the summary dismissal was founded upon a show-cause letter that was irregularly issued; a decision that was arrived at in total disregard of the safeguards in the Manual; and a threatened and promised investigation as per the interdiction letter but which was never undertaken as per the provisions of the Manual. The Court holds that no internal investigation has been shown to have taken place as prescribed in the manual and the allegations that were irregularly invoked by the show cause letter remained empty allegations at the end of the disciplinary process and at the end of the hearing before the Court.

Second the Court has considered the evidence by the respondent witness No. 2 (RW2) one Stanley Okati, the director of Multi Energy Limited Company in the allegations against the claimant in the Kisumu case. He narrated the claimant's visit to his Kisumu premises on 15.12.2016 and stated that on 27.07.2017 he wrote complaining to the respondent about his dissatisfaction of the behaviour and contempt that the claimant demonstrated against his company and operations. That was one of the cases that the respondent had referred to the Directorate of Criminal Investigations (DCI) for appropriate investigation. On 11.12.2017 the DCI wrote to the respondent's Director General stating that the investigations had exculpated the claimant. The DCI reported that the claimant had properly performed his duties and criminal charges had properly been commenced against Stanley Oduor Okati in court file No. 694 of 2016 for the offence of **"Alteration of the Specification Plan attached to the Licence without the Authority of the Commission"** and which was an offence under the Energy Regulatory Commission Regulations.

Third the respondent witness No.3 (RW3) was one Jackson Kariuki, the managing director of Hunkar Trading Co. Limited being the other case alleged in the interdiction letter and the purported show-cause letter. RW3 stated that he had never met the claimant but he had heard about him. He testified that he had never met the claimant and he had never known the claimant. He further stated and alleged that it was the OCS at Lang'ata Police Station who asked him to part with Kshs. 300, 000.00 but he never did. That was the other case referred to the DCI by the respondent for investigation. The DCI reported that the claimant in the course of duty had caused the arrest of two employees of Hunkar Trading Company limited who were released on a police cash bail of Kshs. 10, 000.00 each and the extortion of Kshs. 20, 000, 00 as alleged did not arise at all. The criminal case was before Court and proceeding accordingly.

Third, the DCI letter dated 11.12.2017 on the two cases observed, **"It is clear that the way the licences were obtained or issued in respect of the two matters that were already before Court appears to have been a manifestation to defeat the process of enforcement of the ERC Act. On the allegation of extortion, it would appear as being part of an attempt to frustrate the same and aimed at curtailing the efforts and spirit of the ERC officer John Okwisa Sigura Otido whose actions and that of other Law Enforcement Agencies**

mandated to enforce the Act as well the fight on crime was done in good faith and in a proper execution of duty (ties) and is demonstrated by the ERC officer's initiative to engage other institutions." The DCI letter concluded that the investigations conducted so far did not link the claimant with any criminal act as alleged in the two letters of complaint by Stanley Oduor Okati who refused to substantiate the same allegation in form of a formal statement, saying that he only complained to ERC and not the DCI. The letter stated "It is true that he was charged for operating a business in Kisumu but the matter was withdrawn upon production of licence which was issued thereafter and remains questionable since he was in active violation of the ERC Act at the time of arrest. There is no tangible evidence to sustain allegations of the alleged extortion and any ethical conduct against the said employee (JOHN OKWISA SIGURA OTIDO). In any case, there is evidence to exhibit his efforts on the enforcement of the ERC Act in liaison and active collaboration with other law enforcement agencies. Refer to the two Court matters which were filed against the two employees from Hunkar Trading Co. Ltd and that against Stanley Oduor Okati – both in Nairobi and Kisumu respectively."

Fourth, the respondent provided no evidence at the hearing towards proving the other allegations in the purported show-cause notice. In addition, it was not shown to the Court that internal investigations to establish the allegations had ever taken place as envisaged in the respondent's Manual.

