



**Muraya v Registrar, High Court of Kenya & 2 others (Cause 508 of 2014) [2017] KEELRC 316 (KLR) (20 July 2017) (Judgment)**

*Francis Gitau Muraya v Registrar, High Court of Kenya & 2 others [2017] eKLR*

Neutral citation: [2017] KEELRC 316 (KLR)

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

**CAUSE 508 OF 2014**

**M MBARŪ, J**

**JULY 20, 2017**

**BETWEEN**

**FRANCIS GITAU MURAYA ..... CLAIMANT**

**AND**

**REGISTRAR, HIGH COURT OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**JUDICIAL SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimant is an adult male who file the claim against the respondents on account of wrongful dismissal from employment. By consent of 12<sup>th</sup> April, 2016 the claim against the 3<sup>rd</sup> respondent was withdrawn.

**Claim**

2. The claimant was a Senior Clerical Officer stationed at Makadara Law Court when in 2009 and 2010 was dismissed form his employment from the government on two allegations of desertion and misconduct. The claimant filed Judicial Review Cause No.329 of 2010 and following a decree thereof the claimant was to be reinstated to his employment vide letter dated 11<sup>th</sup> August, 2011. The claimant was also paid his salary arrears for the period of dismissal. The claimant was also to report to work on 15<sup>th</sup> August, 2011 and on the due date he was served with a letter of suspension.
3. On 26<sup>th</sup> August, 2011 the claimant was served with a letter requiring him to appear before the 2<sup>nd</sup> respondent, Judicial Service Commission for hearing of his second appeal challenging his dismissal.



- The claim is that there was no such second appeal pending made by the claimant and his was a miscarriage of justice.
4. On 6<sup>th</sup> December, 2011 the claimant was dismissed from service from the same ground of gross misconduct addressed under JR No.329 of 2010. The claimant filed contempt of court proceedings. On 26<sup>th</sup> August, 2013 the claimant wrote to the Chief Justice with his complaint but there was no reply.
  5. The claim is for orders that;
    - a) The dismissal of the claimant in the government service is unlawful as the same is not within the labour law.
    - b) The court do find that the claimant rights in employment, privileges and benefits under written law has been flawed and abused.
    - c) The court do find the claimant was subject to a hearing on a subject that was manipulated that is he has 2<sup>nd</sup> appeal which was not the case at all.
    - d) The court to order the respondent to reinstate the claimant into government service without loss of any benefit and status as of 14<sup>th</sup> August, 2011.
    - e) The court do order the respondents to pay the claimant any other or further relief this court may deem fit and just to grant together with costs of this suit.
  6. The claimant testified in support of his case that he was employed by the respondents in 1979. In 2011 he had a problem and was suspended from July, 2006 and remained as such for 3 years. The claimant was accused of desertion. Upon a show cause, the claimant replied and in 2009 the claimant was issued with a letter of dismissal from employment for misconduct. He filed a Judicial Review and the dismissal was quashed and he was reinstated.
  7. Upon the claimant reporting on duty, he was issued with a letter of suspension on two (2) grounds. That while in Kiambu Law Court he misconducted himself and that the second allegation is a matter that had been resolved.
  8. The claimant testified that the allegation that he had misconducted himself while in Kiambu Law Court is not true as he was in this station in 1982 and on the allegations date he was at Githunguri Law Court and matters that were investigated by Ringera Report he was exonerated. The charges that had been made against the claimant were addressed and he was transferred to Makadara Law Court.
  9. The claimant also filed a Judicial Review Application and the respondents reinstated him and was paid all unpaid salaries. He never filed any second appeal and when he was called by the 2<sup>nd</sup> respondent for hearing over such a 2<sup>nd</sup> appeal; such was a miscarriage of justice.
  10. The claimant worked for 31 years and as he was born in 1957 he has just clocked 60 years and the prayer to be reinstated cannot issue. The respondent violated his rights and due process was not followed and the court can order as appropriate.
  11. The claimant also testified that while in the employment he served in different stations;  
Kiambu from 1979 to 1982;  
Nairobi from 1982 to 1990;  
Naivasha from 1990 to 1997;  
Githunguri from 1997 to 2004; and



Makadara from 2004 to 2011.

