



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 842 OF 2013

(Formerly H.C.C.C No. 1183 of 2001)

AMBASSADOR SAMSON KIPKOECH CHEMAI.....CLAIMANT

VERSUS

RICHARD ERSKINE LEAKEY.....1ST RESPONDENT

DR. SALLY JEMNG'ETICH KOSGEY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The suit was initially filed in the High Court as HCCC 1183 of 2001 on 17th July 2001 and amended on 1st August, 2001 seeking loss of income and benefits after unlawful termination by the Respondents. The Respondents filed a statement of defence opposing the Claim on 22nd August, 2001 and a Reply to the defence was filed on 23rd August, 2001.
2. Substantive hearing of the Claim took place on 13th and 14th December, 2016, in which Mr. Ouma appeared for the claimant and Ms .Akuno with Soita and Odukenya for the Respondent.
3. The Claimant testified that he was the Managing Director of Kenya Posts and Telecommunications (KPTC) in 1995. By a letter of appointment dated 28th September, 1995 he was appointed Ambassador of Kenya to Japan by the President of the Republic of Kenya in exercise of powers conferred upon him by section 111 of the Constitution. This appointment was for a period of 36 months and provided for extension and transfer for services as Ambassador or High Commission to any station abroad.
4. That in 1997 before the expiry of the first 36 months, he was appointed by the then President to serve as the Ambassador of Kenya to the United States of America, the Republic of Colombia and the United Mexican State.
5. He states that he served the President in the above mentioned capacity with due diligence and his abilities and qualifications were recognized by the President in the following terms:

“I have chosen Samson Kipkoech Chemai to be Ambassador Extraordinary and Plenipotentiary of the Republic of Kenya in the United States of America. The personal qualities of Samson Kipkoech

Chemai give me entire confidence that he is eminently worthy of the high office for which he has been chosen and he will discharge the duties of that office in such manner as will ensure your Excellency's approbation and esteem. I therefore request your Excellency to receive him favourably and give full credence to what he shall say on my behalf and on behalf of the Republic of Kenya and to the assurances which I have charged him to convey to you of my best wishes and those of my government for the prosperity of the People of the United States of America."

6. After expiry of the initial 36 months, His Excellency the President extended his contract for a further 36 months as a result of which the contract period was to expire on 2nd August, 2001. However, before the expiry of his contract by a letter dated 14th October, 1999 the 2nd Defendant, who was then serving as the Permanent Secretary in the Ministry of foreign Affairs, without just and legal cause, maliciously, illegally and unconstitutionally recalled him from his station in Washington D.C. where he was serving.

7. That the purported letter of recall dated 14th October, 1999, did not assign any reason and required him to abruptly return to Kenya by 15th November, 1999, notwithstanding the fact that his family resided in Washington.

8. That upon arrival he reported to the Ministry of Foreign Affairs but the 2nd respondent without lawful reason, and in breach of the terms of his presidential engagement as an ambassador representing the Republic of Kenya abroad, arrogantly refused to give him audience and stopped the remittance of his monthly emoluments and entitlements.

9. The claimant further stated that on 21st March 2000, the 1st Defendant who was the Permanent Secretary in the office of the President and the head of Public Service purported to retrospectively terminate and remove him from his presidential appointment as Ambassador with effect from 15.11.1999. It is his contention that the said Permanent Secretary had no legal authority to terminate him as his was a presidential appointment and he holds the view that he has never been terminated to date.

10. That as a result of the unlawful and unconstitutional termination of appointment he suffered loss of income and benefits for service abroad for 22 months to the tune of US\$ 1,311,522.00 and loss of local income and benefits for 22 months to the tune of Kshs.2,033,857.00/=. These amounts he alleges were tax free.

11. That prior to his appointment he was Managing Director of KPTC where he was earning higher than the position of Ambassador and his claim is thus for the remainder of the contract period which he prays to be allowed.

12. RW1 was the Director of Human Resource Management and Development at the ministry of Foreign Affairs. He admitted that the Claimant was appointed ambassador to Tokyo Japan vide a letter dated 28th September, 1995 which appointment was communicated to him by the then Permanent Secretary one Prof. Philip Mbithi.

