



**Muriuki v Judicial Service Commission (Cause 31 of 2014)  
[2017] KEELRC 1222 (KLR) (9 June 2017) (Judgment)**

*Newton Muriu Muriuki v Judicial Service Commission [2017] eKLR*

Neutral citation: [2017] KEELRC 1222 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**

**CAUSE 31 OF 2014**

**B ONGAYA, J**

**JUNE 9, 2017**

**BETWEEN**

**NEWTON MURIU MURIUKI ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the memorandum of claim on 17.02.2014 through Wahome Gikonyo & Company Advocates but later changed his Advocates to C.M King'ori & Company Advocates. The claimant prayed for judgment against the respondent for:
  - a.) Stay of his dismissal pending the hearing and determination of the matter.
  - b.) A de'claration that the claimant's dismissal is unfit, unlawful and against established labour laws and regulations.
  - c.) An order for payment of all salary arrears from April 2012.
  - d.) An order reinstating the claimant to his employment without loss of benefits.
  - e.) Costs of the suit plus interest at court rates.
  - f.) Any other or better relief that the honourable court may deem meet and just to grant.
2. The statement of response was filed on 03.05.2016 through Issa & Company Advocates. The respondent prayed for dismissal of the claimant's suit with costs.
3. The respondent offered the claimant employment by the letter of offer of appointment dated 08.10.1997 as a clerical officer PLS.4. By the letter of appointment signed 23.05.2001 the respondent



- appointed the claimant to the position of clerical officer with effect from 13.10.1997. The record shows that the claimant's service was blended with instances of disciplinary actions and other misconducts such as criminal case no.328 of 2003 in Magistrate's court at Nyeri on alleged offence of handling stolen goods contrary to section 322(2) of the Penal Code preferred against the claimant and leading to his interdiction by the letter of 11.03.2003 and lifted on 30.09.2003; a warning about alleged performance dated 17.02.2005; disciplinary case about certain destruction of exhibits in criminal case No.910 of 2008; warning about unprocedural handling of traffic files no.1196 of 1996 and 1191 of 2008 per letter of 28.11.2008 and 24.12.2008; and the severe reprimand dated 24.06.2010.
4. The claimant received a show-cause letter dated 20.04.2012 requiring him to explain his absence from duty being with effect from 06.02.2012. The letter conveyed that the claimant's salary had been stopped effective 06.02.2012 and he was to reply within 21 days from the date of the letter as it was contemplated he gets punished including termination of his employment with loss of all terminal dues. The letter was signed by one T.W.M Ndung'u (Mrs) for Chief Registrar of the Judiciary. The claimant replied by his letter dated 26.03.2012. He explained that on 06.02.2012 his daughter had been unwell, he rushed to hospital to attend to her, and he had informed his supervisor to convey his predicament to the executive officer but in the process there had been a miscommunication but the issue had been resolved. He further explained that since 06.02.2012 he had been present at work as per the attendance register but admitted that on 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> March 2012 he had been unwell as per his doctor's letter dated 29.03.2012 and per his medical scheme booklet record of 26.03.2012 showing he went for treatment. He stated that his ailment had been due to pressure and depression flowing from certain domestic problems as the doctor had asked him to rest and he had informed the executive officer on phone. He concluded that no action was to be taken against him and that his salary was to be reinstated.
  5. By the letter dated 19.04.2013, the Chief Magistrate at Nyeri clarified to the respondent that the claimant had been absent for only 4 days on 06.02.2012, 28<sup>th</sup> to 30<sup>th</sup> March 2012 and not as alleged in the respondent's letter of 20.04.2012 (that the claimant had been absent effective 06.02.2012 and his whereabouts were unknown). The Chief Magistrate further stated that she affirmed that the claimant had improved tremendously as per remarks by his supervisor and the Chief Magistrate recommended that the claimant's salary be released less the days he had been absent.
  6. By the letter date 18.07.2012 the claimant lamented to the respondent that he was suffering without pay as his salary had not been reinstated. He pleaded that his salary be reinstated. He made a similar reminder by his letter dated 13.12.2012. By the letter dated 25.03.2013 the claimant lamented that it was over a year and his salary had not been reinstated and he had incurred a lot of debt and he had lost credibility to his family members who had supported him financially. He also complained that he had been denied leave by his executive officer. He pleaded for quick action to save him from the financial constraints flowing from stoppage of his salary.
  7. By the letter dated 11.01.2013 the respondent's Human Resource Management Advisory Committee conveyed to the claimant that at the meeting of 20.11.2012, his case had been deliberated and it was resolved that it be forwarded to the respondent since the claimant had been in service for more than 15 years. The claimant further did a reminder about his predicament by the letter dated 02.08.2013. The respondent's officer replied by the letter dated 28.08.2013 acknowledging receipt of the letter dated 02.08.2013 and stating that the matter would be placed before the respondent and the claimant would subsequently get informed accordingly.
  8. The claimant's contract of service was terminated as conveyed in the respondent's dismissal letter dated 15.01.2014. It was stated that the respondent at its meeting held on 05.12.2013 dismissed the claimant from the judicial service with effect from 06.02.2012 on grounds of absence from duty without leave. Upon dismissal, it was stated that the claimant forfeited all his retirement benefits he



