



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2311 OF 2014**

**PETER MAINA MWANIKI.....CLAIMANT**

*VERSUS*

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR, PROBATION AND AFTER CARE SERVICES**

**MR. J. WW. O. OLOO OGW.....2<sup>ND</sup> RESPONDENT**

**M/S ELIZABETH JUMA KHADULI D.P.O KAJIADO.....3<sup>RD</sup> RESPONDENT**

**MR. HENRY N. OMOSA DHRM.....4<sup>TH</sup> RESPONDENT**

**MINISTRY OF INTERIOR AND COORDINATION OF**

**NATIONAL GOVERNMENT.....5<sup>TH</sup> RESPONDENT**

**S. M. MANGALE.....6<sup>TH</sup> RESPONDENT**

**MRS. M. W. NDEGWA.....7<sup>TH</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MADAM JOSEPHAT MUKOMBE**

**MINISTRY OF INTERIOR AND COORDINATION OF**

**NATIONAL GOVERNMENT.....8<sup>TH</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION (PSCK).....9<sup>TH</sup> RESPONDENT**

Claimant in Person

M/s Shitubi for respondents

**RULING**

1. The claimant brought this suit vide a memorandum of claim filed on 29<sup>th</sup> September 2015 and

amended on 10<sup>th</sup> November 2015. The claimant seeks the following reliefs among others: -

- (i) The court to order the Ministry of Interior and Coordination of National Government to pay 13 months' arrear salary in the sum of Kshs.548,860/=.
- (ii) That Mr. J. W. O. Oloo Director probation and after care service and Mr. Henry Omuba, Director, Human Resource be pushed for illegal withholding of the 13 months' salary.
- (iii) A declaration that the dismissal was malicious, unlawful and unfair.
- (iv) Payment in lieu of one month's notice.
- (v) An order to reinstate the claimant to employment without loss of benefits from 23<sup>rd</sup> November 2013.
- (vi) Interest and costs of the suit.

### **Summary of the Facts of the Claim**

2. The claimant was by a letter dated 28<sup>th</sup> December 2009 employed as a Probation Officer on permanent and pensionable terms.

3. The claimant worked continuously for a period of five years until the respondent stopped the claimant's salary and allowance with effect from 1<sup>st</sup> December 2013.

4. The claimant avers that the decision to terminate his employment and stop his salary was malicious, illegal and unfair. That the Director Probation lied to the principal Secretary in order to help the DPO Kajiado settle personal scores with the claimant. That the action was also meant to stop the claimant from pursuing a case of abuse of power, the claimant had launched with the Ministry on 28<sup>th</sup> November 2013.

5. The claimant further states that he was unprocedurally transferred to Marsabit to stop him from pursuing his law degree at Mount Kenya University where he was attending evening classes.

6. The claimant states that he was condemned without a hearing and his constitutional rights, therefore was violated including Article 4 of the Constitution which provides:

(1) Every person has the right to fair labour practices.

(2) Every worker has the right: -

(a) To fair remuneration.

(b) To reasonable working conditions.

7. That he worked for 13 months without pay and was treated in a degrading manner in violation of his right to human dignity in violation of Article 25 (a) and (b) of the constitution.

8. Claimant denies that he deserted duty on 23<sup>rd</sup> November 2013, stating that he had obtained 45 days leave as from 22<sup>nd</sup> November 2013. The claimant relies on leave forms produced as annexures to the memorandum of claim.

9. On 14<sup>th</sup> February 2014, the claimant states he was involved in a road accident in course of duty at Marsabit and was taken to Marsabit County Hospital and later referred to Nairobi to specialized treatment. He produced the letter of referral, attached to the memorandum of claim.

