



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 256 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th March, 2018)

VINCENT KONGA CHELIMO CLAIMANT

VERSUS

DIRECTOR GENERAL

NATIONAL INTELLIGENCE SERVICE.....1ST RESPONDENT

THE ATTORNEY GENERAL

REPUBLIC OF KENYA.....2ND RESPONDENT

JUDGMENT

1. The Claimant filed suit on 23rd February, 2016 through a Memorandum of Claim of even date, seeking orders for unconditional reinstatement to his employment and or damages for unlawful dismissal.
2. He states that he was recruited into the Kenya Police Service in 1987 through a letter of appointment dated 11th May, 1988 where he worked diligently and rose through the ranks to Police Sergeant. That on 1st July, 1999 he officially joined the National Security Intelligence Service (NSIS), vide a letter of appointment dated 7th July, 1999.
3. On 21.9.2004, he earned an exemplary performance commendation and again was promoted to NSIS level 7 Senior Intelligence Officer with effect from 19.4.2008. That on December 2010, through a performance evaluation he was recommended for another promotion which promotion allegedly never materialized.
4. The Claimant avers that on 18.1.2011 he was summoned by the Banking Fraud Investigation Unit and was informed that there were allegations against him that he had committed a criminal offence namely theft contrary to Section 275 of the Penal Code alleging that on 28.9.2010, jointly stole property belonging to Kenya Police Sacco worth 600,000/=.
5. Following his interdiction in Court he was served with an interdiction letter dated 24.2.2011 and on 13.11.2013, while the trial was still ongoing he was served with a letter of suspension citing that the Court case had taken too long to conclude.
6. That the Claimant was subsequently acquitted and discharged in accordance with Section 210 of the Criminal Procedure Code Cap 275 by a ruling of the Court on 17.12.2014. He supplied his employer with

the proceedings and ruling who in turn proceeded to open an inquiry file on the basis that he had been charged with a criminal offence and as such he was subject to disciplinary action.

7. The Claimant avers that on 30.6.2015, while the Claimant was awaiting hearing of the complaint he was served with a dismissal letter without being afforded a chance to defend himself. That he thereafter lodged an appeal to which as at the time of filing the Claim he had not received a response.

8. The Claimant contends that as a result of loss of employment he suffered loss and damage. He avers that he lost the capacity to reasonably provide for his family and his children education and has been exposed to ridicule and unnecessary embarrassment.

9. In addition to the above, the Claimant contends that having trained in the prime of his life in security related matters he lost all chances of getting alternative employment as a result of the Respondent's actions. He prays for unconditional reinstatement and in the alternative damages for the unlawful dismissal.

10. The Respondents filed a reply to the Statement of Claim wherein they deny the allegations in the claim and state that the Claimant's dismissal was not exclusively grounded on the criminal case against him. They aver that they notified him of the offence leveled against him and he admitted to wrongfully withdrawing money, thereby displaying questionable integrity and conduct unbecoming of a service officer.

11. They further aver that upon conclusion of the inquiry, which also collected relevant evidence, the Claimant was found guilty and recommended for dismissal from employment in view of the seriousness of the offences committed. That he was duly informed of the reasons for dismissal vide a letter dated 30.6.2015, and was notified of his right of appeal, which appeal was denied upon careful consideration. They pray for the Claim to be dismissed with costs.

12. The matter proceeded by way of written submissions.

Claimant's submissions

13. It is submitted on behalf of the Claimant that the only ground leading to the Claimant's dismissal was gross misconduct arising from the charges against him related to fraud. In their view, this reason was not justified and the procedure for dismissal was seriously flawed.

14. Counsel urges that the decision to dismiss the Claimant was predetermined since he was handed a notice of disciplinary proceedings at the same time he delivered a certified copy of the proceedings and ruling of the Criminal Court.

15. Further he submits that the letters attached to the Respondent's bundle of documents dated 5/1/2015 and 30/6/2015 were never shown to him and there is no evidence attached showing that he was ever notified of any inquiry as indicated therein. The said disciplinary proceedings led to his dismissal and he was notified of his right of appeal which he did and the same was rejected.

16. Counsel submits that there was no justification for dismissal and the procedure followed was flawed and therefore the Claim should be allowed as drawn.

Respondent's submissions

17. Counsel for the Respondents submits that the Claimant was lawfully dismissed following his acts of gross misconduct leading to his being charged in a Court of law contrary to Rule 2.1 (xv), (xvii) and (xx) of NSIS Disciplinary Rules and Regulations. That under the internal Disciplinary Rules and Regulations under Rule 10.1(ii) states that:

“Even when an officer has been acquitted by a Court of law, this shall not lead to his automatic

reinstatement. Administrative disciplinary proceedings may still be preferred against such an officer on account of gross misconduct leading to his/her dismissal from service.”

18. It is also submitted that the Appeals Board of the Respondent deliberated on the case and noted that although the officer was acquitted by the Court, it did not absolve him from being dealt with administratively. The Appeals Board noted that the acquittal was based on technicality as some documents which were available to the Board of inquiry were not introduced to the Court. That the officer through Njiwa Sacco drew a cheque of Kshs. 349,931/= in a bid to refund the stolen money. The Board found that the officer lacked integrity and honesty, which are key virtues of the officers of the service.