13. That the Claimant duly signed a contract with the Government of Kenya and duly signed the Local Agreement, GP 105A dated 30th September, 1998. That in the terms of the agreement, the instructions given to the Claimant by the Government were to be communicated through the Permanent Secretary/Head of Department or other duly authorized officers.

14. He further stated that the Claimant earned a monthly salary of twenty four thousand six hundred and forty five Kenyan Pounds equivalent to Kenya Shillings forty one thousand and seventy five. That this was in accordance with the Local Agreement between the Claimant and the Kenyan Government. Additionally he was getting a Foreign Service Allowance only payable to diplomatic officers serving outside the country. That the Claimant was placed in Job Group Q where Ambassadors in public service are graded.

15. That according to the terms of the contract at paragraph 9, the Government could at any time

determine the engagement of the person engaged by giving him three months' notice in writing, or paying him one month's salary in lieu of notice.

16. He further stated that vide a letter dated 14th October 1999, the then Permanent Secretary for the Ministry of Foreign Affairs and International Cooperation, the 2nd Respondent herein, wrote a recall letter to the Claimant directing him to wind up all formalities and be back in Kenya by 15th November, 1999.

17. That vide a letter dated 21st March, 2000, the Claimant was communicated to by the Permanent Secretary that payment of his gratuity was to be for the period 2nd September, 1998, up to and including 14th November, 1999, would be on prorata basis and in accordance with the Local Agreement signed between the parties on 30th September, 1998 amounting to Kshs.254,230/= which was paid.

18. According to RW1 the claim for loss of income and allowances abroad is not genuine as housing, chauffer driven limousine, cook, house keeper and medical allowance were all fully provided and paid for by the Government. That these were only payable when one was serving in a foreign country and when he was recalled he was advised to end all formalities and report back to the country. He is therefore not entitled to any of the sums alleged in the Plaint.

Determination

19. The issues for determination are as follows:

- (i) Whether the 1st and 2nd respondents had the contractual, statutory and constitutional authority to terminate the claimant's appointment as Ambassador/High Commissioner
- (ii) If the answer to (i) above is in the affirmative, whether that authority was exercised lawfully and fairly.
- (iii) What remedies if at all are available to the claimant

Issue i and ii

20. The claimant submits as follows: -

21. Section 111 (2) of the former constitution provides that the power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other Principal Representative of Kenya in another country and to remove from office a person holding or acting in any such office shall vest in the President.

22. The former constitution provides at Section 107 (1) that subject to the constitution, the power to appoint persons to hold or act in offices in the public service and in the service of local authorities (including the power to confirm appointments) the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall best in the Public Service Commission.

23. Section 107 (4) (e) of the repealed constitution provides that Subsection (1) above, shall not apply in relation to any of the office of Ambassador, High Commissioner or other Principal Representative of Kenya in another country.

24. Apart from vesting the power to terminate his appointment in the President of the Republic of Kenya, the Constitution at Section 107 (4) specifically restrained the Public Service Commission from terminating his appointment as Ambassador of the Republic of Kenya.

25. The termination of the claimant's Ambassadorship was done contrary to the Constitution of Kenya

subsisting at the time because while the letter dated 28th September 1995 expressly states that: *His Excellency, The President has appointed you to be Kenya's Ambassador in Tokyo, Japan*, the letter dated 14th October 1999 says, *I am directed to inform you*, and the letter dated 21st March 2000 states that *the Government has decided*. That these two latter letters are completely ambiguous.

26. Clause 9 (1) of the Local Agreement could only be used to determine the operation of the said agreement and not the claimant's ambassadorship as to do so would be unconstitutional, null and void.

27. The respondents therefore purported to exercise power they did not have, which power they were expressly restricted from exercising even in their capacity as members of the Public Service Commission.

28. The 1st and 2nd respondents as demonstrated hereinabove did not have the constitutional authority to terminate the claimant's appointment as Ambassador/High Commissioner and to attempt to do so was illegal and undeniably unconstitutional.