10. The claimant continued working upon discharge but was not paid salary.
11. The claimant got a letter of dismissal dated 22<sup>nd</sup> October 2014. The letter stated that the Ministry had established that the general conduct and work performance of the claimant as a Probation Officer has fallen below expected standard of a Public Officer.
12. Upon dismissal on 22<sup>nd</sup> October 2014, the claimant noted an appeal to Public Service Commission but the appeal was dismissed. The claimant was not called to appear before the Commission. The Public Service Commission, considered his written presentations, which were found unmerited and the dismissal was upheld.
13. The claimant denies these allegations totally stating that since 28<sup>th</sup> December 2008, when he was employed as Probation Officer, he had served under four (4) DPOs in Machakos under Madam Saleh M. John, Kadera, Madam Jennifer Kanyua, Kajiado, Madam Elizabeth J. K and DPO/CPO Mr. A. R. Gutole and none of them ever complained about his general conduct or work performance except Madam Elizabeth.
14. That he earned confirmation upon completing probation by a letter dated 7<sup>th</sup> March 2011, recommended for promotion by the Principal Probation Officer Rift Valley by a letter dated 1<sup>st</sup> September 2012 and was promoted by a letter dated 13<sup>th</sup> March 2013 to Probation Officer 1 Job Group K from Job Group J. He was transferred to Marsabit by a letter dated 15<sup>th</sup> July 2013 on the same terms.
15. The claimant states that the allegations made against him were without basis and were made without giving him an opportunity to be heard. The Director purported to send him to Marsabit as a punishment for poor work yet he was not demoted.
16. The claimant prays for the reliefs sought.
17. The claimant filed a witness statement detailing his testimony in Chief. On 5<sup>th</sup> January 2015, he adopted the statement as his evidence in chief and offered himself for cross-examination by the respondent.
18. The claimant's testimony was adopted on 23<sup>rd</sup> January 2017 and the respondent failed to cross-examine him. The court directed parties to file written submissions and the claimant filed on 25<sup>th</sup> September 2017 but the respondent had not filed by 12<sup>th</sup> October 2017 when Justice Wasilwa referred the matter to me for judgment on account that she was travelling to U.S.A and would not be able to deliver judgment in good time to avoid expiry of three years within which the relief sought by claimant of reinstatement would be considered.
19. The court also noted that the respondent had filed comprehensive submissions on the main claim on 15<sup>th</sup> February 2016, with respect to the exparte chamber summons filed on 26<sup>th</sup> January 2016 in which the claimant sought interim orders including payment of the 13 months' salary, respondent to fill DOSH Forms to enable processing of compensation, payment of periodical payments. Under DOSH and respondent to approve forms for a law degree program at Mount Kenya University.
20. By a ruling made by Justice Wasilwa on 4<sup>th</sup> April 2016, the court decided that all the issues must be determined upon hearing the claim on the merits.

## **Response**

21. The respondent filed a memorandum of response to the claim on 15<sup>th</sup> March 2015 in which the claim is denied in its totality and the respondent avers as follows: -

- (i) That the claimant was involved in a shylocking business contrary to Section G21 (2) of the

Public Service Code of Regulations in respect of which he received warning letters dated 27<sup>th</sup> June 2013 and 9<sup>th</sup> March 2012.

(ii) The claimant was found in contempt of court in that he had interfered in a matter that was pending determination before a court of law.

(iii) He turned the state office into a business enterprise by using a personal photocopying machine for commercial purposes contrary to Section 11 of the Public Officers Ethics Act in respect of which he received a warning letter dated 9<sup>th</sup> May 2013.

(iv) The claimant obtained money from several members of the public by false pretenses by posing to be a criminal investigating Officer and using the state probation officer to con the public and several complaints were received by the respondents.

(v) The claimant failed to declare that he was a previous convict in the PSC 2 form when he had been previously convicted in criminal case number 6625 of 2005 contrary to Section E. 7 (3) of the Public Service Code Regulations.

(vi) That the claimant willfully absconded from duty from 23<sup>rd</sup> November 2013 in contravention of Regulations G19 (1) of the code of regulations.

(vii) The claimant used abusive and insulting language to his employer or to his superior.

(viii) That the claimant was served with several warnings and show cause letters long before his service was terminated.

(ix) That the claimant's salary was stopped for good cause upon claimant deserting duty from 23<sup>rd</sup> November 2013.

(x) That the claimant violated Public Officer Ethics Act, 2003 due to lack of integrity and could not be trusted to hold public office any longer.

(xi) That the claimant was dismissed for warranted reasons and was granted a fair hearing as he was granted a chance to make his representations in accordance with Section 41 of the Employment Act 2007.

22. The respondent made submissions in paragraphs 15, 16, 17 and 18 of the memorandum of response. This is a procedure often followed before this court although not provided for in the rules of the court.

