



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 39 OF 2013**

**(FORMERLY NAIROBI NO. 751 OF 2011)**

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

**1. JARED OMONDI OBER**

**2. JOHN OLUOCH ORINDA.....CLAIMANTS**

**VERSUS**

**COUNTY GOVERNMENT OF HOMABAY.....RESPONDENT**

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

1. By a ruling of Hon. Wasilwa J. delivered on 18<sup>th</sup> September, 2014 judgment in this matter was reviewed and set aside and the court directed the suit to be heard afresh.
2. The suit was heard before me on 20<sup>th</sup> March, 2018 where the two Claimants testified as CW1 & CW2 respectively.
3. Mr. Odunga was in attendance for Mr. Nyauke on the day when the matter was allocated hearing at 12 noon.
4. At 12 noon, Mr. Olendo appeared for Mr. Nyauke and sought adjournment on the basis that Mr. Nyauke was unwell. The court disallowed the application for adjournment since Mr. Odunga had not sought for adjournment of the matter in the morning when the matter was called out and allocated hearing at 12 noon. The court observed that this matter was filed in 2013 and it was imperative that it proceeded on the day as it was now 5 years old.
5. The evidence by the Claimants went uncontroverted to the effect that, they both were placed on suspension following disagreement with the employer on deployment to new duties. 1<sup>st</sup> Claimant was employed as council askari in 1993. He was suspended without pay on 31<sup>st</sup> March, 2009 but had been transferred to work as watchman. The 2<sup>nd</sup> Claimant was employed at customer care desk on 15<sup>th</sup> May, 2007. On 7<sup>th</sup> January, 2009 he was transferred to Education and Social Services Department. Both alleged demotion and wanted to be taken back to their previous positions. The two protested and absconded work while seeking the matter to be resolved. The 2<sup>nd</sup> Claimant was suspended on 23<sup>rd</sup> March, 2009. The two were suspended for about 7 (seven) months and were called back on condition that they signed a form that excluded them from getting paid salaries for the period of suspension.
6. Both were dismissed upon their refusal to accept the conditional return by a letter dated 17<sup>th</sup> December, 2009.
7. The Claimants seek reinstatement to their proper jobs and in the alternative payment of compensation for unfair dismissal and payment of terminal benefits.
8. The Claimants rely on the Collective Bargaining Agreement (CBA) between the union and the Respondent to assert that suspension beyond 3 months was unlawful. They seek payment for the entire period they were on suspension. They also pray for cancellation of warning letters and suspension letters from their files. That the Respondent violated the grievance handling procedure set out in the Collective Bargaining Agreement and Public Service Commission in dismissing them.
9. The Collective Bargaining Agreement filed before court on 10<sup>th</sup> July, 2013, sets the terms and conditions of service for officers of local authorities from 1<sup>st</sup> September, 2012. The suspensions complained of occurred in the year 2009. The dismissals also occurred around 2<sup>nd</sup>

October, 2009 upon the Claimants' refusal to sign forms that would have allowed them to be reinstated back to work.

10. Though the two purports to have reported to work up to 2014, but were not allocated work, there is nothing before court to show this continuous service after 2<sup>nd</sup> October, 2009.

### **Determination**

11. The issues for determination are:-

- (i) Whether the suspension and subsequent dismissal of the Claimants' was lawful.
- (ii) Whether the Claimants are entitled to the reliefs sought.

### **Issue i**

12. Clause 30(a) of the Collective Bargaining Agreement between the parties whose effective dated was 1<sup>st</sup> September, 2005 provided that a Head of Department could be suspended in terms of Public Service Commission [Local Authority Officers] Regulations 1984 No. 24 for investigations on alleged offence for a maximum period of three months without pay.

13. Clause 30(d) provides –

***“Where an officer who has been suspended is subsequently reinstated he shall be entitled to receive full pay in respect of the period of suspension.”***

14. It is common cause that the Claimants were suspended on 31<sup>st</sup> March, 2009 and Respondent kept them under suspension until 2<sup>nd</sup> October, 2009 when it sought to reinstate them without pay. The action by the Respondent violated clause 30(a) and (b) of the Collective Bargaining Agreement and the Claimants were entitled to unconditional reinstatement as the suspension was unlawful.

15. The suspension without pay beyond three (3) months was unlawful and the Claimants are entitled to payment of full salary for the period of suspension.

16. The reason for the dismissal was failure by the Claimants to accept the conditional reinstatement. The court has found that the conditions placed on the reinstatement were unlawful. The dismissal did not also follow the disciplinary procedure set out in the Collective Bargaining Agreement. The court sets aside those conditions and directs that the Claimants be re-engaged on similar terms as officers serving the Respondent today in the respective cadre they had been deployed to then until they reach their retirement age.

17. The Claimants are entitled to the maximum compensation in terms of section 49(1) (c) as read with sub-section (4) for the unlawful and unfair dismissal.

18. The Claimants have suffered immensely, for no justifiable reason since the date of their unlawful suspension and subsequent dismissal. They were not paid any terminal benefits or compensation upon dismissal. They have suffered loss and damage. This is a proper case for the court to order twelve (12) months salary in compensation to the two Claimants for the unlawful dismissal in addition to the order of re-engagement.

19. The court enters judgment in favour of the claimants as against the Respondent as follows –

- (i) The Respondent is directed to re-engage the Claimants to positions equivalent to those held and not inferior as at the time of dismissal from date of judgment.
- (ii) The Respondent to pay each Claimant the equivalent of twelve (12) months salary earned at the time of dismissal for the unlawful dismissal.
- (iii) The Respondents to pay the Claimants salary not paid for the entire period of suspension after expiry of three (3) months to the date of dismissal.
- (iv) The compensation and arrear salary to attract interest at court rates from date of filing suit till payment in full.
- (v) Respondent to pay costs of the suit.
- (vi) Parties to compute the award and file the same for confirmation within 30 days of this judgment.

**Judgment Dated, Signed and delivered this 4th day of October, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

Claimant in person

Mr. Nyauke for Respondent

Chrispo – Court Clerk