



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 8 OF 2018

(Formerly Nairobi HC Petition No. 111 of 2011)

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF THE REPUBLIC KENYA

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM AS ENSHRINED UNDER ARTICLES 27, 28, 41, 47, 40 AND/OR AS READ TOGETHER WITH ARTICLES 2(1) & (4), 10, 19, 20, 21, 23 AND 24 OF THE CONSTITUTION OF KENYA

BETWEEN

KENNETH NYAGA MWIGE.....PETITIONER

VERSUS

THE MINISTER FOR JUSTICE, NATIONAL

COHESION & CONSTITUTIONAL AFFAIRS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner was the Executive Director of the Public Service Complaints Commission (PCSC) and he filed the Petition through the form of Ochieng', Onyango, Kibet & Ohaga Advocates seeking relief *inter alia* for the unlawful removal from office effected by the Minister for Justice National Cohesion and Constitutional Affairs at the time the late Hon. Mutula Kilonzo Snr. The Petitioner remained in office beyond the contract period and he asserted that in line with the administrative circulars by the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service, to the effect that a serving CEO's position would only be declared vacant if the CEO was not interested in the renewal and that the interested CEO was to give notice of the intention to continue in office through a letter 6 months prior to the expiry of the contract. The Petitioner signaled his intention to remain in office by a letter dated 16th September 2010. In the Petition filed herein, the Petitioner sought various reliefs *inter alia* orders for compensation by the Respondents for the Respondents' breach of the Petitioner's contract, contravention of his fundamental rights and for the failure to observe the national values enshrined in Article 232 of the Constitution and for injuring his feelings and dignity and exposing him to public ridicule, odium and possible prejudice as regards public service. He also sought costs of the Petition. By the time of penning the judgment, all the other prayers the Petitioner sought had been overtaken by events and do not fall for consideration in this judgment.

2. The Respondents appeared through Miss Muthoni Kimani, MBS the Senior Deputy Solicitor General at the time. The Respondent filed a number of affidavits. The replying affidavit sworn by Mr. Andrew Ayarah Okwach was the main response to the Petition. He deponed that the office of "Ombudsman" was established by His Excellency the President in exercise of his powers under Section 23(1) of the former Constitution which powers were valid till announcement of the first general elections under the new Constitution. The deponent averred that the Petitioner was eligible for reappointment after the initial appointment came to an end and because the recruitment of his replacement or his reappointment was taking a while, the 1st Respondent (initially heading a ministry known as the Ministry of Justice and Constitutional Affairs before being renamed) gave the Petitioner a letter dated 28th March 2011 to hold over. He deponed that the Petitioner applied for, was shortlisted and interviewed for the position before the Petitioner launched this Petition allegedly on the pretext that the PCSC was undergoing transition into the Commission on Administrative Justice which is a Constitutional commission by virtue of Article 59(4) and (5) of the Constitution. He stated that the 1st Respondent therefore terminated the services of the Petitioner as there was no contractual basis upon which the Minister could have continued to pay the Petitioner his salary dues. The affiant asserts that the Petitioner did not hand over the office and when the proceedings were commenced the Petitioner had stated that he was still in office, an allegation the 1st Respondent denied. He cited instances where the Standing Committee on Public Complaints Committee chaired by a Chairman (hereafter referred to as

the Committee) was ignored by the Petitioner, which action caused friction between the Committee and the Petitioner. He thus asserted that the Petition was unmerited and not fit for grant.

3. The office of Ombudsman was established vide Gazette Notice No. 5826 of 21st June 2007 which was published in the Kenya Gazette of 29th June 2007. The Petitioner was appointed the Executive Director of the Public Complaints Standing Committee (PCSC) with effect from 13th March 2008 vide Gazette Notice No. 1984 of 14th March 2008 duly signed by the Minister for Justice and Constitutional Affairs at the time, Hon. Martha Karua. The source of the petition was the letter issued to the Petitioner by the Minister for Justice, National Cohesion and Constitutional Affairs on 21st February 2011 informing him that his contract was to expire on 31st March 2011. Subsequently, there was a Memo issued on 28th March 2011 which indicated that the Petitioner was to remain in office until the point the next Executive Director was to be determined through competitive process. The Petitioner's challenge was to the administrative action by the Minister the 1st Respondent herein. The 1st Respondent advertised the vacancies for the position of Executive Director in the daily press and received applications for the same. The Petitioner actually applied for, was shortlisted and interviewed for the position before he launched this Petition arguing that the PCSC was undergoing transition into the Commission on Administrative Justice a constitutional commission by dint of the provisions of Article 59(4) and (5) of the Constitution of Kenya 2010. As alluded to earlier, the only issue that remained for determination by this Court was the matter of compensation for the alleged infarctions by the 1st Respondent. Given the foregoing, the issues I distill for determination are as follows:-

- a. Was the contract of the Petitioner frustrated by virtue of abolition of office or operation of law?
- b. Did the termination of the contract of service of the Petitioner constitute discrimination and therefore unlawful?
- c. Is the doctrine of legitimate expectation applicable in the circumstances of the case?
- d. What remedies are available to the Petitioner if at all?