12. The claim is also that Githunguri station is different from Kiambu and allegations made against the claimant relates to a time period he was in Githunguri and not Kiambu. Allegations made against the claimant relates to being late for work and that verbal warnings were issued.
13. While the claimant was at Makadara Law Court the claimant was issued with notices of being absent from duty from 22<sup>nd</sup> November, to 10<sup>th</sup> December, 2004. That this notice was never served upon the claimant but the claimant could not remember if he had signed the register of work attendance.
14. The claimant was also alleged to have received Kshs.2, 000.00 but he denied such malpractice and on the grounds that there was no evidence to support such allegations and the averments that he was made to withdraw such an amount to repay the complaint is not true.

## **Defence**

15. In reply to the claim, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case is that the claimant was employed on 10<sup>th</sup> October, 1979 as Chief Clerical officer to 4<sup>th</sup> June, 2009 when he was dismissed on grounds of desertion. The claimant filed JR Application No.329 of 2010 on 4<sup>th</sup> November, 2010 and was granted orders of certiorari cancelling the respondents decision to dismiss the claimant from duty; was granted an order of prohibition prohibiting the respondent from implementing their decision to dismiss the claimant from employment; and an order of mandamus compelling the respondents to reinstate the claimant to his duties.
16. The defence is also that by an order issued by the High Court on 14<sup>th</sup> June, 2011, the court quashed the decision by the respondent to dismiss the clamant from service and also stopped the respondent from implementing the decision made on 8<sup>th</sup> May, 2009 and 7<sup>th</sup> May, 2010 to dismiss the claimant from employment. The court questioned the process but not the merits of the dismissal and the disciplinary process could be undertaken afresh.
17. The respondent complied with the court orders and reinstated the claimant by letter dated 10<sup>th</sup> August, 2011 and he was to report to work on 15<sup>th</sup> August, 2011 for deployment. By letter dated 11<sup>th</sup> August, 2011 the 2<sup>nd</sup> respondent informed the claimant that disciplinary action was being contemplated against him and on equal dates the claimant was suspended pending investigations. The allegations against the claimant were that;
18. While in Kiambu he consumed alcohol during working hours; demanded and received monies from litigants; failed to take official instructions; being disrespectful; and used harsh and abusive language at his superiors.
19. While the claimant was at Makadara station on 20<sup>th</sup> December, 2004 he deserted duty after expiry of his annual leave and on 23<sup>rd</sup> January, 2006 the claimant was found to have unsatisfactory performance, absenteeism and lack of interest in his official work. On 30<sup>th</sup> January, 2006 the record is that for January, 2006 the claimant only signed the attendance register for 6 days only; he had a serious problem of absenteeism and by end of January, 2006 his whereabouts were unknown.
20. On 18<sup>th</sup> May, 2006 a report was made to the police that the claimant had received kshs.2, 000.00 from a member of the public to assist in processing an appeal of his son who had been sentenced for 6 months. The claimant took off upon the report; he later committed to repay the monies but failed to do so; he pledged his ATM card as security and then claimed the monies had been advanced to him as a soft loan. The police investigated the matter.