would have enjoyed if he had retired normally. The claimant was informed of his right to appeal within 6 weeks from the date of the letter. He was to sign the final declaration of income, assets and liabilities declaration form, sign the official secrets forms, sign clearance form, and return medical cards for self and dependants. The claimant made his 1<sup>st</sup> appeal to the respondent by the letter dated 06.02.2014, the respondent considered the appeal at its meeting of 04.06.2014 and dismissed it as per the letter dated 13.06.2014 because the claimant had not advanced sufficient grounds and which letter concluded thus, “You are hereby informed of your right to apply for review of the decision, provided that such appeal is submitted within one (1) year from the date of this letter. Your application for review will be and accepted if there are new and material facts which might have affected the former decision and if adequate reasons for non-disclosure of such facts at an earlier date are given.”

9. The claimant wrote the letter of 16.07.2014 seeking reversal of the dismissal of his appeal and the letter as filed for the respondent is endorsed “2<sup>nd</sup> Appeal”. The respondent replied by the letter dated 04.06.2015 as follows:

Dear Mr. Muriuki,

Ref: Second Appeal / Application For Review Against Dismissal

The above subject refers.

I wish to convey the decision of the Judicial Service Commission at its meeting held on 30<sup>th</sup> April 2015, that your application for review/second appeal against dismissal from Judicial Service Commission was considered but dismissed since there were no new material facts advanced.

You are hereby advised to treat this case as closed.

Yours faithfully, signed

Anne A. Amadi (Mrs)

Secretary,

Judicial Service Commission”

10. The letter was dated 04.06.2015 long after the claimant had filed the suit on 17.02.2014.
11. The 1<sup>st</sup> issue for determination is whether the respondent followed due process in terminating the claimant’s contract of service. The claimant laments that throughout the disciplinary process he was not given a hearing as envisaged in section 41 of the Employment Act, 2007 and as per regulation 25 of the 3<sup>rd</sup> schedule to the Judicial Service Act, 2011 providing for the appointment, discipline and removal of judicial officers and staff. The parties are in agreement that the said regulation 25 applied to the claimant’s case. The said regulation 25, on proceedings for dismissal, states as follows:
  - (1) Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice’s opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves.



