



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 365 OF 2013

BETWEEN

SHEIKH ABUBAKAR BWANAKAI ABDALLAH.....CLAIMANT

VERSUS

1. JUDICIAL SERVICE COMMISSION

2. THE ATTORNEY-GENERAL.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Gichana Bw'Omwando & Company Advocates for the Claimant

Issa & Company Advocates for the 1st Respondent

State Law Office Mombasa, for the 2nd Respondent

JUDGMENT

Background

1. The Claimant filed his initial Statement of Claim on 5th November 2013. This was subsequently amended on 7th February 2014 and 25th June 2014. The Attorney-General was not a Party in the original Statement of Claim. The Attorney-General was introduced as a Co-Respondent in the amendment of 7th February 2014.
2. The 1st Respondent had in a letter dated 29th March 2006, informed Claimant's then Advocates that the 1st Respondent would be represented by the 2nd Respondent in the dispute.
3. This would perhaps explain why the 2nd Respondent was added as a Co-Respondent. The Court does not see any practical benefit however, in adding the 2nd Respondent to the proceedings. The 2nd Respondent has not participated in the proceedings in any meaningful way, and remedies are sought by the Claimant solely against the 1st Respondent.

4. The Claim against the 1st Respondent is that the 1st Respondent employed the Claimant on 12th January 1995, as Kadhi. He was first posted to Mandera in Northeastern Kenya. He was transferred to Bungoma in Western Kenya, where he worked between 1995 and 2003. His last post was the City of Kisumu. He served there between 2003 and 2004.

5. There were demonstrations in Kisumu for and against the Claimant, in August 2004. Demonstrations were triggered by a Ruling the Claimant made. Disgruntled elements occasioned demonstrations. 10 Ladies emerged alleging the Claimant had made sexual advances on them. The demonstrations attracted the attention of the media.

6. On 13th October 2004, the Acting Secretary of the 1st Respondent wrote to the Claimant, informing the Claimant that the 1st Respondent intended to take action against the Claimant for unprofessional conduct unbefitting of a Judicial Officer.

7. The allegations against the Claimant went beyond making sexual advances to Ladies. It was alleged that the Claimant's mission to hunt for a bride, had taken priority over his official duties; he was known to visit notorious nightspots called 'Blue Sand' and 'Octopus' where naked women frequented and alcohol was served; he received bribes from litigants; he advised a married woman with 6 Children to leave her husband; and declared a litigant a Member of the terror group Al Qaeda.

8. The Claimant replied to Respondent's letter to show cause, on 1st November 2004, denying the allegations against him. He was dismissed by the 1st Respondent on the ground of gross misconduct, with effect from 28th March 2005. He appealed against the decision internally. The 1st Respondent rescinded its decision on 7th June 2005 instead suspending the Claimant with no salary, and requiring the Claimant to report to the Principal Magistrate in Kisumu every Friday. In the period of suspension, the Claimant was now required to show cause, why he should not be retired in the public interest for gross breach of discipline.

9. The 1st Respondent did not give its final word to the Claimant, until 5th July 2012. The 1st Respondent wrote to the Claimant, informing him that it had been decided Claimant's suspension is lifted, and he is retired in the public interest with effect from 22nd June 2012. He would be paid salary up to 7th June 2005 when the 1st Respondent met, and placed the Claimant on suspension. He would not be paid salary for the period from 8th June 2005.

10. The Claimant applied for orders of Certiorari, Mandamus and Prohibition against the 1st Respondent's Chairman [Hon. Chief Justice], at the High Court in Kisumu, Miscellaneous Application Number 113 of 2005. The Application was transferred to the High Court at Kakamega and registered there as Miscellaneous Application Number 40 of 2005. The 1st Respondent's Chairman does not seem to have participated in the High Court proceedings. The Application was rejected in a Ruling delivered on 19th December 2005.

11. Rejection was on the ground that the Claimant failed to provide the Court with key documents in support of his Application. The Letter to show cause was not exhibited. The Verifying Affidavit contained no evidence. The Court held that the Application was hollow, and rejected it.

12. Parties to the current dispute do not in their Pleadings view the previous proceedings at the High Court, as having any effect on the current dispute. It has not been suggested that the Claim is *res judicata*, or in any other way in abuse of the Court Process, in the Statement of Response. The Claimant disclosed the existence of the previous proceedings in his Pleadings. He avers that the Miscellaneous Application was rejected on technicalities. The issues presented at the High Court related to procedure. The substantive issues in the dispute have never been subjected to judicial scrutiny. The procedural issues relating to retirement of the Claimant were similarly not dealt with by the High Court, for reasons given in the Ruling of 19th December 2005.

13. The previous proceedings, do not therefore pose a hindrance to the current Court, in considering and determining substantive as well as procedural issues, relating to the retirement of the Claimant from judicial service.

14. The Claimant asks the Court: to declare that retirement was wrongful and devoid of legal effect; declare that the Claimant is entitled to all dues, salaries, allowances, remuneration, entitlements from September 2004 to-date; an order for payment of all statutory dues to the Claimant including facilitation, for release of pension; costs; interest; and any other suitable relief.

15. He appears not to have a clear mind with respect to the remedies desired, as shown in the persistent amendments, and inconsistent figures, contained in his Pleadings. In his Closing Submissions, he argues that due to slavery, servitude and inhuman treatment, an award of Kshs. 12 million would be ‘*fair recompense for the sins of the 1st Respondent.*’ This is a shift from his last Amended Statement Claim.

