



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 974 OF 2017

JAMES OMONDI WERE.....CLAIMANT

- VERSUS -

KENYA REVENUE AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Tuesday 31st July, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 25.05.2017 through Muttisya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that retirement of the claimant by the respondent “in the authority’s interest” the attendant delay in taking administrative action is illegal, null and void.
- b) An order that the respondent immediately reinstates the claimant to work.
- c) An order that the claimant be adequately compensated for time lost out of employment.
- d) General damages.
- e) Costs of the suit.
- f) Any other relevant relief.
- g) Interest on (c), (d), (e) and (f) above.

The respondent filed on 09.05.2018 the statement of response to claimant’s memorandum of claim through Twahir Alwi Mohamed Advocate. The respondent prayed that the Honourable Court uphold the rule of law and find that the respondent acted in accordance with the law and the claimant’s claim be dismissed with costs. The claimant filed the reply to the statement of response on 31.05.2018.

The claimant was employed by the respondent as a graduate trainee on 29.10.2007 and was confirmed as a permanent and pensionable employee on 29.04.2010 in customs department. The claimant worked in that department until 12.10.2015 when he was retired in the authority’s interest.

The claimant was interdicted from employment by the letter dated 21.01.2012 on half salary and full house allowance. The letter titled “**Discipline**” required the claimant to show-cause why disciplinary action should not be taken against him on account of gross misconduct in view of the allegations stated in

the letter. The allegations were that while working as the compounding officer at the Customs Department, Gilgil station, the claimant corruptly solicited and received Kshs.30,000.00 on 13.07.2012, another Kshs.30,000.00 on 17.07.2012 from unlicensed clearing and forwarding agent one Martin Jacob Ocholla in order to provide assistance in a case involving a truck registration No. KBR 702P/ZC1316. The truck was ferrying undeclared raw imported timber from DR Congo using false customs entry that had been detained at the Gilgil station. It was further alleged that the claimant received cash sent to him by M-pesa from James Wamono (on 12.07.2012 Kshs.10,000.00 and on 14.07.2012 Kshs.20,000.00) and Jackson Emisiko (On 13.07.2012 Kshs.50,000.00 and on 16.07.2012 Kshs.50,000) who are known clearing agents mostly dealing in clearance of timber imports through Busia. The letter stated that the misconduct as was alleged amounted to gross misconduct which may lead to dismissal and was in breach of the respondent's Code of Conduct section 6.2.2.2 thus, **"6.2.2.2. To directly or indirectly solicit or accept any gift or consideration or any pecuniary advantage, as an inducement or reward from members of the public for any act or omission to do anything in the employee's official capacity, or for showing favour or disfavour to any person."**

The claimant replied by his letter dated 30.01.2013. The claimant admitted that he received the money in the M-pesa transactions but it was not a corruption transaction because it was for his personal reasons and it was not linked by any stretch of imagination to the respondent's business. As for the money from one Ocholla, he admitted receiving the cash but the same had not been solicited corruptly or at any rate to provide assistance in a case involving truck registration No. KBR 702 P/ZC1316. Further the case involving the truck had commenced on 03.07.2012 and compounding done on 07.07.2012 and all taxes and fines paid on 10.07.2012. The money in issue was paid after 10.07.2012 and it was the claimant's case that the money he received could not therefore have been meant to bribe the claimant. The claimant stated that the interdiction and show-cause letter was malicious because it was dated and drafted on 21.01.2012 long before the alleged receipt of the cash in July 2012.

The letter of retirement in the authority's interest was dated 12.10.2015 and stated in part, **"We wish to inform you that the whereas the allegations raised against you were not substantiated, it was observed during your hearing by the Disciplinary Committee on 18th March 2015, that you had an inappropriate and unprofessional relationship with the clearing agents to the effect that they would send you money and you took instructions from them. In this regard your actions constituted of conflict of interest.**

In view of the foregoing, the Authority lost confidence in you and it was decided that you be retired in the Authority's interest with immediate effect as per the provisions of the KRA Code of Conduct."

By the letter dated 27.10.2015 the claimant appealed against the retirement in the authority's interest. He stated that as per affidavits he had presented, James Wamono and Jackson Emisiko were not clearing agents. He was concerned that in the termination letter the charge had changed from breach of section 6.2.2.2 of the KRA Code of Conduct to **"conflict of interest"** which was a fresh charge clearly provided for under section 6.2.2.3 of the KRA Code of Conduct. He stated that the reason for termination was a new charge which he had not been charged with or given an opportunity to defend himself. Ocholla had withdrawn his letter of complaint thereby showing that the claimant was innocent. It was his case that he had helped the organisation to recover monies which they would have lost and which he had sworn to protect as an officer while joining the authority. The claimant was called to appear before the appeals panel in May 2016 but later informed that the panel was reconstituted and a new system put in place. He had not received a response to his appeal.

The claimant's case was that his right to fair administrative action under Article 47(1) of the Constitution had been violated in the manner the respondent had handled the disciplinary case. Further, the government circular issued on 24.05.2010 on guidelines for handling as action had been taken after unexplained delayed and contrary to provisions of the circular.