- (2) If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate themselves, the Chief Justice shall cause copies of the statement of the charge, or charges, and the reply, if any, of the officer to be laid before the Commission, and the Commission shall decide whether the disciplinary proceedings should continue or not.
  - (3) If it is decided that the disciplinary proceedings should continue, the Commission shall appoint a Committee or Panel to investigate the matter consisting of at least three persons who shall be persons to whom the Commission may, by virtue of the Constitution, delegate its powers:
12. Provided that the Chief Justice shall not be a member of the Committee or Panel, but if puisne judge of the High Court have been designated as members of the Commission under the Constitution, they may be members of the Committee or Panel.
- (4) The Committee or Panel shall give the officer a written notice of not less than fourteen days specifying the day on which they may be required to appear before it to answer to the charges made against them.
  - (5) If witnesses are examined by the Committee or Panel, the officer shall be given an opportunity of being present and of putting questions on their own behalf to the witnesses, and no documentary evidence shall be used against the officer unless he has previously been supplied with a copy thereof or given access thereto.
  - (6) The Director of Public Prosecutions shall, if requested by the Commission, direct a legally qualified officer from the Office of the Director of Public Prosecutions to present to the Committee or Panel the case against the officer concerned.
  - (7) The Committee or Panel shall permit the accused officer to be represented by an advocate.
  - (8) If during the course of investigation, grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure adopted in framing the original charges.
  - (9) The Committee or Panel, having investigated the matter, shall forward its report thereon to the Commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation; and the report of the Committee or Panel shall include -
    - (a) a statement whether in the Committee or Panel's judgment the charge or charges against the officer have been proved and the reasons therefore;
    - (b) details of any matters which, in the Committee or Panel's opinion, aggravate or alleviate the gravity of the case; and
    - (c) a summing up and such general comments as will indicate clearly the opinion of the Committee or Panel on the matter being investigated, but the Committee or Panel shall not make any recommendation regarding the form of punishment to be inflicted on the officer.
  - (10) The Commission, after consideration of the report of the Committee or Panel, shall, if it is of the opinion that the report should be amplified in any way or that further investigation



is desirable, refer the matter back to the Committee or Panel which shall conduct the investigation for a further report.

- (11) The Commission shall consider the report and shall decide on the punishment, if any, which should be inflicted on the officer or whether he should be required to retire in the public interest.”
13. The court has considered the provisions of the regulation against the evidence on record. The court returns that the claimant was not accorded due process as prescribed as the court makes findings as follows:
- a) There was no charge preferred against the claimant by the Chief Justice as envisaged in regulation 25(1). Even if the letter of 20.04.2012 was to be taken to constitute the charges as contemplated in the regulation, the letter was not done by or for the Chief Justice. Further, it was stated in the letter that it was the office of the Chief Registrar of the Judiciary that contemplated to terminate the claimant’s employment and it was not stated that it was the Chief Justice that had considered it necessary to institute disciplinary proceedings against the claimant. Thus, the court returns that the disciplinary proceedings for the claimant’s dismissal were irregularly commenced and continued against the claimant as it has not been established that regulation 25(1) was complied with as it is clear that the letter commencing the proceedings was devoid of the authority of the Chief Justice as provided therein. On the face of that letter, it is difficult to tell that the Chief Justice had been involved as envisaged in regulation 25(1). To say it in other words, the court finds that disciplinary proceedings for dismissal of the claimant were commenced by the letter of 20.04.2012 Ref. No. Conf. PJ 24371 in clear and unjustified arrogation of the authority vested in the Chief Justice under regulation 25 (1). Accordingly, the court returns that the disciplinary proceedings were a nullity ab initio.
  - b) The decision by the respondent that the disciplinary proceedings for dismissal of the claimant could continue, and as envisaged in regulation 25(2), was not established to have been made as required because no such decision was exhibited or even referred to throughout the hearing of the case.
  - c) It was not established or shown that the respondent had appointed an investigation committee or panel as was envisaged in regulation 25 (3). There was mention of the Human Resource Management Advisory Committee referred to in the letter of 11.01.2013 and which the court finds was not said to be the panel or committee as envisaged in regulation 25(3) because in any event, in that letter, it was conveyed that the said Human Resource Management Advisory Committee lacked authority to deal with the claimant’s case as he had been in service for more than 15 years. The court therefore finds that the claimant was dismissed from employment without a committee or panel investigating the allegations as were purportedly levelled against the claimant.
  - d) Accordingly, the claimant was not given a written notice to appear before the investigating panel as envisaged in regulation 25 (4) and there were no witnesses and documentary evidence as envisaged in regulation 25(5). The opportunity of legal representation as envisaged in regulation 25(7) never accrued as the relevant regulations were absolutely contravened. Thus, needless to state, the court returns that the investigation report per regulation 25(9) was not prepared, and, consideration of such a report as per regulation 25 (11) was therefore not established to have taken place.
14. The court has considered that after the dismissal, the claimant was required to make a first and then a second appeal to the same respondent who had already dismissed the claimant. The claimant complied