19. On whether the Claimant was given an opportunity to be heard they state that he was notified of the disciplinary inquiry vide a letter dated 5.1.2015, which gave the date, time and place of the inquiry. He was informed of the officer who would be undertaking the proceedings and he was told that he was expected to assist in the investigations and he was allowed to bring witnesses on his behalf. He was informed of the decision to dismiss him vide a letter dated 30.6.2015 and informed of his right of appeal.

20. Counsel urges that the Claimant was given ample opportunities to defend himself and the procedure envisaged under section 41 of the Employment Act was followed to the letter. They cite the case of **Kenya Union of Commercial Food and Allied Workers Vs Meru North Farmers Sacco Limited Cause No. 74 of 2013**, which reiterated the mandatory nature of the procedure set out in Section 41.

21. The Respondents further submit that if the orders sought are granted it would result in unjust enrichment of the Claimant as he was lawfully dismissed. Moreover, that the Claimant was paid his dues from 23.2.2011 to 30.6.2015 amounting to Kshs. 5,842,800/= less a KCB loan of Kshs. 2,200,000/= and PAYE of Kshs. 1,752,840/=. He was also paid his pension benefits. They pray for the Claim to be dismissed with costs.

22. I have examined all the evidence of the parties herein. It is true that acquittal in a criminal case is not a bar to internal administrative processes being instituted against an employee. The Respondent's action then of instituting administrative action following the acquittal of the Claimant was proper.

23. The issue then to determine is whether the Respondent had valid reasons to institute these processes and whether they followed due process.

24. The Claimant had been on interdiction since 24th February 2011 after he was charged in a criminal Court. However, on 13th November 2013, he was suspended with no salary, but retained his house allowance and medical cover.

25. On 17th October 2014, after his acquittal, the Claimant notified the Respondent of the same and requested to have the suspension lifted. He also supplied the Respondents with the proceedings of the case.

26. On 30th June 2015, however he tells Court that he was dismissed from the service. As per the dismissal letter, the reasons given for the dismissal were that he had been charged before a Chief Magistrate's Court in Nairobi with the offence of stealing. The letter indicate that, after his suspension, the Respondent's disciplinary found him guilty and recommended his dismissal from the service in accordance with rule 9.2(ix) and 13 of the Disciplinary Rules and Regulations (DRR).

27. The Respondent have averred that they notified him of the disciplinary process and invited him to attend the same on 12th January 2015. The Respondents have not displayed to this Court any letter inviting the claimant for this process. Their letter of 5th January 2015 was denied by the Claimant and the Respondents didn't demonstrate to this Court how they served him if at all.

28. The minutes of the Disciplinary Committee held on 16th June 2015 which also recommended the dismissal of the Claimant do not indicate that the Claimant was present and that he was allowed to present

his case and defend himself. The Fair Administrative Action Act at Section 4 states as follows:-

1) "Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-

a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

b) An opportunity to be heard and to make representations in that regard;

c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;

d) A statement of reasons pursuant to Section 6;

e) Notice of the right to legal representation, where applicable;

f) Notice of the right to cross-examine or where applicable; or

g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4) The administrator shall accord the person against whom administrative action is taken an opportunity to:-

a) attend proceedings, in person or in the company of an expert of his choice;

b) be heard;

c) cross-examine persons who give adverse evidence against him; and

d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6) Where the administrator is empowered by any written law to follow a procedure which confirms to the principles set out in Article 47 of the constitution, the administrator may act in accordance with that different procedure".

29. It is not demonstrated that the Claimant who was being taken through the Administrative Action was ever heard in person. He was never notified of the disciplinary hearing. It is my finding that the process if any taken against the Claimant was flawed and unprocedural.

30. The process also flaunts the provision of Section 41 of Employment Act 2007 which states 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”.

31. The Claimant avers that he appealed the dismissal and had never been notified of the results of the appeal. The Respondents on their part aver that they notified him on 28th September 2015. I note that indeed the Claimant was sent a letter dated 28th September 2015 at Box 76 Kapsowar his known address. That notwithstanding, the initial decision to dismiss him was flawed and in the circumstances I find the dismissal of the Claimant unfair and unjustified as envisaged under Section 45 (2) of the Employment Act 2007 which states 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.

32. Having found as such, I note the Claimant has prayed that he be reinstated. The Claimant was dismissed on 30th June 2015. This remedy of reinstatement is a remedy that is provided for under Section 12 of the Employment and Labour Relations Court Act in determining whether this remedy is appropriate.

33. Section 49(4) of Employment Act provides as follows:-

1. “A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following:

a. the wishes of the employee;

b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

c. the practicability of recommending reinstatement or re-engagement;

d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. the employee’s length of service with the employer;

f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. the opportunities available to the employee for securing comparable or suitable

employment with another employer;

h. the value of any severance payable by law;

i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. any expenses reasonably incurred by the employee as a consequence of the termination;

k. any conduct of the employee which to any extent caused or contributed to the termination;

l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

34. Of course, the Respondents have submitted that they do not want the claim allowed. However going by the fact that the Claimant has served the Respondents for over 30 years and that he cannot easily get another job in a similar establishment at his age it is my finding that the only remedy which will put back the Claimant in a position to compensate him for the wrong done to him is reinstatement. I therefore allow the Claimant's claim and order immediate reinstatement of the Claimant with no loss of benefits from the date of dismissal on 30th June 2015.

35. Respondent will pay costs of this suit.

Dated and delivered in open Court this **6th day of March, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya holding brief Oyugi for Respondents – Present

Claimant – Present