



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2311 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th September 2019)

PETER MAINA MWANIKI CLAIMANT

VERSUS

PRINCIPAL SECRETARY,

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT1ST RESPONDENT

DIRECTOR, PROBATION AND

AFTERCARE SERVICE..... 2ND RESPONDENT

MS. ELIZABETH JUMA KHADULI

DPO KAJIADO.....3RD RESPONDENT

MR. HENRY O. OMOSA DHRM..... 4TH RESPONDENT

MINISTRY OF INTERIOR & COORDINATION

OF NATIONAL GOVERNMENT.....5TH RESPONDENT

MR. S.M. MANG’ALE.....6TH RESPONDENT

MRS.M.W. NDEGWA 7th REPENDENT

P.S MADAM JOSEPHTA MUKOMBE

MINISTRY OF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT..... 8th RESPONDENT

PUBLIC SERVICE COMMISSION (PSCK) 9th RESPONDENT

JUDGEMENT

1. The Claimant, Peter Maina Mwaniki filed this claim vide a Memorandum of Claim on 05/01/2015 and later filed an Amended Claim dated 02/11/2015 against 9 Respondents with the Hon. Attorney General as the 1st Respondent; the 2nd Respondent being the Director of the Department of Probation and Aftercare Services; the 3rd Respondent being the DPO of Kajiado District Probation office.

2. He avers that by a written agreement dated 28/12/2009, he was employed by the Respondents as their Probation Officer on permanent and pensionable terms and started working on 29/12/2009 continually for 5 years when his contract was maliciously, unprocedurally and illegally terminated.
3. That on 11/07/2013, the 2nd Respondent gave him a letter containing 5 allegations which he was required to respond to within two weeks but that no details of the charges were ever given to him despite his many requests for the same.
4. That the 2nd Respondent then maliciously transferred him to Marsabit before he could respond to the allegations and ensuring that he did not pursue his law degree from Mount Kenya University where he was an evening class student. That this is what made him file the abovementioned complaint on 28/11/2013 which led to the 2nd Respondent lying to the Ministry that he had deserted duty on 23/11/2013 when by then he was on a 45 day leave from 22/11/2013.
5. That the Respondents stopped his salary and allowances with effect from 01/12/2013 without any warning or reasons 3 days after he had filed a complaint with the Ministry of abuse of power against the 2nd and 3rd Respondents.
6. That this was aimed at subduing him to silence out of fear of being denied a source of income and which is a violation of labour laws and his constitutional rights to property and that the 3rd Respondent who is a blood relative of the 2nd Respondent even told him that the Probation Office has its owners and that she would make sure he would be sacked.
7. He continues to aver that on 14/02/2014, he was involved in a road accident in Marsabit while on duty and referred to Nairobi for specialised treatment on the same day and that the 2nd Respondent did not assist in any way despite him being admitted for months.
8. That the 2nd Respondent only ordered a Mr. David Muriithi Mbui to take to him the sick sheet forms for the doctors to fill and also to be informing the 2nd Respondent about the Claimant's progress. That after being discharged, he returned back to his work station even though he was not being paid yet and that on 13/04/2014, he took the P3 and accident abstract forms involving GKA 295N to the CPO Marsabit, Mr. Gutola for forwarding to Nairobi.
9. That the 2nd Respondent instead directed that he takes the forms to the 4th Respondent who told him there were no P3s and abstracts in the Ministry and that he should not to return to Marsabit but await a certain lethal letter.
10. That he thereafter got a letter effectively sacking him on 22/10/2014 on among other grounds that his general conduct and work performance as a probation officer had fallen below the expected standard of a public officer. That the Ministry slammed him with a backdated dismissal letter without according him a chance to be heard and that his dismissal was therefore unfair on account of procedure.
11. That he worked for 13 months without any pay with the 4th Respondent declaring that his salaries would never be paid and that during his years of service, he earned several promotions which is proof that his work was above average.
12. The Claimant avers that he appealed to the 9th Respondent, the Public Service Commission in December 2014 and despite furnishing the commission with documents and a flash disk containing audios touching on the matter, it upheld his sacking for desertion and gross misconduct.
13. That his Appeal was disallowed in a letter dated 06/05/2015 which he got after tracking it with a lot of difficulties. That he has never been given his Certificate of Service and he prays for judgment against the Respondents for:-

1. An Order to the Ministry of Interior and Coordination of National Government to immediately release his unpaid 13 months' salary of Kshs. 548,860/= to enable him get treatment for his leg and meet his financial obligations.