21. The 2<sup>nd</sup> respondent thus considered all the evidence against the claimant and resolved to dismiss him on vide letter dated 2<sup>nd</sup> December, 2011 with effect from 15<sup>th</sup> August, 2011. The 2<sup>nd</sup> respondent was guided by the constitution and the code of conduct for judiciary staff and rules of natural justice. The claimant was given a chance to defend himself before the disciplinary committee and to appeal the decision of the committee before he was dismissed from service.
22. The suit lacks merit and should be dismissed with costs.
23. In evidence, the respondent witness was Stephen Mutua the Principal Human Resource officer of the judiciary. He testified that upon the employment of the claimant on 2<sup>nd</sup> November, 1979 he was confirmed as permanent and pensionable vide letter dated 2<sup>nd</sup> May, 1990.
24. The respondent got a long schedule of the claimant's record of lateness at work which cumulatively amounted to 8 hours for the months of July to December, 1989. The claimant was issued with verbal warning.
25. The resident magistrate in Githunguri wrote letter dated 29<sup>th</sup> October, 2002 to the claimant addressing the issue of absenteeism and a show cause letter on 28<sup>th</sup> November, 2002. The chief magistrate in Kiambu issued the claimant with letter dated 10<sup>th</sup> January, 2004 complaining of the claimant's misconduct after a litigant lodged a complaint. A how cause was issued to the claimant for taking alcohol during work hours and for failing to take lawful instructions and for being abusive.
26. The claimant was transferred to Makadara law courts but several complaints for being late or absent from work were made and he was issued with verbal warning, written warnings and a show cause notice. When a member of public lodged a complaint that the claimant had received Kshs.2, 000.00 to help process an appeal for his son, the claimant took off without trace. Upon reporting back to work the claimant first claimed he had been advanced a soft loan by the complainant and then promised to repay the money back. He placed his ATM card as security. As a result and show cause was issued to the claimant.
27. The defence is also that for deserting duty and misconduct, the claimant was invited for disciplinary hearing on 9<sup>th</sup> November, 2006. The claimant was suspended pending investigations. By letter dated 4<sup>th</sup> June, 2009 the 2<sup>nd</sup> respondent resolved to dismiss the claimant from service on grounds of desertion and the claimant was informed on 12<sup>th</sup> August, 2009. The claimant made an appeal against the dismissal and also filed a Judicial Review Application and orders issued to have the claimant reinstated which the respondent.
28. The Judicial Review and order was on the process and not the merits and by letter dated 11<sup>th</sup> August, 2011 the respondents taking into account all the reports of misconduct by the claimant issued him with a show cause letter and gave him 21 days to reply. The claimant replied by his letter of 11<sup>th</sup> August, 2011 and on 12<sup>th</sup> September, 2011 the claimant was invited for hearing in relation to charges against him as noted to him while he was suspended. The allegations made against the claimant were clear and the notice that this was a 2<sup>nd</sup> appeal was an error.
29. Following a meeting of 11<sup>th</sup> November, 2011 and the outcome from the disciplinary committee which heard the claimant a decision was made to dismiss the claimant from the service on the grounds of gross misconduct.
30. The claimant did not file an appeal and instead filing this suit. There is no merit to the case as the respondents applied due process and the claim should be dismissed.



## Submissions

31. Both parties filed written submissions. The claimant reiterates his case in his written submissions.
32. The respondent submitted that the 2<sup>nd</sup> respondent has the constitutional mandate to discipline judiciary staff and upon the claimant deserting duty and committing acts of misconduct he was suspended and issued with show cause notices, he was invited for hearing and a decision was taken to dismiss him from service. The charges facing the claimant amounted to gross misconduct in accordance with section 44 of the Employment Act, 2007 and as such the decision taking to dismiss him was lawful, fair and justified.
33. The respondent has relied on the cases of Sarah Wanyaga Muchiri versus Henry Kathii 7 another [2014] eKLR; Robert Kipyego Rono versus Kosagat Tea Estate Limited [2015] eKLR; Judicial Service Commission versus Gladys Boss Shollei [2015] eKLR.