16. The 1st Respondent filed its Statement of Response on 28th March 2014. It is conceded the Claimant was employed by the 1st Respondent as stated in the Claim. His employment history and terms and conditions of service are largely not disputed. He was appraised while at Mandera and Bungoma. He was found to be rude when dealing with Members of the Public and required constant supervision in his work. He was transferred to Kisumu, where the Muslim Community demonstrated against the Claimant’s conduct in discharge of his official role, demanding for Claimant’s removal. The 1st Respondent investigated and established that: the Claimant harassed Muslim Women who appeared before him; he took bribes from litigants; and was rude, temperamental, and discourteous to litigants contrary to the Judicial Code of Conduct. He was issued letter to show cause, why he should not be disciplined; he was dismissed subsequently; he appealed against the decision; it was decided by the 1st Respondent to place the Claimant on suspension and call upon him to show cause, why he should not be retired in the public interest; suspension was lifted on 22nd February 2012; and the Claimant retired in the public interest. His salary would be released up to 7th June 2005. He was to hand over any property of the 1st Respondent in his possession. He was advised to open a bank account through which his retirement benefits would be paid. His Claim is without merit. The 1st Respondent urges the Court to dismiss the Claim with costs to the 1st Respondent.

17. The Claimant was heard on 28th July 2014, and 6th March 2015 when he rested his case. Simon Kaki Aruwa, Assistant Director Human Resources in the Judiciary, gave evidence for the 1st Respondent on 24th March 2017 when hearing closed.

Claimant’s Position.

18. **The Claimant** confirmed his employment history and terms and conditions of service in his oral evidence. He retold the facts as set out in the Pleadings and Documents on record.

19. He had a conflict with then Chief Kadhi Hamad M. Kasim, while the Claimant served in Kisumu. The Chief Kadhi wanted the Claimant to rule in favour of one of the Parties in Divorce Cause Number 4 of 2004, by transferring the Cause to the Chief Kadhi based at Mombasa. The Claimant declined the Chief Kadhi’s instruction. The disagreement was brought to the attention of the Resident Judge who directed the Chief Kadhi to follow the law on transfer of Suits under Section 18 of the Civil Procedure Act. Soon after, demonstrations against the Claimant erupted in Kisumu. These demonstration were broadcast on Kenya Television Network [KTN].

20. The Claimant was interdicted and asked to show cause why, he should not face disciplinary action. The letter to show cause is dated 13th October 2004, while that on interdiction is dated 14th October 2004. The allegations against the Claimant as stated elsewhere, revolved around sexual harassment. No criminal charges were preferred against the Claimant. He was paid half salary while on interdiction.

21. In February 2005, he was surprised to see the Chief Kadhi address the media, stating that the Claimant

had been dismissed from his position as Kadhi, Kisumu. Dismissal letter was only received by the Claimant in April 2005. It is dated 11th April 2005.

22. The Claimant sought judicial review of the decision at the High Court in Kakamega. This was dismissed on legal technicality.

23. While the proceedings at the High Court were ongoing, the 1st Respondent served the Claimant another letter, rescinding its decision to dismiss the Claimant. He was instead placed on indefinite suspension. He was paid nothing from the date of suspension. His gross salary was Kshs. 19,950 before interdiction and Kshs. 11,250 after interdiction.

24. He was required to report to the Principal Magistrate at Kisumu once every week while on suspension. He continued to do so until 2008. He was no longer able to finance his travel from Mombasa to Kisumu. He sold all his properties at Kisumu and returned to his native Coast Region.

25. He wrote many letters to the 1st Respondent during suspension, seeking to know what his employment status with the 1st Respondent was. There was no response.

26. He was never called before any disciplinary panel for hearing. He expected to be reinstated.

27. Cross-examined, the Claimant told the Court he was trained after employment. He stayed in Mandera for 1 year. He reported to Bungoma in December 1995 and Kisumu in September 2003.

28. He was not able to say if demonstrations in Kisumu were carried out by Muslims. The Chief Kadhi investigated and interviewed the Claimant at Kisumu. The Claimant did not know if Chief Kadhi interviewed the Muslim Community in Kisumu.

29. The Claimant received letter to show cause from the 1st Respondent. There were 3 broad accusations- sexual immorality, corrupt deals and poor public relations. According to the 1st Respondent, Claimant's response to these allegations was considered by the 1st Respondent.

30. He was dismissed on 11th April 2005. He received the letter of dismissal. He appealed against the decision internally. He filed for judicial review at the High Court. This was done after he had appealed. The Application for judicial review was declined on technicality.

31. He did not enquire from the 1st Respondent about his Appeal. He received a letter from the 1st Respondent on 8th June 2005, rescinding dismissal decision and suspending him. He was asked to show cause, why he should not be retired in the public interest. He did not respond substantively, stating that the matter was pending in the High Court. He did not appeal against the decision of the High Court. He was not represented by Counsel. He did not inform the 1st Respondent that the Application at the High Court was dismissed. He did not think by filing the present Cause after the High Court Ruling, he was in abuse of the Court Process. He did not ask for terminal dues at the High Court.

32. The Claimant did not agree that he was subjected to the procedure required of Judicial Officers. He was not granted an oral hearing. The letter of suspension informed the Claimant he was suspended without pay. He was not aware the 1st Respondent could suspend him, without pay.

