



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 212 OF 2010**

*(Before Hon. Justice Mathews N. Nduma)*

**DAVID OMWANSA ORANG'O MONG'ARE.....CLAIMANT**

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT**

**J U D G M E N T**

1. The suit was first commenced by a Memorandum of Claim on 9<sup>th</sup> March, 2010. An Amended Memorandum of Claim was subsequently filed on 12<sup>th</sup> November, 2013. The Claimant seeks damages for unlawful and wrongful dismissal, severance pay for 26 years' service, salary entitlement in the sum of Kshs.4,939,920 and General damages for opportunity cost, mental stress, anxiety and perilous loss of livelihood and costs of the suit.

**Facts of the Case**

2. The Claimant was employed by Government in the Ministry of Finance as Finance Officer II in 1982 and later moved to the Ministry of Local Government where he worked in the capacity of local authorities inspector (1) in Nairobi earning a gross salary of Kshs.37,522.

3. The Claimant states that from the month of July 2007, he was entitled to a salary raise of Kshs.3,644 in terms of a salary increment circular issued by the Ministry otherwise known as conversion table No. 10, which raised his salary scale from 37,522 to 41,166. The Claimant was not paid the new salary scale and claims accordingly till date of dismissal.

4. That by a letter dated 29<sup>th</sup> October, 2007 the Claimant was suspended from duty on allegations set out therein to which the Claimant responds justifying all the actions he had taken herein alleged to have been in excess of his mandate and without due authority.

5. On 5<sup>th</sup> August 2008, the Claimant was summarily dismissed from employment with effect from 1<sup>st</sup> November, 2007 on alleged gross misconduct.

6. The Claimant alleges that the dismissal was unlawful, and unprocedural as it was without sound basis and justification. Since the charges were not proved against him. That no adequate opportunity was afforded him to defend himself contrary to section 36(1) (a) & (b), 37(1) – (II) of the Public Service Commission Act, Cap 185 Laws of Kenya. The Claimant testified under oath and called CW2 Tubmun Otieno, a former Finance Officer (Town Clerk) Mavoko Municipal Council. He had sought authority to convert casuals to permanent staff from the Ministry of Local Government. He received a letter dated 3<sup>rd</sup> October, 2007 from the Claimant authoring the conversion. Before he could do it, he got a telephone call from Mr. Mutua Director Finance and Permanent Secretary asking the CW 2 not to hire the casuals since the letter dated 3<sup>rd</sup> October, 2007 was written by the claimant without authority.

7. CW2 wrote a letter to the Ministry appealing the decision. CW 2 got a reply on 8<sup>th</sup> February, 2008 written by Mr. Okibiro a Finance Officer which gave the council authority to employ 75 and not 70 casuals into permanent terms. CW 2 produced the letter addressed to him to this effect. CW 2 also produced minutes of the Council seeking employment of the casuals and budget estimates for the task. Objections by the Respondent's counsel, M/s. Chesina to the production of the letter and minutes was overruled by the court because it went to the core of the dispute in that lack of authority to recruit 70 casuals was the main reason the Claimant was summarily dismissed. CW 2 stated that authority to recruit was evidently given upon cancellation of the first letter. CW 2 stated the Claimant did not authorize employment of casuals without authority as alleged by the Respondent or at all. CW2 did not act on Claimant's initial letter but on the subsequent letter by a different officer and with approval by the council.

8. The Claimant appealed the decision to dismiss him to the Public Service Commission but the dismissal was upheld without giving the Claimant a fair hearing. The Claimant was denied his terminal benefits by fact of the summary dismissal and seeks to be awarded as prayed in the amended memorandum of claim.

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10. The Claimant states that the Respondent failed to consider his dedicated 26 years of service to the County and to give him the benefit of doubt.

11. At the time of dismissal, the Claimant was aged 50 years and his salary entitlement had risen to Kshs.45,166 per month and that the said salary was subject to annual increment until retirement. That he had 10 more years to serve government which service was curtailed by the unlawful and unfair conduct of the Respondent.

12. As a result of this unlawful conduct, the Claimant suffered loss of salary entitlement in the sum of Kshs.4,939,920 and pension entitlement. The Claimant testified under oath in support of these particulars of claim and relied also on documentary evidence presented before court, pleadings and written submissions. The Claimant prays to be awarded accordingly.

### **Response**

13. The Respondent filed a Memorandum of Defence on 16<sup>th</sup> November, 2010 and admitted that the Claimant was a government employee but was earning a gross salary of Kshs.31,522 per month at the time of dismissal.