Thus the Court returns that the respondent has failed to establish the alleged reasons for termination or to justify the grounds for termination as was envisaged in section 43 and 47 (5) of the employment Act. Instead, as per the findings by the DCI, the claimant appears to have been victimised for properly and lawfully performing the duties that had been vested in him. That amounted to unfair summary dismissal as it was grossly unlawful and unconstitutional. Even if the Court was to disregard the findings by DCI (but basis for such action by the Court not having been established) as urged for the respondent, the Court has already found that it was not established that the respondent undertook internal investigations by which the allegations against the claimant were shown to have been true and proved one way or the other - and at the close of the hearing of the suit, the Court has found that the allegations remained empty, completely bare and without justification whatsoever.

The 3rd issue for determination is whether the claimant was entitled to reinstatement. The claimant has prayed for reinstatement.

It was submitted for the respondent that section 49(3) provides that reinstatement is one of the remedies that can be extended to an aggrieved claimant but it is not to be whimsically granted and the Court must be guided with the provisions of section 49(4) (a) to (m) of the Act including practicability of reinstatement or re-engagement as may be ordered by the Court. The respondent relied on the Court of Appeal decision in **Kenya Power & Lighting Company Limited –Versus- Aggrey Lukorito Wasike [2017]eKLR** (Waki, Karanja, & Kiage JJ.A) where in holding that matters in section 49(4) (a) to (m) must be seriously considered before granting the remedy of reinstatement, the Court stated, "A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a judge ought to set out factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute." It was further submitted for the respondent that in considering whether to grant reinstatement, the Court should be guided by factors in section 49(4) of the Act including practicability of reinstatement and the common law principle that specific performance in an employment contract should not be ordered except in very exceptional circumstances and as was held by the Court of Appeal in **Kenya Airways Limited –Versus- Aviation & Allied Workers Union Kenya & 3 Others [2014]eKLR**. Further, as was held in that case, the Court should balance the interest of the employee and that of the employer. In balancing the interests it was submitted for the respondent that the respondent is a public body rendering a service to the public and its employees must be individuals with a character that passes the values and principles of public service in Article 232 of the Constitution. It was submitted that the allegations levelled against the respondent were very serious and retaining the claimant in the respondent's employment would damage the respondent's reputation because the respondent would be viewed by the public as employing extortionists or intimidators. Further no exceptional circumstance had been demonstrated to justify reinstatement. Further, the claimant's conduct betrayed him and it does not endear him the equitable relief of reinstatement. In urging consideration of equity, it was submitted that the claimant had failed to disclose an earlier suit between the parties about the interdiction in issue but which had been withdrawn.

The claimant in urging for reinstatement relied on **Mary Chemweno Kiptui –Versus- Kenya Pipeline Company Limited [2014]eKLR**, where Mbaru J held thus, "50. The termination of an employee is a penalty with serious consequences that must be done with outmost regard and notice to the affected employee, who should be granted a reasonable opportunity to give a defence. Based on submissions and documents on record, I find there was no proper enquiry on the part of the respondent in this case. The termination was therefore done without observance of the respondents' rules of procedure, contrary to public interest that the respondent officers are bound to protect and the guidelines on disciplinary procedures for public officers."

The Court has considered the material on record and the parties' respective submissions. The Court returns that the instant case squarely falls within similar circumstances and findings in **Mary Chemweno Kiptui –Versus- Kenya Pipeline Company Limited [2014]eKLR**. The Court has found that the respondent failed to comply with its own and agreed disciplinary procedure as was prescribed in the Manual. The Court has found that the respondent referred the allegations in the interdiction letter to the DCI whose investigations exculpated the claimant and the respondent undertook no internal investigations in accordance with its procedures to establish the case as was alleged against the claimant and leading to the purported summary dismissal. The Court finds that there was nothing established against the claimant by the respondent as at the time of the termination to justify the summary dismissal. Instead, the Court returns that it has been established especially by the DCI that the claimant became a victim and was intimidated and harassed by way of the ensuing disciplinary process for having performed his duties. It is an exceptional circumstance that the Court protects the public officer from the summary dismissal which has been shown to rest upon his performance of duty in accordance with the law. It is Article 236 of the Constitution that provides that a public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The Court returns that the claimant's summary dismissal by itself offended the letter of that constitutional provision and protection and the Court will not aid that glaring violation of that mandatory rule of constitutional prescription. The Court follows its holding in **Jadiah M. Mwarania –Versus- Kenya Reinsurance Corporation [2018]eKLR**, thus, "The Court further returns that it would be unfair for the claimant to

suffer loss of his hard earned professional reputation and employment in circumstances that are linked to his actions in discharge of official duty.”