33. Redirected, the Claimant told the Court he protested the manner of his retirement. There were demonstrations in Kisumu. The following day there were counter-demonstrations, condemning the demonstrations held the previous day. The Chief Kadhi did not contact the Claimant. He did not interview the Claimant. The Chief Kadhi did not meet the Claimant at all. Details of sexual harassment were not disclosed. It was not the Claimant's responsibility to communicate the outcome of the High Court proceedings to the 1st Respondent. The Chief Kadhi was malicious.

1st Respondent's Position.

34. Simon Kaki Aruwa confirmed that the Claimant was employed by the 1st Respondent as Kadhi 2, serving in Mandera, Bungoma and Kisumu, in the years given in his evidence. There were demonstrations against the Claimant on 8th August 2004 touching on his conduct. The Chief Kadhi investigated and filed his report. The report was supported by documents. The Claimant was given a chance to answer every allegation.

35. He was dismissed as stated in his evidence. He appealed against the decision. The dismissal decision was rescinded, and the Claimant placed on suspension. He was asked to show cause, why he should not be retired on the ground of public interest.

36. He filed for judicial review at the High Court and the matter was *sub judice*. He did not inform the 1st Respondent about the outcome of the Application. The Claimant was granted fair hearing. There was provision for retirement in the public interest, under the Service Commissions Act Cap 185 the Laws of Kenya.

37. Cross-examined, Aruwa testified he was appointed to the Judiciary in the year 2012. He relied on Claimant's Personnel File, in giving evidence. The Claimant fell under the Judicial Service Commission Regulations, under Cap 185. His case started under the old Regulations.

38. The Chief Kadhi, in his report, stated no complaints against the Claimant had reached the Chief Magistrate. There were problems with the Claimant while he served at Mandera. The Claimant had been assigned magisterial duties by the Chief Justice. Retirement process was fair and lawful.

39. Aruwa concluded his evidence on redirection with the clarification that the decision to retire the Claimant was not predetermined. First decision was rescinded. Notice to show cause was restricted to Claimant's period in Kisumu. Complaints were from different individuals. The Claimant was given a hearing by the Chief Kadhi. He was given a chance to respond. The dispute took long to conclude. The Claimant had told the 1st Respondent that the matter was *sub judice*.

Submissions:-

40. The Claimant submits that demonstrations against him were instigated by disaffected litigants; complaints of sexual harassment were unsubstantiated; the Claimant as a Muslim, was permitted by his faith to marry up to 4 wives; Respondent's Witness was employed after the Claimant's retirement and hard-pressed in explaining documents on record; retirement amounted to unfair termination for want of valid reason under Section 45 of the Employment Act 2007; the 1st Respondent acted contrary to Judicial Service Commission Regulations, and principles laid down in the ***Court of Appeal of Kenya decision in Stephen S. Pareno v. Judicial Service Commission [2014] e-KLR***; and that the decision by the 1st Respondent to retire the Claimant was an armchair and unilateral decision. It was unfair and unlawful. The Claimant submits he deserves the remedies sought.

41. The 1st Respondent appears not to have filed Closing Submissions.

42. The Attorney-General surprisingly did. The Submissions however, do not address the issues in dispute. The 2nd Respondent merely gives a brief recital of the case history- when it was filed; when Parties entered appearance; and when they instructed Counsel. Lastly the Attorney-General submits that the 1st Respondent was well represented by the Law Firm of Issa Mansur.

43. Traditionally, the issues for determination in disputes involving wrongful or unfair termination of employment are, whether, the decision is substantively justifiable; whether it is arrived at fairly; and whether the Claimant merits the remedies outlined in the Claim. These are the issues in dispute in the Claim herein.

The Court Finds:-

44. There are facts which are not contested: the Claimant was employed by the Respondent as Kadhi; he worked from January 1995 to 22nd June 2012 when he was retired in the public interest; he was alleged to have been involved in sexual harassment, corruption and lacked good public relations while in Kisumu; there were demonstrations against him; he was investigated by the Chief Kadhi who prepared a report; the Claimant was called upon by the 1st Respondent to show cause, in a letter dated 13th October 2004, why he should not face disciplinary action for unprofessional conduct not befitting a Judicial Officer; he replied denying the allegations on 1st November 2004; the 1st Respondent interdicted the Claimant effective from 28th September 2004 and placed him on half salary; he was dismissed for gross misconduct through a letter from the 1st Respondent dated 11th April 2005; he appealed against the decision internally on 21st April 2005; the dismissal decision was rescinded by the 1st Respondent on 8th June 2005; the Claimant was suspended, and required to show cause why he should not be retired in the public interest; the Claimant does not seem to have replied because he had as of 13th May 2005 filed for judicial review at the High Court and felt the matter was *sub judice*; the judicial review ended in a Ruling rejecting the prayer for prerogative orders; rejection was mainly on technical grounds; and finally, suspension was lifted 7 years after it was imposed, and the Claimant relieved of his Kadhiship, through retirement in the public interest, on 22nd June 2012. These facts are documented, and not subject to contestation.

45. It was also agreed in the course of the hearing that the Claimant's half salary withheld for the period of interdiction, between 28th September 2004 and 8th June 2005, has since been released to the Claimant. The letter placing him on suspension informed the Claimant he would not receive any salary for the period of suspension. He received nothing between 8th June 2005, and 22nd June 2012 when he was retired.

Substantive validity:-

46. The accusations against the Claimant, which led to his retirement, are contained in the notice to show cause, dated 13th October 2004.

