



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1255 OF 2014

(Formerly High Court Civil Case No. 1512 of 2002 Consolidated with High Court Civil Case No. 8 of 2002)

Before Hon. Lady Justice Maureen Onyango

ISHMAEL OMULA EGALA.....1ST CLAIMANT

STEPHEN NDONGA AGADE.....2ND CLAIMANT

BENSON LUBANGA OGADA.....3RD CLAIMANT

NATHAN MUINDE KIMATU.....4TH CLAIMANT

MANASSEH AGANYA OTEGO.....5TH CLAIMANT

MARTIN OTIENO OLUNYA.....6TH CLAIMANT

GEORGE MAKORI ORINA.....7TH CLAIMANT

EVERSE TIBETEGEREZA BWIRE.....8TH CLAIMANT

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

On 20th September 2002, the Claimants instituted the suit herein against the Attorney General, on behalf of the Public Service Commission. They were contending their retrenchment on the ground that the proper procedure was not followed. They sought the following orders-

- a. Declaration that by 31st August 2000, each and every one of the Plaintiffs was a serving officer in the public service of Kenya in the Kenya Meteorological Department.
- b. Declaration that the retrenchment or earlier retirement of the Plaintiffs on or after 30th September 2000 was unlawful and wrongful.
- c. Declaration that in the circumstances of the case, the conduct of the Permanent Secretary for the time being responsible for the matters relating to the Plaintiff's service as public officers was fraudulent and a malicious procurement of breach of the Plaintiff's contracts of service as public officers.
- d. Declaration that the action of the Directorate of Personnel to employ and deploy 32 trainee officers in the Kenya Meteorological Department on 1st October 2000, some of whom took over the duties of the Plaintiff, was inconsistent with constitutional requirement that the Public Service Commission is responsible for all appointments in the public service. To the extent of the inconsistency the employment and deployment is null and void.
- e. An order for damages for wrongful and unlawful termination of

the Plaintiff's contracts of service in the public service of Kenya to be paid by the Defendants to the Plaintiffs taking account of the

matters pleaded and specified in paragraph 19 of the Plaint and such other circumstances as to the court will be just.

- f. An order for exemplary damages for malicious procurement of breach of the Plaintiff's contracts of service by the Defendants.
- g. An order reinstating the Plaintiffs to their core positions in the Kenya Meteorological Department and therein to serve until voluntary retirement or until their services are lawfully and constitutionally terminated.
- h. Costs.
- i. Such other order as the court deems fit and just to grant in the circumstances.

The Respondent filed a Memorandum of Appearance on 11th October 2002 in HCCC 1512 of 2002 and 27th January 2003 in HCCC 8 of 2003, but did not file a defence. As such, on 7th May 2003, the Claimants filed a Notice of Motion Application dated the same day in which, they sought the following orders-

- a. This application is certified urgent and heard ex parte.
- b. Judgment be entered against the Defendant as prayed for in paragraphs (a), (b), (c), (d) (g) and (h) of the Plaints herein as consolidated.
- c. The suits as consolidated be set down for hearing and assessment of damages as prayed for in prayers (e) and (f) of the Plaints.
- d. Costs of the application be provided for.

On 16th June 2003, Aluoch J. issued a Preliminary decree, granting the following orders-