2. A declaration that withholding his 13 months' salary is a violation of Section 17(1) of the Employment Act and the Constitution of Kenya.

3. An Order that the 2nd and 4th Respondents be jailed for 2 years and be fined Kshs. 100,000/= for illegally and maliciously withholding his salary and giving a fake reason that leads to his sacking.

4. A declaration that the dismissal was unfair and malicious.

5. 12 months' salary in compensation at Kshs. 506,640/= for unfair dismissal.

6. One month's salary in lieu of notice.

7. The Respondents to pay the accrued interest from HELB at the rate of Kshs. 5,000/= per month from December 2013 up to the time the case ends which is charged by HELB for defaulting payment.

8. An Order for the 2nd Respondent to fill and sign the WIBA and send them to the relevant authority to enable him get examined and get his compensation which was his right.

9. Damages for preventing him to study Law at Mount Kenya University.

10. An Order for the PS Ministry of Interior and Coordination of National Government to pay him periodical payments to enable him and his family survive and to get good medication for the leg that was injured.

11. All the adverse letters in his file No.PF. 2009129801 for PETER MAINA MWANIKI.

12. Compensation for mental torture and trauma caused upon him and his family after the dismissal and withholding of his salary.

13. This Court to review the decision to dismiss him from employment of the Respondents and find that the dismissal was irregular, unprocedural and in breach of the tenets of natural justice. That the Claimant has suffered permanent disability while in the service of the Respondents that will require him to seek medication for life.

14. An Order for the Respondent to pay the Claimant General Damages for loss of salary, allowances and career.

15. An Order for the Respondent to reinstate the Claimant to its employment with immediate effect and with full benefits since 23/11/2013. Alternatively, considering the Respondent's work environment, the Ministry should be ordered to pay him all his salaried and benefits for all the remaining time.

16. A declaration that the Constitution does not give an employer the right to dismiss the employee without observing the procedural guarantees given under Sections 41 and 45 of the Employment Act 2007.

17. Costs of this suit.

18. Interest of the withheld salary.

19. Interest of 17 and 20 above.

20. Exemplary, aggravated and special damages.

21. Any further or other relief that this Honourable Court may deem just and fit to grant in the circumstances.

14. The Respondents filed their Response to Memorandum of Claim dated 17/03/2015 admitting that the Claimant was an employee of the State Department of Coordination of National Government. They aver that the Claimant was in gross misconduct because:-

i) He was involved in shylocking business contrary to Section G21 (2) of the Public Service Code of Regulations to which he received warning letters dated 27/06/2013 and 09/03/2012;

ii) He was in contempt of Court by referring to a matter that was pending determination by the court;

iii) He turned the state office into a business enterprise by bringing a personal photocopying machine for commercial purposes contrary to Section 11 of the Public Officers Ethics Act to which he received a warning letter dated 09/05/2013;

iv) He obtained money from several members of the public by false pretence, by posing to be a Criminal Investigating Officer and using the state probation office to con the public to which several complaints were received by the Respondents;

v) Failing to declare that he was a previous convict in the PSC2 form when he had been previously convicted in Criminal Case No. 6625/2005 contrary to section E.7(3) of the Public Service Code of Regulations; and

vi) He used abusive and insulting language to his employer or to his superior leading to his several transfers.

15. They aver that the Claimant had been served with several warnings and show cause letters long before his service was terminated and that his salary was lawfully stopped as he had deserted duty from 23/12/2013.

16. That the Claimant was bound by the Public Officers Ethics Act, 2003 to maintain the integrity of the office and as such, could not be entrusted with a public office and that he also owed duty to the public to not improperly enrich himself.

17. That the Claimant was granted a fair hearing as he was given a chance to make his representations in accordance with Section 41 of the Employment Act and that he did not exhaust all the administrative mechanisms available to solve the dispute before moving to Court. That the orders prayed by the Claimant are not justified and he is therefore not entitled to the same at all.