47. There were no fresh allegations after the Claimant's dismissal was rescinded, the Claimant placed on suspension, and required to show cause, why he should not be retired in the public interest. The letter rescinding the decision, dated 8th June 2005, states, "*the charges leveled against you were enumerated in the Chief Justice's show cause letter... of 13th October 2004.*"

48. These allegations are what informed the decision to retire the Claimant in the public interest, with effect from 22nd June 2012.

49. The allegations were in various forms, and undoubtedly, very grave in nature. First, the Kadhi was alleged by a multiplicity of Muslim Women, to have sexually harassed them. The Claimant was alleged to seek sexual favours from the Women; propose marriage to litigants who had filed for divorce before him; sent a text message to another lady saying "*gud nyte sweet dreams*"; and teased yet another lady by the roadside while driving in the company of a bevy of Ladies, telling her she was beautiful and he wished to marry her; and gave one of Muslim Sisters Kshs. 100 to buy kerosene, telling her a beautiful Woman like her should not suffer.

50. The Women alleged to have been subjected to sexual harassment by the Claimant had been complaining to the Chief Kadhi through various letters on record. They had written to the Chairperson of National Muslim Council complaining about their Kadhi, and asking for an 'Islamic Solution' to their problems.

51. The Chief Kadhi visited Kisumu while these complaints against the Claimant were already a matter of discussion involving other Parties, other than the Chief Kadhi.

52. The Chief Kadhi visited Kisumu on 2nd August 2004. He invited anyone who had a complaint against the Claimant to report to him. The invitation was made to worshippers at Jamia Mosque in Kisumu.
53. Complainants came forward, restating allegations of sexual harassment
54. It was alleged to the Chief Kadhi that the Claimant was engaged in bribery. He was paid Kshs. 3,000 and dissolved a marriage without hearing the Parties; he solicited for Kshs. 50,000 from the family of a robbery suspect, promising to intercede with the trial Court for the suspect's release; and generally asked for bribes to issue certificates of marriage.
55. The last category of complaints was that the Claimant had poor public relations. He advised a Lady who had 6 Children to leave her husband; he shouted at another Lady ' *'nitakutia ndani!*' [Kiswahili for- *I will lock you up*]; he characterized a certain gentlemen to be a member of a terrorist group; and refused to sit with elders. The Claimant was also alleged to have visited nightspots where alcohol and naked Women were available.
56. The Claimant denied these accusations when confronted by the Chief Kadhi. He attributed them to wrangling which was going on within Kisumu Muslim Association.
57. The Chief Kadhi met the Chief Magistrate Kisumu, who told him the Chief Magistrate had not received any complaints against the Kadhi from anyone. The Magistrate informed the Chief Kadhi she believed the demonstrations were occasioned by a Ruling she had made in a case involving Kisumu Muslim Association.
58. The Claimant replied to the notice to show cause, on 1st November 2004. He strongly refuted the allegations against him, terming them as gossip.
59. He stated he was married with 1 wife, and had not contemplated marrying another. He emphasized his right under his Islamic Faith, to marry 3 more wives. He admitted sending a '*gud nyte*' message to the Lady who made this allegation. He however stated that the Lady had shown interest in him, and she was not a litigant before him.
60. He did not know about nightspots where alcohol and naked Women were available. He never visited these dens of vice.
61. He was not involved in criminal trials and the allegation that he interceded for a robbery suspect was false.
62. As Kadhi, he was supposed to be impartial. He could not sit with the so-called Elders because of the divisions rife in their community. He did not threaten to lock up anyone, but pointed out it was not unusual to warn litigants of such an eventuality, particularly when litigants were in contempt of the Kadhi's Court.
63. The Claimant pointed out he had worked in Mandera and Bungoma without any complaints made against him by the public. He had been assigned magisterial duties by the Chief Justice. No complaints against him had been received by the Chief Kadhi or Chief Justice during his time at these other stations. The allegations against him ought to have been treated with caution, considering the poisoned atmosphere within the Muslim Community which he served.
64. In addition to this reply showing why he should not be dismissed from judicial service, the Claimant obtained references from General Community Leaders who had worked with him, showing the Kadhi was of irreproachable character.
65. The references include one from Sheikh Abdallah Sheha who swore an affidavit in favour of the Claimant, on 19th May 2005. Sheikh Sheha was the Imam of Jamia Mosque at Kisumu, the same Mosque the Chief Kadhi visited and called on worshippers with allegations against the Claimant to step forward.

The Imam deponed that the Claimant was a victim of a conspiracy meant to demean his position as Kadhi. Sheikh Sheha termed the Women who had complained against the Claimant as crooked. He revealed that he and other Muslim Scholars had staged a counter-demonstration, to denounce the demonstration previously held against the Claimant. He revealed further that he had given the same information about the crooked Women to the Chief Kadhi, when the latter visited Kisumu to investigate the complaints. Another Affidavit supporting the Claimant's position was sworn by Maalim Ahmed Salim who served as a Principal of High Schools in Nairobi and Kakamega, and was at the material time a resident of Kisumu.

66. Notable references in form of letters addressed to '*whom it may concern,*' were also obtained by the Claimant. Provincial Commissioner Western Province, A.K. Mwasserah, wrote on 27th December 2005, stating the Claimant was industrious, with good public relations skills, experience in administration and management of education. Mwasserah stated that the Claimant was a Member of the Provincial Education Board Western Province and a Member of the District Education Board.

