



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 63 OF 2014**

*(Formerly HCCC No. 926 of 2004)*

*(Before Hon. Lady Justice Maureen Onyango)*

**MARTIN WAWERU NGURU.....PLAINTIFF**

**VERSUS**

**HON. ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

The plaintiff was employed by the Public Service Commission of Kenya and posted to the Ministry of Foreign Affairs as an Assistant Secretary III on 2<sup>nd</sup> November 1981. He rose through the ranks to the position of Senior Assistant Secretary. On 14<sup>th</sup> February 1998, he was posted to the Kenya Embassy in The Hague Counsellor Head of Chancery on a tour of duty that was to last for 36 months. He was however recalled back to Kenya in May 1999 before expiry of his town of duty following disagreements between him and the Ambassador. He however did into report back and on 10<sup>th</sup> December 1999 received another letter of recall. He was required to report back to the Ministry Headquarters in Nairobi by 30<sup>th</sup> December 1999.

By his letter dated 17<sup>th</sup> December 1999 the plaintiff appealed against his recall citing financial commitments to banks in the Hague and his enrolment for a Master's degree program but the appeal was rejected. By letter dated 28<sup>th</sup> December 1999, the plaintiff requested for annual leave to pursue school placements for his children who were in school in London and to organise to relocate. The leave was approved but he was advised that he would not be paid Foreign Service Allowance during the duration of the leave.

The plaintiff's leave was cancelled by letter dated 19<sup>th</sup> January 2000 and he was required to report to Nairobi on 22<sup>nd</sup> January 2000.

Upon receiving the recall the plaintiff applied for unpaid study leave by his letter dated 21<sup>st</sup> January 2000 to commence on 22<sup>nd</sup> January 2000 but the leave was not approved.

On 27<sup>th</sup> January 2000, a show cause letter was issued to the plaintiff following his failure to report back to the office on 22<sup>nd</sup> January 2000 as directed. The show cause letter advised him that having failed to report for duty he was deemed to have absconded duty. He was required to make representations why he should not be dismissed from service on account of desertion.

He replied to the show cause letter on 31<sup>st</sup> January 2000. He eventually travelled back to Kenya on 26<sup>th</sup> February 2000 after a decision was taken to withdraw diplomatic passports for himself and his family. He was never assigned duties after he reported back.

The Ministerial Human Resource Advisory Committee met on 7<sup>th</sup> June 2000, considered his case and recommended that he be dismissed from service for gross misconduct. The recommendation was sent to the Public Service Commission, which instead decided to retire the plaintiff in public interest so that he could access his terminal benefits. The letter retiring the plaintiff in public interest is dated 3<sup>rd</sup> November 2000.

The plaintiff appealed against his retirement in public interest by his letter of 25<sup>th</sup> November 2000 but it was not successful. He was informed by letter dated 21<sup>st</sup> June 2001. He filed a second appeal on 14<sup>th</sup> June 2002 but that too was rejected as communicated to him by letter dated 16<sup>th</sup> August 2002. A further communication of rejection of his appeal was made by the defendant by letter dated 7<sup>th</sup> May 2004.

The plaintiff was aggrieved by his retirement in public interest and by way of the plaint dated 19<sup>th</sup> August 2004, avers that his retirement in

public interest was contrary to the provisions of Section 28, 34 and 40 of the Service Commission Act, was perpetrated by personal malice of the then Ambassador at the Hague and the Permanent Secretary, Ministry of Foreign Affairs was unreasonable, illegal, unlawful and in breach of Rules of Natural Justice. He avers that as a result of the wrongful and unlawful retirement he suffered loss, curtailment of his advancement in career prospects, mental torture and anguish, family disorientation and loss of emoluments and expected future earnings as follows –

