



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 186 OF 2013

BETWEEN

DR. EZEKIEL NYANGOYA OKEMWA.....
CLAIMANT

VERSUS

KENYA MARINE & FISHERIES RESEARCH INSTITUTE.....
RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Wameyo Advocate instructed by Wameyo Onyango & Associates Advocates for the Claimant

The Attorney General on record for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. Dr. Ezekiel Nyangoya Okemwa is a Marine Scientist. He was employed by the Respondent State Corporation as Assistant Research Officer on 1st July 1977. He was appointed the Respondent's Director on 16th March 1990. He was suspended from duty in a letter dated 1st December 1999, by the Permanent Secretary in the parent Ministry of Agriculture and Rural Development, Prof. Shem. E. Migot Adhola, upon complaints made by an anonymous person, that the Claimant was engaged in corruption, as the Director of the Respondent. He was charged in Mombasa Chief Magistrate's Court with the offence of stealing by person employed in Public Service; vide Criminal Case Number 135 of 2000. The Criminal Case went on for 13 years, culminating in the acquittal of the Claimant on all counts, on the 28th August 2012.

2. The Claimant subsequently demanded the Respondent lifts the long-in-place suspension, and gives him back his Director Job. The Permanent Secretary advised the Claimant to rephrase his demand as the Director's slot was already occupied. He was advised to seek re-engagement as Chief Research Officer of the Respondent. The Respondent did not in the end lift the suspension, reinstate or re-engage the Claimant, necessitating the filing of this Claim, in which the Claimant seeks from the Respondent, through the Amended Statement of Claim filed on 13th October 2014, the following Orders:-

- a. A declaration that the Claimant is still an Employee of the Respondent and is entitled to withheld salaries, allowances and benefits.
- b. Gross salary at Kshs. 480,000 per month, from the date of suspension to-date.
- c. 12 months' salary at Kshs. 5,760,000.
- d. Accrued pension up to retirement age of 68 years at Kshs. 10,000,000.
- e. Accrued leave allowance of Kshs, 180,000.
- f. 360 leave days pending at Kshs. 120,000.
- g. Compensation for defamation and loss of career and golden opportunities.
- h. House allowance at Kshs. 19,320,000.
- i. Costs and interest.

3. In his Witness Statement [page 11] the Claimant expands his raft of demands against the Respondent, going beyond the Amended Statement of Claim, giving the total monetary claim at Kshs. 247,039, 200.

4. The Respondent entered appearance and filed its Statement of Response through the Law Firm, Omondi Waweru & Company Advocates, on the 5th September 2013. The Respondent's Advocates filed a Notice of Preliminary Objection on 19th May 2014. It was their position that the Claim is time-barred under the Limitations of Actions Act Cap 22 the Laws of Kenya, as well as the Employment Act 2007. On 23rd October 2015, the matter was scheduled to be heard. Ms. Namahya, Learned State Counsel, informed the Court the Attorney- General had taken over the Response, from Omondi & Company Advocates. She had just received instructions from the Respondent and required more time to familiarize herself with the issues in dispute. The Court adjourned the hearing to 4th March 2016, to allow the Sate Counsel her wish. On 4th March 2016, there was no appearance for the Respondent. The Claimant gave evidence on this date, and rested his Case.

Claimant's Case

5. Dr. Okemwa told the Court he was appointed Assistant Research Officer in 1977, and became Chief Research Officer in 1990. Later the same year, he was made the Respondent's Director by Retired President Moi. He was in job group S, earning a gross salary of Kshs. 218,664 per month.

6. He had not at the time of giving his evidence received any letter terminating his employment from the Respondent.

7. He was summoned by the Permanent Secretary in the parent Ministry at Nairobi in 1999. He was issued a letter of suspension. He was asked to give way for the Government to audit the affairs of the Respondent. There was no complaint communicated to the Claimant before suspension. The Respondent had its own Board of Directors, Internal Auditors and External Auditors; none had raised any complaint against the Claimant.

8. The Government brought in its own audit team. The Claimant was not called to make any representations before this team.

9. Preceding suspension, there was an outcry at the Coast Province, that Persons from the Up-Country, should not lead Coast-based State Corporations. Dr. Okemwa was a Person from Up-Country. An anonymous letter was written to then Head of Public Service Dr. Richard Leakey alleging the Claimant was steeped in corrupt practices. Leakey headed a group of Civil Servants, which was named the 'Dream Team.' It was set up by the Executive to fight and uproot corruption from Public Service. The Claimant was not called to respond to the anonymous letter.

10. He was suspended and denied his entire salary. He was forced out of the Staff House at Nyali, Mombasa. A Management Team was put in place to oversee the affairs of the Respondent. The Claimant did not get to see the Final Report of the Auditors brought in by the Government.