67. Bakari Omari Jambeni, Provincial Police Officer Nyanza, wrote on 22nd July 2005, describing the Claimant as a man of moral integrity who was free from any criminal activities. The Kadhi was according to the PPO, reliable and responsible.

68. P.L.N Kiilu, Senior Deputy Secretary in the Public Service Commission of Kenya wrote on 2nd August 2005 stating he had known the Claimant from 1995, when the Claimant worked with him in Mandera. He later joined Kiilu in Bungoma. Kiilu described the Claimant as a Man of outstanding character, socially and morally. The Senior Deputy Secretary of the Public Service Commission of Kenya states about the Claimant, '*I highly recommend him to anybody who may need his services.*' Nyanza Provincial Commissioner Hassan N. Hassan in his letter dated 18th July 2005, states he knew the Claimant from 1991 when the Claimant was Headmaster at Mpeketoni and Lamu Secondary Schools, both in Lamu. Hassan later interacted with the Claimant at Bungoma and Kisumu. His view of the Claimant was that the Claimant was reliable, responsible and well acquainted in both Secular and Islamic Knowledge.

69. Senior Principal State Counsel Nyanza, D. Musau, gave reference in a letter dated 6th October 2005. He knew the Claimant from 1996, and worked with the Claimant at Kisumu. He termed the Claimant as honest, trustworthy and dependable.

70. Other favourable references are from Mohamed Juma Ponda, Chairman of Supkem Western Province, and Amina Shariff Ahmed, Secretary Mumias Muslim Association. Both of these Muslim Leaders swore affidavits vouching for the Claimant. They asserted that their Community appreciated Claimant's services.

71. The reference letters and affidavits mentioned in the paragraphs above were brought to the attention of the 1st Respondent by the Claimant, in his attempt to clear his name and return to service. They were available to the 1st Respondent as far back as 2005.

72. Whenever a decision is taken in the public interest, it is understood as being informed by the concern for the welfare or well-being of the general public. In the case of Kadhi Abdallah, the decision to retire him was made in the public interest. It was deemed he was not discharging his role for the welfare or well-being of his Muslim Community, and the general public.

73. There were strong voices against the Claimant, in particular those of the self-styled Muslim Sisters, who came forward alleging sexual harassment against the Claimant. These were the voices that the 1st Respondent listened to.

74. But public interest hardly has one side. There are multifarious interests within public interest. The voices of the Provincial Commissioners, the Provincial Police Officer, State Counsel, Imam and Senior Deputy Secretary, the Public Service Commission of Kenya, among others, were expressions of public

interest. They were never considered by the 1st Respondent. The Senior Deputy Secretary to the Public Service Commission of Kenya would be expected to have some idea what public interest entails. There were Muslim Leaders, Men and Women, whose idea of what was in the best of interest of their Community in Kisumu, was different from that of the Muslim Sisters. These alternative voices were not considered before the Claimant was forced into retirement.

75. 'Retirement in the public interest' is of times taken as a code for judicial or executive discretion, in terminating Officers' service. It is a discretion which is susceptible to abuse. Unconstrained, it allows Public Bodies to terminate Public Officers' service without justification. It makes termination of employment without assigning of valid reasons, possible. It is a mode of termination broadly invoked, when it is deemed that an Officer's service cannot suitably be terminated under other modes of termination. Punishments which may be inflicted on an Officer as a result of disciplinary proceedings include dismissal; stoppage of increment; withholding of increment; deferment of increment; severe reprimand and reprimand; and recovery of costs for any loss or breakage. Nothing in the Regulations, limit an Authorized Officer, from requiring an Officer to retire in the public interest.

76. In *D.K. Njagi Marete v. The Teachers Service Commission [2013] e-KLR*, the Court emphasized that retirement in the public interest must always be on objective and demonstrable grounds. The Claimant in this decision, was issued a letter of retirement in the public interest, without assigning any reasons at all.

77. Where there are opposing public interests, the finder of facts must make a full and comprehensive analysis of the competing interests.

78. The Court is not able to discern a full and comprehensive analysis of competing public interests, carried out by the 1st Respondent, based on the material placed before it by the Parties.

79. The complaints against the Claimant were grave and cannot be trivialized. Their gravity however, required they are investigated, and tested through a proper disciplinary process. They ought to have been weighed against what the other Public Officers and Muslim Leaders said of the Kadhi.

80. The Court has in past decisions taken a very strong stand against sexual harassment, in particular employment-related sexual harassment. In *Industrial Court at Nairobi, Cause Number 927 of 2010 between PO v The Board of Trustee, Association for Better Land Husbandry & Rodney Jim Keneally Cheatle*, the Court held that insults, remarks, insinuations, inappropriate comments, condescending or paternalistic attitude which undermine the dignity of Women, amount to sexual violence. Allegations of sexual harassment should not be trivialized, but should also, not be accepted at face value.

81. No person should be allowed to use his position in the Society, to sexually harass Women. This applies even in cases of Muslim Men. Section 6 of the Employment Act 2007, and 1993 UN Declaration on Elimination of Violence Against Women, apply to the broad spectrum of the Kenyan Society.

82. The Court does not accept that because the Claimant is a Muslim Man, entitled to marry an optimal 4 wives, that he should go about looking for the remaining 3 wives, through activities that would amount to sexual harassment.

