



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 1113 OF 2015**

**SAMMY EKATOROT NAWOI.....CLAIMANT**

**VERSUS**

**HON. ATTORNEY GENERAL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 6th December, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 29.06.2015 through Odhiambo & Company Advocates. He prayed for judgment against the respondent for:

- a) A declaration that disallowing the claimant's request for payment of salary arrears, promotions and upgrading covering the period the claimant was away from the service of the Government of Kenya pending the claimant's reinstatement because the claimant did not work during the said period is unconstitutional, unreasonable and self-defeating.
- b) If prayer (a) herein be granted, the Honourable Court be pleased to direct the respondent to pay the claimant salaries, consider and effect all the promotions and upgrading as legitimate expectation by the claimant covering the period the claimant was away from service of the Government of Kenya pending reinstatement and the inter-ministerial transfer effected by the respondent or adequate and reasonable compensation thereof.
- c) Payment of salary arrears in the sum of Kshs.538, 358 and incidental expenses in the sum of Kshs.64, 500.00 making a total of Kshs.606, 858.00.
- d) General damages to the claimant and his dependants during the period the claimant was interdicted, suspended, terminated from service until the date the claimant was reinstated.
- e) Costs of the suit.
- f) Any other or further relief the Hon. Court would deem just and fit to grant.

The respondent filed the reply to the memorandum of claim on 07.11.2017 through learned Litigation Counsel Christine Oyugi for the Attorney General. The respondent prayed that the Honourable Court to dismiss the claimant's suit with costs to the respondent.

There is no dispute that the claimant was employed in the Government of Kenya on 19.02.1996 as a clerk in the Ministry of Immigration and Registration of Persons in the Office of the Vice- President.

In 2008 the claimant was charged in the Senior Magistrate's Court at Lodwar with offences of procuring registration by false pretences contrary to section 320 of the Penal Code; and false assumption of authority contrary to section 104 (c) of the Penal Code. The criminal case was withdrawn on 15.09.2009 under section 87(a) of the Criminal Procedure Code and the claimant was discharged accordingly. After the arrest the claimant had been interdicted from the service on half salary.

After the discharge in the criminal case the claimant requested by the letters dated 20.05.2009 and 15.10.2009 to resume duty and the interdiction to be lifted. By the letter dated 16.12.2009, the claimant was suspended from the service effective 16.12.2009. He was informed that he'd not draw any salary but he'd draw house and medical allowances. He was not allowed to leave his duty station without his supervisor's permission. The letter was signed for the Permanent Secretary. By the letter dated 03.02.2010 the Permanent Secretary dismissed the claimant from service effective 11.11.2008 on account of gross misconduct. He was at liberty to appeal to the Public Service

Commission within 6 weeks from the date of the letter. The claimant appealed to the Commission and by the letter dated 07.09.2010 the Permanent Secretary informed the claimant that the Commission had considered his appeal against the dismissal but upheld the dismissal. The claimant was informed that he could apply for review of the Commission's decision in one year from the date of the letter.

The claimant applied for review and by the letter dated 07.09.2011 the Commission allowed the application for review. The decision was conveyed to the claimant by the Permanent Secretary's letter dated 15.09.2011 and the claimant would be reinstated on the payroll after confirmation that he had reported on duty by reporting to the Director of National Registration (Persons) for deployment.

By the letter dated 15.12.2011 the claimant made a claim for salary arrears from the date of interdiction 23.10.2008 through suspension and dismissal period to the date of reinstatement when the Commission allowed his application for review on 15.09.2011 and he resumed duty thereafter. The claimant stated that he had suffered following his predicament.

By the letter dated 10.02.2015 the Permanent Secretary informed the claimant that the Commission had by its letter dated 14.01.2015 considered but disallowed his request for payment of salaries, promotions and upgrading covering the period he was away from service pending reinstatement since the claimant did not work during the said period.

The claimant filed the suit. The respondent's defence is that the period the claimant claims to be paid withheld salaries he did not serve and therefore it must be treated as leave without pay.

The Court has considered the parties' respective cases, the evidence and the submissions. There is no dispute that the claimant's pay was withheld for the period in issue and as claimed. It is submitted for the respondent that under section 19(1) of the Employment Act, 2007 an employer is entitled to deduct from pay such amounts of money not exceeding the daily wage with respect to each day an employee is absent without permission or lawful cause. Further the respondent submits that under regulation 26(1) of the Public Service Commission Regulations, 2005 the Permanent Secretary as the Authorised Officer was entitled to stop the pay or salary of a public officer who has been absent from duty without leave or lawful cause or reasonable excuse for such period of absence. Further it is submitted that the Public Service Commission and the Permanent Secretary did not instigate the prosecution. The claimant is not entitled to promotions as claimed because the same was guided by schemes of service and the claimant has not established that he qualified for the promotions during his period of absence in issue.

The claimant failed to file submissions. The Court has considered the material on record. There is no dispute that the claimant was reinstated after the dismissal effective 11.11.2008. It is the law that reinstatement comes with full back pay. At reinstatement, the Commission imposed no conditions. Black's law dictionary 10th Edition defines "reinstatement" as placing again in a former state or position, to restore. Thus the effect of the reinstatement decision was to treat the claimant as though he had been in employment throughout the period of interdiction, suspension, and dismissal. Accordingly the claimant is entitled to the pay with respect to the period in issue making **Kshs.538, 358.00** being the undisputed computation by the claimant. The court follows the holding in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, thus, "The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."

The costs claimed at prayer (c) were not strictly proved and they are declined. As submitted for the respondent the claimant had no legitimate expectation to be promoted or upgraded during the period of interdiction, suspension and dismissal in issue and it is speculative for him to claim such promotions. The prayer will fail. The claimant offered no basis and justification for the other prayers and they will fail. The Court has considered the claimant's failure to file submissions and directs that the claimant will not be paid costs of the suit as each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) Payment of salary arrears during the period of interdiction, suspension, dismissal and consequential to the reinstatement by the Public Service Commission in the sum of **Kshs.538, 358.00** and by 01.03.2020 failing interest to be payable thereon from the date of filing the suit till full payment.
- b) Parties to bear own costs of the proceedings.

**Signed, dated and delivered in court at Nairobi this Friday, 6th December, 2019.**

**BYRAM ONGAYA**

**JUDGE**