



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1785 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 20th December, 2018)

SYLVESTER KIOKO MAITHA.....CLAIMANT

-VERSUS-

THE COMMISSIONER OF POLICE.....1ST RESPONDENT

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

JUDGEMENT

1. This Claim was initially filed before CM's Court Nairobi as CMCC No. 12265/06 but was later transferred to this Court on 23/11/2012 and registered as ELRC Cause No. 1785 of 2013.
2. The Claimant, Sylvester Kioko Maitha, in his Amended Complaint dated 22/01/2016 sues the Inspector General of Police as the Chief Officer of the Police Force and the Attorney General in his capacity as the legal representative of the government.
3. He avers that he was a Police Constable No.75900/18038102 attached to the Industrial Area Police Station and on the 6th and 7th of September 2003, he was deployed to Rueben Police Post within Industrial Area on patrol duties at Kingstone, Rueben slums and Falcon road when a V.H.F base station communication set was stolen from the post.
4. He further avers that he was prosecuted in orderly room proceedings as a result of the said theft and found guilty of *an act to the prejudice of good order and discipline* by misleading PC No. 81596(W) Eunice Waringa that he would take charge of the police post while she was in the changing room and he was dismissed from the police force effectively from 31/10/2006.
5. He contends that the said charges and conviction were illegal, erroneous and based on no evidence and that as a result of the illegal and unlawful summary dismissal he lost his employment and livelihood and suffered prosecution for a fabricated offence that he did not commit.
6. The Claimant seeks for orders declaring the said prosecution illegal and unlawful, payment of his unpaid salary since 31/09/2003, general and exemplary damages for illegal dismissal from employment, reinstatement to his employment and/or payment of his terminal dues, any other relief the Court may deem fit to grant and costs of this suit together with interest on unpaid salary and damages since 31/09/2003.
7. The Respondents filed their Statement of Defence dated 20/12/2006 admitting that the Claimant was employed as a Police Officer and that he was lawfully dismissed from his employment after being prosecuted and found guilty of lawful charges brought against him, his offence being contrary to Section 3(41) of the Police Regulations and that there is therefore no cause of action against them.
8. They aver that the Claimant is not entitled to the prayers he seeks and deny that they were served with Demand and/or Notice of intention to sue by the Claimant. They then filed a List of Documents and Witness Statements on 07/11/2017 both dated 30/10/2017.

Evidence

9. The Claimant testified in Court that he was on patrol with a colleague Masinde from 6.00 pm while Eunice Wairimu manned the report office. He avers that a radio set went missing that night and a search for the set in the area was unsuccessful. He was then arrested locked up at Embakasi Police Station and later moved to Central Police Station and that he stayed in the cells for 7 days after Orderly Room Proceedings had been conducted.

10. He was thereafter returned to his station where he worked for the whole month before being dismissed. He filed an appeal, which was also dismissed.

11. In cross-examination, he denied that Eunice had asked him to guard for her as she went to change her uniform and stated that he heard about the missing police radio when they returned from patrol at 5am. That the letter of dismissal said that he had been dismissed for not wearing a uniform and not guarding the post when in fact he was not the one guarding the post on that night. His evidence was corroborated by CW2 who was on patrol with him on the said night and who was also dismissed in a similar manner.

Claimant's Submissions

12. The Claimant submits that the reason for terminating his employment was invalid and not genuine because as per the record of the orderly room proceedings, there was no witness called and that he was also not allowed to bring his witness to testify. That the dismissal was also not proportionate to the established misconduct considering the otherwise clean record of service set out in the dismissal letter.

13. On whether due process was followed in this case, the Claimant submits that the presiding officer failed to inquire from him whether he needed the assistance of another police officer as provided for in **Rule 16(x) of the Force Standing Order** and that a language that he may not have understood was used. That these procedural defects impaired the orderly room proceedings and were prejudicial to his case.

14. He submits that the Court should find that his dismissal from employment was excessive, order for his re-engagement into the police service and allow his Amended Complaint with costs. That he seeks his prayers under **Article 22(1), 23(1), 27(1), 47(1) and 50 (1) and (2) of the Constitution of Kenya 2010** and further seeks the following orders:-

a) *A declaration that his dismissal from the Kenya Police Force was/is unlawful, unreasonable and unfair.*

b) *A declaration that his dismissal from the Kenya Police Force was predicated upon skewed and biased findings uncorroborated by the evidence on record.*

c) *A declaration that the conduct of the Orderly Room proceedings was flawed in procedure as neither the complainant nor the listed witnesses testified.*

d) *A declaration that he was on 31/09/2003 dismissed from the Kenya Police Force on the strength of evidence that otherwise exonerated him from any wrongdoing or default.*

e) *A declaration that the charges preferred against him were not supported by the evidence adduced during the orderly room proceedings.*

f) *The Honourable Court to quash the decision made on 31/09/2003 dismissing him from the Kenya Police Force.*

g) *An order directing the 1st Respondent to reinstate him to the Kenya Police Force forthwith.*

h) *An order for compensation for wrongful and unlawful dismissal from the Kenya Police Force.*

i) *Any such appropriate relief that the Honourable Court may deem fit to grant.*