11. The Claimant was arrested in front of his Family. He was manhandled and kept in custody at Shimo

La Tewa Prison, for 1 day. The case was captured by the mass media. His photo was splashed in the Dailies. He was charged at the Chief Magistrate's Court with the offence of stealing by public servant. The trial dragged on for 13 years, ending on 21st August 2012 with the Claimant's acquittal on all 7 counts. While the criminal trial was still pending, the Inspector General Corporations purported to issue Surcharge Notice to the Claimant, over a sum of Kshs. 830,000, alleged to have been paid irregularly to the Claimant by the Respondent. The allegation was part of the charges the Claimant was defending in Court. Certificate of Surcharge dated 28th March 2003 issued upon the Claimant. The Inspectorate only ceased pursuit of the surcharge after the Claimant's Advocates threatened to sue the State for occasioning the Claimant double jeopardy.

12. All the years, the Claimant never received communication from the Respondent on his employment status. On 29th August 2012, he wrote to the Director of the Respondent requesting that his suspension is lifted, and he is restored to the Director's job. There was no response.

13. The Claimant wrote to the Permanent Secretary in the parent Ministry. He delivered the letter in Person, to the Permanent Secretary. The Permanent Secretary advised the Claimant on two things: he advised that there was a letter of termination written by the Respondent to the Claimant in the year 2002; and secondly, the Claimant should ask for re-engagement as the Chief Research Officer, as reinstatement was impracticable, the Director's position having been substantively filled.

14. The Permanent Secretary introduced the Claimant to the Ministry's Legal Officer Margaret for further assistance. Margaret confided to the Claimant that the Respondent was not responding to communication from the Ministry on the subject matter. She availed to the Claimant a letter dated 30th April 2013, written by the Permanent Secretary to the Respondent's Director, which reads:

" ...we note that you are yet to respond to this letter. It is advisable that you do so urgently, in order to bring this matter to conclusion. Should Mr. Okemwa choose to pursue this matter before the Industrial Court, this delay may be seen as obstruction to justice."

15. The Claimant was convinced he would not get any reprieve by way of voluntary settlement, and he thus approached the Court. He claims the dispute has affected him and his Family adversely.

16. He testified he was a recipient, alongside the former USA Vice- President Al Gore, of the Nobel Prize on Climate Change in 2006; he received Distinguished Leading Scientist in Biological Oceanography 2006; he was supervising hundreds of Researchers in oceanography home and abroad; he was included in the Dictionary of Who's Who of Intellectuals in the 21st Century; he was elected the first African Vice-President of Inter-Governmental Oceanographic Commission of UNESCO; and was in the American Biographical Institute Board of Advisors in 1999. All these accomplishments and opportunities were lost to the Claimant through the unfair and unlawful conduct of the Respondent.

17. He was offered employment in the year 2003 by Maritime University in Malmo Sweden, as a Professor. When the University found out the Claimant had a pending criminal trial, his employment was terminated. On 22nd April 2008, he was hired as the Vice-Chancellor, Fairland University in Uganda. It was discovered he had a pending criminal trial. Appointment was revoked.

18. He had 2 Sons at Edith Cowen University in Australia. He could not continue paying their fees, and had to discontinue their studies. He had 3 other Sons and a Daughter in High Schools in Kenya. He was unable to continue paying for their fees. He testified he was defamed and became the laughingstock in his community. He could not sustain his Family.

19. The Claimant testified he did not receive any termination letter. It was alleged there was such a letter sent through the Respondent's Advocates to the Claimant's Advocates Oyoo & Company Advocates. The Claimant had not instructed any Law Firm to receive any termination letter on his behalf. Oyoo & Company disputed having instructions from the Claimant. The Respondent was aware of the Claimant's address. Oyoo & Company had reported to the Police there were persons forging its letters.

20. The assertion by the Respondent in its Statement of Response, that termination was not based on the criminal case, was not correct. Abuse of office was part of the charges in the criminal trial. All issues against the Claimant were ventilated and determined in the criminal trial.

21. Dr. Okemwa testified he seeks to have the suspension lifted; termination declared to be of no effect; he is re-engaged as Chief Research Officer; he is paid accrued salaries from the date of suspension; he is paid leave allowance similarly; his pension entitlement is reinstated; and he is paid compensation for loss of employment and soiling of his name.

Claimant's Closing Submissions

22. The Claimant repeats most of the factual aspects of his Claim, in his Submissions filed on 24th March 2016. He nonetheless frames issues for the determination of the Court to include: whether the Claim is time-barred; whether the termination letter of the year 2002 had effect; whether suspension should be lifted; and whether the Claimant merits the remedies sought.

23. On limitation of time, the Claimant submits time would only start running from the date the termination decision was communicated to him. There was no evidence from the Respondent on the date communication was made. It was not explained to the Court why the Respondent would send the termination letter to the Claimant through a Law Firm, while the Claimant's physical and postal addresses were known to the Respondent. The time limits under the Limitation of Actions Act, and the Employment Act would therefore not apply.

24. The termination letter, having not been received by the Claimant, did not have effect. It is submitted the Claimant remained on suspension all through. He did not have any reason to consider his relationship with the Respondent ended. At the end of the criminal trial, the Claimant submits he wrote to the Respondent demanding for the lifting of the suspension and return to work. The Respondent ignored him.