83. The 1st Respondent needed to establish the veracity of the complaints against the Claimant. Were the Muslim Sisters who came forward driven by ill motive? Why would their Imam swear an Affidavit denouncing them as crooked Ladies? The Complainants did not make any Affidavits; they just wrote letters. Why would one of the Ladies avail to the Kadhi her mobile phone number, and complain when he sent her a 'good night, sweet dreams,' message? Why was there a counter-demonstration in favour of the Kadhi, after the demonstration led by the 'crooked Ladies'? The Claimant alleged in one of his letters to the 1st Respondent, that the Muslim Sisters had been instigated by the Claimant's estranged Wife. The 1st Respondent as a trier or finder of facts, needed to delve deeper into the allegations facing the Claimant, and balance the material availed by the Parties, before retiring the Claimant.

84. The 1st Respondent merely replicated the accusations made against the Claimant, in the report made by the Chief Kadhi. The protestation by the Claimant that there were differences between the Claimant and the Chief Kadhi was ignored.

85. Excupatory aspects contained in the Report by the Chief Kadhi were ignored. The Chief Magistrate Kisumu, who was the Claimant's immediate Supervisor, told the Chief Kadhi no complaints against the Kadhi had been made before the Chief Magistrate. She went on to say that the demonstration in Kisumu was precipitated by a decision which the Chief Magistrate herself, had made, in a case involving Kisumu Muslim Association. Was it not important for the 1st Respondent to have the view of the Chief Magistrate, an immediate Supervisor, before proceeding against the Kadhi?

86. Imam Maalim Ahmed Salim, swore an Affidavit stating he, and other Muslim Scholars, had communicated to the Chief Kadhi when the latter visited Kisumu, informing the Chief Kadhi about the falsity of the allegations against the Claimant. The Chief Kadhi did not include what he was told by the Imam, in the report which the 1st Respondent relied on. The Imam was the Leader of Jamia Mosque, and his word on matters touching on his flock, should not have been ignored.

87. Most of the allegations against the Claimant were downright criminal in nature, or bordering on crime. He was alleged to take bribes. Yet, there was no action taken to prosecute him for these crimes. There is no suggestion of complaint made to the Police. The Law Enforcement Agencies, as shown in the letters from the PPO and the State Counsel, instead, gave the Claimant what reads better, than a Certificate of Good Conduct. The 1st Respondent does not seem to have considered that the Claimant had been appointed by the Chief Justice in the past, to exercise magisterial functions. He had served the Judiciary for close to 10 years before the events at Kisumu. He was a former School Principal and served in Education Boards. Should these virtues have been let go unnoticed?

88. The 1st Respondent only stated in the letter to the Claimant dated 5th July 2012, that he had been retired in the public interest. The allegations in the notice to show cause were not mentioned. Were they established? The Court, in the case of ***D.K. Njagi Marete***, emphasized the need to demonstrate, in which way public interest has been offended, or is sought to be protected. All termination of employment decisions must be justified based on valid reasons. In ***Nairobi HCC Number 3472 of 1994 between Geoffrey Muguna Mburugu v The Attorney-General***, the Court held that an Authorized Officer under Service Regulations, must approach the issue of retirement in the public interest, with an open mind, and act in a quasi-judicial manner. The action taken against a Public Officer [Mburugu], though made under the Public Service Regulation 40, did not fall out of the category of any other kind of dismissal. ***The Court finds termination of the Claimant's service was not based on valid reasons. It was not substantively justified.***

Fair Procedure

89. The Public Officer Ethics Act 2003 requires relevant Service Commissions under the Service Commissions Act Cap 185 the Laws of Kenya, to establish a specific Code of Conduct and Ethics for Officers.

90. The 1st Respondent formulated a Judicial Service Code of Conduct and Ethics published in Kenya Gazette as Legal Notice No. 50 of 2003.

91. Where an Officer has committed a breach of the Code, appropriate action will be taken in accordance with the provisions of Public Officer Ethics Act, Judicial Service Commission Regulations or the Constitution as the case may be.

92. The Claimant's service was terminated under Regulation 28, in the public interest. The Regulations require the Chief Justice to consider every report in his possession with regard to an Officer. All Service Regulations, as observed in ***John Benson Githinji v. Attorney-General & 4 others [2014] e-KLR***, incorporate provisions of relevant legislations which are applicable on matters of employment and all

human resources management issues. The Regulations must be read together with relevant Acts of Parliament, in particular the Employment Act 2007, which is foundational employment law in Kenya.

93. It is not clear from the Court record which report was availed to the Chief Justice, or even whether any report was availed to the Chief Justice. The Court has concluded that key material documents which favoured the Claimant's position were not taken into consideration, in making the decision against him.

94. The record shows that Claimant wrote to the 1st Respondent in December 2010 asking for minutes of the 1st Respondent's meeting, which would have shed light on the reports, relied upon by the Chief Justice.

95. The 1st Respondent disregarded Claimant's right to information under the Constitution, advising him that the Judicial Service Commission Regulations prohibit disclosure of minutes. He was also advised that all the information he required was in the notice to show cause.

96. Regulation 28 requires the Chief Justice to notify the Officer in writing, specifying the complaints by reason of which retirement is contemplated, together with the substance of any report, or part thereof that is detrimental to the Officer.

97. After lifting of interdiction and placing of the Claimant on suspension, he was informed the accusations against him were the same ones contained in the initial notice to show cause. It is not clear if he was provided with any report at the time he was asked to respond to the notice to show cause for the second time.

