



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1370 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)**

**GREGORY OMWAMI WABWIRE.....CLAIMANT**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE INSPECTOR GENERAL,**

**NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL POLICE SERVICE COMMISSION..3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**1. The Claimant filed a Memorandum of Claim on 18<sup>th</sup> August 2014 contending that he had been unlawfully, unreasonably and unfairly terminated from the Administration Police Service. The Claimant therefore seeks the following reliefs:-**

- a) A declaration that the Claimant’s constitutional rights and in particularly the right to fair administrative action have been breached.***
- b) A declaration that the Claimant’s subsequent dismissal from the Administration Police Service with effect from 11<sup>th</sup> May 2012 was predicated upon illogical, unreasonable, oppressive, malicious and unfair grounds.***
- c) A declaration that the Claimant’s dismissal from the Administration Police Service with effect from 11<sup>th</sup> May 2012 was/ is unlawful, illegal, unreasonable and unfair and that the said dismissal be set aside.***
- d) An order directing the 2<sup>nd</sup> Respondent to reinstate the Claimant to the Administration Police forthwith.***
- e) Full payment of the Claimant’s salary during the period that he was out on illegal dismissal from the force and up to the period of August 2014; plus interest at Court rates.***

**Salary allowance for 2 years 4 months**

- i. April 2012 to April 2013(12 months x 42,079.....KES 504,948***
- ii. April 2013 to April 2014 (12 months x 42,079)...KES 504,948***
- iii. May 2014 to August 2014 (4 months x 42,079).. KES.168, 316***

**TOTAL KES 1,178,212**

**Rental House Allowance**

<i>i. April 2012 to April 2013(12 months x 6,000).....</i>	<i>KES. 72,000</i>
<i>ii. April 2013 to April 2014 (12 months x 6,000).....</i>	<i>KES. 72,000</i>
<i>iii. May 2014 to August 2014 (4 months x 6,000).....</i>	<i>KES. 24,000</i>
<b>TOTAL</b>	<b>KES. 168,000</b>

**Police Risk Allowance**

<i>i. April 2012 to April 2013(12 months x 5,000)....</i>	<i>KES. 60,000</i>
<i>ii. April 2013 to April 2014 (12 months x 5,000).....</i>	<i>KES. 60,000</i>
<i>iii. May 2014 to August 2014 (4 months x 5,000).....</i>	<i>KES. 20,000</i>
<b>TOTAL</b>	<b>KES. 140,000</b>
<b>GRAND TOTAL</b>	<b>KES 1,486,212</b>

*a) Full payment from the period of August 2014 up to the time he is reinstated plus interest at Court rates.*

*f) Compensatory damages.*

*g) Any such other appropriate relief that the Honourable Court may deem it to grant.*

2. The Respondents filed a joint Response to the Claim on 8<sup>th</sup> May 2015 in which they deny the allegations in the Memorandum of Claim and further contend that the Claim does not disclose any cause of action against them as it has been overtaken by events. Moreover, that the Claim is time barred.

**Claimant's Case**

3. The Claimant states that he was recruited into the Administration Police Service with effect from 19<sup>th</sup> September 1993 as an Administrative Police Constable and after completion of the 2 years probation period he was admitted to the Permanent and Pensionable Establishment.

4. The Claimant avers that on 24<sup>th</sup> April 2012 he requested for 5 days pass leave to attend a family matter and was expected to travel back to Nairobi on 29<sup>th</sup> April 2012 to resume his duties. On 29<sup>th</sup> April 2012 the Commanding Officer called the Claimant and informed him that an Administrative Police Officer had signed and taken a Pistol from the armourer on 27<sup>th</sup> April 2012 which had not been returned on 29<sup>th</sup> April 2012.

5. The Claimant avers that the firearm had been issued to APC Kennedy Omollo who did not return it and had been arrested and the firearm detained in Nyatike. The Claimant was thereafter ordered to go ahead and retrieve the firearm in Nyatike since the gun could only be released to an officer of the rank of Inspector and above.

6. The Claimant avers that on 2<sup>nd</sup> May 2012 while returning the firearm to the Commandant in Nairobi, the Claimant found six senior officers with other paraded officers. The Commandant, the paraded officers, 2 other officers and the Claimant were all ordered to surrender all government property and vacate their premises before 2200hours on the very day, 2<sup>nd</sup> May 2012.

7. The Claimant avers that on 13<sup>th</sup> June 2012 he was called to the SGB Camp in Nairobi West to collect his dismissal letter which was dated 31<sup>st</sup> May 2012. The Claimant avers that he appealed against the dismissal to the Permanent Secretary, Provincial Administration and Internal Security, through the Commandant, Administrative Police Service. On 28<sup>th</sup> May 2014 the Claimant received a letter via post from the Administrative Police Service informing him that his case could not be heard.

