



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1438 OF 2015

CONSOLIDATED WITH CAUSE NO 1439 OF 2015

HILTON WAWERU KARIUKI..... 1ST CLAIMANT

JOSPHAT MAINA GACHERU..... 2ND CLAIMANT

VS

THE HON. ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

Introduction

1. This consolidated claim is brought by Hilton Waweru Kariuki as the 1st Claimant and Josphat Maina Gacheru as the 2nd Claimant against the Hon Attorney General, on behalf of the Public Service Commission and the Ministry of Interior and Coordination of National Government.

2. The claim is contained in Memoranda of Claim dated 14th August 2015 and filed in court on 17th August 2015. The respondent filed Memoranda of Reply on 18th January 2016 and 15th November 2016 respectively.

3. When the matter came up for hearing, the Claimants testified on their own behalf and the Respondent called Avisa Kiguhu Harold, a Human Resource Officer at the Public Service Commission.

The Claimants' Case

4. The 1st Claimant, Hilton Waweru Kariuki was employed by the Government of Kenya on 1st February 1977. He held various positions and at the time relevant to this claim he was deployed as Senior Registrar, Civil Registration Division within the Department of Civil Registration.

5. On 9th May 2013, the 1st Claimant was issued with a letter from the Permanent Secretary, Ministry of Immigration and Registration of Persons informing him that he had been interdicted on the ground that he had issued a birth certificate to a Nigerian National, without interrogating the supporting documents with due diligence.

6. The 1st Claimant wrote back to the Permanent Secretary explaining the circumstances under which he had issued the birth certificate. He pointed out that he had examined the documents presented to him, including a Kenyan National Identity Card issued by the National Registration Bureau to one Jeremiah

Wambua Kilonzo and was satisfied that they were genuine.

7. In addition to the National Identity Card, the applicant had also presented the following documents:

- a) Form A1 and 138A filled by a witness, Peter Nzioka to the effect that he knew the applicant personally;
- b) A letter from the Chief, Mukaa Location, confirming that Jeremiah Wambua Kilonzo had been brought up by his father, Mr. Kilonzo ID No. 1*****2;
- c) Father's Identity Card;
- d) School Leaving Certificate;
- e) Baptism Card.

8. In spite of the 1st Claimant's explanation, he was, by letter dated 6th March 2014 from the Principal Secretary, Ministry of Interior and Coordination of National Government notified that the Public Service Commission had already made a decision to dismiss him from service on account of gross misconduct.

9. The 1st Claimant applied for review of the decision to dismiss him vide his letter to the Public Service Commission dated 31st March 2014. By letter dated 19th August 2014 the Principal Secretary in charge of Immigration and Registration of Persons, informed the 1st Claimant that his application for review had been disallowed.

10. The 1st Claimant contends that he followed due procedure in issuing Jeremiah Wambua Kilonzo with a birth certificate after scrutinizing the documents presented to him. He maintains that his dismissal was unlawful and unfair. He therefore claims the following:

- a) Kshs. 499,080 being 12 months' salary in compensation;
- b) Full pension dues;
- c) Certificate of service;
- d) A fine of Kshs. 100,000 against the Respondent for failure to comply with Section 51(3) of the Employment Act;
- e) Unpaid salary from the date of interdiction;
- e) 3 months' salary in lieu of notice;
- g) Punitive and aggravated damages;
- h) Costs.

11. The 2nd Claimant, Josphat Maina Gacheru was employed by the Government of Kenya on 19th August 1982. At the time material to this claim he was working as a Senior Civil Registrar in the Department of Civil Registration within the Ministry of Interior and Coordination of National Government.

12. By letter dated 8th May 2013 from the Permanent Secretary, Ministry of Immigration and Registration of Persons, the 2nd Claimant was interdicted on the ground that he had irregularly issued a birth certificate to a Nigerian National, one John Chidi Ani alias John Kimani Mathai.

13. The 2nd Claimant responded by his letter dated 20th May 2013, stating that in issuing the birth certificate, he had relied on the following documents:

- a) Applicant's Kenyan National Identity Card No. 2*****6 serial No. 2285105838;
- b) Letter of identity from the National Registration Bureau Ref. No. NRB/OPS/C/2ND/Gen/86.VI19(219)412 of 29th September 2011 giving particulars of John Kimani holder of Kenyan Identity Card No. 29824776;
- c) Baptismal Certificate issued on 4th April 1999 signed by Rev. Mark Kamore of CPK St. Monica Parish on behalf of Church of the Province of Kenya (CPK) which was also authenticated by the 2nd Claimant;
- d) Photocopy of the identity card of Alice Muthoni Wangonde, the witness.

14. Despite the 2nd Claimant's explanation, he was, by letter dated 25th February 2014 from the Principal Secretary, Ministry of Interior and Coordination of National Government notified that the Public Service Commission had made the decision to dismiss him on account of gross misconduct.

