



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR COURT OF KENYA

AT NAIROBI

CAUSE NO. 261 OF 2014

(Before D. K. N. Marete)

WILLIS OWOTSI.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

This matter was originated by way of a Complaint dated 2nd November, 2004. It does not disclose any issue in dispute on its face.

The respondent in defence filed a Defence dated 6th May, 2005 denying the claim and praying that it be dismissed with costs.

The plaintiff's case is that at all material times to this cause, he was employed at the Office of the Attorney General, the defendant, as head of accounts at her chambers.

The claimant's other case is that by a letter dated 12th February, 1998, the Principal Administrative Secretary at the defendant's chambers interdicted the plaintiff from exercising the powers and functions of his office allegedly because he had stolen and misappropriated government funds by altering payment vouchers.

His further case is that he responded to the accusations by a letter dated 13th February, 1998 and explained, exonerated himself and also explained the circumstances under which the payments were made. The Principal Administrative Secretary lifted the interdiction and even offered to sponsor him for a Bachelor of Commerce degree course at the University of Nairobi. On 15th September, 1999, the Permanent Secretary in the Ministry of Finance confirmed the plaintiff to be head of accounting unit at the defendant's chambers.

The plaintiff's other case is that on 27th September, 1999, a reporter from the print media had been at the defendant's chambers and on the following day, it was reported in the press, more so 'The People' newspaper, that there was massive misappropriation of funds at defendant's office with the Attorney General being the beneficiary of this. On the same day, the plaintiff was suspended, allegedly pursuant to the earlier interdiction of 12th December, 1998.

The plaintiff's case is further expressed as follows;

9. It is the plaintiff's contention that the defendant's action to suspend him on 29th September 1999 was motivated by unsubstantiated press reports, rumours and malice because although the suspension was said to follow the plaintiff's interdiction there was indeed no interdiction in force at the time of suspending the plaintiff.

10. On 12th November 1999 the same Principal Administrative Secretary wrote to the plaintiff alleging that the plaintiff had made irregular payments of honoraria amounting to Kshs.1,254,050.00 without the authority of the Directorate of Personnel Management. The defendant's allegations were untrue as any payment made were supported by relevant authority.

11. In the same letter of 12th November 1999 the plaintiff was asked to defend himself which he did by a letter dated 30th November 1999. However on 15th December 2000 the plaintiff was dismissed from service on account of gross misconduct.

On 14th January, 2001 the plaintiff exercised his right of appeal pursuant to the letter of dismissal and his terms and conditions of service but this was declined vide a letter dated 21st November, 2001. He was also informed that his case had been closed.

It is his further case that his dismissal from employment was illegal and unlawful, malicious and a breach of his terms and conditions of employment and he has suffered loss and damage.

He prays as follows;

- a) *Outstanding salary from the date of termination of service to the date of judgement together with interest at court rates.*
- b) *Severance pay for 15 years the plaintiff was in employment.*
- c) *Three month's salary in lieu of notice.*
- d) *The university fees the plaintiff paid after the defendant defaulted in paying the same.*
- e. *A declaration that the interdiction, suspension and dismissal of the plaintiff from employment was unlawful and/or illegal.*
- f) *In the alternative reinstatement of the plaintiff to service.*
- g) *Costs of this suit.*

The defendant's case is one of denial of the claim.

She however admits paragraph 10 of the plaint and avers that the plaintiff made an irregular payment of Kshs.1,254,050.00 without the authority of the Directorate of Personal Management. This amounted to gross misconduct for which the plaintiff was lawfully dismissed. The decision of dismissal was arrived at after affording the plaintiff a hearing.