98. The 1st Respondent appeared to blame the Claimant for not replying to the second notice to show cause, why he should not be disciplined. On 21st June 2005, the Claimant had written to the 1st Respondent holding that the dispute was *sub-judice*, as he had filed for judicial review.

99. The Court does not think the proceedings at the High Court can be the reason for delay in concluding 7 years down the line, a disciplinary process which started in the year 2004. The lack of a reply from the Claimant when asked to show cause why he should not be disciplined, after he was suspended, cannot have prevented the 1st Respondent from concluding the case within reasonable time.

100. The accusations against the Claimant were contained in the notice to show cause, which issued on interdiction. The Claimant was never given a personal hearing where his accusers confronted him eyeball to eyeball. This did not happen even when the Chief Kadhi visited Kisumu. The same notice was relied upon by the 1st Respondent, in asking the Claimant to show cause, after dismissal was rescinded and Claimant placed under suspension. Why did not the 1st Respondent rely on the reply given by the Claimant in the first place and move the process forward? The accusations were the same. Furthermore, the 1st Respondent wrote to the Claimant on 26th August 2010 advising that "*the Court Cases you have filed against your Employer, cannot bar us from taking administrative action against you, as this is an employment contract, based on mutuality.*" There was no order issued from the Court, staying the disciplinary proceedings. Delay in completing the process can only be attributed to the 1st Respondent, and was detrimental to the Claimant.

101. The Chief Justice is required after giving the Officer an opportunity to show cause why he should not be retired in the public interest, to lay before the 1st Respondent a report of the case, the Officer's reply, and the Chief Justice's own recommendation. The 1st Respondent decides whether the Officer shall be required to retire in the public interest.

102. The letter retiring the Claimant dated 5th July 2012, does not indicate, whether the Chief Justice placed any report on the case before the 1st Respondent. Nothing is said about the recommendation of the Chief Justice. It was just the decision which was made known to the Claimant. The proceedings of the 1st

Respondent could not be supplied to the Claimant because, according to the 1st Respondent, the Regulations barred the Claimant from accessing these proceedings. How would the Officer know if the 1st Respondent complied with the Regulations, without access to the proceedings which led to retirement in the public interest?

103. Regulations relating to suspension of Judicial Officers are onerous, and a fertile seed-bed, for unfair labour practices. Administrative suspension is not a disciplinary sanction. The Officer merely steps aside to allow his Employer, carry out investigations, and disciplinary process against him, without the possibility of the Officer interfering with the process. Suspension, in this context, is not a disciplinary punishment. It should not be applied as if it is a punishment.

104. Suspension Regulation is onerous in the extreme, as it allows, for an Officer to go on suspension without pay. The Officer remains an Employee, with mutuality of obligations. The contract of employment remains. A Regulation which allows an Employee to go without any form of a salary while still under contract, is in breach of fair labour practices.

105. The Claimant was suspended without pay, from June 2005, until 2012, when he was released from service, without any social security.

106. He was required under the Regulations, not to leave his station without the permission of the Chief Justice, or any other Officer designated by the Chief Justice.

107. The Claimant was stationed in Kisumu. His home was at Lamu. He seems to have had a residence in Mombasa. He was required to report to the Chief Magistrate every Friday, a requirement which does not seem to have support under the regulations. Without a salary to sustain himself in Kisumu, or enable him to travel from Lamu or Mombasa to Kisumu, the terms of suspension, which run for about 7 years, were oppressive. It is stated in the letter by the Chief Magistrate Kisumu addressed to the Registrar High Court, dated 10th September 2010, that the Claimant had reported to the Chief Magistrate every Friday until 2008. It would be expected that without any income, the Claimant would fail in meeting his terms of suspension. How in any case, was he to pay rent in Kisumu, without a salary?

108. The situation could have been alleviated had the Chief Justice granted the Claimant alimentary allowance while on suspension, as the Chief Justice is permitted to grant, under the Regulations. The Claimant did not receive any alimentary allowance. The term 'alimentary' is similar to the term 'alimony.' The terms generally describe periodical payments sufficient for the bare support of the recipient. Without a salary and alimentary allowance, the Claimant was left without bare support. He would not have the ability to honour the terms of his suspension, or fairly defend himself before the 1st Respondent. Although payment of alimentary allowance to an Officer on suspension is at the discretion of the Chief Justice, such discretion does not appear to have been judiciously exercised in the circumstances of this case. The Court is convinced the Claimant was not taken through a fair disciplinary process.

Remedies:-

109. As observed by the Court, the Claimant has not clearly detailed what remedies he wishes to have from the Court.

110. The decision to retire the Claimant in the public interest was made in the year 2012. The Employment Act 2007 was already in force. The Witness for the 1st Respondent observed correctly that the disciplinary process traversed different legal epochs. An unfair termination decision made in the year 2012 would correctly be remedied under the Employment Act 2007, notwithstanding that the disciplinary process was initiated in 2005.

111. The remedy of reinstatement is always appropriate whenever there are multiple violations in the process of termination. The Claimant was able to show retirement in the public interest was not based on valid reasons and was not carried out fairly. There were Members of his Community, and General

Community Leaders, who pleaded with the 1st Respondent, through letters and affidavits, to return the Claimant to work. In Employment and Labour Relations Court at Nairobi Petition, involving **Kizito M. Lubano v. KEMRI Board of Management & 8 Others [2015] e-KLR**, an Officer retired in the public interest, was reinstated, the Court having found there were fundamental failures in the proceedings leading to retirement.

