



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 135 OF 2015**

**GEORGE KALEVE MUSYOKI.....CLAIMANT**

**VERSUS**

**NOLTURESH LOITOKTOK**

**WATER & SANITATION COMPANY LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 24<sup>th</sup> June, 2016)**

**JUDGMENT**

The claimant filed the memorandum of claim on 31.07.2015 through the Kenya Union of Commercial Food and Allied Workers. The claimant is a member of the union. The claimant prayed for judgment against the respondent for:

- a. Reinstatement to his former job as security officer without loss of benefits.
- b. An award of 12 months' gross wages by way of compensation for wrongful dismissal.
- c. Payment of all monthly wages and allowances from February 2015 to the date of determination of the matter.
- d. In alternative and where the court finds reinstatement is not appropriate, payment of terminal benefits being 3 months' pay in lieu of notice Kshs. 188, 250.00; 30 days pending annual leave Kshs. 62, 750.00; pay for loss of future earnings for 22 years at Kshs. 62, 750.00 making Kshs. 16, 566,000.00; 12 months outstanding salary arrears Kshs. 753, 000.00; 12 months' gross salaries for unfair termination Kshs. 753, 000.00; and being a total prayer for Kshs. 18, 323, 000.00.
- e. Plus both contributions to the pension scheme in accordance with the rules of the scheme.
- f. Any other relief the court finds appropriate to grant to meet the ends of justice.
- g. Costs of this claim in favour of the claimant.

The respondent's memorandum of response was filed on 13.11.2015 through Mbaluka & Company Advocates. The respondent prayed for the claimant's claim to be dismissed with costs.

By the letter dated 22.01.2003 the claimant was appointed by the National Water Conservation and Pipeline Corporation to the position of Security Guard II. By the letter dated 14.03.2005 he was confirmed in appointment and deployed to the Corporation's Southern Region at Oloitokitok. Following the legislative reforms in management of the water resource, the claimant came to serve under the Athi Water Services Board, then Emasu and Loitokitok Water and Sanitation Company Limited and deployed at Emasu. By reason of further restructuring of the water sector, the claimant came to serve under the respondent's establishment.

The letter dated 24.11.2014 deployed the claimant to Pipeline as the Area Manager in an acting capacity effective 25.11.2014. By the letter dated 06.01.2015 the claimant was deployed to Sultan-Hamud as the Security Officer effective 06.01.2015. The letter dated 15.01.2015 deployed the claimant to Kalanzoni as the Security Officer effective 19.01.2015. The deployments came in a short interval of about a week. The claimant did not report at Kalanzoni. He received the show-cause letter dated 23.01.2015. It was alleged that the claimant had refused to report to his new station as per the letter dated 23.01.2015 but which the claimant testified had not been delivered to him. The letter referred to the Human Resource Policy that it was a condition of employment that an employee could be posted to any place where the respondent had business interest; that absence from duty without leave or reasonable excuse was a gross breach of discipline rendering an employee liable to disciplinary action including summary dismissal; and that any employee who neglected and refused to comply with any lawful instruction without any cause was liable to disciplinary action. The claimant was to show-cause, within 14 days, why disciplinary action should not be taken against him for failing to adhere to the laid down regulations.

The claimant replied by his letter dated 03.02.2015. He stated that he had not absconded nor deserted duty on any single day. It was true that he could be deployed to anyplace where the respondent operated. However, he had explained to the Inspector and Human Resource Officer that the deployment to Kalanzoni was highly risky to his life because the place was isolated and without enough security for a security officer, unless, the security officer was corrupt or unfaithful. That when he was deployed as acting area manager for pipeline area he had worked with dedication to uplift the respondent by trying his best to finish irrigation and to control illegal connections. There were unfounded allegations levelled against him by a named customer and in the process many customers were found guilty with the offences of vandalising and stealing from the respondent. Some culprits awaited their judgment at the court in Kajiado and he was in charge of the pending cases. It was therefore unfair to deploy him to a risky place because he was to save his life first, and then save the property.

Further at the time of deployment he was unable to report to Kalanzoni because there were 13 months' outstanding salaries and he had not been facilitated to relocate as transferred. Otherwise, he was on duty and had not been absent from work even for a single day. It was the claimant's further response that he was a shop steward and the prevailing court order in Cause No. 813 of 2013 was that union officials were protected from intimidation and the transfer to Kalanzoni, a remote place which did not have even a guard deployed, was such intimidation and frustration that the court order in Cause No. 813 of 2013 was meant to prevent.