1. That judgment be and is hereby entered against the Defendant as prayed for in paragraphs (a), (b), (c), (d), (g) and (h) of the plaints herein as consolidated, the orders being:
 - a. That it is hereby declared that by 31st August 2000 each and every one of the Plaintiffs was a serving officer in the Public Service of Kenya in the Kenya Meteorological Department.
 - b. That it is hereby declared that the retrenchment or early retirement of the Plaintiffs on or after 30th September 2000 was unlawful and wrongful.
 - c. That it is hereby declared that in the circumstances of the case, the conduct of the permanent secretary for the time being responsible for the matters relating to the plaintiffs' service as public officers was fraudulent and malicious procurement of breach of the Plaintiffs' service as public officers was fraudulent and a malicious procurement of breach of the Plaintiffs' contracts of service as public officers.
 - d. That it is hereby declared that the action of the Directorate of Personnel to employ and deploy 32 trainee officers in the Kenya Meteorological Department on 1st October 2000, some of whom took over the duties of the Plaintiffs was inconsistent with the constitutional requirement that the Public Service Commission is responsible for all appointments in the Public Service. To the extent of the inconsistency the employment and deployment is null and void.
 - e. That the Plaintiffs are hereby reinstated to their core positions in the Kenya Meteorological Department and therein to serve until voluntary retirement or until their services are lawfully and constitutionally terminated.
 - f. That the Defendant to pay the Plaintiff costs of this suit.
2. That the suits as consolidated be set down for hearing and assessment of the damages prayed in prayers (e) and (f) of the Plaints.
3. That the costs of this Application are awarded to the Plaintiffs.

The Respondent filed an Application dated 9th July seeking to set aside the interlocutory judgment but it was dismissed. Additionally, on 5th March 2004, the Ojwang J. refused to grant the Respondent the orders sought in their Application dated 27th October 2003 and filed on 29th October 2003, seeking to have the orders issued on 7th October set aside, vacated or reviewed and to have the Respondent's earlier Application of 9th July 2003 reinstated.

Further, on 30th September 2010, the Mwera J. issued the following orders regarding the matter-

- a. That the prudent thing to do of this case is to begin to put into effect Ojwang J. direction that the 8 Plaintiffs be reinstated.
- b. That there is a preliminary decree in force which is neither reviewed nor set aside.

c. That the Plaintiffs then should be reinstated with effect from 1st October 2010.

d. That in 14 days thereafter, they will file and serve the Attorney General the aspects/items for which the intended

assessment (for damages/payments) to be based (sic).

e. That the Attorney General to respond in the following 28 days and only unresolved items to proceed for determination before the court.

f. That outstanding items to be laid before court on a mention by the parties after the Attorney General's recreation to the proposals to settle.

The Respondent filed a Notice of Appeal on 29th September 2010, but never lodged the appeal. The Claimants were reinstated, remunerated appropriately and the arrears paid. The only issue for determination is therefore the assessment of damages.

In their submissions filed on 26th February 2019; the Claimants submit that pursuant to regulation 20 of the Public Service Commission Regulations, an officer seeking to abolish a public service office was required to send the recommendations, reasons for abolition and the names of the officers whose employment would be terminated, to the Public Service Commission. This was not done, as such, it was unconstitutional. Further, the Claimants were not in the list of the 110 officers who had been identified for early retirement.

The Claimants further submit that they ought to have been sensitized and adequately prepared for their retrenchment before the letters of 31st August 2000 and 28th September 2000 were issued to them. It is their further submissions that unless any action in redundancy, retrenchment or abolition of office strictly adheres to the laid down procedures and is carried out by the relevant organ of the employer, it shall be null and void.

They further submit that the Repealed Employment Act did not apply to their case and therefore the case of *Unilever Kenya Limited vs. John Kememia Gitau* does not bind the Court in the circumstances. As such, the reasonable period for purposes of assessing damages is 12 months. They rely on the case of *Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR*. They urged the Court to award them exemplary damages to act as punishment and as a deterrent mechanism.

The Claimants submit that the Respondents should be held in contempt for failing to obey the orders issued on 16th June 2003 for over a decade.

The Respondent filed his submissions on 22nd May 2019. It submits that the Claimants are not entitled to damages for wrongful and unlawful termination of employment since they were reinstated to their positions and paid salary arrears dating back to 1st October 2000. He therefore submits that this should be treated as reasonable compensation.

The Respondent contends that the persons alleged to have replaced the Claimants were trainees and never took over their duties.

