



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 496 OF 2015

SAMUEL MWANZIA WAMBUA.....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 27.03.2015 through K.A. Nyachoti & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) General damages for unlawful termination of employment.
- b) Payment of pension.
- c) Costs and interest.

The respondent filed on 05.11.2015 the memorandum of reply to the memorandum of claim through learned Litigation Counsel Beatrice Akuno for the Attorney General. The respondent prayed that the suit be dismissed with costs to the respondent.

There is no dispute that the parties were in a contract of service. The claimant was employed by the public Service Commission in the Ministry of Immigration and Registration of Persons on 05.09.1978 on permanent and pensionable terms of service in the position of a clerk. He was promoted through the ranks and as dismissal on 08.05.2013 he held the position of Fingerprint Officer.

By the letter of gross misconduct and interdiction dated 08.05.2013, the claimant was interdicted from the service with immediate effect. It was alleged that investigations conducted by the Ministry about fraudulent issuance of a Kenyan National Identity Card to a Nigerian national one John Chidi Ani showed that on 19.08.2011 the claimant facilitated the issuance of the identity Card No. 23824776 to the said Nigerian national in the name of John Kimani Mathai at Kariokor Registration Office, Nairobi by entering his name in the Not Previously Registered Persons' Register in circumstances whereby that was not one of his core functions as a Fingerprint Officer. Further the claimant had failed to explain to the investigators the misconduct and was unable to produce the register to the investigators at the time of the questioning. Further the letter stated the claimant had failed to interrogate the supporting documents which were attached to the application by the Nigerian national and it was not the claimant's duty to do whatever he had done. The letter stated that the claimant's conduct amounted to gross misconduct under section 44 (3) and (4) (g) of the Employment Act, 2007. He was required to show cause in 21 days why dismissal proceedings should not go on by submitting his written representation. The letter was signed for the Permanent Secretary.

The claimant replied by his letter dated 24.05.2013 to the following effect:

- a) He was a Fingerprint Officer stationed at Kariokor Registration Office from 2009 up to 24.05.2013 when he was making his representations.
- b) His work as a Fingerprint Officer was to check fingerprints quality and sequence in all identity application forms at Kariokor office. However within the spirit of the core value of team work, he may undertake tasks outside his stated official duties.
- c) On 19.08.2011 he happened to be at the registration table and an applicant came with certified copies of official documents required for not previously registered application (NPR) and the applicant came with authority from the registrar in charge, the claimant was obliged to issue him with an application form Reg. 136A.
- d) He admitted that during the investigations the investigators summoned him and he confirmed that he was the one who had entered

the name of John Kimani Mathai in the NPR register on 19.08.2011. He had not failed to produce the register to the investigators because he had been shown the register by the investigators at the National Registration Bureau (NRB) headquarters.

e) He explained to the investigators all the stated information. The claimant pleaded that he was innocent.

The Ministerial Human Resource Management Advisory Committee meeting was held on 20.08.2013. The Committee deliberated the case and recommended that the claimant be dismissed on account of facilitating issuance of an identification card to a foreigner who was over age. The Committee noted that the misconduct was serious and touched on state security. The Permanent Secretary approved the recommendation and the case was forwarded to the Public Service Commission for approval and decision. By the letter dated 19.02.2014 the Commission conveyed that the claimant be dismissed from the service effective 08.05.2013 on account of facilitating issuance of Kenyan Identification Card No. 23824776 to a Nigerian National one John Chidi Ani in the name of John Kimani Mathai at Kariokor Registration Office, Nairobi by entering his name in the "Not Previously Registered Persons' Register, though that was not one of his core functions as a Fingerprint Officer; and the purported John Kimani Mathai was over age and the standard procedures were to subject him to a vetting process which the claimant failed to do. The letter addressed to the Principal Secretary stated that the claimant could apply for review. The Principal Secretary conveyed the Commission's decision by the letter dated 25.02.2014 and informed the claimant that he could apply for review of the Commission's decision within one year from the date of the letter. The claimant appealed (applied for review) by his letter dated 10.04.2014. The claimant stated that entering the name in the register was indeed not his function but he had undertaken the duty in good faith within the core value of team work. Further entering the name in the register did not guarantee issuance of the identification card because there were further procedures to be complied with. On failure to vet the officer, the claimant stated that the registrar had in section 22 of Reg. 136A certified that the applicant had given full information to guarantee the registration and the registrar's certificate stated the resume of late registration. He stated that he was innocent and that dismissal denied him all his benefits accrued over the service of 36 years.