25. Consequently he merits the remedies sought. He was in an employment relationship with the Respondent, only having been suspended as the allegations against him were investigated and prosecuted. Once absolved, he would be entitled to full job and payroll restoration. He merits damages for loss of employment; economic injury; and reputational damage. He relies on several decisions of the Employment and Labour Relations Court, among them, ***Mary Chemweno v. Kenya Pipeline Limited [citation not given]***; and ***Joseph Sitati Nato v. Kenya Ports Authority [2010] e-KLR***, where the Courts emphasized the need for Employers to avail substantive and procedural justice to Employees in termination processes. The remedy of reinstatement, with back pay, was availed to the Employees in the various decisions cited by the Claimant. The Claimant submits termination offended Sections 41, 43 and 45 of the Employment Act 2007.

Respondent's Pleadings

26. The Respondent as seen above did not participate in the hearing. In its Statement of Response, it concedes the Claimant was its Employee, on terms and conditions stated in the Claim.

27. The Claimant was suspended on 1st December 1999, and advised by the Permanent Secretary, to hand over his duties to one James Muhoro.

28. There were changes made by the Ministry at the Respondent. The new Board of Management investigated non-criminal mismanagement issues, and uncovered a series of vices committed by the Claimant which included: use of funds without the Board's approval; irregular establishment of lower cadre positions; irregular recruitment of senior staff; and irregular deployment of more than 10 Respondent's staff to the Claimant's residence. The Respondent, upon consulting the Ministry, summarily dismissed the Claimant. The decision was effective from the date of suspension.

29. The dismissal letter was released to the Claimant's Advocates Oyoo C.P. by the Respondent's Advocates L.N. Momanyi in June 2002. Oyoo C.P. wrote to L.N. Momanyi on 24th June 2002,

acknowledging receipt of the termination letter. It is not true that the Claimant learnt of the termination letter in September 2012.

30. Although the Claimant was acquitted on 23rd August 2012, he was not summarily dismissed on the same facts upon which he was tried in the Criminal Court; he was summarily dismissed for administrative anomalies. Contrary to the Claimant's assertion, he was granted a full opportunity to answer to the allegations. There were minutes of the Respondent's Board's meetings, showing there was fair process leading to the decision against the Claimant. He was asked to show cause, why he should not be surcharged. Dismissal was within the confines of Section 44 of the Employment Act. The Respondent prays for dismissal of the Claim.

Issues

31. The Court adopts the issues as crafted by the Claimant at paragraph 22 of this decision.

32. **Time limits.** The Respondent's preliminary objection is based on time limits. It is submitted the Claim offends the 6 year limit placed on filing of contractual Claims under the Limitation of Actions Act. Assuming the Employment Act 2007 applies to this Claim, the submission is that the Claim is time-barred under the 3 year statutory limit, placed on the filing of employment Claims under Section 90 of the Employment Act 2007.

33. The letter of termination on record is dated 20th June 2002. It is addressed to Dr. Ezekiel Okemwa, P.O. Box 81651 Mombasa.

34. The evidence that it was not posted to the given address is mutual. It is agreed, and there are documents to support this, that the letter was entrusted L.N. Momanyi Advocates for the Respondent, to pass on to Oyoo C.P. Advocates, who were reputed to be having instructions for the Claimant.

35. There is no evidence availed to this Court by L.N. Momanyi, to shed light on circumstances revolving around the termination letter being entrusted to L.N. Momanyi for delivery to Oyoo C.P. Advocates. There is no evidence the letter was delivered to Oyoo C.P. Advocates. It was not told to the Court why a termination letter, in a situation where the Employee's physical and postal addresses were known to the Employer, would be delivered through Advocates who dispute having instructions from the Claimant.

36. Oyoo C.P. is alleged to have written a letter dated 24th July 2002 directly to the Managing Director of the Respondent. The letter makes reference to summary dismissal of the Claimant. The presumption would be that the Law Firm received the letter of dismissal, and instructions from the Claimant, to respond to the letter of termination.

37. Oyoo C.P. wrote to L.N. Momanyi on 8th October 2002 denying ever writing the letter of 24th July 2002. It was pointed out to L.N. Momanyi that the letter could have been a forgery. Various reasons were communicated for this thinking. Oyoo C.P. disclosed there were other incidents of forgery involving its letterheads, which had been reported to the Police. L.N. Momanyi wrote to the Respondent's Director advising that Oyoo C.P. had alleged not to have instructions. The advice was that the matter be kept in abeyance. It was not thought prudent to resend the letter of termination to the Claimant in person, in view of the failure of the advocate route. Summary dismissal is termination of employment without notice, or with less notice than is given in the statute or the contract of employment. Receipt of the notice of termination, or the letter of summary dismissal by the Employee, as the case may be, must always be shown, by the Employer, to have taken place. Without evidence of receipt of these letters, it is difficult to assign terminal rights and obligations to the Employer and the Employee.

