



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2235 OF 2014**

**JOHN KARIUKI NJUGUNA.....CLAIMANT**

**v**

**HONOURABLE ATTORNEY GENERAL.....1<sup>st</sup> RESPONDENT**

**COMMISSIONER-GENERAL OF PRISONS...2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. John Kariuki Njuguna (Claimant) was employed by the Kenya Prisons Service on 12 November 1976, and in the course of employment served in various prisons in the country.
2. On the night of 3 September 2000 and 4 September 2000, there was an attempted prison break at Nyeri G.K. Main Prison. Some of the inmates died.
3. Around 14 May 2002, the Claimant was arrested and charged with the murder(s) of the inmates.
4. The Claimant was convicted and sentenced on 18 December 2008.
5. The Claimant appealed against the conviction/sentence and the Appeal was successful, leading to reinstatement and transfer to Nairobi G.K. Remand and Allocation Prison.
6. On 4 November 2013, the Commissioner General of Prisons (2<sup>nd</sup> Respondent) wrote to the Claimant giving him notice of retirement, on attainment of the retirement age of 60 years, effective 17 January 2014.
7. The letter also notified the Claimant of entitlement to 30 days terminal leave on top of annual leave.
8. The 2<sup>nd</sup> Respondent wrote again to the Claimant on 4 February 2014 indicating that the effective date of retirement would be 30 June 2014.
9. On 12 February 2014, the Claimant wrote to the 2<sup>nd</sup> Respondent indicating that due to *unavoidable circumstances*, he did not proceed on 3 months' terminal leave but had worked until 30 January 2014, and therefore requesting to be paid in cash.
10. On the same day, the Claimant wrote another letter to the 2<sup>nd</sup> Respondent stating that he had not been paid salary for June, July and August 2013 (after reinstatement). The Claimant wrote a reminder on 7 April 2014.
11. It appears that the concerns by the Claimant were not addressed for on 16 December 2014 he instituted the instant proceedings against the Attorney General (1<sup>st</sup> Respondent) and the 2<sup>nd</sup> Respondent seeking salary arrears for the period 1 March 2009 to 31 May 2013, totalling Kshs 1,707,771/- and commuted 3 months terminal leave not taken of Kshs 97,538/-.
12. The Respondents filed a *Memorandum of Reply* on 15 May 2015 in which it was contended that the Public Service Commission of Kenya had advised that the period 1 March 2009 to 25 April 2013 when the Claimant was in custody/serving the jail term be treated as *leave without pay for purposes of pension*.
13. The Cause was heard on 5 December 2018 when the Claimant testified and closed his case. The Respondents opted not to call any

witnesses.

14. The Court consequently directed the parties to file and exchange submissions.

15. The Claimant filed his submissions on 21 December 2018 while the Respondents filed their submissions on 6 March 2019.

16. It is not disputed that the Claimant's salary was stopped from February 2009. This was after the conviction and sentence on 18 December 2008.

17. It is also not disputed that the Claimant was not paid any salary up to May 2013, just after the Court of Appeal quashed the conviction and sentence.

18. The Claimant contended that he was entitled to the salaries during the period served in prison because, the Court of Appeal quashed the conviction and sentence, and therefore it would be an unfair labour practice to deny him the salary during the time served in jail, and that he had a legitimate expectation to be paid all salary arrears upon reinstatement.

19. The Claimant relied on the case of *Paul Ngeno v Pyrethrum Board of Kenya* (2013) eKLR to urge that where an employee was exculpated after interdiction/ suspension or disciplinary process, he would be entitled to with-held salaries.

20. In resisting the claim, the Respondents urged that the Claimant was not an employee from 1 May 2009 to 31 May 2013 because he was in prison after lawful conviction and sentence, and had been dismissed from service and removed from the payroll.

21. According to the Respondents, the quashing of the conviction and sentence was of no significance as the Claimant was not an employee during the period he is seeking salary arrears.

22. The Respondents were of the persuasion that the period could only be treated as *leave without pay* because no contractual services were rendered.

23. The Respondents drew the attention of the Court to the provisions of section 73 of the Public Service Commission Act and the Regulations made thereunder, section 16 of the Prisons Act, section E (12) of the Human Resource Policies and Procedures Manual for the Public Service and *James Mugeru Igati v Public Service Commission of Kenya* (2014) eKLR, *Geoffrey Mworio v Water Services Management Authority* (2015) eKLR.

24. In respect to the *Ngeno* case relied on by the Claimant, the Respondents submitted that it did not apply as the circumstances therein related to interdiction/suspension, and not conviction and sentence by a Court of law.

25. It is correct as urged by the Respondents that the criminal process and disciplinary process are distinct.

26. And if that be so, then it would follow that the mere fact that an employee has been imprisoned upon conviction does not automatically terminate the employment relationship.

27. The employer should take a positive step to notify the employee of the end of the employment relationship whether due to the doctrine of *frustration*, or otherwise as any other disciplinary process.

28. There was no evidence (despite the submission) led by the Respondents' that the Claimant's employment was terminated by dint of section K3 (2) of the *Human resources Policies and Procedures Manual*.

29. An employment relationship rendered *incapable of performance* by supervening factors beyond the control of the parties, should not be treated as a dismissal in law.

30. For practical purposes, the Claimant was incapacitated and could not perform his contractual obligations during the time after conviction and sentence.

31. The Court of Appeal quashed the conviction and sentence thus rendering not only the conviction and sentence as null and void, but the entire criminal proceedings.

32. However, the Claimant did not attend work to perform his contractual obligations and drawing from the philosophy in section 19(c) of the Employment Act, 2007 that an employer may deduct from wages in respect of days an employee is absent without leave or lawful cause, the Court is of the view that the Respondents were justified to treat the Claimant as having been on leave without pay during the period he was serving a lawful sentence.

#### **Terminal leave**

33. The retirement notice to the Claimant expressly informed him of the right to take 30 days terminal leave in addition to any accrued annual leave.

34. While testifying, the Claimant did not advert at all to the *unavoidable circumstances* which led him not to proceed on terminal leave.

35. It is therefore left to speculation as to whether the *unavoidable circumstances* were due to the exigencies of duty, at the request of the employer or factors peculiar to the Claimant. The Court will not speculate.

36. Section E (12) of the *Human Resource Policies and Procedures Manual* provides that such *untaken leave* would be forfeited.

37. The Court is unable, considering the non-disclosure of the *unavoidable circumstances* to find that the terminal leave ought to be commuted.

#### **Conclusion and Orders**

38. From the foregoing, the Court finds no merit in the Cause and orders the *Memorandum of Claim* filed in Court on 16 December 2014 dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 31<sup>st</sup> day of May 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Nchogu instructed by Lilian Nchogu & Co. Advocates

For Respondents Ms. Odhiambo, State Counsel, Office of the Attorney General

Court Assistant Lindsey