



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**ELRC NO. 1372 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 24<sup>th</sup> June, 2019)**

**GEORGE OSERO.....CLAIMANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR OF GENERAL,**

**NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. The Claimant herein filed his Memorandum of Claim on 18/8/2014 and later an Amended Claim on 31.8.2017 through Ogetto Otachi and Company Advocates alleging unlawful, unreasonable and unfair dismissal from the Administration Police Service.
2. The 1<sup>st</sup> Respondent is the Principal Legal Advisor to the Government of Kenya mandated to represent the National Government in Court or in any other legal proceedings to which the National Government is a Party, other than criminal proceedings.
3. The 2<sup>nd</sup> Respondent is the Head of the National Police Service and exercises independent command over the National Police Service and performs any other functions prescribed by national legislation.
4. The 3<sup>rd</sup> Respondent is the Head of the National Police Service Commission and exercises disciplinary control over and removes persons holding or acting in offices within the service.

**The Claimant's case**

5. The Claimant's case is that he was employed into the Administration Police Service on 8<sup>th</sup> November 1999 as an Administration Police Constable on two years' probation period. He attached his appointment letter as an annexure GOA 1.
6. He avers that he served his probation period successfully and was admitted in permanent and pensionable terms with Police No. 99016315 (Annex GOA 2).
7. He contends that he served in the National Police Service for 12 years. It is his case that on 27<sup>th</sup> April 2013, he was on duty patrolling around Mathare area with a procedurally assigned firearm a ceska pistol No. F8428 and after the days duties at around 0930 hours, he returned the firearm to the armoury and handed it over to the then armourer, one Sergeant Peter Wathika who received and acknowledged its receipt in the Firearms Movement Register.
8. He contends that on 29<sup>th</sup> April 2012 he received a call from one Sergeant Mulinge inquiring about the whereabouts of the firearm – whereupon he informed the Sergeant that he had returned it to the armoury on the 27<sup>th</sup> of April 2012 and handed it over to the armourer.

9. The Claimant was requested to accompany the said Sergeant Mulinge to the armoury where they all went through the Movement Registers and established that the Claimant had returned the firearm which was thereafter assigned to one APC Kennedy Omollo.

10. On 2<sup>nd</sup> May 2012 the Claimant was called by one SP Muchiri who informed him that the AP Commandant S.M Arachi wanted to see him at the Security of Government Building (SGB) Headquarters at Nairobi West, together with APC Kennedy Omollo and SGT Wathika. They were accompanied by SP Kinyua, the then Starehe District Commander. Later on, they were joined by another officer IP Gregory Wabwire.

11. The Commandant asked IP Wabwire how he had obtained the firearm. The IP told him that he only went to collect the firearm under orders from CIP Mulela and that he was not there when the firearm was being assigned.

12. The Commandant got annoyed and ordered the senior officer to charge the Claimant and his colleagues and after that, they surrender all government kits in their possession including their police uniforms and vacate the government houses that they were occupying.

13. The Claimant aver that he explained to the IP that he was procedurally assigned the firearm following the laid down procedures and regulations and that the Firearm Register confirmed this position. The Claimant explained that he had also returned the firearm on 29<sup>th</sup> April at 9.30 hours and signed it in.

14. The Claimant avers that the Commandant did not listen to him and he was taken to Mathare with other officers and ordered to surrender all government uniforms and vacate the house allocated to his family which he vacated at 23.00 hours.

15. On 31<sup>st</sup> May 2012, he was dismissed from the service and the dismissal letter indicated that he was charged and found guilty of the following counts:-

**1. That on 27<sup>th</sup> April 2012 at around 1000 hours at Mathare AP Camp, the Claimant jointly conspired to use a firearm Ceska pistol body No. F8428 loaded with 12 rounds of ammunition without following firearm regulations.**

**2. That on the same material day the Claimant conspired and engaged himself in unauthorised assignment (GOA3).**

16. The letter indicated that the Claimant was dismissed from the Administration Police Service with effect from 11<sup>th</sup> May 2012 with loss of all his terminal benefits.

17. The Claimant avers that he was never subjected to any properly constituted orderly room proceedings apart from being summoned into the Commandant's office and taken into a room where he was asked to recount the events relating to the firearm.

18. He avers that he was ostensibly charged and convicted of offences that he had no chance to plead to or to have a statement in reply.

19. He avers that he never committed the alleged offence and that APC Kennedy Omollo denied conspiring to assign the firearm to Claimant (GOA 4(a) & (b)).

20. The Claimant avers that he appealed the dismissal to the Permanent Secretary, Provincial Administration and Internal Security (GOA 5) and the appeal was forwarded to the 2<sup>nd</sup> Respondent for deliberations and that the 3<sup>rd</sup> Respondent declined to admit his appeal (GOA 6).