29. Twenty two months before the expiry of his contract of service, the claimant was by a letter dated 14th October, 1999 authored by the 2nd respondent, who was then serving as the Permanent Secretary in the Ministry of Foreign Affairs, recalled him from his station in Washington D. C where he was serving as Kenya's Ambassador to the United States of America, United Mexican State and the Republic of Colombia.

30. Although it is tenable that an ambassador can be recalled from one station, such recall does not constitute termination of the appointment, particularly when such a recall is not by the President of the Republic. The claimant expected that upon arrival back in Kenya, he would then be dispatched to a different station as was the case when he was moved from Tokyo to Washington.

31. The claimant submits that the recall letter dated 14th October 1993, was without just or legal cause, malicious, taking into account that shortly thereafter the 2nd respondent's husband or former husband, Dr. Yusuff Nzibo was appointed as Ambassador to the United States of America, the United Mexican State and the Republic of Columbia in the claimant's place on the recommendation of the 1st and 2nd respondents.

32. Such appointment directly benefitted the 2nd respondent on account of the benefits that accrue to her personally as spouse together with her children on account of the then and renewed terms of service for Ambassadors and High Commissioners appointed by the president of the Republic of Kenya to serve abroad.

33. The purported termination of the claimant's presidential appointment as Ambassador by the 1st and 2nd respondents was an ill motivated conspiracy between the said respondents with the sole motive of filling the resultant vacancy in the office of Ambassador of the Republic of Kenya to the United States of America, the United Mexican State and the Republic of Columbia with the husband or former husband of the 2nd respondent.

34. It is noteworthy and in support of the claim herein, that to date, the purported terminal dues owed to the claimant have never been paid, that no gratuity has been paid, a fact admitted by the respondent's sole witness.

35. The claimant further submits that the respondent's conduct is similarly quite telling, by attempting to mislead the Court that gratuity had been paid by way of voucher dated 20th August 1998 and pay slip dated 25th August 1995, both of which do not fall during the period and contract under review.

36. The circumstances of the claimant's termination herein constitute unfair and or unlawful termination, is fraught by malice and conducted for ulterior motive and for personal gain.

37. The claimant reiterates that the respondents' actions in terminating the claimant's appointment were unfair, unlawful, malicious, conducted for ulterior motive and most of all unconstitutional

38. The claimant submits that he has met the standard of proof on a balance of probability by showing that;

- a. His appointment and termination as Ambassador was a prerogative of the President of Kenya.
- b. The said appointment was unlawfully and unconstitutionally terminated.
- c. The 2nd respondent obtained a direct benefit from his termination as an Ambassador.
- d. That even if the respondents were to be believed, that the claimant's termination was legal, it is admitted that to date no terminal dues including gratuity has been paid to the claimant, hence proof of malice.

39. The claimant prays for the following reliefs

(i) A declaratory judgment/order that the purported removal of the claimant from his position as Ambassador/High Commissioner by the 1st and 2nd respondent is unconstitutional, unlawful, invalid and void *ab initio*.

(ii) A permanent injunction restraining the respondents whether by themselves, their agents or officers working under their control or direction from harassing, interfering with the enjoyment of the claimant's constitutional rights of movement and travel to security and to employment as a citizen of the Republic of Kenya.

(iii) The sum of Kshs.101,709,529.50/= being the equivalent of the claimant's tax free salaries and benefits for the unexpired period of his contract between 15th November, 1999 to 2nd August, 2001.

(iv) General damages for the unlawful and unconstitutional removal of the claimant from the position of Ambassador/High Commissioner by the 1st and 2nd respondent.

(v) Exemplary damages.

Respondent's Submissions

The respondent submits as follows;

41. That the claimant confirmed during cross-examination that the appointment by the President to the position of Ambassador was communicated to him by a letter by Professor Philip Mbithi, the then Permanent Secretary, Secretary to the Cabinet and Head of Public Service. The appointment was in terms of Section 111 of the Constitution.

42. It follows therefore, that the Permanent Secretary also had the legal right to communicate to the claimant of his recall.