accordingly but the court finds that the requirement or advisory to make the 1<sup>st</sup> and then the 2<sup>nd</sup> appeal was an unfair disciplinary procedure that subjected the claimant to unjustified delays in pursuing justice in the matter. In that regard, the court upholds and follows its opinion in R-Versus- Public Service Commission and Another Ex-Parte Joel Kaithia Mathiu [2017]eKLR thus, “As for the case for the 1<sup>st</sup> respondent that the appeal process had to be exhausted, the court returns that appeal was not mandatory but was discretionary and within the applicant’s choice. Further, the court considers that on appeal a decision maker different from the maker of the decision appealed against reconsiders the decision on account of alleged error of fact or law in the decision appealed against. In so far as the 1<sup>st</sup> respondent had decided to dismiss the claimant, the court returns that the purported right of appeal was perfunctory as the appeal was to the same 1<sup>st</sup> respondent which had already declared its decision in the matter and the court holds that the purported right of appeal served no purpose as it would not operate as a valid internal or administrative procedure that the applicant could be found guilty of failing to exhaust prior to filing of the judicial review proceedings. Thus, the application was not premature or it was not barred or ousted by the applicant’s failure to appeal.”

15. To answer the 1<sup>st</sup> issue for determination, the court returns that due process was not followed and the claimant was not accorded the procedural safeguards as prescribed in the said regulation 25 prior to the dismissal decision as conveyed in the letter of dismissal ref. No. 1/2 dated 15.01.2014.
16. The 2<sup>nd</sup> issue for determination is whether there was a valid reason for terminating the claimant’s employment as conveyed in the letter of dismissal ref. No. 1/2 dated 15.01.2014. The court has found that there was no due process and the allegations were not established by way of the prescribed investigation proceedings. In absence of the investigations by the prescribed committee or panel, or admissions on the part of the claimant, the court returns that the reasons could only be found to have been invalid.
17. The court considers that there is another reason why the reason for dismissal was invalid. The claimant was dismissed from duty with effect from 06.02.2012 on grounds of absence from duty without leave. The purported show-cause letter of 20.04.2012 had alleged that the claimant had absented himself from duty without leave with effect from 06.02.2012 and his whereabouts were not known. By the letter dated 19.04.2013, the Chief Magistrate at Nyeri, and where the claimant had been deployed to serve, wrote to the respondent and clarified that the claimant had been absent for only 4 days and affirmed that the claimant had improved tremendously. The court finds that the respondent never reissued a show-cause notice or charges reflecting the correct particulars of absence for only 4 days as clarified by the Chief Magistrate. Thus the court returns that the claimant was dismissed upon the initial allegations that he had absented him-self from duty without leave with effect from 06.02.2012 and his whereabouts were not known. The court finds that in any event the claimant put a strong defence explaining his predicament for the 4 days of alleged absence without permission and his defence was obviously not considered in view of the finding that the allegations were never investigated in the manner that was prescribed in regulation 25. As submitted for the claimant, in any event, regulation 21 specifically provided for the manner of handling of cases of absence from duty without leave and the same was never considered or applied in the claimant’s case. The regulation states, thus,

21. Absence from duty without leave

Where an officer is absent from duty without leave or reasonable cause for a period exceeding twenty-four hours and the officer cannot be traced within a period of ten days from the commencement of such absence, or if traced no reply to a charge of absence without leave is received from them within ten days after the dispatch of the charge to them, the Commission may summarily dismiss them”