## Determination

34. It is common cause that the claimant was dismissed from employment by the 2<sup>nd</sup> respondent vide letter dated 4<sup>th</sup> June, 2009 made a decision to dismiss the claimant with effect from 16<sup>th</sup> January, 2006. The claimant challenged this decision and filed Judicial Review application No.329 of 2010 and the court made orders and quashed the decision to dismiss the claimant; the respondents were ordered to reinstate the claimant; the respondents were stopped from impending the decision to dismiss the claimant over grounds of desertion and misconduct and the claimant was to be paid his dues salaries.
35. The orders of reinstating the claimant were made on 19<sup>th</sup> May, 2011.
36. The claimant admitted in his evidence that he was reinstated back to work by letter dated 10<sup>th</sup> August, 2011 and all owing dues were paid to him by the respondents.
37. By letter dated 11<sup>th</sup> August, 2011 the claimant was suspended from duty to facilitate further investigations into allegations of gross misconduct and which allegations were set out in the notice issued to the claimant.
38. Following the show cause issued to the claimant, disciplinary proceedings were undertaken against the claimant and he was invited to the same to defend himself. On 2<sup>nd</sup> December, 2011 the 2<sup>nd</sup> respondent made a decision to dismiss the claimant from his employment. The claimant was then issued with letter communicating the 2<sup>nd</sup> respondent decision on 6<sup>th</sup> December, 2011.
39. The claim is that the dismissal of the claimant vide letter dated 6<sup>th</sup> December, 2011 was wrongful as the basis of the same was similar to grounds of gross misconduct which had been addressed by the High Court in Judicial Review Application No.329 of 2010. That by taking a decision to quash the dismissal, the respondents cannot use the same ground to dismiss the claimant.
40. The respondent has challenged these assertions by the claimant on the grounds that by filing Judicial Review Application No.329 of 2010 the court issued orders which challenged the process undertaken in the dismissal of the claimant but not the merits of the same. That the respondents were not stopped from undertaking further investigations or undertaking disciplinary action against the claimant arising from his employment before the challenged dismissal on 4<sup>th</sup> June, 2009.
41. I have carefully gone through the pleadings, the submissions of both parties and the testimony of each party in court. My reading of Judicial Review Application No.329 of 2010 is that the orders issued by the High Court on 19<sup>th</sup> May, 2011 returned the claimant back to where he stood as at 4<sup>th</sup> June, 2009 before his dismissal from employment by the respondents. With the decision to dismiss the claimant



quashed and the order to have all his due salaries paid, the position subsisting before such dismissal was restored.

42. By letter dated 10<sup>th</sup> August, 2011 the claimant was reinstated and directed to report to Makadara Law Court.
43. The High Court in its orders of 19<sup>th</sup> May 2009 did not stop the respondent from conducting investigations on the claimants work misconduct or from undertaking disciplinary action thereof. Upon the restatement of the claimant back to employment, the code of conduct for judiciary staff by the 2<sup>nd</sup> respondent was applicable to him. The claimant's work record(s) was not erased.
44. Upon reinstatement, the claimant was issued with notice of suspension dated 11<sup>th</sup> August, 2011. The allegation leading to the suspension were set out for the claimant to reply. A suspension is allowed in an employment relationship where there is good basis that the employer wishes to undertaken investigations and give the employee he benefit to reply. In *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR the court held as follows;

A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer.

45. Upon the suspension, the claimant was invited to a disciplinary hearing on 12<sup>th</sup> September, 2011 and by a letter dated 13<sup>th</sup> September, 2011 the claimant was dismissed from his employment on the grounds that at the disciplinary hearing he did not give satisfactory response to allegations made against him.
46. In employment and labour relations, where an employee is invited to a disciplinary hearing such as the claimant was on 12<sup>th</sup> September, 2011 and the same related to work place misconduct, poor performance of duty or any other misconduct, account should have been taken of the provisions of section 41 and 44 of the Employment Act. Where the respondent enjoyed the right to discipline the claimant due to any misconduct, the claimant also had a right to due process set out in law.
47. The procedural requirements of section 41 of the Employment Act, 2007 provides as follows;
  41. Notification and hearing before termination on grounds of misconduct
    - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
    - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.