43. That the Local Agreement signed between the claimant and the Government dated 30th September 1998 read at paragraph 2-

"The person engaged agrees that he will diligently and faithfully perform the duties of an Ambassador for the term of his engagement and will act in all respects according to the instructions or directions given to him by the government through the Permanent Secretary/Head of Department or other duly authorized officers. In this agreement he term 'Permanent Secretary/Head of Department' shall mean the person for the time being in

charge of the Ministry/Department in which the person engaged is employed and included any persons for the time being acting as Permanent Secretary/head of Department.”

44. It is therefore perfectly clear that no procedure was violated by the recall notice by the Permanent Secretary who was also Head of Civil Service at the time.

45. The respondent further submits that Clause 9 (1) of the Local Agreement provided –

“The Government may at any time determine the engagement of the person engaged by giving him one month’s notice in writing or paying him one month’s salary in lieu of notice.”

46. Furthermore, the respondent submits that in terms of Section 25 (1) of the repealed constitution-

“save in so far as may be otherwise provided in the constitution or by any other law, every person who holds office in the service in the Republic of Kenya shall hold that office during the pleasure of the President.”

47. The respondents submit therefore that the recall of the claimant by the 1st and 2nd respondents which led to the termination of employment from Public Service was lawful and procedurally fair.

Determination

48. The court has weighted carefully the submissions of the parties on the facts and law applicable on employment and recall of Ambassadors by the President in the pre-2010 Constitution regime.

49. It is perfectly clear that Ambassadors and High Commissioners served and still now serve at the pleasure of the President.

50. Black law Dictionary, 9th edition defines an Ambassador as follows: -

*“A diplomatic officer of the highest rank, designated by a government as its resident representative in a foreign state. Ambassadors represent the Sovereign as well as the nation and enjoy many privileges while abroad in their official capacity including immunity. Ambassadors are distinguished from Ministers and envoys **who represent only the state where they are from and not the Sovereign.**”*

51. Sovereign is defined by the same dictionary *inter alia*-

“2. The Ruler of an independent state.”

52. An Ambassador therefore is a direct representative of the Ruler of an Independent state. It follows that the Ambassador derive his/her authority solely from the Ruler and must therefore serve the Ruler at his own pleasure in terms of Section 35 (1) of the erstwhile constitution.

53. The instrument of appointment and the instrument of recall must therefore be in the hand of Sovereign and no other.

54. The local contract specifying the terms and conditions including, privileges, allowances and benefits attributed to the appointment need not be signed by the Sovereign. It is sufficient that the designated person in this case the Head of Public Service and Secretary to Cabinet was the designated person to sign the local contract that specified the local terms applicable to the claimant while he held the Ambassadorial office.

55. The pleasure doctrine was enunciated by the courts in the following cases: -

(i) **Cecilia Wangechi Ndungu –vs– County Government of Nyeri & another [2014] eKLR** the

Court held:

“The court holds that elected and appointed leaders, state officers or public officers, do not hold individually generated goals that constitute political will and goals mysterious to the Constitution.

.....

The court therefore holds that any public authority must be exercised in accordance with the Constitutional tests including the power to remove a public or state officer from office like it was anticipated and legitimately expected by the petitioner in the present case. In making that holding, the court further holds that statutes or other written laws and policies need not repeat the cited constitutional tests whenever authority or power is vested or conferred upon a person or body. The cited constitutional provisions are of universal application and not mere flowers in the constitutional text that readily wither in our constitutional practices; in the opinion of the court, they are provisions that must bloom into seeds of vitality that enhance our constitutional practices and lifestyle.”

(ii) In the case of **Republic –vs– Evans Odhiambo Kidero (Governor Nairobi County) & another ex-parte Evans Ondieki [2016] eKLR** this Court held:

“No documentary evidence that remotely points to poor work performance by the applicant has been produced by the respondent in court. One can only assume none existed at all in absence of any evidence to the contrary. Article 236 of the Constitution cannot be allowed to remain as if it did not exist. In the court’s view, the pleasure doctrine in Kenya must be exercised not only within the four corners of the enabling statutes but must also meet constitutional threshold articulated in all the relevant provisions of the Constitution of Kenya 2010.”