### **Determination**

23. The issue for determination is whether the matter is ready for judgment.

24. Though the matter was placed before me for judgment having carefully considered the file, the court notes as follows:-

25. The memorandum of claim was drafted by the claimant in person. It contains long narrative usually left for oral testimony or witness statement and this made the work of the court more onerous in determining the matter. There are many disputes of facts in this case and is not an appropriate case to be determined on the basis of documentation and written submissions to the exclusion of oral testimony under oath.

26. The claimant however testified under oath before Justice Wasilwa on 23<sup>rd</sup> January 2017 and cross-examination was reserved for 10<sup>th</sup> April 2017.

27. The court notes the language used by the claimant against the respondents in his pleadings and depositions before court is not civil and was on 29<sup>th</sup> June 2017, ordered by Justice Wasilwa to apologize to the state law office for abusive letter written to the Office of the Hon. Attorney General by the claimant on issues arising from the matter. The use of unwarranted language by the claimant is regrettable but the court notes that the same shall not influence the determination of the issues in dispute in this case.

28. The counsel for the respondent, M/s Chesina was not ready to proceed with the case on 29<sup>th</sup> June 2017. On 24<sup>th</sup> July 2017, counsel noted that the claimant had not written letter of apology for abusive language used and she recused herself from handling the matter.

29. M/s Shitubi, state counsel took over handling of the matter and matter was mentioned before me on 19<sup>th</sup> September 2017 for taking of a hearing date on priority basis.

30. The claimant stated that if judgment is not delivered before the expiry of three years from the date of termination, the claimant will be greatly prejudiced because he would be denied the chance to be reinstated to his earlier employment.

31. Counsel, Shitubi submitted that delay was occasioned by the claimant by his conduct and use of abusive language which led to the recusal of the state counsel Chesina.

32. On the same date, I referred the matter back to Justice Wasilwa to set down the matter for hearing on a convenient date when the Judge would be available.

33. Justice Wasilwa recorded the said order when the claimant and Shitubi appeared before her-

*“By consent the matter be disposed of through written submissions. The claimant to file written submissions within 7 days. The respondent to file their submissions within 14 days. Mention on 2<sup>nd</sup> October 2017”.*

34. On 2<sup>nd</sup> October 2017, the claimant and Mr. Odukenya appeared before Justice Wasilwa and Mr. Odukenya submitted that the matter should start *denovo*. Mr. Odukenya asked for 30 days to file a list of documents and witness statements. The court granted the respondents thirty days to file list of documents and witness statements entered after a convenient hearing date be taken at the registry.

35. However, matter was mentioned before Hon. Ngumi, the Deputy Registrar on 12<sup>th</sup> October 2017 and was on the same date placed before Justice Wasilwa for directions. The claimant appeared before Justice Wasilwa in the absence of the respondents who were not notified of the mention.

36. Justice Wasilwa referred the file to the Principal Judge for directions on the same date. The claimant appeared in person and M/s Shitubi appeared for Mr. Odukenya for respondent. Claimant told the court that the Trial Judge directed the file be placed before the Principal Judge for final submissions. He said he had filed submissions on 22<sup>nd</sup> October 2014. The claimant submitted that the prayer for reinstatement will lapse on 22<sup>nd</sup> October 2017.

37. Counsel Shitubi submitted that the matter is part heard and defence had not testified. The court ordered the respondents to file submissions. Counsel Shitubi submitted that the matter should proceed before the Trial Judge or it starts a fresh before another Judge.

38. I referred the matter back to Justice Wasilwa for directions on the same date in view of the conflicting submissions by the parties.

39. Justice Wasilwa on the same date made a clarification to the effect that the claimant had expressed desire to proceed by way of written submissions because he sought an order of reinstatement and three years would expire on 22<sup>nd</sup> October 2017.

40. Justice Wasilwa indicated that on 18<sup>th</sup> September 2017, she had directed that the case proceed through written submissions.

41. That on 2<sup>nd</sup> October 2017, the respondent appeared before Justice Wasilwa in the absence of the claimant who had already filed written submissions and made application for matter to start *denovo* which application was granted by Justice Wasilwa.