18. The court returns that the regulation applied in view of the allegations that were levelled against the claimant but the same was not invoked at all. In such circumstances, the court returns that the reason for termination namely, the claimant being absent from duty without leave with effect from 06.02.2012 and his whereabouts were not known, was not a valid reason to dismiss the claimant as at time the dismissal decision was made and as envisaged in section 43 as read with section 45 (2) of the Employment Act, 2007.
19. The 3<sup>rd</sup> issue for determination is whether the termination of the claimant's employment was unlawful and unfair. The court has already found as much as it was unlawful and unfair for want of compliance with regulation 25 and for want of a valid reason for the termination.
20. The 4<sup>th</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows.
21. First, the claimant prayed for a declaration that the claimant's dismissal is unfit, unlawful and against established labour laws and regulations. The court has made a finding as much and the claimant is entitled to the declaration as prayed for.
22. Second, the claimant prayed for an order for payment of all salary arrears from April 2012. The claimant's salary was stopped on 06.02.2012. He continued working without pay until dismissal by the letter dated 15.01.2014 which was forwarded, and therefore received by the claimant, on 05.02.2014. The stoppage of payment of the claimant's salary was not lifted despite the letter of clarification by the Chief Magistrate dated 19.04.2013 confirming that the claimant was at work and had improved tremendously. As the claimant worked for all that period, the court returns that he is entitled to all the due basic salary and remunerative allowances as prevailing for designation 4AAFG Clerical Officer [2] from 06.02.2012 to 05.02.2014.
23. Third, the claimant prayed for an order reinstating the claimant to his employment without loss of benefits. Section 49 (4) of the Employment Act enumerates factors to consider before ordering reinstatement. The factors include:
  - (a) the wishes of the employee;
  - (b) the circumstances in which the termination took place, including, the extent, if any, to which the employee caused or contributed to the termination; and
  - (c) the practicability of recommending reinstatement or re-engagement;
  - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
  - (e) the employee's length of service with the employer;
  - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
  - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
  - (h) the value of any severance payable by law;
  - (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
  - (j) any expenses reasonably incurred by the employee as a consequence of the termination;



- (k) any conduct of the employee which to any extent caused or contributed to the termination;
  - (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
  - (m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.
24. The claimant testified that as at the time of the hearing of the case he was in business and he had partly mitigated his losses accordingly. He stated that he was not sure that he wished to work for the respondent. He further stated that he could work for the judiciary if the court decided so but he felt that the judiciary had mistreated him and he had no desire to work for the judiciary. The court has considered the tough and unfair circumstances that the respondent subjected the claimant to. The claimant worked for a long time of about 2 years without pay. The respondent took unexplained and inordinately long delay before deciding the purported disciplinary case. For unexplained reasons, the respondent failed to act upon the claimant's plea that the stoppage of his salary be lifted as he was at work and without pay as he was engulfed in financial embarrassment. Further, the respondent failed to act upon the Chief Magistrate's letter of clarifications including that the claimant had improved tremendously. The court finds that all those were emotionally draining circumstances and the claimant's negative attitude towards the respondent as an employer would be understandable in the circumstances of the case.
25. The court has considered that as at January 2012 the claimant was 33 years old and he would have a long time in public service prior to attaining the prevailing age of retirement, being attainment of 60 years of age. The claimant had served in the judiciary for over 15 years as a public officer. The court has considered the compelling and binding provisions of Article 236 (b) of the Constitution that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The court has considered all these matters and the need to uphold the Constitution and to balance ends of justice in the case. The court finds that the claimant would be justified to a partial reinstatement whose pay back would be limited to 12 months' gross pay prevailing as at 05.02.2014, the last day the claimant was at work, and being so awarded in consideration of the persuasive policy in section 49(1) (c) of the Employment Act, 2007.
26. While making that finding as founded upon the prayer for reinstatement, the court further considers and upholds its opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11, where the court stated thus "In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, '(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;'. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has



not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.” While fixing and limiting the award flowing from the partial reinstatement at 12 months’ pay, the court has considered that the claimant had partially mitigated his losses by engaging in business as at the time of the hearing of the case.