The matter came to court variously until the 19th October, 2018 when the court suggested a disposal by way of written submission. This was agreed on by the parties.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The plaintiff/claimant in his written submissions dated 6th November, 2018 reiterates his case of unlawful termination of employment. He comes out as follows;

- On 12th February, 1998 he was interdicted on allegation *“that on diverse dates in 1997 he had caused payment vouchers to be altered or assisted in altering and/or accepted alteration with a view to defrauding the Government.”*
- By a letter dated 13th February, 1998, he vehemently disputed this and explained in great detail that he had not prepared the payment vouchers that were allegedly altered.
- On 15th September, 1999, the plaintiff was confirmed as head of accounting unit in the Attorney-General's Chambers.
- This notwithstanding the plaintiff was suspended from service by a letter dated 29th September, 1999. In this disciplinary letter, he is accused of having been irregularly paid Kshs.1,254,050.00 without authority from the Directorate of Personnel Management (DPM.)
- Despite answer and vehement denial of these accusations he was nonetheless dismissed from service by a letter dated 15th December, 2000.
- He made an appeal against dismissal in tandem with the Public Service Code of Regulations but this was declined. His further appeal against this was also dismissed.
- His position and case is that all payments he received were authorized by the accounting officer who had sought and obtained authority from the DPM.
- As Chief Accountant, he was entitled to payment of honoraria with other officers involved in the various task forces. This included Attorney-General and Solicitor General. These payments were authorized by the DPM.
- He has been singled out for preferential/selective treatment without incorporating all the other officers who received payments as honoraria.
- Contrary to the assertion that the plaintiff was dismissed from service with effect 12th February, 1998, there are two intervening circumstances that contradict this;

(i) He was sponsored for a degree course (Bcom) which he successfully undertook.

(ii) He was designated as the head of accounting unit in the Attorney-General's Chambers in 1999.

- The plaintiff's dismissal does not amount to fair administrative action for being selective.
- The plaintiff was not afforded an opportunity to defend himself before dismissal thereby offending the principal in the authority of **David Otunga Kenanai v Office of the Controller and Auditor General & Another Cause No.933 of 2013** at pages 47 – 56.

The respondent in her written submissions dated 9th November, 2018 comes out blaring in reiteration of her case. This is as follows;

- The actions of the plaintiff/claimant were necessitated when it was discovered that on diverse dates in 1997, he cause payments of vouchers to be altered, assisted in altering and or accepted alterations with a view to defraud the government, actions which he knew or was expected to know amounted to gross misconduct. This was tantamount to stealing and or misappropriating government funds.
- His case was deliberated on by the Ministerial Advisory Committee in its meeting held on 19th August, 1999 under Minute No.24/99 (A) and recommended that:-

i. Mr. Owotsi (the Claimant) be suspended from exercising the powers and functions of his office with effect from 19th August, 1999.

ii. He be dismissed from the service with effect from 19th August, 1999 because of gross misconduct and recommendation be made to the Public Service Commission for appropriate action.

iii. All the money irregularly paid to him as honoraria and meals allowance without the Directorate of Personnel Management's Authority which is shillings one million two hundred fifty-four thousand and fifty only. (Kshs.1,254,050.00) be recovered in full.

iv. Since Mr. Owotsi is accused of having caused payment vouchers to be altered, assisted in altering and/or accepted alteration with a view to defraud the Government his case be handed to the relevant arm of the Government to institute legal action against him.

The claimant was subsequently dismissed and even his appeal and second appeal against dismissal to the Public Service Commission were declined for want of merit.

The respondent seeks to buttress his case by relying on the authority of section 45 (2) of the Employment Act, 2007 which provides as follows;

45.(1) No employee shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

i.related to the employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

I must admit that the Employment Act, 2007 was not in place at the time of this cause of action and is therefore not applicable in the circumstances. However, fairness, fair procedure and fair administrative action are as old as is the rule of law and civilization. The Employment Act, 2007, Chapter 226, Laws of Kenya (now repealed), The Public Service Commission Act, Chapter 189, Laws of Kenya and the Code of Regulations thereof all incorporated provisions and clauses on the necessity of a fair hearing in the event of any administrative action involving and affecting parties and their employment right. This is the celebrated principles of natural justice of which no one should be denied.

Notable of these proceedings against the plaintiff/claimant is the following;

i. That his letters of interdiction and suspension did not include the particulars of the allegations or charges to which he was accused of and required to answer. There were no annexures of the particular documents (vouchers) which were the causative of his alleged fraud and misconduct. How then was he expected to answer the same.

ii. The claimant's request for particulars of his accusations, including documentation remain unanswered to date. Why? No available answer.

iii. The allegations and accusations against the claimant/plaintiff were serious and life threatening. We live in a jurisdiction where termination of employment is tantamount to termination of life. It is tantamount to a death sentence. Yet the claimant/plaintiff was

never afforded an open opportunity to ventilate his case. A face to face situation where he would answer his accusers directly. This would have been the appropriate situation and satiated the tenets of justice, fairness and transparency. It would have fully satisfied the twin facets of the rule of natural justice namely, *nemo judex in causa sua* and *audi alterum partem*: no man shall be a judge in his own court and the rule against bias.

From this analysis, it is clear and evident that the claimant/plaintiff was not treated fairly in the management of his disciplinary case. This was lopsided and faulty in all senses of the word. He was never afforded a fair hearing in the dispensation of his disciplinary proceedings. I therefore agree with his case and submissions that his termination was wrongful, unfair and unlawful. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to some of the relief sought. This is analyzed and awarded as follows;

a) Outstanding salary from the date of termination of service to the date of judgement together with interest at court rates.

It is trite law and practice that employees are paid for work done. Salaries and wages are a reward for labour expended at work for the benefit of the employer, simply said, production and productivity. In the instant case, the claimant/plaintiff did not work during termination of employment. He should not therefore be paid.

b) Severance pay for 15 years the plaintiff was in employment.

This is a case of unlawful termination of employment. This is not redundancy and therefore severance pay is not applicable.

c) Three month's salary in lieu of notice.

The common and conventional allowance is one (1) months pay salary in lieu of notice. Any other facility must be specifically contracted *inter partes* and proved in evidence.

d) The university fees the plaintiff paid after the defendant defaulted in paying the same.

This was a benevolent act by the employer before winter crept in. It is not an outright or enforceable employment benefit.

e) A declaration that the interdiction, suspension and dismissal of the plaintiff from employment was unlawful and/or illegal.

This is awardable and an entitlement to the plaintiff/claimant in the circumstances of his glory in winning his case.

f) In the alternative reinstatement of the plaintiff to service.

This would have been an appropriate remedy if this cause was determined expeditiously and in due time. It is now about twenty years since the cause of action arose. The claimant was born in 1956 and is now 62. This prayer becomes overtaken by events through effluxion of time.

However, the circumstances of the case dictate and allow an award of partial reinstatement for purposes of the plaintiff's award and accessibility to his terminal and pension in terms of his contract of employment. I award the same on this format.

g) Costs of this suit.

This is awardable to the claimant/plaintiff.

I am therefore inclined to allow the claim, declare and order relief as follows;

- i. A declaration that the interdiction, suspension and dismissal of the claimant/plaintiff from employment was wrongful, unfair and unlawful.
- ii. That the claimant/plaintiff be and is hereby awarded contractual damages for wrongful, unfair and unlawful termination of employment being the equivalent of twelve (12) months of his gross salary at the time of his termination of employment.
- iii. The claimant/plaintiff be reinstated to employment solely for purposes of sustaining, accessing acquiring payment and receipt of his terminal benefits and pension in terms of his contract of employment.
- iv. Interest at court rates from the date of judgement till payment in full.
- v. The Commissioner of Labour with the involvement of the parties be and is hereby ordered to compute the package in (ii) above and report to this court in 120 days from this judgment of court.
- vi. The Director of pensions be and is hereby ordered to compute the package in (iii) above as of course.

vii. Mention on 20th March, 2019 for a report on computation by the Commissioner of Labour.

viii. The costs of this claim shall be borne by the respondent.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Kioko instructed by State Law Office for the claimant/plaintiff.
2. Mr. Ratemo holding brief for Mr. Ombete Instructed by L. M. Ombete & Company Advocates for the respondent.