18. That the Claimant was bound by **Articles 73 and 75 of the Constitution** on the exercise of authority as a state officer and how such officer ought to behave whether in public or private life. That the Respondents made the decision to dismiss him upon hearing his defence and it prays that the Claimant's suit be dismissed with costs to the Respondents.

19. The Respondents also filed on 24/11/2017 a List of Witnesses being the 6th Respondent, S.M. Manga'le and the 3rd Respondent, Elizabeth Khaduli with attached Statements dated 21/11/2017.

Evidence

20. The Claimant testified in Court that his claim is for malicious termination, withholding of his salary from 2013 to date, violation of his constitutional rights, nepotism by his supervisors and unfair labour relations by the Director and the DPO.

21. In cross-examination, he admitted he had a criminal record before applying for the job and that he declared that in his P2 form but that in the form in Court, the same is not disclosed. That he was never interdicted, he does not know why his salary was stopped and that **Exhibit 23** shows he was on leave.

22. RW1, Elizabeth Juma testified that she would like to adopt her filed witness statement and Respondent's documents as evidence in Court. That she wrote two letters to the Claimant shown in the Claimant's bundle as **App 36 and 40** and that he had brought a photocopier to the office which he removed upon her telling him to. She stated that she never treated him with bad faith and that she dispelled the notion of malice in **paragraph 10 of App 40**.

Claimant's Submissions

23. The Claimant submits that that since the Defendant did not rebut his case, his pleadings remain unchallenged and that the fact that he was not taken through the laid down procedures makes the dismissal illegal, unprocedural and malicious.

24. That he could not have deserted work as alleged with **Exhibits 19, 20 and 20b** showing he was head counted on 30/12/2013 and that the Director even certified his documents. That despite all the allegations against him by the Respondent being of criminal nature, he fails to understand why he was not charged in a Court of law if the allegations were genuine and that no report was even booked at the police station.

25. He relies on the following case law which he also attaches in his submissions dated 24/09/2017:-

1. Civil Appeal Nos. 17 & 18 of 2015, County Assembly of Kisumu and 2 others vs. Kisumu County Assembly Service Board and 6 Others;

2. Petition 4 of 2015, Geoffrey Mworira vs. Resources Management Authority and 2 others;

3. Cause No. 435 of 2013, Mary Chemwono Kiptui vs. Kenya Pipeline Company Limited; and

4. Cause No. 60 of 2013, Hesbon Ngaruiya Waigi vs. Equitorial Commercial Bank Limited.

26. In his further submissions dated 20/06/2019, he submits that his salary was stopped without due regard to **Article 47 of the Constitution** on fair administrative action and that he prays for reinstatement as under **Section 49 of the Employment Act** because he was maliciously sacked.

Respondents' Submissions

27. The Respondents submit that the understanding of unfair termination of employment was elaborated by Lord Denning in the case of **British Leyland UK Ltd -v- Swift [1981] IRLR 91** where he stated:-

"The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair..."

28. That the Claimant has not proved that the termination was unfair and that all he has submitted is circumstantial while avoiding the real issues that necessitated his dismissal. That his dismissal was done pursuant to **Section 45(2) of the Employment Act** as the reasons for desertion from duty and gross misconduct were valid and the Claimant was given opportunities to make representations.

29. That his actions warranted the Respondent to summarily dismiss him as provided at **Section 44(3) and (4)(a-g) of the Employment Act** and that the evidence to buttress the said section is provided in **Exhibits 5, 8, 11, 13, 22, 23, 33, 36, 40** and the Response to the Claim.

30. That the Claimant has not demonstrated why he was the only employee among the rest to face numerous complaints and show cause letters as he alleges and that he deserted duty from 22/11/2013 to 03/01/2014 contrary to **Regulation G19(1) of the Code of Regulations**.

31. They submit that the claim for 13 months' withheld salary and accrued interest for HELB should be denied as they have failed the test and further, that the Claimant has not produced his employment contract before this Court to substantiate his allegations.

32. That the Claimant is also not entitled to any compensation having been dismissed from employment for a valid reason and procedural fairness and that the claim for unpaid salary is not provided for anywhere under the Employment Act. They cite **Civil Appeal No. 25A of 2013, Elizabeth Wakanyi Kibe -v- Telkom Kenya Ltd [2014] eKLR** where the appellate judges considered the expressions of Onyango J in **Engineer Francis N. Gachuri v Energy Regulatory Commission, Industrial Cause 203/2011** that there is no provision for payment of damages to the date of retirement because employment like any other contract provides for exit from the contract and that there is no guarantee of employment to the date of retirement.