38. A casual reading of the letter dated 24th July 2002, purported to originate from Oyoo C.P. leads the Court to form the view, that this letter, was not authored by a Learned Counsel. It has obvious grammatical errors. These include the following sentences:

- *We put across to yourselves that you are deploring unilaterally the issue prematurely without consent of the Court subject to frustrating our Client before judgment is delivered whereas the case is self-explanatory.*
- *The liability hereinafter is erroneously denied before the decision of the Court.*
- *Any action taken against our Client the same shall be defended at your own peril as to costs and incidental thereto.*

39. This highfalutin, and unadulterated gibberish, cannot surely be attributed to any Learned Counsel. It can be speculated to be the work of some impostor. It could have been the work of some corrupt subordinate staff or ex-staff of Oyoo C.P & Company Advocates, with some knowledge of the workings of Oyoo C.P. Advocates. It cannot however be said that this was official communication written by Learned Counsel.

40. The upshot is that there was no evidence the Claimant received the termination letter in the year 2002, either from a Law Firm, or from the Respondent itself.

41. The evidence of Dr. Okemwa on the circumstances revolving around the discovery of the termination letter is persuasive. He was advised by the Permanent Secretary that a termination letter was in his employment record, when the Claimant sought the intervention of the Permanent Secretary in having suspension lifted, in September 2012.

42. It is therefore fair to assume that the Claimant learnt of the termination of his contract of employment on 22nd September 2012. This is the point at which time in any action for unfair or unlawful termination should be deemed to have started running. Furthermore it is acknowledged by the Permanent Secretary in the letter to the Director of the Respondent dated 30th April 2013, that the dispute with the Claimant was still active. The Permanent Secretary advises the Director to respond to letters on the subject urgently, to bring the matter to conclusion. To the extent that negotiations and consultations were ongoing, and the dispute unconcluded, it would be unrealistic to expect the Claimant to have filed the Claim before the voluntary settlement process had irretrievably broken down.

43. The Claim was filed on 28th June 2013, less than a year after the Claimant learnt of termination. ***The Claim was therefore filed in time, whether one considers the time limits in the Limitation of Actions Act, or the Employment Act 2007. The preliminary objection is declined.***

44. ***Unfair and unlawful termination:*** The Court is not convinced that the Employment Act 2007 is the correct substantive law applicable to this dispute as the Parties appear to have agreed. The Claimant repeatedly submitted on procedural and substantive guarantees under Section 41, 43 and 45 of the Employment Act 2007. The Respondent submits termination was justified under Section 44 of the Employment Act 2007.

45. The Employment Act 2007 was not in force when the Claimant was suspended; when he is alleged to have gone through the motions of investigations and surcharge; and when he is alleged to have been summarily dismissed by the Respondent in 2002. The discovery in 2012, that he was summarily dismissed in 2002, in the view of the Court would not allow the adoption of the Employment Act 2007, as the applicable substantive law. Such discovery can only be useful in fending off the assertion that the Claim is time-barred. It does not allow for application of the Act of 2007. The requirements of substantive and procedural justice would therefore have to be argued from other sources, not the Employment Act 2007.

46. Before such other sources can be considered, it is proper to examine the facts leading to the summary dismissal of the Claimant.

47. He was first employed as a Research Assistant in 1977. He became Chief Research Officer in 1990, and ascended to the pinnacle of the Respondent, becoming its Director later in 1990.

48. He was suspended with effect from 1st December 1999. He was advised this was necessary in order for the Government of Kenya to institute a management audit into the affairs of the Respondent.

49. The process was initiated by the Dream Team, an assortment of Civil Servants assembled from various sectors of the economy. They were placed under the leadership of paleoanthropologist Dr. Leakey. They were reputed to be highly efficient and incorruptible. They were head-hunted by the former President to restore confidence in the Public Service, in the eyes of the Public; the Bretton Woods Institutions; and other Donors. Their mandate was to fix governance of public service. The letter of suspension was issued by Prof. Shem. E. Migot-Adhola, Permanent Secretary in the Ministry of Agriculture, and one of the individuals comprising the Dream Team.

50. There was no complaint against the Claimant's stewardship of the Respondent. His Board of Directors had not complained. Internal and External Auditors had not complained. There was only an anonymous letter to Dr. Leakey, making all manner of allegations against the Claimant. He was not asked by his Employer to respond to the anonymous letter.

51. The Dream Team set up a Management Team to oversee the affairs of the Respondent. An Investigations Team headed by Mr. Edward Mugo from the Inspectorate of State Corporations, audited the Respondent's books and prepared a Financial Report. The Claimant was not questioned by the Team. The Claimant was charged in Mombasa Chief Magistrate's Court with theft by a public servant, of Kshs. 7,302,516.35, said to have taken place between 24th December 1996 and 2nd December 1999. He was charged alongside 4 other Officers.

52. The Respondent alleges, and has attached minutes of its Board meetings in support, to have deliberated on the allegations against the Claimant and determined he is summarily dismissed. The criminal trial was ongoing. The Respondent further explains summary dismissal was based on other non-criminal anomalies.