21. It is the Claimant's case that he was dismissed without any valid reasons and without any due process and he seeks orders as follows:-

**a) "A declaration that the conduct of the Orderly Room proceedings allegedly held on 2<sup>nd</sup> May 2012 was illegal and void ab initio.**

**b) A declaration that Claimant's subsequent dismissal from the Administration Police Service with effect from 11<sup>th</sup> May 2012 was unlawful, unconstitutional, unreasonable, unfair and that same should be set aside.**

**c) An order directing the 2<sup>nd</sup> Respondent to reinstate the Claimant to the Administration Police Service forthwith.**

**d) Full payment of the Claimants salary during the period that he was serving the illegal dismissal from the force and up to the period of August 2014 with interest at Court rates.**

**Salary allowance for 2 years 4 months**

**i. April 2012 to April 2013 (12 Months x 23,934).....KES 287,208**

**ii. April 2013 to April 2014 (12 Months x 23,934).....KES 287, 208**

**iii. May 2014 to August 2014 (4 months x 23,934).....KES 95,736**

**TOTAL..... KES 670.152**

House supplementation allowance

i.... April 2012 to April 2013 (12 Months x 1,650).....KES 19,800

ii... April 2013 to April 2014 (12 Months x 1,650).. ....KES 19,800

iii.. May 2014 to July 2014 ( 3 months x 1,650).....KES 6,600

TOTAL.....KES 46,200

**Police Risk Allowance**

i. April 2012 to April 2013 (12 Months x 5,000). KES 60,000

ii..... April 2013 to April 2014 (12 Months x 5,000)..... KES 60,000

iii.....May 2014 to July 2014 (3 months x 5,000)..... KES 20,000

**TOTAL.....KES 140,000**

**GRAND TOTAL .....KES 856. 352**

**e) Full Payment with interest at Court rates from the period of August 2014 up to the time he is reinstated.**

**f) Any such other appropriate relief that the Honourable Court may deem fit to grant”.**

22. The Claimant gave his oral evidence reiterating his evidence as per the Statement of Claim. In cross-examination, he denied being taken through orderly room proceedings and also denied using the firearm illegally. He avers that the proceedings of orderly room proceedings of 2/5/2012 were done in his absence as he had been summoned to Headquarters on the same day.

23. The Claimant’s two witnesses Kennedy Omollo and Gregory Wabwire also corroborated his evidence.

#### **Respondents case**

24. The Respondents filed their Memorandum of Appearance on 10<sup>th</sup> September 2014 but filed their Response on 8/5/2015. They later filed submissions but never called any witness to prove their case.

25. It is therefore apparent that the Claimant’s case remained uncontroverted.

26. In **CA No. 140/2008**, the Court of Appeal JJA Visram, Mwilu (as she then was) and Otieno Odek rendered themselves as follows:-

**“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence”.**

27. In the absence of the Respondents calling any evidence, their submissions cannot be taken as evidence and this means that they offered no evidence against the Claimant’s case.

#### **Submissions**

28. The Claimant filed their submissions and aver that he was condemned unheard. He submit that the Respondent abused his powers and he cited **Republic vs Cabinet Secretary Ministry of Interior and Co-ordination of National Government and 6 Others Ex-parte Africa Centre for Open Governance and 7 others (2017) eKLR**, where the Court opined as follows:-

**“A power which is abused should be treated as a power which has not been lawfully exercised...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the ex-parte Preston where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.”**

29. I have considered the evidence and submissions filed by the Claimant. It is apparent that due process was never followed before the Claimant was dismissed from the service. Procedures for conducting disciplinary proceedings of officers in the APS is set out in the law.

30. Section 41 of Employment Act 2007 provides as follows:-

**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".**

31. There is nothing presented in Court to show that the Claimant was summoned for any disciplinary hearing and thereafter minutes or proceedings to indicate that there were proceedings held which found him guilty.

32. In the absence of such proceedings, I find the dismissal of the Claimant unfair and unjustified as provided for under Section 45(2) of Employment Act which states as follows:-

**(2) "A termination of employment by an employer is unfair if the employer fails to prove:**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason:-**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(iii) that the employment was terminated in accordance with fair procedure".**

33. In terms of remedies, given the callous nature in which the Respondent's officers acted by condemning the Claimant without due regard to the law and evidence, I find that the Claimant is entitled to maximum compensation and I find for him as follows:-

**1. I find the dismissal unlawful and unprocedural and I convert it to a normal termination.**

**2. The Claimant is entitled to 12 months' salary as compensation for unfair and unlawful termination= 12 x 30,584 = 367,008/=.**

**3. 1 month salary in lieu of notice = 30,584/=**

**TOTAL = 397,592/=**

**4. Payment of his pension dues.**

**5. The Respondent will pay costs this suit plus interest at Court rates with effect from the date of this Judgement.**

Dated and delivered in open Court this 24<sup>th</sup> day of June, 2019.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ogada holding brief Miss Omesa for Claimant – Present

Respondent – Absent