14. The claim of underpayment is therefore denied especially because the Claimant was on suspension with no salary as per the permanent secretary's letter C/1982093738/34 of 29<sup>th</sup> October, 2007 to the Claimant.

15. That in the said letter the Claimant was given opportunity to show cause why he should not be dismissed and to respond within fourteen (14) days. That the Claimant was dismissed from service with effect from 1<sup>st</sup> November, 2007 on grounds of misconduct.

16. That the Respondent followed the laid down procedure and requirements in terminating the Claimant's services.

17. The Respondent filed list of documents in support of its case on 23<sup>rd</sup> January, 2014 which documents show the disciplinary process followed leading to the summary dismissal of the Claimant.

18. In terms thereof, the Claimant was accused of directing municipal council of Mavoko to employ or confirm 70 casuals contrary to the directive by the minister.

19. That on 15<sup>th</sup> January, 2004 the Claimant had been charged in a criminal court with the offence of theft of public funds. He was interdicted from duty during the hearing of the case. He was however acquitted and was reinstated back to work. The disciplinary committee that dealt with his matter in 2009, was however of the view that the Claimant was guilty of the offence.

20. Claimant was accused of receiving two (2) days night out payment in the sum of Kshs.6,000 when the routine inspection he had done was not authorized.

21. That on the Claimant had authorised Town Clerk of Municipal Council of Limuru to pay one J. K. Karanja his full salary and allowances while attending a privately sponsored course in the UK. That the Claimant had no authority to do so.

22. That the Claimant had permitted purchase of mobile phones for the Chairman, Vice Chairman, Finance Chairman, clerk and the Treasurer of the County Council of Nandi without the approval from the Minister.

23. That the Claimant had renewed without authority of permanent secretary special duty allowance for two (2) council staff of Mt. Elgon County Council and that the Claimant had authorized opening of a new LATF account by Municipal Council of Kitale without Council minutes authorizing the opening.

24. On the above basis the Claimant was summarily dismissed from employment and his subsequent application for review to the public service commission was dismissed.

25. The Respondent called RW 1 Avis Kiguli Harold, Human Resource Officer at the Public Service Commission who testified in support of the Respondent's case. RW 1 concluded that all due process was followed in disciplining the Claimant for gross misconduct and therefore his dismissal from service was lawful, justified, and procedural. The procedure followed was as per public service commission Act, Legal Notice No. 28 of 2005 and subsidiary code of regulations revised in 2006. That the written responses made by the Claimant to the charges against him by a letter dated 29<sup>th</sup> October, 2007 was taken into account before the dismissal on 23<sup>rd</sup> July, 2008 for gross misconduct. The application for review was considered and dismissed by a letter dated 29<sup>th</sup> October, 2008 because the Claimant did not raise any new grounds in the application for review.

26. RW 1 admitted that the disciplinary process went beyond the six (6) months allowed by section G33 of the code of Regulation revised in 2006. He denied that authority to employ 70 casuals had been obtained from the Minister. This was the main allegation against the Claimant

27. RW 1 stated that all the 7 allegations were dealt with under review.

### **Determination**

28. The issues to determination are as follows:-

- (i) Whether the Summary Dismissal of the Claimant was for valid reasons and was arrived at following a fair procedure?
- (ii) What remedies, if any is the Claimant entitled to?

**Issue i**

29. The main reason for the Summary Dismissal of the Claimant by the Respondent was that he had written a letter to Mavoko County Council authorizing the Clerk to employ or confirm 70 casuals to permanent status, without authority of the Ministry.

30. Uncontroverted evidence by CW 2, the then town clerk is that, he did not act on the letter written initially by the Claimant because implementation of the same was stopped by a telephone call from the Ministry. However, the council appealed the decision stopping the recruitment and the Ministry wrote a subsequent letter, not written by the Claimant authorizing recruitment of 75 casuals to permanent status. From this uncontroverted evidence, the Claimant did not authorize recruitment of 70 casuals as alleged by the Respondent or at all. This was a false allegation against the Claimant and is not a valid reason to cause the summary dismissal of the Claimant.

31. With regard to the other 7 minor charges, the Claimant had comprehensively responded to the same even after pleading to be provided with the relevant files, to no avail to enable him respond to the same. Therefore, the allegations were not substantial to warrant a summary dismissal of a Senior Officer of 26 years standing and secondly, the Respondent did not provide the necessary file or information to allow the Claimant to deal with those matters which in the court's view did not amount to gross misconduct or misconduct within the meaning of section 44 of the Employment Act, 2007 to warrant dismissal or summary dismissal of the Claimant.