It is submitted that should the Court find that the Claimants are entitled to damages for wrongful and unlawful termination, then they should be awarded 3 months' notice pay. He relies on the case of *Kenya Bus Services Limited vs. Meleksadik Okutoi, Nairobi Court of Appeal No. 145 of 1998*.

The Respondent submits that the Claimant's retrenchment was part of the reforms to be carried out in the public sector to restore efficiency and efficacy. That the Claimants were retrenched on account of lack of minimum requirements for the scheme of service while the 4th Claimant was retrenched for poor performance. It is submitted further that the principles of natural service were adhered to in the process as the Claimants' appeal were heard.

It is further submitted that the facts surrounding the Claimants' retrenchment did not meet the threshold for awarding exemplary damages as set out in the case of *Rookes vs. Barnard [1964] 1 ALL ER 367*. It is the respondent's submissions that the Claimants are not entitled to the costs of the suit as they have not proved their case on a balance of probabilities.

Determination

I have considered the pleadings, the evidence adduced and submissions by parties and find that the following are the issues for determination before this Court-

a. Whether the Claimants are entitled to the damages sought and if so, how much should be awarded.

b. Whether the Claimants are entitled to costs of the suit.

Damages

The issue whether the Claimants are entitled to damages for wrongful and unlawful termination employment is no longer an issue for determination herein as the same was decided upon by Aluoch J. in her preliminary decree of 16th June 2003 and Mwera J. in his order of 20th September 2010 which have never been set aside or vacated.

Paragraph 3 of the preliminary decree was to the following effect–

“That the suits as consolidated be set down for hearing and assessment of the damages prayed in prayers (e) and (f) of the Plaints.”

Further paragraph (d) of Mwera J. order was to the following effect-

“That in 14 days thereafter, they will file and serve the Attorney General the aspects/items for which the intended assessment (for damages/payments) to be based (sic).”

Additionally, parties were directed to come up with proposals on how to settle the issue. This is a clear indication that the issue of the Claimants’ entitlement to damages was settled. The court further notes that the Respondent never filed a defence to deny the liability and that the reinstatement of the claimants was an admission that the respondent had accepted the decision of the court.

On the issue of how much the Claimants are entitled to; the applicable law is the Repealed Employment Act which was in force at the time of their retrenchment. The law does act retrospectively. On the issue of whether on the issue of whether general damages are payable in a contract of employment, the Court of Appeal in **Directline Assurance Company Limited vs. Jeremiah Wachira Ichaura [2016] eKLR** held as follows-

*“We now turn to consider whether the respondent was lawfully entitled to an award of damages in the sum of Ksh.4,200,000/- as general damages. Both parties concede that the applicable law to the dispute was Cap 226. The general rule then was that the court could not award general damages for breach of contract and or employment terms. This was succinctly summed up in the case of **Securicor Courier (K) Ltd v Benson David Onyango and Ann, Civil Appeal No. 323 of 2002 (UR)** as follows:*

As general damages for breach of contract, this court has repeatedly held that general damages are not awardable for breach of contract...’

*Further in the case of **Joseph IleliKikumbi v Central Bank of Kenya (supra)** it was held-*

*“The law with respect to the quantum of damages payable to an employee who is wrongfully dismissed is now well settled in this jurisdiction. When the contract of service contains a termination clause, the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause regardless of the nature of the Employment following the unlawful termination of such service contract. There is then breach of contract and the measure of compensation or indemnity or general damages or special damages is the loss of the employee would incur during the stipulated period of the termination clause or notice ...” see also **Central Bank of Kenya vs Nkabu (supra)** “*

As earlier established, the Claimants are not entitled to 12 months’ compensations since the current employment Act is not applicable to the situation. As such, I award them compensation equivalent to 3 months’ gross salary at the time of termination which would have been a reasonable period for them to be sensitized and prepared for their retrenchment, had the right procedure been followed. The Court of Appeal in **Kenya Bus Services Limited vs. Meleksadik Okutoi [SUPRA]** held as follows-

“The Conduct of the defendant may have been reprehensible but this cannot change the well-known legal principles upon which damages are calculated in such cases. Since no evidence was led on the length of notice applicable in this case we think that three months would be reasonable.”

