



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 131 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 12<sup>th</sup> January, 2015)

JACKSON NYAMWANGE OKARI ..... CLAIMANT

**-VERSUS-**

THE HON. ATTORNEY GENERAL ..... RESPONDENT

**JUDGMENT**

This case was previously filed on 17.6.2011 as Kakamega CMCC No. 186/2011 through a plaint filed through the firm of Momanyi, Manyoni & Co. Advocates. By consent of the parties however, the matter was transferred to the Industrial Court Kisumu for hearing and disposal.

The claimant's case is that he was employed by the Kenya Government at the then Ministry of Home Affairs on 2.1.1979. He was later transferred to the Ministry of Health on 1.7.1980 where he worked upto 1991 when he was arrested and charged in Busia Resident Magistrate's Criminal Case No. 2277/1991 where he was acquitted on 29.3.1992. He stated that following the charging, he was put on half salary as he was interdicted and earned the half salary for 3 months before his salary was discontinued. He continued to report to his work place daily as required till on 26th June 2008 when he received his dismissal letter informing him that his employment had been discontinued. On 17.12.1992. He appealed against this dismissal and the appeal was allowed on 8.9.2009. He then reported back to his work station on 16.11.2009 and his salary arrears were calculated and paid to him during the month of August 2010. He however discovered that the respondent had miscalculated the arrears as required, in that the calculation didn't take into account the salary harmonization done by the Government on 13th August 2009, 9th November 2009 and other increments. He further contends that the calculation did not also take into account what was due to him when he was on ½ salary. He also claims that what was due to him when his salary was discontinued = Kshs 18,441/= from July 1991 to October 2009= Kshs 2,655,504. He also avers that when his appeal was allowed, the respondent fraudulently changed his personal no. 2010029365 from the previous no. 507835 which will ensure that he loses his benefits earned under no. 507835. He wants the respondent ordered to reinstate his personal no. 507835 and also the arrears amounting to Kshs 2,673,945/= plus costs and interest.

The respondents did not file any response/defence to this claim. They only filed a statement of their witness. They however called one witness the Vihiga County Government HRD. The witness told court that the claimant is one of the workers who was devolved from the National Government to the County and still works for them. He contends that based on date done reinstating the claimant, he was not to be paid salary arrears for the days he was on interdiction. In cross-examination the witness agreed that the letter reinstating the claimant stated that he was to be paid arrears. He also admits that the new personal no. of the claimant shows he was employed in 2010 but he interdicted in 1992. He also stated that a person facing criminal charges remains interdicted until the case is over.

After hearing the evidence of both parties and upon consideration of the submissions filed, the issues for determination are:-

- 1. Whether claimant is entitled to reinstatement of his personal no. 507855.**
- 2. Whether the claimant is entitled to be paid arrears from the date of interdiction to the date of reinstatement i.e from 1991 - 2009 and if so, how much.**

On the first issue, when the claimant appealed against his dismissal, he received a letter which stated as follows:

**"The Commission considered and allowed your appeal against termination of temporary appointment and decided that your interdiction be lifted and, you be paid your dues accordingly."**

The wording of this letter shows that the claimant was being allowed back to work as if no interdiction had ever been meted against him.

S. 49(3) of the Employment Act states that in case of reinstatement as was the case here:-

**"the employer shall reinstate the employee and treat the employee in all respects as if the employer's employment had not been terminated."**

To have reinstated the claimant at the same time give him a new personal no. was in bad faith. This is because the change affects his pension benefits at the end of the day and treats the claimant as a new employee. This flouts the provision of S. 10(5) of Employment Act which is tantamount to changing employment particulars.

S. 10(5) of Employment Act 2007 states that:-

**"Where any matter stipulated in subsection(1) changes, the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing."**

The employee was not consulted when the new no was given. The respondent have contended that the change was necessary in view of the new IPPD System being implemented. This position is not true because other public officers who had been working had their numbers changed but reflecting the year of employment. For the claimant the year is indicated as 2010 whereas he was employed in 1979. It is therefore the finding of this court that the claimant is entitled to reinstatement of his personal number to reflect the correct year of employment in tandem with what was meted out on other public officers.

On the 2nd issue, appeal against termination was allowed and claimant was entitled to payment of his dues being dues payable from the time of interdiction putting into consideration the time he was paid 1/2 pay and all other salary reviews and increments as per his schedule of payments from page 20 to 204. This amounts to Kshs 1,759,800/= less statutory deductions. I award the claimant the same accordingly plus costs. Being an officer seconded to the County Government of Vihiga the payments shall be made by his employer the Vihiga County government as his services were devolved to the County.

**HELLEN S. WASILWA**

**JUDGE**

**12/1/2015**

**Appearances:-**

Claimant present

Mis Langat for respondent present

CC. Wamache