The respondent decided to dismiss the claimant from employment by the letter dated 13.02.2015. The letter addressed to the claimant stated as follows:

**“RE: DISMISSAL FROM SERVICE**

**Following your failure to obey lawful and proper command issued to report to your new duty station on 19<sup>th</sup> January, 2015, Management has reviewed your case and decided that you be dismissed from the Company with effect from 13<sup>th</sup> February, 2015.**

**This is in contravention of the Human Resource Policy Manual Section 12(12.2) (iii) which states;**

***“if an employee knowingly fails or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or person placed in authority over by***

*the employer constitute justifiable or lawful grounds for the dismissal.”*

**The authority gave you an opportunity to defend yourself through a show cause letter dated 23<sup>rd</sup> January 2015, followed by your appearance before the Staff Disciplinary Committee on 13<sup>th</sup> February, 2015. In your appearance before the said committee you did reiterate your response to the show cause letter, where you admit that you never recorded nor reported any threats either to the police station or the management regarding your life being in danger.**

**In view of the above and given the magnitude of the offences committed, the management has therefore decided to dismiss you from the Company’s service with effect from 13<sup>th</sup> February, 2014.**

**Please arrange to surrender your employment card and any other Company property that need to be returned to Human Resource Department with immediate effect.**

**Signed**

**J.T. Mutende**

**Managing Director”**

The claimant’s union reported a labour dispute by the letter dated 19.02.2015 and a certificate of disagreement was issued on 26.03.2015. Thus the present suit was filed.

The **1<sup>st</sup> issue** for determination is whether the termination of the claimant’s employment was unfair. The evidence is clear. The respondent issued two letters of redeployment of the claimant on 06.01.2015 then on 15.01.2015. The respondent did not explain and justify that action and then in the show cause letter referred to a fictitious deployment letter of 23.01.2015. The respondent has not at the disciplinary hearing and at the hearing in court showed how it discredited the claimant’s line of defence that the deployment was intimidation and frustration in view of the claimant’s involvement in cause No. 835 of 2013 as per the decree issued on 28.04.2014 about the respondent’s payment of salaries, remission of union dues, and prohibition of intimidation of union officials. The respondent has not showed that the claimant’s fears that Kalanzoni was an insecure place and that Kalanzoni lacked an establishment for a Security Officer were unfounded or unreasonable grievances. The court finds that taking all the evidence and the circumstances of the case into account the claimant has established that he had valid grievances surrounding the redeployment to Kalanzoni. Such grievances would not constitute valid reasons for termination as per section 46 (h) of the Employment Act, 2007. Further the claimant’s involvement in Cause No. 835 of 2013 would not constitute a fair reason for termination in view of the provisions of section 46 (d) and (e) and (h) of the Act.

Thus the court returns that the respondent has not established that the claimant had deliberately refused to take up the redeployment. The respondent has not answered the claimant’s concern and valid grievance that in any event there was no financial facilitation to take up the transfer. The respondent has further failed to show that on any date, the claimant was absent from duty as was alleged in the show cause letter. The court has noted the evidence by RW that the management thought that the claimant had a good reason not to report to Kalanzoni. The court has considered that the claimant was not given a chance to appear at the disciplinary hearing accompanied with a union representative as provided in section 41 of the Act; which omission in the circumstances of the case rendered the procedure and the termination unfair. The court returns that the termination was further unfair for want of a valid reason for termination as envisaged in section 43 of the Act.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for.

The court has considered the evidence and the circumstances of the case. The claimant has dedicated himself to the service of the respondent and the respondent’s predecessors since 22.01.2003. The claimant

is keen to continue in employment. There is no material on record that act as a bar to reinstatement. The court returns that the claimant is entitled to reinstatement. The court returns that the claimant is also entitled to the unpaid salary arrears and as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a. The declaration that the termination of the claimant's employment as conveyed by the respondent's letter dated 13.02.2015 Ref. No. NLWSC/HQ/ADM/003/VOL.IV/350 was unfair and is hereby set aside.
- b. The claimant is hereby reinstated back to his job as a security officer in the respondent's service without loss of benefits with effect from 13.02.2015 and for that purpose to report to the respondent's managing director for deployment not later than 01.07.2015 at 9.00am and to continue in employment under the prevailing terms and conditions of service and without a break in service until lawful separation.
- c. The respondent to pay the claimant all withheld salaries and allowances effective reinstatement being Kshs. 62, 750.00 times 16 months making **Kshs.1, 004,000.00**.
- d. The respondent to pay the claimant a sum of **Kshs.753, 000.00** being outstanding salary arrears for 12 months as at time of termination now set aside.
- e. The respondent to pay the money in (c) and (d) above by 01.09.2016 failing interest to be payable thereon at court rates from the date of filing the suit 05.08.2015 till the full and final payment.
- f. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at Nyeri this **Friday, 24<sup>th</sup> June, 2016**.

**BYRAM ONGAYA**

**JUDGE**