On the issue of whether the Claimants are entitled to exemplary damages, I find in the affirmative as the Permanent’s Secretary actions were found to be null and void and unconstitutional. The Court in **Benedict Munene Kariuki and 14 Others vs. The Attorney General [2011] eKLR** held that:

“[55.] This holding encapsulates my position on awarding aggravated and exemplary damages in cases where unconstitutional action has been challenged in a changed and improving political environment. I must take judicial notice of that fact in today’s Kenya and I am satisfied that no benefit was procured by the Moi regime in its obviously unconstitutional actions. Kenya’s Government has learnt from its past and the deterrent effect is alive and obvious. I also agree with the Respondents that in the circumstances, exemplary damages are not properly awardable noting the burden to the innocent tax-payer. Further I note that the Petitioners were not labouring for the “Second Liberation” in order to get monetary compensation but for the attainment of a higher ideal; a just society. That Society is slowly coming alive and their contribution by this judgment has been recognized.”

The Court of Appeal in **Gitibu Imanyara and 2 others –Vs-**

Attorney General [2016] eKLR held that although awarding exemplary damages was the Courts discretion and was appropriate in instances of constitutional violations, there were instances when a declaration order would suffice so as to balance the interests of the parties. I find that this is one instance that warrants the Court to exercise its discretion.

The Permanent Secretary’s violations cost the Claimants’ their means of livelihood for about 7 years while they were following up on this case. This is because Public Service Commission (PSC) failed to honour the order by Aluoch J. directing the Claimants to be reinstated. In any event, the court ordered that they be paid damages. As such, I award each of the Claimants exemplary damages in the sum of Kshs.500,000.00 each, to compensate for the delay by the Public Service Commission to reinstate them to their former positions and for the suffering they underwent for over 7 years before their reinstatement..

Conclusion

The claimants are each awarded –

Ishmael Omula Egala – 1st Claimant

1. Compensation at 3 months' gross salary

(21,906.50 x 3) Kshs.65,719.50

2. Exemplary damages Kshs.500,000.00

Total Kshs.565,719.50

Stephen Ndonga Agade – 2nd Claimant

1. Compensation at 3 months' gross salary

(25,370 x 3) Kshs.76,110.00

2. Exemplary damages Kshs.500,000.00

Total Kshs.576,110.00

Benson Lubanga Ogada – 3rd Claimant

1. Compensation at 3 months' gross salary

(15,363.50 x 3) Kshs.46,090.50

2. Exemplary damages Kshs.500,000.00

Total Kshs.546,090.50

Nathan Muinde Kimatu – 4th Claimant

1. Compensation at 3 months' gross salary

(18,775.50 x 3) Kshs.56,326.50

2. Exemplary damages Kshs.500,000.00

Total Kshs.556,326.50

Manasseh Aganya Otego – 5th Claimant

1. Compensation at 3 months' gross salary

(24,864.50 x 3) Kshs.74,593.50

2. Exemplary damages Kshs.500,000.00

Total Kshs.574,593.50

Martin Otieno Olunya – 6th Claimant

1. Compensation at 3 months' gross salary

(17,148 x 3) Kshs.51,444.00

2. Exemplary damages Kshs.500,000.00

Total Kshs.551,444.00

George Makori Orina – 7th Claimant

1. Compensation at 3 months' gross salary

(26,615 x 3) Kshs.79,845.00

2. Exemplary damages Kshs.500,000.00

Total Kshs. 579,845.00

Everse Tibetegereza Bwire – 8th Claimant

1. Compensation at 3 months' gross salary

(18,775.50 x 3) Kshs.56,326.50

2. Exemplary damages Kshs.500,000.00

Total Kshs.556,326.50

The costs of this suit are awarded to the Claimants plus interest at court rates from date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE