



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT MOMBASA
CAUSE 257 OF 2015

JAMES OMONDI OTIENO.....CLAIMANT

VERSUS

1. THE ATTORNEY GENERAL

2. INSPECTOR GENERAL OF POLICE

3. NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

JUDGMENT

Introduction

1)The claimant was enlisted in the Kenya Police service on 12.5.2011. On 31.1.2013, he got permission from his senior to go home for 3 days after falling sick. On 24.4.2013 he was arrested and charged in court with the offence of desertion contrary to section 94(1) of the National Police Service Act and dismissed from the service. After the full trial, the Court acquitted him of the offence on 22.11.2013 and subsequently he was reinstated to the police service by the letter dated 17.2.2014 and received his full pay.

2) Subsequent to the said reinstatement, the claimant was served with the later dated 23.2.2014 by his Commandant asking him to show cause why he should not be removed from the police service. He responded to the show cause letter but his response was not found to be satisfactory and he was removed from the service. According to him the termination of employment was unfair because he was not accorded any 'Orderly Room Proceedings' and also because the reason for his dismissal was the same offence he had been charged with and acquitted by the court. He has therefore brought this Suit seeking:-

- a) Declaration that the termination of his employment was unfair, unlawful and wrongful.
- b) General damages.
- c) Two months' salary in lieu of notice.
- d) 12 months' salary compensation.
- e) Reinstatement to the National Police Service.
- f) Costs and interest.

T3) the respondents admit that the claimant was enlisted to the Kenya police service on 12.5.2011 but was removed from the service by the letter dated 3.4.2014. The respondents aver that the termination of the claimant's service was substantively and procedurally fair and lawful. They further aver that the termination was done in compliance with the procedure set out in chapter 20 of the Force Standing Orders (FSO) and the tenets of Natural Justice. Finally they aver that the provision of the employment Act are not applicable to this case by dint of section 3(2) (b) of the Act.

4) The Suit was heard on 9.11.2015 and 25.5.2016 when the claimant testified as CW1 and the respondents called Chief Inspector of Police Mr. Patrick Osuru Ombech as RW1. All the documentary evidence filed was admitted by consent of the Parties at the start of the hearing and thereafter both parties filed written submissions which I have carefully considered herein.

Analysis and Determination

5) There is no dispute that the claimant was enlisted in the Kenya Police Service on 12.11.2011 and worked under the Anti stock theft unit (ASTU) until 3.4.2014 when he was removed from the service by the Commandant ASTU. The issues for determination herein :-

- a) Whether there was valid and fair reason to warrant the removal of the claimant from the police service.
- b) Whether the procedure followed to remove him was fair.
- c) Whether the claimant is entitled to the reliefs sought or any part thereof.

Valid and Fair Reason

6) The reason cited for the removal of the claimant from the police service was that he was unlikely to become an efficient police officer. The basis upon which the said opinion was formed by his boss is the history of his misconduct in his records. The record showed that the claimant was habitually absenting himself without leave that led him to face Orderly Room Proceedings and severally got punished. The claimant has admitted in evidence that he absented himself without leave from 5.5.2012 to 9.5.2012 while on his internship. He further admitted that he absented himself without leave from 9.11.2012 to 29.11.2012, and from 4.1.2013 to 14.1.2013 while attached to Tana delta on operational duties and he was subjected to Orderly room Proceedings and punished. Finally he has admitted in evidence that while attached to the ASTU Head Quarters, Gilgil, he absented himself for over 21 days from 5.2.2013 until 19.4.2013 when he was arrested at Kendu Bay and brought to Naivasha Law Courts where he was charged with desertion.

7) After consideration the evidence presented to the Court and the submissions by Counsel, I find and hold that there was a valid and fair reason to justify the removal of the claimant from the police service. His conduct right from time of his internship, special operation and finally at his substantive station at the ASTU Headquarters portrayed lack of qualities of a reliable police officer. Under chapter 20 paragraph 33 of the Force standing Orders (FSO) any police officer of the rank of inspector or below may be removed from the service if he/she is unlikely to become or has ceased to become an efficient police officer.

Procedure Followed

8) Under the said chapter 20 paragraph 33 (c) of the FSO, when the officer in charge of the Division or Formation considers that an officer is unlikely to become or has ceased to be efficient, he is supposed submit to the Commissioner of Police (COP) or Provisional Police Office (PPO) a full report of the officer including confidential reports on the officers work, conduct, and efficiency and any warnings administered. Thereafter the COP or the PPO is supposed to write to the said officer notifying him/her that his removal from the service is contemplated and give the reason therefor and invite the officer to write his/her representations within a specified reasonable time. If after considering the representations

made by the officer and officer in charge of the Division or Formation in which the accused officer is serving, the COP or PPO is satisfied that the officer is unlikely to become or has ceased to be an efficient police officer, he shall remove him/her from the service and notify him/her in writing the effective date of his/her removal from the service.

9) In this case the claimant has admitted that he was served with a show cause letter dated 23.2.2014 notifying him of a contemplated removal from the service on ground that he was unlikely to become an efficient police officer. He further admitted that he responded to the show cause letter on 6.3.2014 saying that he was still young in the force and apologizing for his absence without leave but his defence was found unsatisfactory and he was removed from service by the letter dated 2.4.2014 which gave the effective date as 30 days from 3.4.2014.

10) After considering the evidence, submissions and the said chapter 20 paragraph 33 of the FSOs, I am satisfied that the procedure followed in removing the claimant from the police service was proper, fair and lawful. As correctly submitted by the defence, section 41 of the employment Act and indeed the whole of that Act does not apply to members of Kenya police service by dint of section 3(2)(b) of the said Act. Similarly convention 158 of the ILO which deals with fair termination of employment contracts by employers is not part of our laws by dint of article 2(6) of the constitution of Kenya because it was never ratified by Kenya.

Reliefs

11) In view of the finding herein above that there was a justifiable reason for removing the claimant from the police service and that a fair procedure was followed in doing so, I decline to make declaration that his removal from the police service was unfair, unlawful or wrongful. I also decline to award the claimant any damages or reinstate him to the police force. As already observed herein above, the remedies provided under section 49 of the employment Act have not been availed to members of the police service.

Disposition

12) For the reasons that the removal of the claimant from the Kenya Police was not fair, I dismiss this suit but with no order as to costs.

Signed, Dated and Delivered at Mombasa this **3rd February 2017.**

ONESMUS MAKAU

JUDGE