- (a).. Salary from 11<sup>th</sup> October, 2000 to December 2001 at Kshs.19,245 per month 19,245 x 14½ months.....  
Kshs.279,053
- (b) Salary from January 2002 to June 2004 at  
Kshs.21,293 x 30 months..... Kshs.638,790
- (c). Salary from July, 2004 to December, 2004 at  
Kshs.52,975 x 6 months..... Kshs.317,850
- (d)..... House allowance from January, 2002 to December, 2004  
at 20,000/= per month x 36 months..... Kshs.720,000
- (e) Salary from January, 2005 to December, 2007 at  
Kshs.55,692 per month x 36 months..... Kshs.2,004,912
- (f). House allowance from January 2005 to December, 2007  
at 25,000.00 per month x 36 months..... Kshs.900,000
- (g) Salary from January, 2008 to December, 2010 at Kshs.60,586  
per month x 36 months..... Kshs.2,181,096
- (h) House allowance from January 2008 to December, 2010  
at Kshs.28,000 per month x 36 months..... Kshs.1,008,000
- (i). Salary from January, 2011 to January, 2014 at Kshs.68,500  
per month x 37 months..... Kshs.2,534,500
- (j). House allowance from 2011 to January, 2014 at Kshs.60,000  
per month x 37 months..... Kshs.2,220,000
- (k). Foreign Service Allowance (FSA) from January 2000 to September 2000 at US\$ 3108 per month.....  
Kshs.2,181,816
- (l). FSA at US\$4184 per month from October 2000 to  
February 2002..... Kshs.5,547,984
- (m) FSA at US\$5606 from January 2005 to  
December 2008..... Kshs.20,988,864
- (n) FSA at US\$8000 from January 2011 to  
January 2014..... Kshs.23,088,000
- (o) Refund of expenses from shipment of personal effects from Hague (Motor Vehicle plus clearance).....  
Kshs. 100,000
- (p) Loss of unshipped personal effects..... Kshs.3,000,000

He prays for judgment against the defendant for –

- (a) Kshs.67,710,865 plus interest at court rates
- (b) Accept damages plus interest at court rates
- (c) Costs

The defendant filed a statement of defence on 20<sup>th</sup> January 2005, which was amended by consent order recorded on 4<sup>th</sup> May 2006. In the Amended defence, the defendant admits the engagement of the plaintiff and his posting to the Kenya Mission at The Hague Counsellor and Head of Chancery. The defendant further admits to having recalled the plaintiff in accordance with transfer policy under the Service Commissions Act. It avers that the plaintiff was initially required to report at Headquarters of the Ministry of Foreign Affairs on 3<sup>rd</sup> June 1999 but failed to do so. That he was given another chance to report on 30<sup>th</sup> December 1999 and a third chance to report by 22<sup>nd</sup> January 2000 but failed to do so. That a show cause letter was addressed to the plaintiff on 28<sup>th</sup> January 2000 in accordance with the law following his refusal, neglect or failure to report back to Headquarters.

The defendant avers that the plaintiff was never dismissed but deserted duty following which he as retired in public interest on grounds stated in his show cause letter.

Both parties called witnesses at the hearing. The plaintiff testified on his behalf while the defendant called MARY NJERU NGURIMU, a Principal Human Resource Management Officer serving as Deputy to the Director Human Resource Management at the Ministry of Foreign Affairs. The parties thereafter filed and exchanged written submissions.

### **Determination**

The issues for determination are whether the termination of the plaintiff's employment was in violation of Sections 28, 34 and 40 of the Service Commissions Act, whether the termination was unreasonable and in breach of the Rules of Natural Justice and if the plaintiff is entitled to the damages sought.

The defendant raised another issue which I believe is a preliminary point to be disposed of first that is, whether the plaintiff was an employer of the Government at the time of filing this suit.

According to the defendant, the plaintiff having accepted his retirement and drawn his pension which he is still enjoying, is estopped from and has no *locus standi* to bring this suit. The plaintiff cites the case of *Nurdin Bandali -V- Lombank Tanganyika Limited (1963) E.A.*, the case of *Kenya Prots Authority -V- Industrial Court of Kenya and Another C. A No. 236 of 2012* and Section 12(2) of the Employment and Labour Relations Court Act.

The plaintiff did not respond to this issue as it was raised in the submissions. It is a cardinal rule that parties are bound by their pleadings. The defendant did not plead the issue of *locus standi* in its defence. Submissions are not pleadings and cannot be used to found a cause of action or a defence.

Be that as it may, the plaintiff's claim is for unfair termination of his employment. His complaint is that the defendant wrongfully terminated his employment through his retirement in public interest. The defendant conceded that the plaintiff is earning a pension which is paid to him by virtue of his having been retired from the service of the defendant. It is this court that is clothed with jurisdiction to inquire into and determine whether the termination or rather, the retirement in public interest was unlawful, and if the plaintiff is entitled to the remedies, he seeks. His claim is brought under Section 12(i)(a), of the Employment and Labour Relations Court Act which gives jurisdiction to this court to determine disputes relating to or arising out of employment between an employer and an employee.

I therefore find that the case is properly before this court and the plaintiff has locus to bring the suit as he did.

The plaintiff has stated that the termination of his employment was precipitated by differences between him and the Ambassador at the Hague. He however testified that this is what he suspected. He did not raise any tangible evidences to prove this averment. The plaintiff further averred that the termination of his employment was in violation of Sections 28, 34 and 40 of the Service Commissions Act but does not demonstrate how. He however produced copies of the Service Commission – Regulations and not the sections.