Though this case was decided in the new constitutional dispensation, it is the court’s considered view that the pleasure doctrine even in the old constitutional dispensation had to be exercised reasonably and with procedural fairness.

56. The recall must be done in a humane and reasonable manner, without visiting undue hardship on the person and family of the recalled officer.

57. If the officer was a Public Servant on permanent and pensionable terms prior to the appointment to the Ambassadorial position, the relevant Public Service Law and Regulations apply in determining whether or not such an officer will continue to serve in any other capacity in public service till retirement.

58. In the case of the claimant, he was the Managing Director of Kenya Posts and Telecommunications as at the time of his appointment to Ambassadorial position on 28th September 1995 in terms of Section 11 of the Constitution.

59. The claimant served in Japan for 36 months and the tenure was extended for a further 36 months in 1997, this time to be Ambassador of Kenya in the United States of America, Republic of Colombia and the United Mexican State.

60. The second term was terminated on 14th October 1999 before its expiry date scheduled on 2nd August 2001. He was yet to serve 22 months.

61. The claimant was not prior to his appointment as Ambassador or a Public Servant on permanent and pensionable terms. He served the Kenya Posts and Telecommunications on contract basis.

62. The claimant was therefore not entitled to any public appointment upon his recall from United States of America but had legitimate expectation in the least that he would serve public serve in any other capacity for the remainder of his contract.

63. No person has inherent right to public office. The claimant was not owed any reason for his recall by

the Sovereign and none was given. However, the claimant was owed fair and humane process of recall by according him adequate notice to wind up his and family commitments abroad and payment of all applicable emoluments to ease his return.

64. In terms of Section 111 (2) of the former constitution, the Sovereign owed the claimant a letter of recall revoking his appointment. It was not sufficient to delegate this authority to Permanent Secretary especially in circumstances where the spouse of the said Permanent Secretary was appointed to replace the claimant.

65. It was not far-fetched for a reasonable person to impute malice, ill will and illegality in the manner the claimant was abruptly recalled and received harsh welcome back at home. The claimant and his family were subjected to undue hardship and as a result suffered humiliation, pain, loss and damage.

66. The fact that the claimant was immediately replaced by the husband of the 2nd respondent confirmed the worst fears of the claimant. This was followed by a letter of termination of employment of the claimant from public service without payment of terminal benefits lawfully due to the claimant.

67. Therefore, the answer to issue (i) and (ii) above is that the 1st and 2nd respondents did not have the contractual, statutory and constitutional authority to terminate the claimant's appointment as Ambassador/High Commissioner. That power vested in the Sovereign under Section 111 (2) of the constitution could not be delegated.

68. The 1st and 2nd respondents acted in excess of their authority and their actions to recall the claimant and subsequent termination of his appointment in the ambassadorial position was tainted with malice, ill will and illegality to the loss and detriment of the claimant.

69. In **Civil Case No. 3472 of 1999 between Geoffrey Muguwa Mburugu –vs– The Hon. Attorney General** and in **Civil Case No. 2230 of 2001 between Lt. Col. Benjamin Mweme –vs– the Hon. Attorney General**, the court upheld the duty of the employer to act fairly. These cases were decided before the promulgation of the current constitution.

70. The old constitution is applicable to the present case. Similarly, the Employment Act, CAP 226, Laws of Kenya is applicable to this case since, the Employment Act, 2007 had not been enacted at the time the cause of action arose.

Remedies Available (Issue iii)

71. The court has already found that the recall of the claimant and his removal from the ambassadorial position was unconstitutional and unlawful.

72. Prayer two (2) of the claim sought related to the government of the day be restrained from harassing the claimant and interfering with the claimant's constitutional rights of movement and travel, to security and to employment as a citizen of the Republic of Kenya. This prayer has now been overtaken by events in our new constitutional dispensation. The harassment and curtailment of the claimant's right of movement however is an aggravating factor in assessing the general damages payable to him.