The Principal Secretary forwarded the appeal to the Commission by the letter dated 05.06.2014. The Commission by the letter dated 27.08.2014 informed the Permanent Secretary that the dismissal of the claimant as a Fingerprint Officer II had been upheld and the case marked as closed. By the letter dated 21.10.2014 the claimant was informed that his application for review had been considered, disallowed and the case closed. Further the Commission by the letter dated 09.12.2014 replied the claimant's letter dated 26.11.2014 and conveyed that the review had been disallowed.

The respondent's case is that the claimant fundamentally breached the obligations under his contract of service; he carelessly performed duty which was his duty to perform carefully and properly; and he was reasonably suspected to have committed an offence. The conduct amounted to gross misconduct under section 44 (3) (4) (c) and (g) of the Employment Act, 2007. Further, the Director of National Registration of Persons had considered the claimant's representations and commended as follows:

- a) The claimant had failed to confirm beyond reasonable doubt that the applicant in issue got clearance from the Registration Officer in charge of the Kariokor Station.
- b) The claimant filed application forms Reg. 136A and 136C and made a dispatch note to the Identity Card Production Centre at the National Registration Bureau Headquarters.
- c) The applicant was overage and the claimant failed to subject him to vetting such as by interviewing him.
- d) There was no established link of conspiracy between the claimant and one Omollo the District Registration Officer in the registration of John Chidi Ani alias John Kimani Mathai.
- e) That the claimant was to be treated as a first offender who had served the Government for over 30 years without any adverse report and he should therefore be retired in the public interest.

The claimant testified to support his case and the respondent's witnesses were Joel Kaburu (RW1). RW1 confirmed that Luke Omollo the District Registration Officer in the registration of John Chidi Ani alias John Kimani Mathai was retired in the public interest. He also confirmed that the serial numbers on the register and the form in issue as exhibited were different. Further the forms exhibited showed that the Assistant Chief had authorised and further that Luke Omollo had authorised or approved. He stated that no criminal case had been initiated in the matter. Further on 28.08.2011 Luke signed and the I.D Card was issued. Further Luke was the main culprit but the claimant had participated – but the claimant had been summarily dismissed while Luke Omollo was retired in the public interest. RW1 further testified that it was the Registrar who could refer the applicant for vetting.

The respondent's witness No. 2(RW2) was John Kimani Njorio. He confirmed the processes in handling the claimant's case from interdiction to the disallowed review and as already set out earlier in this judgment. He confirmed that the claimant could perform duty outside his core roles but such extra duties needed to be assigned by the supervisor. He testified that documents supporting form 136A in issue were never shown to the Commission and the Commission never received a statement from Luke Omollo.

The claimant filed submissions through its advocates and the respondent through learned Senior Litigation Counsel Odukenya Wycliffe. The Court has considered the pleadings, the evidence and the submissions. The Court finds as follows.

To answer the **1st issue** for determination, the Court returns that the dismissal of the claimant was unfair for want of due process and want of genuine reasons as per sections 41, 43, 45 and 47(5) of the Employment Act 2007. First, while admitting that he made the entry in the register and which was not his core function, it has not been shown how the Committee, the Permanent Secretary or Principal Secretary and then the Public Service Commission resolved the claimant's case that he had acted within the Ministerial core value of team work and in good faith. Secondly the claimant was dismissed on account of failure to vet the over age applicant but RW1 testified that it was the duty of the Registrar to refer such an applicant for vetting. Thus the claimant was dismissed on account of failure to vet the over age applicant but which has not been shown to have been his duty. Third, the mandatory procedural step of hearing the claimant as per section 41 of the Act and which would have assisted the Committee, the Permanent Secretary or Principal Secretary and then the Public Service Commission

resolve the grey areas in the case was not undertaken and that failure clearly led to miscarriage of justice in the case. Fourth, the advisory by the Director of National Registration of Persons that the claimant be treated as a first offender as he otherwise had a clean record of service; and further that there was no established link of conspiracy between the claimant and one Omollo the District Registration Officer in the registration of John Chidi Ani alias John Kimani Mathai were both disregarded and upon unexplained grounds. Fifth, RW1 confirmed that Luke Omollo who was the main culprit in the case was retired in the public interest whereas the claimant who carried lesser responsibility and culpability was dismissed with loss of pension. The Court finds that the dismissal of the claimant was not proportionate in the circumstances of the case. Thus the Court returns that the claimant's dismissal was unfair both in procedure and substance.

While making that finding the Court further finds that it was remote for the respondent to invoke section 44 of the Employment Act in the manner it was urged. It was not established that the claimant had failed to perform his duty with due care and properly. Further there had been no reported or suggested criminal proceedings against the claimant as no evidence of reasonable suspicion in that regard was shown to have existed or proposed. Further the alleged fundamental breach of the contract of service as was alleged was not demonstrated at all.