The said Regulations provide as follows –

#### **28. Absence from duty without leave**

***Where a public officer is absent from duty without leave or reasonable cause for a period exceeding twenty-four hours and the duty without public officer cannot be traced within a period of ten days from the commencement of such absence, or if traced no reply to a charge of absence without leave is received from him within ten days after the despatch of the charge to him the authority empowered to dismiss him may summarily dismiss him.***

#### **34. Proceedings for dismissal of Officer in Job Group 'L' or above**

***(1) Where an authorized officer considers it necessary to institute disciplinary proceedings against a public officer to whom this regulation applies on the ground of misconduct which, if proved, would his opinion, justify dismissal from the public service, he***

shall, after such preliminary investigation as he considers necessary, and after consulting the Attorney-General ~as~ to the terms of "the charge or charges, forward to the public officer a statement of the charge or charges framed against him together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based; and shall invite the public officer to state in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate himself.

(2) (a) If the public officer does not furnish a reply to a charge or charges forwarded under paragraph (1) within the period specified, or if in the opinion of the authorized officer he fails to exculpate himself, the authorized officer shall forward to the Commission copies of the statement of the charge, or charges, the reply, if any, of the public officer, and the comments of himself and, where applicable, of the head of department thereon, and the Commission shall appoint a committee, which shall consist of not less than three members, to investigate the matter.

(b) The chairman of the committee shall be a judge, magistrate or a public officer with legal qualifications, and all members shall be selected with due regard to - the standing of the public officer concerned.

(c) The head of the public officer's department or the authorized officer concerned shall not be a member of the committee.

(3) The committee shall inform the public officer that on all specified day the charges made against him will be investigated and that he shall be allowed or, if the committee so determine, shall be required to appear before it to defend himself.

(4) If witnesses are examined by the committee, the public officer shall be given an opportunity of being present and of putting questions on his own behalf to the witnesses, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(5) The committee may permit the authorized officer or the public officer to be represented by a public officer or "an advocate;

Provided that where the committee permits the authorized officer to be so represented it shall permit the public officer to be represented in a similar manner.

(6) If during the course of the investigation grounds for the framing of additional charges are disclosed, the authorized officer shall follow the same procedure as was adopted in framing the original charges.

(7) The committee, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the committee shall include—

(a) a statement whether in the committee's judgment the charge or charges against the public officer have been proved and the reasons therefor;

(b) details of any matters which in the committee's opinion aggravate or alleviate the gravity of the case; and

(c) a summing up and such general comments as will indicate clearly the opinion of the committee on the matter being investigated;

but the committee shall not make any recommendation regarding the form of punishment to be inflicted on the public officer.

(8) The Commission, after consideration of the report of the committee, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer the matter back to the committee for further investigation and report.

(9) The Commission shall decide on the punishment, if any, which should be inflicted on the public officer or whether he should be required to retire in the public interest.

(10) The provisions of this regulation shall apply to a public officer Job Group "L" or above.

#### 40. Retirement on grounds of public interest

(1) If an authorized officer, after having considered every report in his possession made with regard to a public officer, is of the opinion that it is desirable in the public interest that the service of such public officer should be terminated on grounds which cannot suitably be dealt with under any other provisions of these Regulations, he shall notify the public officer, in writing, specifying the complaints by reason of which his retirement is contemplated together with the substance of any-report or part thereof that is detrimental to the public officer.

(2) If, after giving the public officer an opportunity of showing cause why he should not be retired in the public interest, the authorized officer is satisfied that the public officer should be required to retire in the public interest, he shall, in the case of public officers to whom regulations 34 or 36 apply, forward to the Commission the report on the case, the public officer's reply and his own recommendation, and. the Commission shall decide whether the public officer should be required to retire in the public interest.

**(3) Where the public officer is one to whom regulation 34 or regulation 36 does not apply, the authorized officer, if satisfied as aforesaid, may himself retire the public officer in the public interest.**

**(4) Where a public officer is retired in the public interest, the Pensions Branch of the Treasury shall be furnished with full details of the case by the authorized officer.**

In his evidence, the plaintiff admitted that he was recalled from The Hague in May 1999 when he was given two weeks to report to Headquarters but failed to do so. He was again recalled in December 1999 but did not comply until 28<sup>th</sup> February 2000. He admitted writing a letter of apology on 29<sup>th</sup> February 2000. (Refer to page 38 of plaintiff's list and bundle of documents). He admitted that on 28<sup>th</sup> December 1999 he issued a *note verbale* requesting for visas for himself and family to travel to the USA meaning that he did not intend to return to Headquarters. He only returned to Kenya after diplomatic passports for himself and his family were withdrawn.