73. The claimant seek to be paid a sum of Kshs.101,708,529.50/= being the equivalent of the claimant's tax free salaries and benefits for the 22 months unexpired term of his contract between 15th November 1999 to 2nd August 2001.

74. As said earlier, no person has a personal entitlement to be appointed a representative of the Sovereign as an Ambassador or High Commissioner. However once the appointment has been made by the Sovereign and for a fixed term, then the doctrine of legitimate expectation comes to play that the terms and conditions of the contract of service shall be fulfilled by either party.

75. If the contract itself provide for an exit clause and the same is terminated lawfully in terms of the said contract, then the employee is only entitled to payment equivalent to the notice period provided in the contract itself. See the decision of the **Court of Appeal in United States International University –vs– Eric Rading Outa [2016] eKLR**.

76. However, if the court finds that the contract of service was curtailed unlawfully as it was in the present case, then the employee is entitled to general damages.

77. The issue that follows is how such damages are to be assessed.

78. The Employment Act, CAP 226 of the Laws of Kenya applicable to this case did not provide for award of general damages or compensation for unlawful termination of employment.

79. The court must resort to common law to guide it in assessment of such damages.

80. In the case of **Pravin Bowry –vs- Ethics and Anti-Corruption Commission**, the court upheld the doctrine of legitimate expectation and awarded the claimant general damages equivalent to the basic salary for the unexpired term of the contract. The case is similar to the present one where the contract was terminated for no fault of the claimant by operation of the law.

81. The court has also taken into account personal circumstances of the claimant as follows: -

(i) The claimant was a career diplomat and his career was terminated at the height of his career without lawful cause and or any contribution by himself to the termination.

(ii) The claimant was highly inconvenienced by the sudden recall without giving him time to prepare for his return and that of his school-going children from United States of America.

(iii) The claimant's prospect of continued career back home was quickly snuffed by the 1st and 2nd respondents by their failure to deploy him to any other suitable position back at home for the remainder of his term.

(iv) The respondents failed to pay the claimant's terminal benefits timeously and for a long time of period to his loss and detriment upon his return to Kenya.

(v) The claimant may not have had personal entitlement to the many benefits accorded an ambassador, but he is entitled to a fair recall and easement upon his return to the home country. Instead, the claimant was humiliated, harassed, remained unpaid and without income therefore. His travel and future employment was curtailed. This was degrading and an invasion of the claimant's human dignity and he suffered mental anguish, pain, loss and damage.

(vi) It is always a difficult task to assess the damage that would put the claimant back to the position he was unlawfully removed from. This case has unfortunately taken over sixteen (16) years to complete.

82. No amount of compensation would put the claimant to the position he was in financially then and in the comfort and enjoyment of a high state job.

83. The court will in the circumstances of this case rely on the doctrine of legitimate expectation and upon consideration of personal circumstances and similar cases, the court awards the claimant equivalent of the basic allowance, both foreign and local for the period of twenty two (22) months remaining to complete, the contract of service that was unlawfully breached by the 1st and 2nd respondents as set out in the particulars of loss, paragraph (1) (a) US\$133,122 and in paragraph 11 (1) Kshs.985,800/=.

84. The rest of the allowances may only be justified provided that the claimant serviced the full term. Since the contract was unlawfully terminated, the claimant is not entitled to the enumerated benefits

which were meant to facilitate his office while he served.

85. The court further awards the claimant loss of school fees K-GD12 and GD6 – GD12 in the sum of USD25,800 and US\$27,000 which loss is directly attributable to the unlawful and sudden recall from U.S.A and termination of employment of the claimant in public service.

86. In the final analysis, judgment is entered in favour of the claimant against the 3rd respondent as follows: -

(1) USD185,922

(2) Kshs.985,800/=

(3) The award in (a) and (b) is payable with interest at court rates from date of filing suit till payment in full.

(4) Costs to follow the outcome.

Dated, Signed and Delivered on this 10th Day of November 2017

MATHEWS NDERI NDUMA

JUDGE