15. The 2nd Claimant applied for review of the decision to dismiss him vide his letter to the Public Service Commission dated 28th April 2014. By letter dated 19th August 2014 from the Principal Secretary in charge of Immigration and Registration of Persons, the 2nd Claimant was informed that his application for review had been disallowed.

16. The 2nd Claimant contends that he followed due procedure in issuing John Kimani Mathai with a birth certificate after scrutinizing the documents presented to him. He maintains that his dismissal was unlawful and unfair. He therefore claims the following:

- a) Kshs. 475,200 being 12 months' salary in compensation;
- b) Full pension dues;
- c) Certificate of service;
- d) A fine of Kshs. 100,000 against the Respondent for failure to comply with Section 51(3) of the Employment Act;
- e) Unpaid salary from the date of interdiction;
- f) 3 months' salary in lieu of notice;
- g) Punitive and aggravated damages;
- h) Costs.

17. In the alternative, the Claimants seek reinstatement without loss of benefits.

The Respondent's Case

18. In its Reply to the 1st Claimant's claim dated 18th January 2016 and filed in court on even date, the Respondent states that the 1st Claimant joined the public service in 1977 and served on permanent and pensionable terms of service. He was placed on interdiction on 9th May 2013 on grounds of gross misconduct, particulars being that he had approved an application for issuance of a Kenyan Birth Certificate No. 745367 without interrogating the supporting documents.

19. The Respondent avers that the 1st Claimant's omission to authenticate the documents had facilitated one Jeremiah Obika Okwuoma alias Jeremiah Wambua Kilonzo, who was a Nigerian National to fraudulently acquire a Kenyan Birth Certificate and Passport No. A 1*****4. The Respondent adds that the 1st Claimant's acts of omission had compromised National Security.

20. The 1st Claimant, having been administratively charged with gross misconduct, was required to submit his representations within a period of 21 days. The 1st Claimant submitted his defence vide letter dated 16th May 2013 and his case was discussed on 20th August 2013 upon which a recommendation for his dismissal was made.

21. The 1st Claimant was dismissed by letter dated 6th March 2014 and his application for review was disallowed vide letter dated 6th August 2014.

22. The Respondent's Reply to the 2nd Claimant's claim dated 29th March 2016 was filed in court on 15th November 2016. The Respondent states that the 2nd Claimant was fairly dismissed from service on the ground of gross misconduct. The Respondent adds that the 2nd Claimant failed to exercise due diligence and therefore flouted the procedure laid down for late registration of birth.

23. It is the Respondent's case that the Claimants' dismissal was justifiable and in accordance with fair procedure.

Findings and Determination

24. There are two (2) issues for determination in this case:

- a) Whether the Claimants' dismissal was lawful and fair;
- b) Whether the Claimants are entitled to the remedies sought.

The Dismissal

25. The 1st Claimant's dismissal was effected by letter dated 6th March 2014, stating as follows:

“DISMISSAL FROM SERVICE

This is to convey the decision of the Public Service Commission that you be dismissed from the service with effect from 9th May 2013 on account of gross misconduct as you failed to establish the authenticity of documents submitted by a foreigner one, Jeremiah Obioka Okwuona in support of his late issuance of a birth Certificate which compromised National Security.

However, in accordance with the service regulations you are at liberty to Apply for a Review of this decision to the Commission through this Ministry within a period of one (1) year from the date of this letter.

In the meantime, you are requested to return Declaration form for officers leaving the service and Declaration of Income, Assets and Liabilities form which should be returned to this office dully signed and witnessed together with the Civil Servants Identity Card for cancellation as soon as possible.

(Signed)

R.N. Kamau (Mrs.)

FOR: PRINCIPAL SECRETARY”

26. The 2nd Claimant's dismissal letter dated 25th February 2014 states the following:

“DISMISSAL FROM SERVICE

This is to convey the decision of the Public Service Commission that you be dismissed from the service with effect from 8th May 2013 on account of gross misconduct as:-

(i) you facilitated the issuance of late Birth Certificate to a Nigerian National who was not eligible to be issued with the same and

*(ii) The Birth Certificate aided the Nigerian to be issued with a Kenyan passport No. A1*****7 which was a preserve of Kenya Citizens only.*

However, in accordance with the service regulations you are at liberty to Apply for a Review of this decision to the Commission through this Ministry within a period of one (1) year from the date of this letter.

Consequently, we enclose herewith Declaration form for officers leaving the service and Declaration of Income, Assets and Liabilities form which should be returned to this office dully signed and witnessed together with the Civil Servant Identity Card for cancellation as soon as possible.

(Signed)

R.N. Kamau (Mrs.)

FOR: PRINCIPAL SECRETARY”

27. According to these letters, the charges against the 1st and 2nd Claimants are materially similar. The substance of these charges was that the Claimants had facilitated irregular issuance of Kenyan birth certificates to foreigners which in turn led to acquisition of Kenyan passports by the said foreigners.

