



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

CAUSE NO. 1891 OF 2014

EX CORPORAL ELIJA KAMOLO PETERCLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

PRINCIPAL SECRETARY

KENYA DEFENCE FORCES.....2ND RESPONDENT

M/s Jude Onyango for claimant

Odukenya for respondent

JUDGMENT

1. The preliminary objection raised by the respondent in this matter that the suit is statute barred by dint of section 90 of the Employment Act, 2017, is misconceived in that from the statement of claim filed on 27th October 2014, it is averred that the claimant was discharged from service on 27th October 2011. The certificate of discharge dated 23rd August 2011, clearly shows that the discharge was with effect from 27th October 2011. The suit was filed within the three (3) years limitation period therefore and the court has jurisdiction to entertain the same. The claimant filed an amended statement of claim on 30th June 2015.

Merits

2. The claimant was recruited by the Kenya Defence Forces in June 2001. He was posted to 10 Engineers Battalion and later to 12 Engineer Battalion. In March 2011, he was promoted to the rank of corporal. The claimant served diligently and continuously until he was discharged from service on 27th October 2011, following charges made against him for receiving leave travelling allowance when he was not entitled to receive the same having proceeded on training and did not go on leave.

3. The claimant denies the charges and states that he was not given a fair hearing and there was no valid reason to discharge him from service.

4. That colleagues who were in the same predicament with him were pardoned and continued to work, he was thus discrimination upon.

5. The claimant seeks:-

- (i) a declaration that termination of employment was unlawful, wrongful and unfair;
- (ii) general damages for wrongful termination based on lost earnings;
- (iii) gratuity for years worked;
- (iv) unpaid salary;
- (v) road travelling expenses;
- (vi) twelve (12) months compensation;
- (vii) costs and interest.

6. The claimant testified under oath in support of the amended memorandum of claim. He adopted a witness statement filed on 4/9/2015 as his evidence in chief. He relies on the attachments to the memorandum of claim and written submissions.

7. The claimant was charged before commanding officer for colluding with a serviceman to obtain Kshs.45,000/= road travel allowance. He was cautioned in terms of Regulation 9 (2).

8. The claimant told court that he did not agree to be tried by a commanding officer instead of a court martial as per forces procedure. He did not sign any forms to that effect.

9. The commanding officer found him guilty and dismissed him from service. The verdict of dismissal was reviewed on 14th July 2011 and dismissal was reduced to a demotion to senior private and he was discharged from service for service no longer required. He was thus entitled to payment of pension and has been duly paid.

10. The claimant states that colleagues who had been equally erroneously paid were pardoned and continued to work. He testified that he was discriminated against therefore.

11. The claimant denies that he was guilty at all. The money was banked in his account in his absence. He did not realized the payment was done until it was too late. The claimant had remained jobless for a long time. He was to start a new job at the time of the hearing at Delta, Chelsea Hotel as a security officer.

12. At the time, he was training with the United States Army in Lamu from December 2010 to April 2011. He did not see his April and May pay slip in which the impugned payment had been reckoned. He prays that his suit be allowed with interest and costs.

Response

13. The respondents filed a memorandum of response on 21st May 2015 in which they admit particulars of employment of the claimant.

14. The respondent avers that the claimant was charged with the offence of colluding with a service member to obtain Kshs.45,000/= in a road travel allowance which he was not entitled to contrary to Section 68 of the Armed Forces Act, CAP 199 (now repealed).

15. That the claimant appeared before Commanding Officer on 14th July 2011, where he was fined, accorded a chance to defend himself and was found guilty.