**Respondents' Case**

8. The Respondents aver that the Claimant was procedurally terminated in accordance with the law pursuant to the Orderly Room Proceedings dated 2<sup>nd</sup> May 2012. The Respondents therefore aver that the Claimant was given a hearing and that the whole termination process was done in good faith.

**Respondent's submissions**

9. The Respondent submitted that the Claimant had proved that the Claimant had used abusive language and had converted the institution's property for his own use without authority of the institution. The Respondent relied on the case of Attorney General & Others v Evans Arthur Mukolwe [2013] eKLR and Staff, Disciplinary Committee of Maseno University & 2 Others v Prof. Ochong Okello (2012) eKLR where, in the latter, the Court of Appeal held:-

***“However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the Respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties.”***

10. The Respondent submitted that the court ought not to award any compensatory award as the procedure in the Administration Police Act was followed. The Respondent relied on the case of CMC Aviation Limited v Mohamed Noor [2015] eKLR.

11. In respect of the provisions of Section 45 of the Employment Act on unfair termination, the Respondent submitted that the reason for the Claimant's termination was his sharing of a firearm with his colleague. Further, that the reason was valid since Sections 8 and 9 of the Public Office Ethics Act provides the general code of conduct and ethics, which includes professionalism as work ethics. The Respondent further submitted that Article 75 of the Constitution provides some of the disciplinary measures to be taken against a public officer as a state officer including dismissal or termination from office.

12. The Respondent finally submitted that the Claimant is not entitled to the terminal benefits since his termination was rightly done. With respect of reinstatement, the Respondent submitted that it was impractical to re-employ the Claimant as the relationship between him and the employer was completely destroyed. They relied on the case of New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School where the New Zealand Court of Appeal held:-

***“Practicability is capability of being carried out in action, feasibility or the potential for re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.***

***Whether...it would not be practicable to reinstate [the employee] involved a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.”***

13. I have considered the evidence of the parties plus submissions filed herein. The issues for determination are as follows:-

1. ***Whether the Respondent had valid reasons to dismiss the Claimant.***
2. ***Whether due process was followed.***
3. ***Whether Claimant is entitled to remedies sought.***

14. On the 1<sup>st</sup> issue, from the Claimant's evidence, he was dismissed for apparently being rude to his supervisor. The Claimant avers that he had been sent to pick a firearm from Nyatike. On arrival he went to hand it over and was now enjoined to other officers and accused of mishandling a firearm.

15. The Respondents on their part contend that it is the Claimant who authorized APC Omollo to use a firearm illegally. The Claimant was subjected to orderly room proceedings and one IP Anthony Okeyo testified that the Claimant authorized the armourer to issue a firearm to APC Omollo.

16. The Claimant is said to have admitted in the orderly room proceedings that he instructed the armourer to issue the firearm to APC Omollo thinking that APC Omollo was going on patrol. APC Omollo testified and told the Court that he is the one who asked the armourer for a pistol for his own security.

17. Despite the Respondent filing a defence, they did not call any evidence. This means that the Claimant's case remained uncontroverted. The Respondent's Counsel filed submissions, which is tantamount to Counsel attempting to give evidence on behalf of the Respondent.

18. From the evidence of the Claimant, he only went to pick the pistol from Nyatike after APC Omollo was arrested. He denied authorizing issuance of any pistol. Indeed the Respondents did not call the armourer as a witness to indicate that, it is the Claimant who authorized him to issue a firearm to APC Omollo. PC Omollo indicated he requested the armourer to issue him with a pistol for his own security.

19. It is my finding from evidence above that the Respondent had no valid reason to dismiss the Claimant from the service.

20. On due process, the Claimant avers that he was not accorded any hearing. He denies being taken through orderly room proceedings as he was on leave when these proceedings are said to have been conducted on 29.4.2013.

21. He denies signing any orderly room proceedings and those filed by the Respondent do not bear his signature. In the absence of any

evidence to counter this evidence and given that Claimant never signed the orderly room proceedings, I find that the Claimant was denied his right to be heard and was condemned unheard.

22. On remedies sought, I find for Claimant and order he be paid as follows:-

*1. 1 months' salary in lieu of notice = 53,079/=.*

*2. 12 months' salary as compensation for unlawful dismissal = 12 x 53,079 = 636,948/=.*

*Total = 690,027/=*

*3. The Claimant be paid all his pension benefits.*

*4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.*

Dated and delivered in open Court this 20<sup>th</sup> day of December, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

No appearance for the Parties