42. Justice Wasilwa however, noted that re-opening the matter *denovo* would-be prejudicial to the claimant and ruled that the matter to proceed by way of written submissions. However because Justice Wasilwa was proceeding on leave and would-be unable to determine the matter before 22<sup>nd</sup> October 2017, the matter was referred back to me for further direction's. I made the following orders –

*“Following the ruling by Judge Wasilwa explaining the status of the case respondent to file written submission within three days. Judgment on 20<sup>th</sup> October 2017.”*

43. Upon a careful perusal of the file, it is clear that the respondent desired and was granted an order to file further list of documents and witness statements in preparation for cross examination of the claimant and defence hearing or the matter to start *denovo*.

44. Clearly, there was no consent by the parties constituting a waiver by the respondent to adduce oral evidence under oath.

45. The matters leading to the termination of the employment of the claimant as outlined herein before are highly contested. The respondent desires to adduce oral evidence under oath to show that the termination was merited.

46. It is correct, that Section 12 (3) (vii) of Employment and Labour Relations Court CAP 234 B provides that the court may grant;-

**“(vii) an order for reinstatement of any employee within three years of dismissal, subject to such condition as the court thinks fit to impose under circumstances contemplated under any written law;”**

47. It was submitted that the Court of Appeal has since interpreted this Section to be mandatory and therefore, an order of reinstatement may not be awarded by the court after expiry of three years from date of termination. The claimant however, seeks alternative remedies in the matter which are open to the court to grant.

48. Contrary to the assertion by the claimant that the delay in finalizing the matter was caused by the respondent, a close perusal of the file has convinced the court that it was conduct of the client to the contrary, which led to recusal of counsel for the respondents and filing of application necessitating a ruling by the court on 4<sup>th</sup> April 2016.

49. The Judge, granted the application partly by ordering the 2<sup>nd</sup> respdoent to fill the accident/medical forms in respect of injuries sustained by the claimant on 17<sup>th</sup> February 2014 in the course of duty to enable the claimant to seek compensation from Director WIBA. It would appear the order was complied with. However, the Judge also stated that other prayers sought by the claimant were best suited to be determined upon hearing the case on its merits.

50. The application may have been necessary but contributed to the delay to hear and determine the main suit. It is therefore not true that the delay is attributed to the respondent.

51. Furthermore, the pleadings herein are not elegantly drafted and are unduly long, also a factor complicating the matter unnecessarily.

52. Article 50(1) of the constitution provides;

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body”.**

53. Furthermore, Article 27 (1) provides –

**“Every person is equal before the law and has the right to equal protection and equal benefits of the law”.**

54. It is my considered view that there is an order by Justice Wasilwa issued on 2<sup>nd</sup> October 2017, allowing for good reason, the respondents to file list of documents and witness statements and that be followed by taking of a hearing date of the suit on the merits before the Registrar.

55. It is manifestly clear to me that the claimant having adduced oral evidence in support of his case and the respondent having had no opportunity to cross-examine him and to adduce evidence to rebut the testimony by the claimant that the respondent would be heavily prejudiced in this matter. The court would not have treated the parties equally before the law. The court would have also allowed the claimant to benefit from his own inappropriate conduct which led to the recusal of state counsel Chesina from the matter. This is what largely contributed to the delay in finalizing the matter.

56. The court also takes note of the fact that there are many litigants before the court who are awaiting their cases, in which they seek reinstatement to be heard and determined notwithstanding the lapse of three (3) years. This delay is largely not attributable to the parties but to the huge backlog of cases at the Nairobi, Employment and Labour Relations Court. This therefore cannot be reason to take a decision which prejudices the right to a fair hearing of a party before this court.

**57. Even though, I was required to provide judgment in this matter, it is manifestly clear to me that all the circumstances of the case were not disclosed to me by the claimant when I made directions for filing of submissions by the respondent within three days to allow me to make judgment in this matter. I therefore vacate that order.**

58. Accordingly, it is my considered view that the matter is not ripe for judgment. The matter remains a part heard before Justice Wasilwa who is currently on annual leave and has travelled to the United States of America. The Judge will be back on 15<sup>th</sup> November 2017.

59. The matter be mentioned before Justice Wasilwa on 20<sup>th</sup> November 2017 for setting of a hearing date on priority basis.

**Dated, Signed and Delivered on this 23<sup>rd</sup> Day of October 2017**

**MATHEWS NDERI NDUMA**

**JUDGE**