53. While the trial was going on, the Inspectorate of State Corporations, which was represented in the special audit carried out by the Team lead by Mr. Mugo, decided to surcharge the Claimant for a sum which was part of the charges under trial in the Criminal Court. A surcharge notice was followed by a surcharge certificate. Precipitate action appears to have been averted when the Claimant's Advocates threatened to bring suit against the State.

54. Eventually the Court acquitted the Claimant on all 7 counts. The Respondent sought to have suspension lifted. The Respondent did not act on his request. These facts are largely uncontested.

55. The result was that the Claimant, a highly educated, skilled, experienced, and knowledgeable man in his field of marine science, a man who claims to have been feted by the international community for his work, including being awarded the Nobel Prize for Climate Change alongside former USA Vice-President Al Gore, was maligned, calumniated, traduced, unfairly tried, professionally ruined, and rendered incapable of sustaining his Family. He testified his employability was diminished or lost; his professional name injured; his person injured; his and his family's economic well-being injured; as a result of the Respondent's unlawful and unfair behaviour. His claim straddles the landscapes of natural justice, statutory, tortious, common-law and contractual violations in employment law. He specifically states in his submissions that the Respondent, a Public Body, occasioned him economic injury, loss and damage under the rarely pleaded tort of misfeasance in Public Office.

56. ***Procedural and substantive justice before the Act of 2007:*** The issues in dispute save for the date when the Claimant discovered his contract had been terminated and the refusal to lift the suspension arose before the Act of 2007 came into force. The applicable substantive law would be the Employment Act Cap 226, preceding the Act of 2007. As a Public Servant, the Claimant's Contract would also have been subject to the Service Commissions Act Cap 185 the Laws of Kenya, and the Public Service Commission Regulations. He also submitted his contract was subject to the Terms and Conditions of Service for Employees of the Respondent. He attached a copy of the Terms and Conditions of Service, albeit an incomplete copy.

57. The question would be whether the Claimant was entitled to substantive and procedural justice under the laws that governed his contract of employment at the time of suspension; whether he received such justice from the Respondent; and whether in the absence of such justice, the law as it were, afforded the Claimant the nature of remedies he seeks. The remedies under the Employment Act 2007 would clearly not be in play, at the time the Claimant was investigated, suspended and sent home.

58. In *the Court of Appeal of Kenya decision Kenya Revenue Authority v. Menginya Salim Murgani [2010] e-KLR*, the Court held that [prior to 2007] Employers had no obligation in observing principles of natural justice, in termination of contracts of employment. The Courts have explained that under the old employment law in Kenya, Employers could terminate contracts of employment at will, for good cause, bad cause or no cause. At the time, employment was at the will of the Employer. This thinking stretches far back as exemplified in the 1909 *English Case of Addis v. Gramophone Co. [1909] AC 488*, where the House of Lords ruled that an Employee who was dismissed in a manner which imported obloquy among the commercial community in India, resulting in permanent damage to his reputation, could not recover damages for loss of employability and injured feelings. It was suggested such a pursuit could only be considered in a separate claim for defamation. Decisions in our Courts save for those from the Industrial Court have long upheld this dogma.

59. In Employment and Labour Relations Court decisions *involving Major Wilfred Kyallo Kangulyu v. Tetrapak Limited [2014] e-KLR* and *Kenya Ports Authority v. Festus Kipkorir Kiprotich [2015] e-KLR*, it was explained that the concept of unfair termination, as opposed to the concept of unlawful termination, was not universally accepted and applied in Kenyan employment law. It was confined to the Industrial Court of Kenya, where by dint of Section 15 of the Trade Disputes Act Cap 234 the Laws of Kenya, the Court could grant the remedies of compensation for unfair termination, or order Employers to reinstate or re-engage Employees found to have been unfairly dismissed. Employment at will was the dominant doctrine, with near-universal application in the Civil Courts.

60. The Court of Appeal in *Menginya* clarified that where the contract of employment, even before the Act of 2007, imposed on the Employer the duty to observe principles of natural justice, then Court could, enforce such obligations and damages could be paid for non-observance of obligation.

61. Employment contracts frequently are not contained in the one document such as the letter of appointment issued upon employment. They adopt other workplace human resource policies and regulations, subsidiary legislation, legislation and decisions of the Court. Parties to the initial contract of employment in most cases negotiate the fundamentals, or the *essentialia negotii*, with other terms and conditions of employment adopted from the aforesaid instruments. Over time, the original contract may be varied by an assortment of subsequent labour instruments.

62. The Respondent therefore needed to look at the Claimant's contract of employment and the laws governing such contract holistically, before suspending and summarily dismissing the Claimant from service.

63. The Claimant testified he was in the equivalent job group S in the Civil Service. The Service Commissions Act applied to Officers in other groups as well as group S. In *John Benson Githinji v. The Attorney- General & 4 others [2014] e-KLR*, the Court emphasized that the Service Regulations themselves are not exhaustive. They must be read together with the relevant laws relating to the employment relationship.

64. The Discipline Manuals generated by the Public Service Commission of Kenya over the years, similarly emphasize the regulations governing disciplining of Public Servants must be read together with the Constitution, Service Commission Act, Employment Act, the Trade Disputes Act etc.

65. In the case of *John Benson Githinji*, the Court concluded that the Service Commission Act and the Regulations, embraced principles of natural justice in public service, long before the enactment of the Employment Act 2007.

66. The letter suspending the Claimant, and the one summarily dismissing the Claimant, did not reveal any valid reason for the decision. The summary dismissal was not preceded by a fair procedure as required by the Terms and Conditions of Service of the Respondent, read together with the Service Commissions Act and Regulations, and having consideration of the principles of natural justice.

67. The Service Commissions Act outlined 4 ways a Public Officer could relinquish public office: through resignation; through termination in accordance with the contract of employment; through various types of retirement; and through dismissal.

68. In all forms, the Service Commissions Act, even before its amendment to the current form, recognized the exercise of disciplinary control by Public Authorities over their Employees, should be alert to fundamental principles of natural justice, recognizing further that an Officer's career and livelihood are at stake. In all cases of involuntary termination, the Officer concerned was given an opportunity to make his representations, and those representations considered by the Employer, before the Officer's service was terminated. The protections against arbitrary actions imposed on Employees by their Employers, has always been part of the Service

Commissions Act. These protections extend to CEOs of State Corporations, appointed under Section 5(3) of State Corporations Act, Cap 446 of Laws of Kenya. The Terms and Conditions of Service of the Respondent flow from this legislation. They protect Employees against arbitrary actions by Public Employers. The concept of fair administrative action has been part of the law governing termination of employment in Public Service.

69. The ***High Court of Kenya in Civil Case Number 3472 of 1994 between Geoffrey Muguna Mburugu v. The Attorney- General*** and in ***Civil Case Number 2230 of 2001 between Lt. Col. Benjamin Mwema v. the Attorney- General***, upheld the duty of the Employer to act fairly. Notably these decisions were made in the civil jurisdiction, in an era when the dominant doctrine in that jurisdiction was that employment was at the will of the Employer. In ***Mburugu***, the Court ordered the Claimant to be paid arrears of salary, having concluded that he was unfairly retired. In the latter case, a Senior Military Officer who was dismissed arbitrarily was granted general damages.

70. The Dream Team did not involve the Claimant in the Investigations which followed his suspension. Suspension itself was based on rumour. The Claimant was not availed a Statement of Offence, and called upon to show cause. He was not invited at any forum to exculpate himself. The Respondent attached minutes of its meetings deliberating on the Claimant. At no meeting was the Claimant present. He was not heard. He was arraigned before the Court. He was suspended by the Respondent for the entire period of the criminal trial without pay. Even as the criminal trial unfolded, he was burdened with surcharge over an alleged financial loss which was part of the criminal trial. In responding to the Claim, the Respondent compounded the gravity of the violations against the Claimant, by alleging the decision to summarily dismiss the Claimant, was based on non-criminal management anomalies. These anomalies were themselves not uncovered in a fair and participatory process. The various acts of the Respondent and its assistive Public Bodies against the Claimant, were not only against rules of natural justice; against the contract of employment; against the law, rules and regulations governing public service employment; but strongly, amounted to misfeasance in Public Office.

71. He was arrested in the full glare of the cameras and his Family. He was detained for 24 hours at Shimo La Tewa Prison. He was charged with 7 counts of stealing by public servant. The Respondent purported to investigate other non-criminal activities, and argues that summary dismissal was based on these other non-criminal activities. The Court does not see what distinction there was between the activities stated to be criminal and those which were non-criminal. At heart was a charge relating to abuse of office and theft by a Public Servant. The matters under investigation related to the period between 1996 and 1999. They were in essence the same matters subjected to the audit of the Team led by Mugo. They were the same matters forwarded to the Criminal Court for trial. It is surprising that the Inspectorate of State Corporations, which had a representative in the audit team sent by the Government, would later surcharge the Claimant over a sum of money, which was subject matter of the criminal trial. The Claimant was faced with multiple adverse actions: the criminal trial; dismissal from employment; and

surcharge. This was not by any standards fair treatment of the Officer.

72. After being acquitted, the Claimant communicated the Court's decision to the Respondent and the Parent Ministry. While the Ministry through the Permanent Secretary appears to have been open to offering the Claimant some form of remedy, the Respondent did not respond to the Claimant's request. It was left to the Ministry to remind the Respondent that the Respondent, as an agent of the Government, was in the wrong. The Ministry appears to have belatedly acknowledged there were multiple violations against the Claimant. The Respondent just ignored the Claimant, and did not communicate to him, just as it had ignored him and refused to communicate termination in the year 2002.

73. The Claimant suffered loss of employment, his career progression was impaired, and his employability was lowered. He was not paid anything even while on suspension. He is no doubt a man whose stock in the labour market, particularly the international labour market, was remarkably valuable. That stock lost value due to the acts attributable to the Respondent. He lost the opportunity to resurrect his career owing to the stigma emanating from the long-running criminal case. Termination was wrongful and unfair. He merits damages.

Remedies

74. The Claimant prays for re-engagement in the position of Chief Research Officer. He was advised by the Permanent Secretary to pursue this position as the position of Managing Director has been filled. The Court was not told if the position of Chief Research Officer is vacant, or whether it is possible to have more than one holder of that office. It is unlikely that the position is vacant. Besides, many years have passed after suspension of the Claimant. The Parties have moved on. Although the Claimant testified he has not landed a suitable job commensurate with his pedigree, he informed the Court he has been teaching at Mombasa Technical University. An order for re-engagement would not be appropriate given the years that have lapsed from the date the Claimant last worked for the Respondent. It is also likely that the Claimant, having worked for the Respondent from 1977 would have attained the mandatory retirement age for Public Servants or at the very least be approaching that age. He was not clear on his current age, but suggested in some sections of his Pleadings that he is about 64 years. It would not be reasonable to have him return to the Respondent and probably take the place of a younger Kenyan.

75. The Claimant learnt about the termination letter in September 2012. Having learnt this, he would have no reason to continue to believe he was under suspension. It would therefore not be appropriate to order for lifting of the suspension. Suspension was no longer in place, at least not from September 2012, when the Claimant learnt of termination. The Court would not find, as has been concluded in some decisions of the Employment and Labour Relations Court, that where an Employee has not received a letter of termination from the Employer, and a considerable period of time has passed since the Employee last reported for duty, that the Employee should consider himself constructively dismissed. Constructive dismissal as held in ***Industrial Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East Africa Limited***, occurs where the Employee resigns by reason of the Employer's conduct. Owing to the intolerable behaviour of the Employer, the Employee resigns, believing himself to have been fired. In the case of Dr. Okemwa, he did not consider himself fired. He thought he was under suspension, up till he came across the termination letter in 2012. He did not resign at any time by reason of the Employer's conduct, believing himself to have been fired. The concept of constructive dismissal cannot apply to this dispute. There is no justification however, in declaring that the Claimant continued to be an Employee of the Respondent all along. The relationship must have mutually ended once the Claimant was aware about the termination letter in 2012.

76. He merits his arrears of salary from the 1st December 1999, when his salary was stopped, and the Claimant suspended, up to September 2012, when termination was mutually known. His last salary was Kshs. 218,664. This should be the base rate. There is no good ground to adopt the amount of Kshs. 480,000 which was the salary payable to subsequent Directors. Employment remedies are guided by the principle of fair-go-all round. Fair base rate would be the rate actually earned by the Claimant at the point of exit, not what he expected he would earn, or what his successor earned. ***He is allowed Kshs. 218,664 per month, for the period from 1st December 1999 to September 2012, calculated at Kshs. 281,664 x***

153 months = Kshs. 33,455,592.

77. The Claimant seeks 12 months' salary at Kshs. 5,760,000. He did not explain what this sum represents. The prayer is declined.

78. He prays for accrued pension up to the retirement age of 68 years at Kshs. 10 million. He did not show to the Court which law or contract, set his retirement age at 68 years. He pleaded in other instances that he was to retire at the age of 65 years and 70 years. He mentioned the transfer of his Pension Scheme from KNA to Alexander Forbes. There was no evidence from the Claimant justifying the award of Kshs. 10 million in accrued pension.

79. Similarly the Claimant did not provide the Court with evidence to support his claim for Kshs. 180,000 in annual leave pay. This applies also to the claim for 360 days of unutilized annual leave. Having been the Director of the Respondent he should have been able to provide the Court with his proper annual leave records. These claims are rejected.

80. There was no clarity in the prayer for Kshs. 19,320,000 in house rent allowance. The monthly salary given by the Claimant in his evidence was stated to be gross and the housing element inclusive therefore, of that sum.

81. The last prayer is on damages to compensate the Claimant for defamation, loss of career and what he calls loss of golden opportunities.

82. In *Naqvi Syed Omar v. Paramount Bank Limited & the Attorney- General [2015] e-KLR*, it was the view of the Court that where an Employee's attractiveness to potential Employers is damaged or diminished as a result of the actions of the Employer in the process leading to termination of employment, the Court may grant damages to compensate the lost employability. The manner of dismissal and negative publicity attendant to the process of dismissal have the potential to damage or lower the Employee's stock in the labour market. In highly sophisticated, skilled and specialized labour markets such as that to which the Claimant belongs, employability is highly valued, is jealously guarded, and where it is shown to have been deliberately injured, must be adequately compensated. The Claimant provided evidence that he was in an Institution which shared the Nobel Prize for Climate Change with Al Gore; he was awarded Distinguished Leading Scientist of the World 2006 in Biological Oceanography; he supervised maritime Researchers home and abroad; he was listed amongst 2000 Outstanding Intellectuals of the 21st Century; he was elected the first African Vice- President of the Intergovernmental Oceanographic Commission of UNESCO; and was conferred honorary appointment to the Board of American Biographical Institute. These accolades are documented and not contested by the Respondent.

83. It needs no repeating that the Claimant is a highly educated, skilled and experienced man, internationally recognized, and whose appointment to work in prestigious International Institutions, was rescinded upon discovery he was under criminal trial. His employability suffered. He was not only stigmatized as an individual, shunned locally and abroad, as an individual; he lost stock in the highly specialized international labour market. He lost his appointment with the World Maritime University in Sweden, and with the Fairland University in Uganda. This is a man who claims to have won a Nobel Prize alongside former USA Vice-President Al Gore. He established he won other international accolades. The Government of Kenya, and its agencies which include the Respondent, did not fete this gentleman; they instead treated him like a felon.

84. In the case of *Addis* cited above the Court held Employees were not entitled to damages for injured feelings and loss of, or diminished employability.

85. In subsequent decisions such as *Johnston v. Unisys limited [2001] UKHL* it was recognized that in the course of the last century, there has been a fundamental alteration in the employment relationship. *Addis*, it was explained, was determined in the heyday of a judicial philosophy of market individualism, in respect of what was then called the law of master and servant.

86. In **Spring v. Guardian Assurance Plc [1995] 2 AC 296, 335**, Lord Slynn of Hadley observed:

“...there are changes which have taken place in the employment relationship, with far greater duties imposed on the Employer than in the past, whether by statute or judicial decision, to take care of the physical, financial and even psychological welfare of the Employee”

87. It was found in the case of **Johnston** that since 1909, our knowledge of stress related psychiatric and psychological problems of Employees has greatly increased. What in the early century, was dismissively described as injured feelings, is now accepted as recognizable psychiatric illness. Psychiatric injury in Employees, due to excessive stress has increased. The Claimant's assertion that he suffered injured feelings must therefore not be trivialized. The Court observed him to shed tears, as he testified in Court, and formed the view this is a man who was left with deep mental scars. The Court in the case of **Johnston** found it was no longer right to equate a contract of employment with commercial contracts. Modern employment contract is a relational contract. The psychological injuries sustained by an Employee consequent upon the wrongful conduct of the Employer, must therefore, like the purely economic injury arising from breach of the contract and Statute, be capable of redress. Injured feelings can no longer be trivialized, or placed beyond remedy.

88. The Claimant must be compensated, with a quantity of damages reflecting his pedigree, and the extent of the injury. The Court has taken into consideration that although the Claimant lost opportunity to work with these international Employers, he has found an opening teaching at a local University. This opening cannot however be sufficient compensation for a succession of lost opportunities in the international job market. There were multiple violations in the process of terminating the Claimant's employment. The tort of misfeasance in public office, allows the Court to grant damages to a Public Officer, where the Public Defendant's acts of unlawfulness against the Public Officer are committed by the Public Defendant who knowingly abuses public power or authority; who is recklessly indifferent as to the limits or restraints upon their public power or authority; and who acts with the intention of harming the Public Officer; or with the knowledge or probability of harming the Public Officer; and/ or with the conscious and reckless indifference to the probability of harming the Public Officer. In the view of the Court, these characteristics were displayed by the Respondent and the Dream Team, in terminating the Claimant's contract. The tort of misfeasance in public office was substantiated by the Claimant. Equally, the Claimant ably demonstrated breach of statute, rules of natural justice, terms and conditions of service, service regulations and breach of the contract of employment in its entirety. He suffered injury as a person and as a professional. He was globally stigmatized. His family suffered economic hardship. He was taken through an unnecessary 13 year criminal trial, and in the course of that trial, taken through a process of surcharge. He was placed on an indefinite suspension, without pay. Termination of employment remained unknown to him for 13 years. When he sought the lifting of suspension, he was met with a wall of silence by the Respondent, a silence deprecated even by the Respondent's parent Ministry. The Court is not required to grant damages under each separate head. Considering other decisions of this Court which have in the past called for proportionality in grant of employment remedies, it would not be prudent to assess and list the violations separately, and consider remedies separately, as the Claimant appears to submit the Court should do. In essence the Court has understood the Claimant to have suffered multiple violations, which nonetheless are capable of being redressed in one coalesced general damages. ***The Court grants the Claimant Kshs. 20 million as coalesced damages for unfair and unlawful termination; diminished employability; and in compensation for the other violations outlined in this Award.***

89. Costs to the Claimant.

90. Interest awarded at 14% p.a. from the date of this Award, till payment in full.

IN SUM IT IS ORDERED:-

a. ***It is declared the Claimant's summary dismissal was unfair and unlawful.***

b. ***The Respondent shall pay to the Claimant Kshs. 33,455,592 in salary arrears; and Kshs. 20***

million in damages for unfair and unlawful termination, diminished employability, and in compensation for related violations outlined in the Award.

- c. *In total the Respondent shall pay to the Claimant the sum of Kshs. 53,455,592 in arrears of salary and compensatory damages.*
- d. *Costs to the Claimant.*
- e. *Interest to the Claimant at 14% p.a. computed from the date of delivery of this Award.*

Dated and delivered at Mombasa this 8th day of July, 2016

James Rika

Judge