16. That the claimant was accorded a fair hearing and was discharged from service in accordance with section 82 and 179 (g) of the Armed forces Act, Cap 199 Laws of Kenya (now repealed).
17. That the punishment meted on the claimant was lawful.
18. The respondent denies that any personnel involved in similar misconduct were pardoned and neither was retained in service as alleged by the claimant or at all.
19. That the claimant service gratuity was processed and forwarded to the Director of Pensions at Treasury in December 2011 as such the claimant is not entitled to the reliefs particularized under paragraph 8 of the memorandum of claim.
20. The respondent denies that the claimant is entitled to any reliefs sought or at all since the respondent has proved that the claimant was guilty of misconduct and this was a valid reason in terms of Section 43 as read with Section 45 of the Employment Act, 2007. The respondent prays the suit be dismissed with costs.
21. The respondent called RW1 Warrant Officer II Silvester Mbaji to testify under oath in support of its case. The officer filed a witness statement dated 11/7/2011, which he adopted as his evidence in chief.
22. The officer testified that on 31st May 2011, while working as binding clerk he went through pay slips of officers including that of the claimant. In the process he discovered that several officers had been paid RTES – Road Transport Allowance reflected in their pay slips without authority. Payments were made by one Sgt. Owour who was in another zone, “A”. RW1 asked Sgt. Owour for the letter of authority for the payments but he did not have any. RW1 reported to his Senior Warrant Officer I Matu. Mr. Matu reported the matter to zone “A” leader where Sgt. Owuor worked Warrant Officer I Simiyu.
23. RW1 told the court that the officer concerned including the claimant ought to have reported the unlawful payment but they did not. That all the twenty nine (29) officers who had been paid and did not report were charged with similar offences and were all sent home.
24. RW1 under cross-examination told the court that, the head of unit gave authority for payment of RTES whereas leave is given by a commanding officer who also authorizes payment of RTES. That Col. Tungo was head of unit. The irregular payments were discovered upon investigations. Payments involved officers in different units. RW1 said he simply reported the matter and was not in the investigations thereafter.
25. That pay slips are sent to the binding clerks to check payments are in order. That pay clerks take slips to the units. Then everyone is called to pick their slips. RW1 confirmed that pay slips remain at the pay office if an officer is absent unless the officer sent someone to pick it. RW1 further added that commanding officers, who head the units, conduct disciplinary hearings.
26. RW1 prayed that the suit be dismissed with costs.

Determination

27. The issues for determination are:-

- (i) Whether the discharge of the claimant from the Armed forces was for a valid reason and done in terms of a fair procedure;
- (ii) Whether the claimant is entitled to the remedies sought.

Issue (i)

28. It is not in dispute that the claimant and other named officers received unauthorized leave payments

made by 61491 Sgt. Owuor.

29. From the evidence before court, payment was made to twenty nine (29) officers in different units. That the payment was discovered by RW1, in the course of his normal duty as a binding clerk. RW1 told the court that he received the pay slip of the claimant and others. That pay slips normally come to his office for checking that proper payment has been done. That the pay slips are then sent to unit officers, from where they are collected by the owners. RW1 clarified that, officers who are not at the work station may not receive the pay slips until they report back or unless they sent someone to collect the pay slips on their behalf.

30. The uncontroverted evidence by the claimant is that at the material time in January 2011, he received his RTES which was authority for him to go on leave in February 2011 but he did not go because he was sent to attend civil affairs course from 17th January to 25th April 2011 conducted by USA, Army personnel in Lamu.

31. The claimant further testified, which evidence was not controverted that he did not get his pay slips for March 2011 and April 2011 because he was away from the work station as explained.

32. The claimant further explained which evidence is not controverted that his salary for March and April 2011, was put directly in his account and that he had left his ATM card with his wife so that she could access his salary for the family up keep while he was away in Lamu on training.

33. That during the period, there is no way he would have realized that the leave travelling allowance in the sum of Kshs.45,000/= had been paid into his account even though he had not taken leave for reasons beyond his control. That he actually did not know of the payment until he was confronted and charged with the offence of colluding with Sgt. Owour to obtain transport allowance unlawfully.

34. The claimant told the court under oath that there was no way he would have colluded with Sgt. Owour to procure the payment unlawfully because he was away during the material time undertaking official training.

35. That payments must have been done courtesy of an oversight by the officers responsible in that they did not realise that some officers who had authorised leave did not proceed on leave for reasons beyond their control.

36. The claimant further testified that had he been given an opportunity to explain his case before an impartial and fair forum, it would have been very clear that he was not guilty of collusion or unlawful receipt of the Kshs.45,000/= but rather the payment was a result of oversight by the officers responsible for payment.

37. That it would have been fair and proper for the respondents to recall the payment and/or deduct the amount from his salary in subsequent months because this was a pure mistake, not by the claimant but by the payment clerks which could not be visited on the claimant.

38. The claimant has proved on a balance of probability that: -

(i) He did not collude and had in fact no opportunity to collude with Sgt. Owour so as to receive unauthorized travelling allowance in the sum of Kshs.45,000/=.

(2) That the payment was a genuine mistake made by the persons responsible for payment of leave travelling allowance on the mistaken believe that the claimant had already taken his leave, which had already been authorized.

(3) That the claimant could not go on leave for reasons beyond his control as he was directed to attend military training in Lamu between February and April 2011.

(4) That during the said period the claimant had no access to his pay slips or account statements and could not have known that there was an excess payment of Kshs.45,000/= leave travelling allowance.

(5) That the claimant was not accorded a fair hearing by the respondents and had the respondents availed him a fair hearing, it would have been obvious that he was not guilty of collusion and of concealing the unauthorized payment.