112. The Claimant herein however, stopped working, effectively in the year 2004, when interdicted. He has not discharged the role of Kadhi, for about 13 years today.

113. The Employment Act 2007 does not allow the Court to reinstate Employees whose contracts are unfairly terminated, after the lapse of 3 years from the date of termination.

114. The Judiciary of 2004 is not the same Judiciary today. The Claimant himself is not the same person. For 13 years, Parties have not stood still. It is doubtful that the Parties can rebuild the relationship that was there over 13 years ago.

115. While under different circumstances it would have been most appropriate to grant the remedy of reinstatement, it would not be in accordance with the law, and would not be practicable or reasonable in this dispute.

116. Alimentary allowance, as discussed above is under the Regulations, given at the discretion of the Chief Justice. The amount is determined by the Chief Justice. It is not something that this Court can enforce, little less, do so in arrears.

117. Basic salary and allowances are sought in arrears from June 2005 to-date. The Court is of the view that, had the 1st Respondent weighed the facts carefully and followed fair procedure, the Claimant would not have been retired in the public interest.

118. The Claimant had a contract of employment which was only brought to an end in the year 2012. He was still an Employee of the 1st Respondent.

119. As observed by the 1st Respondent, there was a mutuality of obligations. The Claimant remained under contract, and in the 1st Respondent's payroll. The Claimant should not be denied his salary for the period between June 2005 and June 2012. Had a proper disciplinary process been put in place, suspension would, in all likelihood, have been lifted, and the Claimant restored to service with full salary, for the period under suspension. In this Court's decision, **John Benson Githinji**, and High Court decision, **Geoffrey Muguna Mburugu**, the wronged Officers were granted arrears of salary, the Court having found they were unfairly retired, under the respective Service Regulations.

120. The Claimant's last monthly salary shown in his pay slip marked SAB 8, was a total of Kshs. 16,525. It is the only pay slip the Court has seen in the Court File. The Court has not seen any other pay slip, to support any other monthly rate. The total includes basic salary, rental allowance, personal allowance and responsibility allowance. The Claimant did not work after interdiction, and was paid half salary, between interdiction and suspension. He still had a contract. He was on the payroll. While the Court acknowledges the salary payable to a Kadhi was not static from 2005 up to 2012, the Claimant did not work up to 2012. It was not his fault that he did not work. A fair rate in granting him arrears of salary should be the rate applicable when he left work. There is absolutely no reason why he should expect to receive arrears of salary to-date. He definitely ceased working as Kadhi, in 2012.

121. **He is allowed salary arrears from June 2005 to June 2012, a period of 7 years, at Kshs. 16,525 each month. This is computed as follows: Kshs. 16,525 x 12 x 7 = 1,388,100.**

122. Compensation for unfair termination is allowed, limited to a ceiling of 12 months' gross salary, under Section 49 of the Employment Act 2007. The Claimant did not supply the Court with evidence to justify his prayer for Kshs. 12 million in compensation. It was not demonstrated by the Claimant that he

merits a compensatory award beyond the statutory ceiling the equivalent of 12 months' gross salary. Remedies in claims for wrongful, or unfair termination, as observed frequently by our Courts, are not meant to cripple Employers or enrich Employees unjustly [see *Elizabeth Wakanyi Kibe v. Telkom Kenya Limited [2014] e-KLRJ*]. The remedies are aimed at redressing economic injury sustained by the Employee, proportionately. ***The Claimant is granted the equivalent of 12 months' gross salary at Kshs. 198,300 in compensation for unfair termination.***

123. The Claimant's letter of appointment, entitled him, retirement benefits in accordance with the provisions of pension legislation of the Public Service of Kenya. The Judicial Service Commission Regulations state that where an Officer is retired in the public interest, the Pensions Branch of the Treasury shall be furnished with the full details of the case by the Chief Justice. The Claimant prays that the 1st Respondent facilitates payment of his pension. The letter of retirement dated 5th July 2012 required the Claimant to open a Bank Account, through which retirement benefits would be paid. ***There is therefore good ground, to order that the 1st Respondent facilitates the Claimant in payment of his pension.***

124. There was considerable delay in concluding the disciplinary proceedings, which had the effect of prolonging the harm done to the Claimant. The 1st Respondent interdicted the Claimant, dismissed him, suspended him and took 7 years without a good reason, to conclude the disciplinary process. Proceedings at the High Court ended with a Ruling delivered in 2005. The Court has noted that the salary paid to Kadhi has not remained static, but to take into account all increments made in the absence of the Claimant, would be a distortion, as the Claimant has not given any judicial service in the 7 years. The principle of fair dealing between Employers and Employees, calls for delicate balancing of interests. ***The Court shall allow interest on arrears of salary at the rate of 14% per annum, from the date of suspension, June 2005, till payment is made in full.***

125. ***Costs to the Claimant.***

IN SUM, THE COURT ORDERS:

- a) It is declared retirement of the Claimant in the public interest was wrongful and unfair.***
- b) The 1st Respondent shall pay to the Claimant: arrears of salary at Kshs. 1,388,100; and the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 198,300- total Kshs. 1,586,400.***
- c) The 1st Respondent shall facilitate the Claimant in payment of pension.***
- d) Interest granted on the arrears of salary at 14% per annum, from June 2005, till payment is made in full.***
- e) Costs to the Claimant to be paid by the 1st Respondent.***

Dated and delivered at Mombasa this 15th day of December 2017.

James Rika

Judge