32. This is a very serious matter given that a normal termination of the employment of the Claimant or retirement in public interest would have allowed the Claimant to get pension earned for the past 26 years of service. Furthermore, the Claimant had reached 50 years and therefore was within the permitted age of voluntary retirement from public service to allow him to enjoy his pension in retirement. With these options before the Respondent, it was wrongful, unjustified and unfair not to take them into consideration considering the long service by the Claimant to the County. It was not reasonable nor fair to go for the ultimate penalty in the circumstances of this case.

33. Furthermore, the wrongful conduct by the Respondent was aggravated by back dating the summary dismissal by a period of one year to 29<sup>th</sup> October 2007, whereas the termination was on 23<sup>rd</sup> July, 2008 and confirmation upon review was on 29<sup>th</sup> October, 2008. This effectively denied the Claimant a salary for a whole year while under suspension whereas the regulation allowed the process to be concluded within 6 months. It was unlawful to back date the date of dismissal to the loss and detriment of the Claimant.

34. Accordingly, the court finds that the conduct by the Respondent violated not only section G33-13 Code of Regulations revised in 2006 but was also in contravention of Public Service Commission Act, Legal Notice No. 28 of 2005 and sections 36(1)(a) & (b) and 37(I) –(II) in that the entire process was flawed and unfair to the Claimant. In addition the Summary dismissal violated section 41, 43 and 45 of the Employment Act, 2007 in that it was not for a fair reason and was not done following a fair procedure.

**Issue ii**

35. The next issue for determination is what remedies are available to the Claimant. Firstly, the Summary Dismissal denied the Claimant the benefit of pension earned and accumulated over a period of 26 years as pleaded under paragraph 13 of the amended memorandum of claim. Accordingly, the court declares that the Claimant is pensionable from the date of termination of his employment being 29<sup>th</sup> October, 2008 and the Respondent is directed to ensure pension is processed and paid with effect from that date.

36. Secondly, the Claimant is entitled to salary arrears from the date of suspension, that is 29<sup>th</sup> October, 2007 to 29<sup>th</sup> October, 2008 at the rate of Kshs.41,166 per month in terms of conversion table No. 10 of July, 2007. This takes care also of the Claim for underpayment at the rate of Kshs.3,644 per month set out under paragraph 4 of the amended memorandum of claim.

37. Thirdly, the Claimant is entitled to compensation for the wrongful, and unfair summary dismissal in terms of section 49(1)(c) as read with 49(4) of the Act.

38. In this respect, the Claimant had served the Government for 26 years. He was summarily dismissed on unfounded grounds. He lost the benefit of 10 years' salary to retirement as he was only 50 years old at the time of dismissal and the retirement age for Public Servants is 60 years.

39. The Claimant lost the benefit of pension for many years and has suffered hardship loss and pain since the summary dismissal.

40. This is a proper case to award the maximum 12 months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs.494,992.

41. Finally, the claims for payment of lost salary to retirement, severance pay for 26 years served and General damages for pain and suffering in addition to compensation for wrongful dismissal are without merit and are dismissed.

42. The Claimant is entitled to costs of the case and interest on the award granted.

43. In the final analysis judgment is entered in favour of the Claimant as against the Respondent as follows:-

(i) The Claimant is declared pensionable and the Respondent is directed to process and pay the pension due and owing to the Claimant from the date of dismissal (29<sup>th</sup> October, 2008).

(ii) The Respondent to pay salary arrears at the rate of 41,166 per month for the entire period of suspension being 29<sup>th</sup> October, 2007 to 29<sup>th</sup> October, 2008.

(iii) The Claimant is to be paid compensation equivalent to 12 months' salary in compensation for the wrongful and unfair summary dismissal in the sum of Kshs.493,992.

(iv) The award in (i) & (ii) above is payable with interest at court rates from date of termination till payment in full except the current pension instalments which ought not to attract interest.

(v) The award in (iii) above is payable with interest at court rates from date of judgment till payment in full.

(vi) Respondent to pay costs of the suit. Judgment be implemented by the Respondent within 60 days.

**Dated and Signed in Kisumu this 12<sup>th</sup> day of October, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 26<sup>th</sup> day of October, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Nyanyuki for Claimant

M/s. Chesima for Respondent

Daniel Ngumbi – Court Clerk