REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1837 OF 2015

HENRY MUGITA LUGADILU.....CLAIMANT

- VERSUS -

NAIROBI CITY COUNTY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 15.10.2015 through Billy Amendi & Company Advocate. The amended memorandum of claim was filed on 16.06.2016 and a further amended memorandum of claim on 04.07.2016. The claimant prayed for judgment against the respondent for:

a) A declaration that the claimant's termination from the employment was unfair and unlawful.

b) The claimant to be reinstated to employment.

c) The respondent be ordered to compensate the claimant equivalent 24 months' gross salary.

d) The Honourable Court to issue such orders and give such directions as it may deem appropriate in the interest of justice.

e) The claimant be paid costs plus interest.

f) Any other and further relief the Honourable Court shall deem fit to grant.

The respondent employed the claimant as a City Askari by the letter dated 27.01.1997 and effective 15.02.1997. On 24.01.2013 the respondent ordered the claimant to attend a smartening course on account of habitual absenteeism. The orders were conveyed in the internal memo dated 15.01.2013 addressed to the Director, City Inspectorate by Divisional Commander, Starehe CBD. The officers mentioned in the memo, including the claimant, were to be released for the smartening course at the C.I.T.C Dagoretti effective 14.01.2013. The claimant's case is that he could not have attended the course because at the material time he was on his annual leave. He reported back to work on 09.02.2013 at the end of the annual leave and proceeded to the training school for the smartening course. It was the claimant's evidence that at the school he was surprised there was no training but he was assigned to excavate trenches, cutting grass, and uprooting tree stamps. Upon inquiry as to why he was at the school, the Instructor advised the claimant that the Assistant Commander at the school one Tom Seme had conveyed that the claimant was assigned as such because it was punishment and the claimant's stay at the school was going to be indefinite. The claimant testified that one morning an Instructor ordered him to remove his shirt in presence of other people attending the training and when the claimant declined, the Instructor instructed the others to rough the claimant up – and the claimant testified that he had to run for his dear life but thereafter continued attending the training but with a lot of frustrations from the Instructor one Tom Seme and who eventually expelled the claimant about May 2013 without a lawful cause.

The claimant testified that on 17.06.2013 the shop steward handed to him a photocopy of a show-cause letter dated 17.06.2013. It was alleged that effective 11.02.2013 the claimant had disappeared from his place of work and he could not be traced and he had not offered explanation on his absence from duty. He was to show cause within 10 days. The claimant replied by his letter dated 21.06.2013 in the following terms:

a) He was on annual leave from 02.01.2013 to 08.02.2013.

b) On 09.02.2013 he reported back on duty at Mworoto, CBD enforcement office and his supervisor one Inspector Kimutai informed

the claimant that he had been transferred to training school for a smartening course. The period of annual leave could not amount to absconding duty.

c) He made detailed inquiries about reporting at the training school because he had not been given a letter to that effect. Eventually he obeyed the verbal instructions to report at the school.

d) The claimant narrated his frustrations at the training school and eventual unfair expulsion from the school. That he had been at the training school but he had been denied the chance to sign the attendance register.

e) From 14.03.2013 to 04.04.2013 he had been on serious medical treatment.

The respondent appointed Kithi & Company Advocate to act in the matter and a preliminary objection was filed on 02.02.2016 that a wrong party had been sued but which appears to have been cured with the amendment of the memorandum of claim. The respondent did not file a defence or appear at the hearing. The record shows that the hearing date was fixed in presence of the respondent's advocate and in absence of the claimant. The hearing proceeded ex-parte.

By the letter dated 01.07.2013 the claimant reported to the Director of City Inspectorate how the school Commandant had designed to assault him on 01.07.2013 when the claimant reported at the school for signing of the staff summary for Financial Year 2013 and that he had been locked out. He requested for intervention.

The claimant testified that he continued earning from 09.02.2013 to 30.09.2013. He failed to receive the October 2013 salary and he discovered that his name had been deleted from the payroll. Thereafter he was not paid at all he received the letter dated 23.01.2014 by the respondent's County Secretary dismissing him from employment effective 11.02.2013 on account of gross misconduct and desertion of duty. He was advised that he could appeal to County Public Service Board within 42 days and through the County Secretary.

The claimant appealed to the Public Service Board by his letter dated 07.10.2013. By the respondent's letter dated 19.01.2015 the claimant was informed that the appeal had been disallowed and that he could appeal to the Public Service Commission within 90 days from the date of that letter. The claimant appealed to the Commission by his letter dated 12.02.2015.

The Commission disallowed the claimant's appeal because:

a) He did not report back to his duty station after expiry of his annual leave.

b) His whereabouts remained unknown.

c) He was unable to prove that he was on duty during the period he was accused to have absented himself from duty without lawful authority.

The Court has considered the material on record and makes findings on the matters for determination as follows:

1) There is no dispute that the claimant was on leave ending on 11.02.2013. It is also clear that while he was on leave, by the internal memo of 15.01.2014 he had been released to attend the smartening course effective 14.01.2014 – but which memo was not copied to the claimant and there is no evidence that he was advised in writing accordingly. Upon resumption of duty the claimant was concerned about the oral advice to attend the training but he eventually complied and attended. It is clear evidence that after 11.02.2013, the claimant attended the training. It is also clear that he continued to earn throughout the indefinite period of training until he was locked out of training and his salary stopped effective beginning of October 2013 so that at the end of that month he was not paid. The Court finds that the termination of the claimant's employment by the letter dated 23.01.2014 and effective 11.02.2013 and as upheld by the Nairobi County Public Service Board and the Public Service Commission was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007. Further, the claimant was not accorded a hearing throughout the disciplinary process as per section 41 of the Act and the Court returns that the termination was procedurally unfair under the section as read with section 45 of the Act. Accordingly, the termination was unfair in procedure and substance. A declaration will issue as prayed for.

2) The claimant desired to continue in employment. He had served for a long period effective 15.02.1997 and he did not contribute to his unfair termination. The Court has considered the aggravating factor of the manner in which the claimant was harassed and frustrated and assigned meaningless manual work at the training school. The Court has also considered the aggravating factor that the respondent opaquely set up the claimant by failing to communicate in writing about his release to attend the smartening course effective 14.01.2014. The Court returns that in such circumstances the claimant is entitled to 12 months' gross salaries in compensation for unfair termination as provided for under section 49 of the Act. The claimant earned a gross of Kshs.31, 575.00 per month making **Kshs. 378, 900.00** in compensation.

3) The claimant prayed for reinstatement. Under section12(3) (vii) of the Employment and Labour Relations Court Act, 2011, an order for reinstatement of any employee is available within 3 years of dismissal subject to such conditions the Court thinks fit to impose under circumstances contemplated under any written law. The 3 years have lapsed since the termination of the claimant. The prayer will therefore fail.

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

a) The declaration that the claimant's termination from the respondent's employment was unfair and unlawful.

b) The respondent to pay the claimant **Kshs. 378, 900.00** in compensation by 15.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

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

Signed, dated and delivered in court at Nairobi this Friday 2nd November, 2018.

BYRAM ONGAYA

JUDGE