27. The court considers that the claimant stated that he would be willing to serve if the court ordered as much and in upholding Article 236(b) of the Constitution, the court considers that the respondent would re-engage the claimant in the designation of 4AAFG Clerical Officer [2] if the claimant opts to be so engaged by reporting to the respondent’s secretary, the Chief Registrar of the Judiciary for deployment to any station other than at Nyeri Law Courts and without break in service as any days of absence flowing from the unlawful and unfair termination would be treated as leave of absence but subject to specific findings and orders in this judgment.
28. Finally, if the claimant will opt not to be re-engaged, he would be entitled to the declaration that he is entitled to his accrued terminal dues as at 05.02.2014 as he is deemed to have retired normally effective that date and the benefits to be paid in accordance with the law. While making that award, the court follows its opinion in Henry Kamau Ngare –Versus- Teachers Service Commission and Another [2016]eKLR where it was stated thus,

“Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee’s right within the realm of employment law such as is recognized under section 5 of the Pensions Act and section 35 (5) and section 40 (1) (g) of the Employment Act, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41 (1) and 41(2) (b) of the Constitution of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee’s crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee. In the opinion of the court, to do so would amount to unjust enrichment on the part of the employer where the service pay or pension benefits are payable directly out of the employer’s resources as such pay is meant to compensate the service the employer would have already enjoyed from the employee. The court has further considered and persuaded itself that every person is entitled to social security under Article 43 (1) (c) of the Constitution of Kenya, 2010 and provisions that deny eligible employees from receiving their service pay or pensions benefits would undermine that right to social security. While that provision was not in force at the time of the cause of action in the present case, the court holds that in event of established poor performance, misconduct, gross misconduct or other adverse ground that would justify the dismissal of the employee, it is sufficient that the employer terminates the employment relationship and, where the grounds bear a criminal element, like it appears to have been the allegation in the present case, the matter should be remedied under the criminal justice system without depriving the employee the accrued pension benefits or service pay. The court therefore holds that contractual or statutory provisions that attach



disciplinary action to depriving the employee pension benefits or service pay the employee has become eligible to be paid are unconstitutional because it amounts to unfair deprivation of the employee's property and is unfair labour practice.”

29. As the claimant is successful in urging his claims, the respondent will pay costs of the suit.
30. The court considers that within the prefecture of the findings in this judgment, the claimant's prayer for any other or better relief that the honourable court may deem meet and just to grant has been exhaustively addressed.
31. In conclusion, judgment is hereby entered for the claimant against the respondent for:
  - 1) The declaration that the claimant's dismissal is unfair, unlawful and against the established and applicable labour laws and regulations.
  - 2) The respondent to pay the claimant all the due basic salary and remunerative allowances as prevailing at all material times for designation 4AAFG Clerical Officer [2] from 06.02.2012 to 05.02.2014.
  - 3) Consequential to the partial reinstatement whose pay back will be limited to 12 months' gross pay prevailing as at 05.02.2014 (the last day the claimant was at work), the respondent to pay the claimant accordingly.
  - 4) The claimant to compute, file and serve, within 14 days, the schedule of the amount due accordingly and for recording the quantum in court on a convenient mention date in view of order 2 and 3 above.
  - 5) The respondent to pay the claimant the money due under orders 2, 3, and 4 above by 01.08.2017 failing interest to be payable at court rates from the date of the suit till full payment.
  - 6) The respondent shall re-engage the claimant in the designation of 4AAFG Clerical Officer [2], if the claimant opts to be so re-engaged not later than 01.08.2017, by reporting to the respondent's secretary, the Chief Registrar of the Judiciary, for deployment to any station other than at Nyeri Law Courts and in that event, for pension purposes, there be no break in claimant's service as any days of absence flowing from the unlawful and unfair termination or from terms of this judgment, be treated as leave of absence.
  - 7) If the claimant opts not to be re-engaged per order 6 above, it is hereby declared that he is entitled to his accrued retirement benefits or pension or gratuity dues as at 05.02.2014 as he is deemed to have normally retired from the respondent's service effective 05.02.2014 and the accrued retirement benefits, pension or gratuity to be paid in accordance with the applicable law or other relevant provisions.
  - 8) The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED IN COURT AT NYERI THIS FRIDAY, 9<sup>TH</sup> JUNE, 2017.**

**BYRAM ONGAYA**

**JUDGE**