33. The Respondents submit that the Court cannot lightly order reinstatement as an employee cannot be forced onto an employer and that the

Court must satisfy itself that very exceptional circumstances exist to warrant reinstatement.

34. That the Claimant contributed to his dismissal and that from the way he has conducted his case, it is difficult to reinstate him and that the three years within which the Claimant was to be reinstated lapsed on 22/10/2019.

35. In submissions dated 10/07/2019, it further submits that the Claimant violated **Section 27 of the Public Service Commission Regulations of 2005** on absence from duty without permission which led to the stoppage of his salary and which meant that the Claimant was suspended in accordance with **Section 24(2) and (3) of the Public Service Commission Regulations of 2005**.

36. That the Claimant has failed to rebut that the suspension or stoppage of salary was not anchored under the Code of Regulations and that in **Grace Gacheri Muriithi –v- Kenya Literature Bureau [2012] eKLR**, Ongaya J held that it would be unfair labour practice to pay the claimant during the time of suspension as the disciplinary process found him culpable.

37. That the Claimant in this instance case cannot hold the Court and the Respondents at ransom the way he has done since this case was filed and that his labelling this case as being a battle between two tribes is far from the truth. That this Court should strictly apply the Constitution and the law and not sympathise with the Claimant.

38. I have examined all the evidence and submissions of both Parties. The issues for this Court's determination are as follows:-

1. Whether the Respondent had valid reasons to dismiss the services of the Claimant

2. Whether due process was followed before dismissal.

3. What remedies to award in the circumstances.

1. Reasons for dismissal

39. The Claimant was dismissed vide a dismissal letter dated 22.10.2014 which states as follows:-

“Mr. Peter Maina Mwaniki

P.O. Box 19742 -00202

NAIROBI.

RE: DISMISAL FROM SERVICE

The office has established that your general conduct and work performance as a Probation Officer have fallen below the expected standards of a Public Servant The following acts of gross misconduct have been noted against you:-

Shy Locking Business

You have been involved in Shy Locking Business Contrary to Section G21 (2) of the Code of Regulations.

Arbitrator

While stationed at Kajiado, you acted as an arbitrator in a matter dial you knew was already before Court, pending determination. By so doing, you acted in contempt of Court by tampering with the matter contrary to die Code of Ethics as a Probation Officer. Note that it is the Court that promotes reconciliation and facilitates the settlement of dispute in amicable way of proceedings.

Turning the office into a Business Enterprise

You had turned the office into a business enterprise by bringing a personal Photocopying machine, which you used for commercial purposes contrary to Section II of the Public Officer Ethics Act.

Impersonation

You obtained money fraudulently from one Mr. Timothy Tisike by posing to be a Criminal Investigating Officer.

False Declaration

You did not declare in the PSC 2 forms completed on first appointment (29/12/2009) that you had a previous Conviction, Criminal Case number 6625 of 2005 at Kibera Law Courts, where you were charged and convicted with the offence of giving false information to a person employed in the Civil Service. By so doing, you were employed without the concurrence of the Authorized Officer contrary to Section E.7 (3) of the Code of Regulations.

Desertion

You absented yourself from duty without permission with effect from 23rd November 2013 upto and including 2nd January, 2014, a period of forty one (41) days. However, you resumed duty on 3rd January, 2014 and continued to perform your normal duties without giving valid reasons for your absence. You were therefore deemed to have deserted duty with effect from 23rd November, 2013.

In view of the above, it has been decided by the Authorized Officer on the advice of the Departmental Human Resource Management Advisory Committee in its meeting held on 21st August, 2014 that you be dismissed from the service with effect from 23rd November, 2013 on grounds of desertion of duty and gross misconduct.

In accordance with the Public Service Regulations, you are at Liberty to appeal against decision to the Public Service Commission through this office within six (6) weeks from the of this letter.

Enclosed, find Official Secrets Act Form for your completion and return it to this office duly witnessed. Also surrender your Civil Servant Identity Card to this office.

Signed

N. Omosa,

FOR: PRINCIPAL SECRETARY,

COORDINATION OF NATIONAL GOVERNMENT

Encl.