The plaintiff further admitted that he reported back to Kenya and found the Ministry Disciplinary Committee was discussing his case on 29<sup>th</sup> February 2000. That is the day he wrote the letter of apology which is reproduced below –

*“Martin W. Nguru*

*Ministry of Foreign Affairs and I. C.*

*Dr. S. J. Kosgei*

*Permanent Secretary*

*Ministry of Foreign Affairs and International Cooperation*

*NAIROBI*

*Madam P. S.*

***APOLOGY FOR MISCONDUCT***

*I write to beseech your personal forgiveness and mercy for my conduct. I know it is a very serious case of indiscipline and that is why I am kindly requesting you, Madam, to pardon me. I sincerely apologise to you, The Ambassador and the Ministry at large for my misconduct.*

*I am willing to continue serving in this Ministry and I would be very grateful Madam if you could give me a second chance.*

*Yours Sincerely,*

*Martin W. Nguru”*

Regulation 28 of the Service Commissions Regulations provides for summary dismissal where an employee is absent without permission. The plaintiff's notice to show cause letter dated 27<sup>th</sup> January 2000 clearly stated that the office intended to dismiss him from service on account of desertion of duty with effect from 22<sup>nd</sup> January 2000. In response to the said letter the plaintiff wrote that –

*“I wish to explain that my failure to report on duty not later than 22<sup>nd</sup> January 2000 was not intended to abscond myself from duty without permission as I had in my letter of 21<sup>st</sup> January 2000 applied for unpaid leave to enable me pursue my studies. I therefore deemed my application to be under consideration.”*

The plaintiff did therefore take leave before the leave was approved. That leave application was responded to by letter dated 3<sup>rd</sup> February 2000 in which the defendant stated –

*“The question of your study leave can only be handled at the Headquarters once you complied (sic) with the instructions to report as this was quite unrelated issue to your recall.”*

The plaintiff was therefore clearly absent without permission as stated in the show cause letter up to 28<sup>th</sup> February 2000 when he reported back to find that the Ministerial Committee was considering his case of desertion of duty. His apology meant that he admitted that he was guilty of the charge against him.

Regulation 34 and 40 of the Service Commission Regulations in my view are not relevant in the plaintiff's case as he was never charged under Section 34. Further his retirement in public interest was not under Regulation 40 but under Regulation 28. Regulation 40 provides that the same is only applicable where the officer is to be retired in public interest **“on grounds which cannot be suitably be dealt with under any other provisions of these Regulations...”** In the plaintiff's case the Ministerial Disciplinary Committee had already considered his case under Regulation 28 and determined that he should be summarily dismissed.

The Public Service Commission therefore only reduced the severity of the punishment to enable him access his terminal benefits and pension which he would have lost had he been dismissed from service.

For the foregoing reasons I find that the retirement of the plaintiff in public interest was in accordance with the Regulations under the Service Commissions Act and that there was valid reason for so doing.

With respect to the remedies sought by the plaintiff, they are in relation to the period after he ceased being in the employment of the defendant. He admitted in his testimony that he was paid terminal dues and is in receipt of his monthly pension. The prayers in respect of future earnings are not legally or contractually justifiable. As was stated by Riika J. in the case of **D. K. Njagi Marete -V- Teachers Service Commission (2013) eKLR** –

*“This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way. In **Industrial Court Cause No. 1722 of 2011 between David Mwangi Gioko and 51 Others -V- Nairobi City Water and Sewerage Company Limited [2013] eKLR** and the unreported **Industrial Court Cause No. 611 [N] of 2009 between Maria Kagai Ligaga -V- Coca Cola East Africa Limited**, this Court found that in examining what remedies are suitable in unfair employment termination, the Court has a duty to observe the principle of a fair go all round.*

*A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 years from the same public coffers, from which the Claimant is currently drawing salaries and allowances. The Court would facilitate double remuneration of the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round.*

*In the **High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani -V- Kenya Revenue Authority**, Ojwang’ J. stated that it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational engagement outside the defendant’s employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration. The Claimant has moved on, and that he is serving as a Judge, attests to his sharp intellect, professionalism and high level of employability. The question whether he is likely to find occupational engagement outside the TSC Outfit, is spent. The High Court observed that the breach of the employment contract coalesced into one broad damage, and went on to award damages under one head. This High Court decision, agrees with the decision of this Court in the case of **Maria Kagai Ligaga**, where the Court upheld the principle of fair go all round; refused to grant anticipatory salaries and allowances; and declined to award multiple damages. The rationale was that employees must not be encouraged to replicate injuries, and multiply remedies. To his credit, the Claimant prays for general damages as an alternative to statutory compensation.”*

I find no merit in the suit and dismiss it in entirety. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**