48. In my view, the procedural requirement contemplated under the above legal provisions is that an employee faced with allegations of misconduct or gross misconduct should be issued with notice to attend to be given an explanation as to why the employer intends to terminate the employee based on the allegations made and at such a forum, the employee should have with him another employee of his choice present. Such other employee should hear the explanations given. I take it that his is a key and crucial witness as to the proceedings taking place at the shop floor.
49. The Court of Appeal at Mombasa in this regard has held in the case of *CMC Aviation Limited v Mohammed Noor* [2015] eKLR as follows;
- ... we find that the appellant's act of summarily dismissing the respondent from its employment without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the Employment Act. In *Kenya Union Of Commercial Food And Allied Workers V Meru North Farmers Sacco Limited*, [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. That applies in a case for termination as well as in a case that warrants summary dismissal. See also *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* [2014] eKLR. We respectfully agree. Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract. ... Had the appellant complied with the requirements of sections 41 and 45 of the Employment Act, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree.
50. The above position is reiterated by the Court of Appeal at Nairobi in *International Planned Parenthood Federation v Pamela Ebot Arrey Effiom* [2016] eKLR. the provisions of section 41 of the Employment Act, 2007 are mandatory. Fair labour relations requires that the employee be taken through due process before termination of employment.
51. In this case, the respondent does not clarify what transpired at the disciplinary hearing held on 12<sup>th</sup> September, 2011 when the claimant was invited to the hearing. What is apparent is that an advance decision was taken and which led to the dismissal of the claimant from employment.
52. Even where the respondents were at liberty to apply the code of conduct applicable to judiciary staff in the disciplinary process of the claimant, fair procedure required that such be undertaken with the confines of the law where the same was to result in a section of termination of employment. Noting matters taking place between the parties from the proceedings in *Judicial Review Application No. 329 of 2010*, the High Court having set in motion the procedural requirements that the respondent ought to have followed before the dismissal of the claimant, a similar lapse in terms of due process should not have been repeated.
53. I find, the dismissal of the claimant vide notice dated 6<sup>th</sup> December, 2011 was procedurally unfair. I find no justification as to why the respondents failed to comply with the mandatory provisions of section 41 of the Employment Act, 2007.



54. On the substance of allegations made against the claimant vide notice and suspension letter of 11<sup>th</sup> August, 2011 the matters facing the claimant were grave. The allegations of lateness at work, absconding duty and soliciting for funds from members of the public are matters set out under section 44 of the Employment Act as warranting summary dismissal.
55. In the reply filed by the claimant to these allegations, I find he was fixated on the Judicial Review Application No.329 of 2010 findings that he had been absolved from blame and ought not to have been taken through the same allegations again. As noted above, with the claimant having been reinstated back to work, he was taken back to the position held before his dismissal. Where there were matters of misconduct that required him to address, the employer had the chance to do so with the reinstatement.
56. The failure to address matters of work place misconduct cannot thus be sanctioned by the court. save for the failure to follow due process in addressing the allegations made against the claimant, I find no sufficient defence given by the claimant to matters against him which required him to make a response.

### **Remedies**

57. The claimant is seeking reinstatement. However in evidence he noted that he is now over 60 year and the remedy cannot issue.
58. The remedy of reinstatement is regulated in law. Termination of employment was on 6<sup>th</sup> December, 2011 and it has been over 3 years since. Section 12 of the Employment and Labour Relations Court Act read together with sections 49 of the Employment Act, 2007 requires the court to put into account the time factor since the cause of action arose. As such, reinstatement at this point and following the lapse of more than 3 years is not appropriate to consider.
59. The claimant has also sought the court to grant any other order the may be deemed appropriate. With the order for reinstatement addressed as above, section 49 of the Employment Act, 2007 provide for the remedy of compensation. The claimant did not set out how much he earned last in gross salary. Compensation shall therefore be awarded at 3 months gross salary earned as at 6th December, 2011.
60. On the finding that the procedure applied by the respondent was unfair, notice pay is due. The claimant is awarded one month's gross pay in notice pay.

Accordingly, judgement is hereby entered for the claimant against the respondent for compensation at 3 months gross salary and one (1) month gross salary in notice pay. Each party shall bear own costs. The respondent shall compute the monies due and pay within sixty (60) days.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF JULY, 2017.**

M. MBARU

JUDGE

In the presence of:

Lilian Njenga and David Muturi – Court Assistants