The **1st issue** for determination is whether the termination of the claimant's contract of employment was unfair. It is clear that the claimant was given notice of the allegations, he replied, and he was accorded a

disciplinary hearing prior to the termination. To that extent and as submitted for the respondent, there was due process involving a notice and hearing as provided for in section 41 of the Employment Act, 2007 with respect to the original allegations of alleged breach of section 6.2.2.2 of the KRA Code of Conduct.

The Court has considered the evidence. The witness for the respondent (RW) confirmed that the Disciplinary Committee found that the allegations against the claimant as per the show-cause letter were unsubstantiated and the claimant was not given notice and a hearing on the new charge forming the reason for termination namely, conflict of interest. The Court returns that the as at the time of termination it has been established that the respondent had no valid reason to terminate the claimant as envisaged in section 43 of the Act. Further, the Court returns that with respect to the allegation of conflict of interest and which constituted the reason for termination in the letter of retirement in the authority's interest, the claimant was not given a notice or hearing as per section 41 of the Act and it cannot therefore be said that as at the time of termination, the respondent had established the purported conflict of interest against the claimant. Accordingly, the Court returns that the termination by way of retirement in the interest of the respondent was unfair in procedure and substance. It was submitted for the respondent that the respondent's Rules and Regulations define "**conflict of interest**" to mean staff shall not trade or engage in any business that may lead to a conflict of interest with the Authority. Further that the claimant engaged in business of enriching himself. However, it is by the respondent's own finding that the allegations against the respondent were unsubstantiated and therefore, the Court returns that the alleged conflict of interest was unfounded as it was an unreasonable finding – if the allegations were unsubstantiated, then conflict of interest could not be returned except on vacuum. As submitted for the claimant, in any event, the burden to prove conflict of interest as a ground for the retirement in the interest of the Authority rested with the respondent but throughout the hearing, the respondent failed to discharge that burden as required under section 43 of the Act.

The **2nd issue** for determination is whether the claimant is entitled to the remedy of reinstatement.

The Court of Appeal decision in **Kenya Power & Lighting Company Limited –Versus- Aggrey Lukorito Wasike [2017]eKLR** (Waki, Karanja, & Kiage JJ.A) it was held that reinstatement cannot be made except in very exceptional circumstances and seriously considering the matters in section 49(4) (a) to (m) of the Employment Act, 2007.

In the present case, the Court has considered the matters in section 49(4) (a) to (m) of the Act and returns that there are exceptional circumstances and it is a proper case for reinstatement because the Court has made the following findings:

- a) The claimant is an experienced officer and he is willing to continue in employment and it is not said that he did not have a clean record of service.
- b) The respondent found that the allegations against the claimant had not been substantiated so that the claimant was found not culpable of misconduct or poor performance as had been alleged against him. Instead, the respondent while finding that the claimant was innocent, purported to retire him upon conflict of interest that was unfounded and not established at all.
- c) The manner the case against the claimant was handled falls short of actions by the respondent that can be said to have been in good faith. The letter of interdiction and show-cause dated 21.01.2012 has received no explanation why it was purportedly dated and issued prior to the allegations which are said to have taken place in July 2012. There was no attempt even to explain that it was a typographical error meant, say, for 21.01.2013. Paragraph 4 of the response states "**4.The respondent avers that on 21st January 2012, the claimant was informed of his suspension due to ground of gross misconduct contrary to the Respondent's code of conduct section 6.2.2.2.**" The Court considers that such conscious and glaring error goes to show that the respondent was not keen and serious in making genuine allegations against the claimant or that the disciplinary proceedings were maliciously initiated. Further the Court returns that the respondent for unexplained reasons did not determine the appeal and has not offered a reasonable justification for that failure.

c) The Court finds that the statutory 3 years for award of the remedy for reinstatement have not lapsed and the respondent has not raised any bar to granting the remedy such as want of a vacancy in that regard. The Court returns that there is no established impracticality to the grant of reinstatement and the claimant is a competent employee who is ready to work and there is no reason to doubt that he is capable of repeating his otherwise good performance. There are no established changed operational systems or requirements that would bar reinstatement and the respondent has a countrywide establishment within which the claimant can easily get deployed to continue in service.

d) The respondent has cited **Sheikh Abubakar Bwanakai Abdallah –Versus- Judicial Service Commission & Another [2017] eKLR**, (Rika J) but the case is clearly distinguishable because unlike in the present case, in that case the statutory period of 3 years for grant of reinstatement had long lapsed the claimant having been dismissed over 13 years ago in 2004 as at the time of the judgment; and the grant of the remedy of reinstatement was found not to be practicable or reasonable in the dispute.

In conclusion the claimant's case will succeed and judgment is hereby entered for the claimant against the respondent for:

a) The declaration that retirement of the claimant by the respondent “**in the authority's interest**” the attendant delay in taking administrative action is illegal, null and void.

b) An order that the claimant is hereby reinstated in the employment of the respondent as Revenue Officer I with effect from 12.10.2015 with full benefits and be paid all withheld remuneration from that date to the date of resumption of duty, as the same will be paid by 01.09.2018 failing interest to be payable thereon from the date of this judgment till full payment; and for that purpose the respondent to deploy and permit the claimant to resume duty not later than 05.08.2018.

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

Signed, dated and delivered in court at Nairobi this Tuesday 31st July, 2018.

BYRAM ONGAYA

JUDGE