28. The 1st Claimant, Hilton Waweru Kariuki, was accused of authorising the issuance of Birth Certificate No. 745367 to a Nigerian National, Jeremiah Obioka Okwuoma alias Jeremiah Wambua Kilonzo. In his defence, Kariuki stated that he had relied on several documents, including an original Kenyan Identity Card in the name of the applicant. He had gone further to check the authenticity of the identity card in the e-citizen portal. Kariuki made reference to two Government Circulars dated 16th August 1991 and 9th November 2000, which provided the standard operating procedures in processing late registration of birth. He asserted that he had fully complied with these procedures.

29. The 2nd Claimant, Josphat Maina Gacheru, was accused of facilitating the issuance of late birth certificate to a Nigerian National, John Chidi Ani alias John Kimani Mathai. The said birth certificate aided the Nigerian National to acquire Kenyan passport No. A1*****7.

30. Gacheru stated that in processing the birth certificate, he had relied on all the required documents, including the original identity card of the applicant and had gone further to obtain written communication from the National Registration Bureau confirming authenticity of the applicant's identity card.

31. The Respondent's witness, Avisia Kiguhi Harold testified that the Claimants had failed to scrutinize documents presented in support of the respective applications for late registration of birth, which documents turned out to be fraudulent.

32. In the final submissions filed on behalf of the Respondent, the Court was urged to consider the serious ramifications on national security arising from these cases. This is all very well but the Court must do more than be alarmed at the prospect of foreigners acquiring crucial documents preserved for citizens

only. The Court must ask whether blame has been fairly placed.

33. These matters were investigated and a detailed report produced. From the said investigations, several findings were made including the following:

a) The Civil Registration Officer, Mr. H.K Waweru was not culpable. He relied on Kenya identity card No 2*****8 presented by Jeremiah Wambua Kilonzo and the letter (JKW4) from the Chief Mukaa Sub-Location which were genuine;

b) The Civil Registration Officer Mr. J.M Gacheru was not culpable. In processing the issuance of Certificate of Birth, he relied on the Kenya Identity Card No. 2*****6 and a supporting note of particulars from the National Registration Bureau dated 29th September 2011, referenced NRB/OPS/PC/2ND/GEN/86/VL.19 (219)412 authenticating the said card.

34. The investigation report concluded that the National Registration Bureau was at the epicentre of the problem. None of the Claimants worked for the Bureau and the Respondent's witness, Avisia Kiguhi Harold could not place any culpability on them.

35. The Court was referred to several decisions from this Court where it has repeatedly been held that termination of employment can only stand first, if there is a valid reason for it and second, if the affected employee has been given prior opportunity to defend themselves (see *Shankar Saklani v DHL Global Forwarding (K) Limited [2012] eKLR* and *Walter Ogalo Anuro v Teachers Service Commission [2013] eKLR*)

36. In instant case, there was no basis for the Claimants' dismissal from public service. The fact that things went wrong did not lay automatic blame on them. Causation was not established and the Court finds that there was no reason at all for the severe disciplinary action taken against the Claimants.

37. Further, apart from an exchange of correspondence, the Claimants were not afforded an opportunity to be heard as required under Section 41 of the Employment Act. The only conclusion therefore is that the Claimants' dismissal was substantively and procedurally unfair and they are entitled to compensation.

Remedies

38. For the foregoing reasons, I award each of the Claimants twelve (12) months' salary in compensation. In arriving at this award, I have taken into account the Claimants' length of service as well as the Respondent's irregular conduct in effecting the dismissal.

39. I further award each of the Claimants one (1) month's salary in lieu of notice, full pension dues plus unpaid salary from the date of interdiction until the date of dismissal.

40. Finally, I enter judgment in favour of the Claimants as follows:

1st Claimant: Hilton Waweru Kariuki

a) 12 months' salary in compensation.....Kshs. 499,080

b) 1 month's salary in lieu of notice.....41,590

c) Full pension benefits to be tabulated and paid within the next 30 days from the date of delivery of this judgment;

d) Unpaid salary from the date of interdiction until the dismissal date to be tabulated and paid within the next 30 days from the date of delivery of this judgment.

2nd Claimant: Josphat Maina Gacheru

e) 12 months' salary in compensation.....Kshs. 713,952

f) 1 month's salary in lieu of notice.....59,496

g) Full pension benefits to be tabulated and paid within the next 30 days from the date of delivery of this judgment;

h) Unpaid salary from the date of interdiction until the dismissal date to be tabulated and paid within the next 30 days from the date of delivery of this judgment.

41. The amounts in respect of compensation and notice pay will attract interest at court rates from the date of delivery of judgment until payment in full. The amounts in respect of pension benefits and unpaid salary will attract interest at court rates thirty (30) days from the date of delivery of judgment until payment in full.

42. The Claimants will have the costs of the case.

43. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 5TH DAY OF MARCH 2018

LINNET NDOLO

JUDGE

DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MARCH 2018

ONESMUS MAKAU

JUDGE

Appearance:

Mr. Njomo for the Claimants

Mr. Kioko for the Respondent