



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2005 OF 2014

JOSHUA MOMANYI MORANGA.....CLAIMANT

- VERSUS -

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th July, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 11.11.2014 through Kiarie, Kabita, Kihunyu & Associates. The amended memorandum of claim was filed on 19.02.2015. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant's contract by the 1st respondent was unlawful.
- b. A declaration that the deployment of the claimant by the Administration Police Service while the contract between the claimant and the 1st respondent subsisted was unlawful and ultra vires.
- c. A declaration that the summary dismissal of the claimant by the Administration Police was unlawful, malicious and intent on victimization.
- d. Salary in lieu of notice.
- e. Salary for the balance of the contract period from May 2014 to April 2016.
- f. General damages consequential to the declaration that the deployment of the claimant by the Administration Police Service while the contract between the claimant and the 1st subsisted was unlawful.
- g. Damages for unlawful termination.
- h. Severance pay.
- i. Costs of the suit.
- j. Such further or other relief that the Honourable Court may deem fit to grant.

The 2nd respondent filed a response to the amended claim on 09.03.2015 through Diana Mumo, Litigation Counsel, for Attorney General and prayed that the suit be dismissed with costs.

The 1st respondent filed the reply to the amended memorandum of claim on 16.03.2015 through Diana K. Ogula Advocate.

The claimant was at all material times a n Administration Police Officer No.2001006813 at the rank of a constable and having been employed on 09.04.2001. The claimant was deployed to serve with the 1st respondent. Subsequently, the 1st respondent and the National Police Service Commission exchanged correspondence under which the 1st respondent was desirous that the claimant is seconded to serve the 1st respondent. The secondment was approved and the 1st respondent employed the claimant on secondment basis by the letter dated

04.04.2013 as a VIP Protection Assistant effective 01.05.2013. The appointment was for 3 years renewable contract pegged to the contract of the serving Commissioner.

By the letter dated 14.04.2014 from the Administration Police Service, the claimant was redeployed to SGB Unit at Athi River Sub County. That redeployment was revoked by the letter dated 08.05.2014 from the Administration Police Service. By the letter dated 10.05.2014 the claimant was again redeployed by the Administration Police Service to SGB Unit, Kibish Sub County. The 1st respondent then released the claimant by the letter dated 26.05.2014 as redeployed. His contract of service was terminated and he would be paid gratuity for the period served. The claimant was to submit stated documents to facilitate clearance and processing of his final dues.

The evidence was that the claimant had served Commissioner Professor Onsongo until March 2013 when the Commissioner complained about lapses in her security. Thus, in March 2014 the claimant was redeployed to Administration Department from VIP Protection unit but he continued to serve on secondment with the 1st respondent.

It was the claimant's case that unless the 1st respondent released him he could not be redeployed by the Administration Police Service as was done. His further case was that the secondment had been ended in breach of clause 2 (c) in the letter of appointment or secondment contract dated 04.04.2013. It was his further case that he was not invited to attend the orderly room proceedings, he never attended such proceedings and his dismissal from the police service was unfair. The claimant was dismissed from the Administration Police Service by the letter dated 23.01.2015 on account of absence from duty and on account of failure to report at Kibish Sub County for deployment. The letter stated that the claimant had the right to appeal to the National Police Service Commission within 30 days.

The Court has considered the material on record. The main issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The Court returns that the claimant is entitled to a declaration that the termination of the claimant's contract by the 1st respondent was in breach of the secondment contract. Clause 2(b) of the letter dated 04.04.2013 exempted the claimant from probationary service and clause 2(c) provided for a termination notice or pay in lieu of notice but which was not accorded to the claimant. Thus the termination by redeployment to the Administration Police Service by letter dated 26.05.2014 was unfair for want of due process as was agreed upon.
- b. The Court finds that the claimant is entitled to a declaration that the deployment of the claimant by the Administration Police Service while the contract between the claimant and the 1st respondent subsisted was unlawful and ultra vires. It is clear that he was deployed effective 10.05.2014 but released on 26.05.2014. The Court finds that the claimant could not take up the redeployment prior to the release. Similarly, the redeployment was ultra vires because as long as the secondment subsisted, the claimant could not be so redeployed.
- c. The Court returns that the claimant is entitled to a declaration that the summary dismissal of the claimant by the Administration Police was unlawful, malicious and intent on victimization. The Court has already found that it was impossible and unfair that the claimant was expected to take the redeployment effective 10.05.2014 whereas he was released on 26.05.2014. It is clear that the reason for the termination was invalid.
- d. The Court returns that in view of the findings, the respondent will pay the claimant one month salary in lieu of notice as the said clause 2 (b) provided.
- e. The claimant was to revert back to his service in the National Police Service. He testified that he was not keen to continue in the National Police Service. The Court finds that despite the unfairness, the claimant ought to have taken up the redeployment to mitigate his losses but he did not do so. The prayer for salary for the balance of the contract period from May 2014 to April 2016 will therefore fail.
- f. The claimant prays for general damages consequential to the declaration that the deployment of the claimant by the Administration Police Service while the contract between the claimant and the 1st respondent subsisted was unlawful. The Court finds that the claimant made no submissions on this heading of prayer and the same will fail as abandoned or unjustified as the Court was not guided on the measure of the general damages.
- g. The claimant prayed for damages for unlawful termination. The claimant submitted that he should be awarded Kshs, 2,000,000.00 as damages for violation of the claimant's constitutional rights. The claimant had not pleaded violation of constitutional rights. The prayer will fail as the claimant failed to provide the measure of such damages.
- h. The claimant made no submissions on the prayer for severance pay and the prayer is deemed abandoned.
- i. The respondents will pay the claimant's costs of the suit.

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

- a. The declaration that the termination of the claimant's contract by the 1st respondent was in breach of the secondment contract between the parties.
- b. The declaration that the redeployment of the claimant to the Administration Police Service while the contract between the claimant and the 1st respondent subsisted was unlawful and ultra vires.

c. The declaration that the summary dismissal of the claimant from the Administration Police Service was unlawful, malicious and intent on victimization.

d. The 1st respondent will pay the claimant one month salary in lieu of notice as per clause 2 (b) of the secondment contract between the parties, and to pay within 30 days from the date the claimant will comply with the prescribed clearance and failing, interest to run at Court rates from the date of the suit till full payment.

e. The respondents to jointly or severally pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 6th July, 2018**.

BYRAM ONGAYA

JUDGE