Copy to:

The Director,

Probation and Aftercare Service,

P.O. Box 42335-00100,

NAIROBI.

“

40. Before this dismissal, the Claimant told Court that he worked in various stations including Machakos, Kandara, Kajiado and Marsabit. He contended that on 11.7.2013 he was served with a show cause letter asking him to explain why disciplinary action should not be taken against him for various reasons.

41. The reasons for the show cause letter included corruption allegations, hijacking cases allocated to other colleagues and proceeding to handle them without express consent, soliciting for bribes, harassing and fleecing unsuspecting members of the public and masquerading as a CID officer and lastly converting a Government office into a private commercial enterprise.

42. The Claimant responded to the allegations denying them in total. He was thereafter transferred from Kajiado to Marsabit. It appears that the issues raised in the show cause letter either fizzled out or were left pending following the reply by the Claimant.

43. The RW1 who was the Claimant's immediate boss in Kajiado testified about the events that led to issuance of the show cause letter and in cross-examination, she indicated that the Claimant used to have a photocopier machine in the office.

44. She also stated that the Claimant used to carry out shylocking business in the office and that she even borrowed money from him once as per Appendix 46. She indicated that she had no evidence on the integrity issues concerning the Claimant but had received complaints about him from members of the public but the person in question denied issuing a bribe to the Claimant.

45. When Claimant testified, he was also cross-examined by Counsel for the Respondent and he admitted he had a criminal record prior to his appointment as a Probation Officer for which he indicated that he disclosed in his form PSC II but the PSCII form submitted in Court did not show this indication.

46. On the issue of desertion of duty, the Claimant established that he was on leave from 7/8/2013 for 45 days with effect from 22.11.2013 and the leave had been approved and he reported to Marsabit on 5/8/2013.

47. He also admitted he had a photocopier in Government premises which was wrong. He admitted he was reprimanded in Kajiado about his Court attendances. The Claimant also admitted receiving Appendix 6 and 76 in Respondent's documents, which concerned integrity issues.

48. From the above analysis, I deduce that from the letter of dismissal, reasons which are proved that would have warranted disciplinary

action against the Claimant are:- **“shylocking, doing business in the office, false declaration of his previous criminal record and some integrity issues”**. These issues if proved were valid reasons that would have warranted dismissal of the Claimant. This is in line with Section 43(2) of the Employment Act 20017 which states as follows:-

“(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

49. The issue of desertion was however not established as at the time Claimant is alleged to have deserted duty he was officially on approved leave.

50. From the forgoing analysis and based on the dismissal letter, the Respondent had valid reasons to initiate disciplinary processes leading to dismissal of the Claimant.

2. Due Process

51. The due process envisaged before dismissal of an employee is as provided for under Section 41 of the Employment Act which 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”.

52. The Respondent have not established that the Claimant was taken through any of these processes. His salary was stopped without any warning or notice or hearing. He was thereafter terminated without being subjected to any disciplinary hearing.

53. The Respondents insisted that they gave the Claimant an opportunity to be heard but no evidence of such a hearing even in form of minutes was produced. There is no letter inviting Claimant to any disciplinary hearing also. It is therefore my finding that the Claimant was dismissed without being accorded a fair hearing.

54. Having found as above, it follows that the Claimant was dismissed without due process and therefore the termination was unfair in terms of Section 45(2) of Employment Act which provides 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

(c) that the employment was terminated in accordance with fair procedure”.

3. Remedies

55. The Claimant sought various remedies from this Court. 1st is the payment of his withheld salary prior to dismissal which is from December 2013 to 22/10/2014 the date of the dismissal letter. Indeed the process was initiated without notice and without due process and I find the Claimant is entitled to payment of withheld salary upto 22/10/2014:-

1. 11 months x 41,020 = 451,220

2. I also award Claimant 1 months’ salary in lieu of notice = 41,020/=

3. In view of the unfairness in the process of dismissing the Claimant, I also award him 10 months’ salary as compensation for the same = 10 x 41,020/= 410,200/=.

Total = 902,440/=

4. Prayer for aggravated damages is not granted.

5. The Respondent will pay costs of this suit plus interest at Court rates.

Dated and delivered in open Court this 30th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya for Respondents – Present

Claimant – Present