4. On the first issue, there is no doubt that the Petitioner held a position that was entrenched in the former Constitution. He filed the Petition during the recruitment exercise of his successor. As the Constitution of Kenya 2010 did not provide for the Committee, it is clear there was abolition of office. Under Chapter Fifteen of the Constitution and in keeping with the new constitutional dispensation, various independent commissions were established and the Commission on Administrative Justice also known as the Office of the Ombudsman was established under Article 59 (4). Parliament enacted the Commission on Administrative Justice Act, 2011 to give full effect to the provisions of Article 59(4) of the Constitution and establish the Commission. The Act was assented to on 27th August 2011 and came into effect on 5th September 2011. The Commission's mandate was to *inter alia*, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and receive and investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. This Commission in essence effectively replaced the Committee established by the President previously and which Committee was headed by the Petitioner as CEO. The Petitioner's position as Executive Director of the PCSC no longer existed as of August 2011. The holding of the court is that the contract of the Petitioner was ultimately frustrated by virtue of abolition of office despite the genesis having been the letter of the 1st Respondent giving notice that the contract was coming to an end. The issue that falls for determination next is whether the Petitioner's unlawful removal from office was discriminative therefore unlawful. The Petitioner was not permitted to serve till December 2011 as the rest of the management team of PCSC such as the Chairman and the members were. He had indicted his keenness to continue serving in that position. Having a regard to the circulars by the Head of Public Service, the Petitioner expected to continue serving in line with the directives contained in the two circulars. He had no inkling that there was a change of heart in the 1st Respondent as he served his intent in September of the preceding year 6 months prior to the end of the contract in March 2011. He was given a letter in February 2011 telling him he would have to exit at the end of March 2011. He thus was unlawfully removed from office and his service to the nation was brought to an abrupt end contrary to his expectations. There was a legitimate expectation engendered by the letter of comfort issued vide the Memo dated 28th March 2011 which indicated that the Petitioner was to remain in office until when the next Executive Director was determined through competitive process and the letter from the Prime Minister of Kenya which stated the Petitioner was to serve till December 2011. As the Petitioner suffered the ignominy of a forced early exit in the circumstances, he would be entitled to recompense.

5. As to discrimination, the Petitioner was singled out for an early exit. As to whether this was on account of his minority status or whether it was as a result of the prevailing hostility between him and the Chairman of the Committee and some members of the Committee is debatable. However, the Petitioner was treated differently and that constituted discrimination. Black's Law Dictionary Tenth Edition defines discrimination as the **differential treatment, especially a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored**. The common definition of discrimination is **to distinguish, make a distinction or to single out**. From the foregoing definitions, there was discrimination against the Petitioner in as far as his terms of extension were singled out for differential treatment.

6. As to the measure of damages, there is a growing body of precedent on the subject. As I cannot reproduce all the reasoning in the various cases, the court will call to aid one authority which succinctly sets out the various aspects of this legal and philosophical conundrum. In the case of **John Wairimu Mathenge (Petitioning on Behalf of the Estate of Adam Mathenge Wangombe) v Attorney General [2017] eKLR** Mativo J. held as follows:-

It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the Constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

67. *On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.* [37] *The jurisprudence that*

has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court.

68. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. [38] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened.

69. *The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.* [39]

70. *An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.*

71. An injury suffered as a result of discrimination, harassment or inhuman and degrading treatment is no less real because it does not possess tangible physical or financial consequences. And the difficulty in assessing the amount of compensation for that type of injury should not deter a court from recognizing its potential. [40]

72. Assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms.

73. Translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation, it is a philosophical and policy exercise more than a legal or logical one. [41] The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

74. *Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury. (emphasis mine)*

7. The Petitioner had served as the CEO for 3 years and was poised to continue in his service. He asserts this dream was curtailed by the 1st Respondent and caused him anguish entailing suffering, ridicule, odium and disdain. As held by Mativo J. there is no precise science to measure the hurt the actions in such a case caused nor can one effectively measure the damage caused by the non-adherence to the Constitutional bar and ensuing discrimination. In my considered estimation a sum of Kshs. 10,000,000/- would suffice as compensatory damages. The Petitioner will also have costs of the suit.

8. In the final analysis the court finds as follows:-

- a. The unlawful removal from office of the Petitioner was unfair and discriminative in the circumstances then obtaining and was an abridgement of his fundamental rights under Article 22 of the Constitution.
- b. Damages Kshs. 10,000,000/-
- c. Costs of the Petition.
- d. Interest at court rates on the sums above from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nairobi this 18th December 2018

Nzioki wa Makau

JUDGE