The claimant is willing to continue in employment. There is no case that the respondent’s operational requirements have changed or the claimant has deteriorated in any manner so as not to continue performing in the office he held. The Court has considered the material non disclosure as urged for the respondent and returns that the material non disclosure was a point at the interlocutory stage and appropriate findings were made in that regard. In any event the court returns that the material non disclosure related to a previous suit which has since been withdrawn and did not relate to the merits of the matters in dispute in the case and the factors envisaged in section 49(4) of the Act to be considered in granting or denying reinstatement.

The Court has found that the respondent has not established that the claimant was culpable of the allegations as was levelled against him. Thus the Court finds that there is no established improper conduct on the part of the claimant that would operate as a bar to reinstatement in the fear of the respondent’s reputation or good image being adversely affected as was submitted for the respondent. Thus in the present case the Court returns that there was no established impracticability to implementing reinstatement.

Further there is no material on record showing that the claimant contributed to his summary dismissal. The respondent did not show any payments due to the claimant after the offensive termination and as at hearing, the claimant had not secured any alternative employment.

The letter by the DCI dated 11.12.2017 confirmed that the claimant should not be subjected to any query or ridicule about his qualifications because he held and had invested in his qualifications including Presidential Commission by the Retired President, H.E. Daniel Toroitich Arap Moi; certificate of attendance of Armed Forces Training College (AFTC); Certificate of Qualification, Kenya Army Ordinance Corps; 75 Artillery Battalion Commanding Officer’s Letter; Extract of Service, Kenya Defence Forces; Certificate of Basic Investigations from DCI Academy; Diploma in Forensic and Criminal Investigations from Kenya Institute of Security and Criminal Justice; Master degree in Public Administration (Executive) from Moi University; and Bachelor’s Degree in Public Administration from Universidad Empresarial de Costa Rica. The Court returns that the claimant has clearly invested in his chosen line of public service so that his long and concentrated effort and investment in that regard favours award of reinstatement towards defeating and discouraging unjustified spoils system in our public service.

The Court therefore returns that the claimant’s summary dismissal was unfair, unlawful and the claimant has established a case for reinstatement.

The claimant has prayed for payment of allowances and salary withheld from 06.09.2017 up to 11.04.2018. The Court returns that since the disciplinary proceedings ending with the summary dismissal have been found to have been unfair and unlawful, the claimant is entitled as prayed for. The court follows the holding in Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR, in which the court stated thus, **“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”**

While making that finding the court further uphold its opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11, where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”**

The claimant prayed for payment of full salary and allowances from 11.04.2018 to date. The Court returns that the claimant is entitled as prayed for and consequential to the reinstatement.

The Court returns that the order of reinstatement meets the full ends of justice in this case and therefore the prayer for compensation for unfair dismissal under section 49(1) (c) of the Employment Act, 2007 will not issue.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. Reinstatement of the claimant to the position of Head of Security in the respondent's establishment effective 11.04.2018 and for that purpose the claimant to report to the respondent's Director General not later than 15.04.2019 at 8.00 O'clock in the forenoon for assignment of duty by his immediate supervisor (the respondent's Head of Human Resource and Administration Department) and as per the contract of service between the parties and with full prevailing statutory and contractual benefits.
2. The respondent to pay the claimant all due salary and allowances withheld from 06.09.2017 up to 11.04.2018.
3. The respondent to pay the claimant all due salaries and allowances from 11.04.2018 to the date of this judgment and to continue paying monthly salaries, allowances and benefits, thereafter, in accordance with the contract of service and without a break in service consequential to the order of reinstatement.
4. The claimant to compute and serve the schedule of the dues under order 2 and 3 above within 7 days from today and the sum to be included in the final decree and any disagreement on computation to be resolved by the Deputy Registrar of the Court.
5. The respondent to pay the claimant the decretal sum as ordered above by 01.06.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
6. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Wednesday 10th April, 2019**.

BYRAM ONGAYA

JUDGE