To answer the **2nd issue** for determination, the Court has considered section 49 of the Employment Act, 2007. The Supreme Court (Mwilu – DCJ & VP, Ibrahim, Wanjala, Njoki, and Lenaola, SCJJ) in **Kenfreight (E.A) Limited –Versus- Benson K. Nguti [2019]eKLR**, held, “**32. When giving an award under Section 49 of the Employment Act, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. The Black’s Law Dictionary 9th edition at page 534 defines judicial discretion as follows: “the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not to act when a litigant is not entitled to demand the act as a matter of right.” 33. On award on damages, the Act limits the award a court of law can make to a maximum of 12 months’ salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-Section 4 of Section 49 of the Employment Act....”**

The Court is guided accordingly and considered the circumstances of the present case against the factors in section 49 (4) of the Employment Act, 2007. The claimant had a clean record of service. He desired to continue in employment until honourable retirement upon attaining 60 years of age. He had already served for a long period of time beyond 30 years. The aggravating factor is that he was not given an opportunity for a hearing to call witnesses and to explain him-self. However, the Court notes that in a way he contributed to his termination when the claimant without deep thought appears to have engaged and performed duty to make the entry outside his official duties of Fingerprint Officer II. That contribution is put at 25% and the claimant is awarded 9 months’ salaries in compensation at a gross monthly pay as at end of April 2013 and to be paid less due PAYE.

The Court has found that the termination was not proportionate and there was no reason to disregard the advisory by the Director of National Registration of Persons that the claimant be retired in the public interest. Proportionality is a guiding principle that the Court is required to uphold as per section 3 of the Employment and Labour Relations Court Act, 2011. The main culprit in the matter (per evidence by RW1) one Luke Omollo the District Registration Officer was retired in the public interest. Taking all that evidence and factors into consideration the dismissal is liable to being set aside as excessive punishment in the circumstances and replaced with retirement of the claimant in the public interest.

While making that finding the Court follows the South African decision cited for the respondent in **Nampak Corrugated Wadeville – Versus- Khoza (JA14/98) [1998]ZALAC 24** thus, “**A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.**” The Court has found that the dismissal was unreasonable especially because the main culprit in the case was retired in the public interest while the claimant was dismissed despite the balanced advisory by the Director of National Registration of Persons that retirement in public interest would be appropriate in view of the claimant's vested pension benefits and otherwise clean service of over 30 years.

The Court further follows its opinion in **Henry Kamau Ngare –Versus- Teachers Service Commission & Another [2016]eKLR**, thus,

“Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee’s right within the realm of employment law such as is recognized under section 5 of the Pensions Act and section 35 (5) and section 40 (1) (g) of the Employment Act, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41 (1) and 41(2) (b) of the Constitution of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee’s crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee. In the opinion of the court, to do so would amount to unjust enrichment on the part of the employer where the service pay or pension benefits are payable directly out of the employer’s resources as such pay is meant to compensate the service the employer would have already enjoyed from the employee. The court has further considered and persuaded itself that every person is entitled to social security under Article 43 (1) (c) of the Constitution of Kenya, 2010 and provisions that deny eligible employees from receiving their service pay or pensions benefits would undermine that right to social security. While that provision was not in force at the time of the cause of action in the present case, the court holds that in event of established poor performance, misconduct, gross misconduct or other adverse ground that would justify the dismissal of the employee, it is sufficient that the employer terminates the employment relationship and, where the grounds bear a criminal element, like it appears to have been the allegation in the present case, the matter should be remedied under the criminal justice system without depriving the employee the accrued pension benefits or service pay. The court therefore holds that contractual or statutory provisions that attach disciplinary action to depriving the employee pension benefits or service pay the employee has become eligible to be paid are unconstitutional because it amounts to unfair deprivation of the employee’s property and is unfair labour practice.”

The claimant has substantially succeeded and is awarded costs of the case.

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

1) The decision for dismissal of the claimant on account of gross misconduct as conveyed in the letter by the Public Service Commission Ref. No. PSC.D/WA/871 dated 19.02.2014 and all processes flowing therefrom are set aside and instead the claimant, Fingerprint Officer II in the Ministry of Interior and Coordination of National Government, Department of Immigration and Registration of Persons, be and is hereby retired from the public service on account of public interest with effect from 08.05.2013 and with due pension benefits in accordance with the provisions of the Pensions Act.

2) The respondent to pay the claimant 9 months' salaries in compensation at a gross monthly pay at the rate as due at the end of April 2013 (less PAYE) to be computed by the parties as part of the decree herein.

3) The amount due under this judgment to be paid to the claimant by 01.05.2020 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

4) The respondent to pay the claimant's costs of the suit.

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

BYRAM ONGAYA

JUDGE