15. He relies in the case of **Joseph Mwenda Mbuko vs Provincial Police Officer and 2 Others, High Court at Meru Petition 5 of 2011** where the J.A. Makau J (as he was then) declared that, *the Petitioner's rights under Article 47(1) and 50(1) and (2) of the Constitution of Kenya 2010 were violated by conduct of the Orderly Room Proceedings which was flawed in procedure and the basis of Petitioner's dismissal from the Kenya Police Force and the charge against the Petitioner was not supported by evidence and subsequently those proceedings and the dismissal of the Petitioner from the Kenya Police Force are null and void.*

Respondent's Submissions

16. The Respondents submit that the Claimant was accorded a fair hearing as per **Article 47(1) of the Constitution of Kenya 2010**, which entitles every citizen to the right to a fair administrative action including a fair hearing. That **Section 4 of the Fair Administrative Action Act, 2015** provides the procedure by which administrative action should be taken against an individual.

17. That the Claimant was given notice of the hearing, informed of the charges against him, granted a fair hearing where he was entitled to give his evidence and call any witnesses and further cross-examine his colleagues who testified against him. That it is based on the inquiry that the PPO recommended to the then Police Commissioner for the summary dismissal of the Claimant and which was also evidenced in Court.

18. It is submitted by the Respondent that **Section 41 of the Employment Act** provides for fair procedure while **Section 43** provides for proof of reason for termination which they say was duly followed and a valid reason given and they rely on **Judicial Service Commission vs Gladys Boss Shollei & Another, Civil Appeal No. 50 of 2014** where the Judges of the Court of Appeal borrowing from **Michael Dowling vs Work Place Safety and Insurance Board [2004] CAN LII 43692 at page 74**, observed as follows:-

"...It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction

imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the circumstances of the misconduct.”

19. They submit that **Section 49 of the Employment Act** has provided remedies for unfair termination. That in the event this Honourable Court finds against the Respondents, *Reinstatement* can only be awarded in a case instituted within 3 years of the dismissal of employment which in this case was 31/09/2003 and 27/10/2006 for the Plaintiff meaning the Claimant is not eligible for the orders sought for being time barred by one month. They finally submit that the Claimant has failed to prove his case on a balance of probabilities and that this claim should be dismissed with costs.

20. I have examined the evidence and submissions of the parties herein. The issues for determination are as follows:-

1. Whether there were valid reasons to warrant dismissal of the Claimant.

2. Whether due process was followed.

3. Whether the Claimant is entitled to the remedies sought.

21. On the first issue, when the Claimant was charged, he was taken through Orderly Room Proceedings where he was charged with the offence of “guilty of an act prejudicial to the good order and discipline contrary to Regulation 3 sub (41) of the Police Regulations”. The particulars of the charge were that:-

“No. 7590 PC Sylvester Kioko Maitha on the night of 7th September 2003 at Reuben Police Post within Nairobi Area was found guilty of an act conduct prejudice to good order and discipline by misleading No. 31596 PC (W) Eunice Waringa that you would take care of Reuben Police Post report office, while she was in the changing room”. He pleaded not guilty.

22. The Claimant was taken through Orderly Room Proceedings. From the proceedings, the Claimant and his colleagues PC Nzomo and PC Masinde were allocated patrol duties and the officer to man the report office was PC (W) Eunice Waringa. The Claimant indicated that he had been on his patrol duties the whole night and learnt of the theft of the VHF radio at 6 am.

23. From the evidence of PW1 (in the orderly room proceedings) it was not normal to leave a single officer on duty at night and the problem arising in such a case should be handled by the shift in charge in the absence of OCPC.

24. The shift in charge was PC Alfred Nzomo. PC (W) Eunice Waringa told the orderly room proceedings that it is the Claimant who told her of the theft of VHF radio. After these proceedings, the Claimant was found guilty of complicity in crime by not waking up PC Waringa as they left the post.

25. The evidence of the Claimant before this Court is that he was assigned patrol duties. That is indeed corroborated by his witness CW2 who was on patrol with him and even from the PW1 from the orderly room proceedings. The Claimant would not have been expected to be on patrol duties and at the same time be at the report office. There cannot therefore be “complicity in crime of not waking up PC Waringa” as that was not the Claimant’s duty.

26. The dismissal letter issued to the Claimant indicated that the Claimant was assigned to guard Reuben Police Post on 6th and 7th September 2003 which is not true.

27. It is my finding that contrary to the reasons given in the dismissal letter, the Claimant was never assigned guard duties at the police post on the day the VHF phone got lost as he was on patrol duties. I therefore find that there were no valid reasons to dismiss the Claimant.

28. Due process was actually followed but even from the proceedings, the Claimant was being accused of not waking up PC (W) Waringa. This was also not his duty as he was outside the post on patrol duties.

29. Having found that there were no valid reasons to warrant dismissal of the Claimant, it is my finding that the Claimant’s dismissal was unfair and unjustified.

30. In terms of remedies, I award the Claimant damages for unfair dismissal equivalent to **2 million Kshs.** The Respondent will also 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 20th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Koiko holding brief Oyugi for Respondent – Present

Claimant in person – Present