(vi) That the punishment meted on the claimant was excessive in the circumstances of the case.

39. Accordingly, the discharge of the claimant from Armed Forces, on grounds of service no longer required and demotion to a Senior Private from a Corporal was unlawful and unfair as it was not for a valid reason and was not done in terms of a fair procedure.

40. The court finds that mere submission by the claimant before the Commanding Officer does not negative the claimant's inherent right to a fair administrative action in terms of Article 47 of the Constitution nor does not entitle the Commanding Officer not to give the claimant a fair hearing mandated under Section 41 of the Employment Act, 2007.

41. Furthermore, Sections 43 and 45 of the Employment Act, mandate the respondent to provide a valid reason for the termination of employment, which the respondent did not have in the circumstances of this case. The respondent violated its own disciplinary code by failing to accord the claimant an impartial tribunal to hear his case.

42. Accordingly, the court finds and declares that the demotion of the claimant and simultaneous discharge from service, for service no longer required was unlawful and unfair.

Issue ii

43. What remedies is the claimant entitled to? The claimant has not sought reinstatement to the forces. The claimant has instead sought payment of damages set out in the statement of claim and reproduced in the judgment.

44. In **Civil Appeal No. 25A of 2013**, before Court of Appeal at Nyeri, between **Elizabeth Wakanyi Kibe Telkom Kenya Limited Visram, Koome, Odek JJA**; adopted the reasoning of Justice Rika in **D. K. Njagi Marete –vs– Teachers Service Commission, Industrial Cause No. 379 of 2009** where he held: -

“This court has advanced the view that employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, they are meant to redress economic injury in a proportionate way.....”

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years would not be a fair and reasonable remedy.....”

45. The claimant has sought to be paid equivalent of remuneration lost till retirement age. General damages for wrongful termination, gratuity for years worked, service pay from date of termination till retirement and road travelling expenses.

46. It is not in dispute that the claimant was paid gratuity for the served term upon discharge on ground of 'service no longer required'.

47. The claimant however lost his pension which he would have otherwise been entitled to if he had served his term.

48. In **Petition No. 23 of 2012, Corporal John Kamotho Murage –vs– Attorney General And 2 Others [2016] eKLR**, the court awarded the claimant Kshs.3,000,000/= for unlawful early retirement from the force on medical grounds.

49. The court cited the **Court of Appeal in Civil Appeal No. 79 of 2012, Peter M. Kariuki –vs– Attorney General** at page 43 as follows:-

“ ___ it bears repeating that assessment of amount of damage is matter for the discretion of Trial Judge, which must be exercised judiciously and with regard to the general conditions prevailing in the county and to prior relevant decisions.”

50. In the case of **Sylvanus Otieno Odiege –vs– The Attorney General, ELRC Cause No. 891 of 2012, [2014] eKLR**, Justice Ndolo awarded the claimant Kshs. 5 million for unlawful termination of commission.

51. In the present case the claimant wrongfully, lost prospective carrier, after serving for ten (10) years in which he had received promotions and had a clean record, until trumped up charges were made against him.

52. The client earned a basic salary of Kshs.31,748.00/= at the time. Clearly, he was punished for a mistake made by others to his immense loss and detriment.

53. To the credit of the respondents, they commuted the dismissal to a more lenient severance for ‘services no longer required’ and paid his gratuity.

54. The failure by the claimant to timeously detect the unauthorized payment and report cannot in the court’s view be seen as contribution to the termination. A reasonable explanation was given for the same.

55. The claimant had a young family of a wife and two children who lost their support as a result of misjudgment by the respondent.

56. Military service is peculiar and once one is terminated from service, it is difficult to get alternative employment. The claimant remained out of employment for a long time and got a job while the trial was going on.

57. The discretion of the court to award damages is not limited to compensation only. Under Section 49 of the Employment Act, 2007, other relevant remedies if properly sought may be awarded.

58. However, in the present case the claimant had sought an award of equivalent of twelve (12) months salary as compensation for the unlawful discharge in addition to other remedies sought. The court awards the claimant as follows: -

Judgment is entered in favour of the claimant as against the respondents:-

(i) In the sum of the Kshs.380,976/= which is equivalent of 12 months’ salary as compensation for the unlawful discharge from service.

(ii) The demotion of the claimant from the rank of Corporal to Senior Private is declared unlawful, null and void.

(iii) The claimant be entitled to monthly pension from the date of judgment calculated on the basis of his monthly salary at the time of discharge.

(iv) Interest is payable on (i) above at court rates from date of judgment till payment in full.

(v) Costs to follow the outcome.

Dated, Signed and Delivered on this 24th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE