



**REPUBLIC OF KENYA**

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

**CAUSE NO. 39 OF 2016**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS...CLAIMANT**

**VERSUS**

**KITUI WATER AND SANITATION COMPANY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 4<sup>th</sup> November, 2016)

**JUDGMENT**

The memorandum of claim was filed on 23.02.2016 by the claimant trade union through the union's General Secretary Boniface M. Kavuvi and on behalf of its member one Charles Tongi, the grievant. It was alleged that the grievant was unlawfully terminated from employment. The claimant prayed for judgment against the respondent for:

- a) A declaration that the grievant's dismissal was unlawful and unprocedural.
- b) An order directing the respondent to reinstate the grievant's services unconditionally without loss of service or benefits.
- c) An order directing the respondent to pay the grievant's wages for November and December 2011 and all other unpaid wages.
- d) An order for the respondent to pay the grievant 12 months' salaries being compensation for loss of employment.
- e) Any other relief the court may grant to meet ends of justice.

In alternative to the foregoing the claimant prayed for judgment against the respondent for:

- a) A declaration that the grievant's loss of employment was unlawful, unprocedural and therefore unfair.
- b) An order for the respondent to pay all unpaid salaries.
- c) An order for payment of all terminal benefits including payment of the grievant's pension in accordance with the rules of the pension scheme.
- d) An order directing the respondent to pay the grievant 12 months gross wages for unfair loss of employment.

e) Any other relief the court finds proper and appropriate to grant.

The claimant had instituted a trade dispute in accordance with the Labour Relations Act, 2007 culminating in the certificate to refer the dispute to this court dated 08.07.2013.

The response to the claim was filed on 12.05.2016 through Professor Musili Wambua & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The grievant was employed by the Ministry of Water Development on 01.03.1980 as a Water Supply Operator and was promoted to a Meter Reader in the section of meter installation and servicing. The grievant was appointment on secondment by the National Water Conservation and Pipeline Corporation as per the letter dated 15.01.1990. The appointment was with continuous permanent and pensionable service for pension purposes. The grievant joined the claimant union on 16.06.2004. The grievant served in various stations as deployed by the Corporation.

There was far reaching reorganization of the water sector and the grievant appears to have been assigned to serve at Tanathi Water Services Board and then at Kitui Water and Sanitation Company, the respondent. In the process the respondent undertook a staff vetting process under which the employees were invited to apply for available vacancies and the employees were subjected to suitability interviews. By the letter dated 20.03.2012 by Tanathi Water Services Board, it was confirmed that the grievant failed to attend the vetting and it was proper that his salary had been stopped. The letter further stated that the grievant had been advised to apologize in writing to the respondent's board of directors and to seek reinstatement if vacancies existed. By the letter dated 27.03.2012 the respondent advised the grievant to apply for reinstatement subject to availability of a vacant position relevant to the grievant's academic qualifications and experience.

The grievant wrote to the respondent the letter dated 28.03.2012. He apologized to the respondent's board. He applied to be reinstated to the position of a meter reader as he had earlier applied (but failed to attend the vetting because he had not been aware of the scheduled interviews and on the date of the interviews he had travelled to hospital for medication – the subject of the subsequent apology as was advised). The grievant's case was that he had not received a letter inviting him to attend the vetting and he had not received a letter terminating his employment. Thus he applied for reinstatement purely in compliance with the advice he was given so as to protect his job.

The grievant reported his case to the union and by the letter dated 29.01.2013 the claimant wrote to the respondent demanding that the claimant is reinstated. The respondent wrote on 04.02.2013 confirming to the claimant that the grievant would not be reinstated. The union submitted the trade dispute and by the conciliator's letter dated 08.07.2013 the conciliator advised the union that the dispute be referred to the court.

The **1<sup>st</sup> issue** for determination is whether the grievant was in employment of the respondent at all material time prior to the respondent's refusal to "reinstatement" the claimant. There is no material on record to suggest that the grievant had not been in the respondent's employment at such material time. Indeed, the respondent's letter dated 04.02.2013 confirms that the respondent was to delink its staff from the government and the Corporation by 30.06.2011. The court finds that the grievant was the respondent's one such staff that was to be delinked. Further, correspondence on record such as the internal memorandum filed and dated 15.10.2010 by the respondent's managing director confirms that the grievant was an employee of the respondent. To answer the **1<sup>st</sup> issue** for determination the court finds that the grievant was the respondent's employee at all material time prior to the respondent's refusal to "reinstatement" the claimant.

The **2<sup>nd</sup> issue** for determination is whether the grievant's employment with the respondent was terminated. By the letter dated 04.02.2013 the respondent confirmed that the grievant was no longer in the respondent's employment. By that letter the respondent stated that the claimant would not be reinstated and the court returns that effective that date, the grievant was entitled to consider his contract of employment terminated. The termination was constructive.

The 3<sup>rd</sup> issue for determination is whether the constructive termination of the grievant's employment was unfair. The reason advanced for the respondent is that the grievant failed to attend the vetting interview. The evidence on record shows that the respondent never communicated the date of the interview to the grievant. The further evidence is that the grievant was attending a medical check up on the scheduled date of the interview. Finally, prior to the vetting interview, the grievant's contract of employment with the respondent had not been terminated at all. The idea that the respondent had to be reinstated in the respondent's employment was therefore a misconception. In view of the enumerated reasons, the court returns that the termination was founded upon an invalid reason and it was unfair under section 43 of the Employment Act, 2007 for want of a valid reason. Even if the grievant's failure to comply with the vetting process and failure to attend the vetting on 09.09.2011 were to be viewed to have amounted to misconduct or poor performance, the court considers that the grievant was not accorded a notice or a hearing as envisaged in section 41 of the Employment Act, 2007. To answer the 3<sup>rd</sup> issue for determination, the court returns that the termination was unfair.

The 4<sup>th</sup> issue is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows.

**First** the claimant has prayed for the award of the grievant's withheld salaries. The last time the grievant was paid was end of September 2011 per pay slip on record showing total earnings of Kshs. 22, 406.00. Without subjecting the grievant to disciplinary proceedings or other valid termination proceedings, the respondent decided not to assign the grievant any duties and instead required the grievant to apply for the misconceived "reinstatement" and thereafter the respondent kept silent until the letter dated 04.02.2013 confirming that the grievant would not be continuing in the respondent's employment. The court finds that for 16 months the grievant was not assigned duties and it was not for his fault. The grievant testified that he reported on duty but the respondent refused to assign him duties. For that period, the court finds that the grievant is entitled to full pay making **Kshs.358, 496.00**. While making that finding the court uphold its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **"In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, '(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;'**. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged."

In the present case, the court finds that the respondent's refusal to assign the grievant duties from September 2011 to 04.02.2013 amounted to unjustified suspension and the grievant is entitled accordingly.

**Second**, the court has found that the termination was unfair. The claimant is entitled to the declaration accordingly. Further, the court has considered the grievant's very long service with a clean record. The claimant did not contribute to his predicament in any manner. He desired to continue in employment and to retire honorably. Accordingly, he is awarded 12 months' compensation for the unfair termination under section 49 (1) (c) of the Employment Act, 2007 making **Kshs.268, 872.00**. The court considers that such compensation will meet the ends of justice in this case and taking into account the inconveniences emerging from the reorganized water sector and then the public service structural and functional reorganization under the Constitution of Kenya, 2010, the prayer for reinstatement for the grievant to serve until the mandatory age of retirement of 60 years will be declined.

**Thirdly**, the circular by the Ministry of State for Public Service dated 16.08.2010 Ref. No. MSPS/10/149A (16) entitled the grievant to pension benefits under the Pensions Act, Cap.189 and since the claimant had attained over 50 years of age and qualified for pension, the court returns that he is deemed to have retired on age grounds effective 04.02.2013 under the attainment of at least 50 years rule and he is entitled to pension as per the circular and the Pensions Act, Cap. 189. For that purpose the respondent will complete all documentation by 15.12.2016 to facilitate the payment of the pension benefits to the grievant by the Director of Pensions.

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

- a) The declaration that the termination of the grievant's employment was unfair.
- b) The respondent to pay the grievant **Kshs.627, 368.00** by 15.12.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- c) The declaration that the grievant is deemed to have retired on age grounds effective 04.02.2013 under the attainment of at least 50 years' age rule and he is entitled to pension as per the circular by the Ministry of State for Public Service dated 16.08.2010 Ref. No. MSPS/10/149A (16) and the Pensions Act, Cap. 189; and for that purpose the respondent will complete all necessary documentation in favour of the grievant by 15.12.2016 to facilitate the payment of the pension benefits to the grievant by the Director of Pensions in accordance with the applicable law.
- d) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 4<sup>th</sup> November, 2016**.

**BYRAM ONGAYA**

**JUDGE**