



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NO. 1303 OF 2013

(Before Hon. Justice Maureen Onyango on 13.3.2015)

KENYA NATIONAL UNION OF NURSES..... CLAIMANT

-VERSUS-

THE ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

The claimant, National Union of Nurses filed the claim herein against the respondent, the Attorney General on behalf of the Public Service Commission and the Ministry of Health. In the Memorandum of Claim dated and filed on 15th August 2013 the claimant states that it is a registered trade union and has signed a valid recognition agreement with the respondent to represent the respondent's employees including Peter Munywoki the grievant, on matters of employment and labour relations.

The claimant submitted that the grievant was employed by the respondent on 2nd January 1988 as a registered nurse. He worked for 22 years with a clean record. On 12th March 2009 a patient complained of having been raped by the grievant. The grievant was arrested, charged in court, and convicted. He was imprisoned for a term of 17 years on 8th April 2010. The claimant was dismissed on 22nd February 2012. The grievant appealed against the conviction and sentence. The appeal was allowed, the conviction quashed and the sentence set aside on 19th March 2012.

Following his successful appeal the claimant appealed to the respondent to review his dismissal by his letter dated 10th August 2012. He received the respondent's letter dated 26th March 2013 disallowing the application for review.

The claimant alleges that the dismissal of the grievant was unlawful and against Section 25(3) of Service Commission Act which provides that "where a public officer has been acquitted of a criminal charge, such public officer shall not be dismissed or otherwise punished on any charge upon which he has been acquitted---". The claimant further alleges that the dismissal did not comply with the provisions of the Employment Act.

The claimant prayed for the following reliefs:-

1. That the court declares that the dismissal of Mr. Peter Munywoki while he had appealed against his conviction was unlawful, un-procedural and against the established law, and quashes the letter of dismissal dated 22nd February 2012.
2. That the court declares that the decision to dismiss Mr. Peter Munywoki, the grievant, while the criminal charges preferred had not been litigated and finalized and a binding verdict not given was unlawful in accordance to the law that was in place (The Service Commission Act Cap 185 Section 25(2)).
3. That owing to the relations between the respondent and the claimant that may have broken down irretrievably, that the honorable court considers the alternative remedy of maximum compensation and general damages and three months in lieu of notice amounting to Kshs 13,267,775.
4. A declaration that subject to any law for the time being in force the grievant shall not forfeit any rights or claims to pension, gratuity, annual allowance or other retirement awards and any rights or claims he should enjoy in regard to leave or passage at the expense of public.
5. That the court issues any other remedy that it shall deem fit to order.
6. That the costs of the suit be provided for by the respondent.

The respondent filed a Reply to the Memorandum of Claim on 27th March 2014. The respondent averred in the response that the acquittal of the claimant was not a guarantee for reinstatement of the claimant. That the entire process leading to claimant's dismissal was fair and just, that the respondent carried out thorough investigations which showed that the claimant was guilty of gross misconduct on a balance of probabilities. The respondent prayed that the claim be dismissed with costs.

The case came up for hearing on 7th October 2014 when parties agreed to proceed by way of written submissions. The claimant was represented by Mr. Enonda instructed by Enonda, Makoloo, Makori & Co. Advocates while the respondent was represented by the Attorney General.

I have considered the pleadings and the submissions of the parties. I have also considered the following authorities cited by the parties:-

Michael Kiguma Maina V Kenya Police Service & 2 Others [2013] eKLR; Fredrick Were V MK. Jeffrey's Haulier [2013] eKLR; Joseph Sitati V Kenya Ports Authority [2010] eKLR; Universities Academic Staff Union V Masinde Muliro University {Cause No. 379 of 2010} (unreported); Raphael Juma Juma V Armed Forces Canteen Organization [Cause No. 1070 of 2012]; David O. Omino V Kenya Institute of Special Education [Cause No. 453 of 2012]; James Mugeru Igati V The Public Service Commission; D. K. Njagi Marete V Teachers service Commission [Cause No. 379(N) of 2009]; David Mwangi Gioko & 51 Others V Nairobi Water & Sewerage Co. Ltd [2013] eKLR; Maria Kagai Ligaga V Coca Cola East Africa Limited [Cause No. 611(N) of 2009] {unreported} and Menginya Salim Murgani V Kenya Revenue Authority [HCCC No. 1139 of 2002].

From the record, the respondent did not adduce any evidence to controvert the allegations made in the Memorandum of Claim. The defence consisted of mere denials. There is no evidence that the respondent complied with the disciplinary procedure in the Service Commission Act or the Employment Act. The provisions of the Service Commission Act on the procedure to be adopted where a public officer has been charged in court is clear. No employee is supposed to be dismissed unless he is not acquitted in the charge or in an appeal. The grievant herein was dismissed while his appeal was pending in court.

After the appeal was concluded and the charges against him dropped, the grievant applied for review of his case which was rejected.

The foregoing manifestly demonstrate that the dismissal of the claimant was unfair. The respondent

did not comply with the procedure set out in either the Service Commission Act or the Employment Act.

I therefore declare the termination of employment of the claimant unfair.

The claimant seeks payment of Kshs 13,267,775 being 3 months salary in lieu of notice in the sum of Kshs 250,335/=, maximum compensation of 12 months salary in the sum of Kshs 1,001,340/= and general damages of Kshs 12,016,080 being salary for 11 years.

On notice, the claimant did not prove that the terms under which the grievant was employed provided for 3 months notice. I have taken the initiative to check the Code of Regulations which refers to notice according to the terms of the officers letter of appointment. The grievant's letter of appointment does not provide for notice. For this reason, I award the claimant 1 month's salary in lieu of notice as provided in the Employment Act. The claimant's last salary was not pleaded. Neither was any payslip appended as proof of his last pay. I however note that the respondent has not raised any objection to the sum of Kshs 83,445 used by the claimant in the tabulation of the claimant's terminal benefits, and adopt it as claimant's final gross salary.

I award the claimant one month's salary in lieu of notice in the sum of Kshs 83,445/=.

Having worked for the respondent from 1988 to 22nd February 2012, and having been unfairly dismissed, I award the claimant maximum compensation of 12 months salary in the sum of Kshs 1,001,340/=.

The claimant prays for general damages of Kshs 12,016,880 being salary for 11 years, presumably to grievant's retirement date. No mention is made of the reason why 11 years was arrived at. The Employment Act does not provide for payment for years remaining to retirement in the event of unfair termination. The remedies as provided in Section 49 limits compensation to a maximum of 12 months gross salary for unfair termination or dismissal.

The claimant has referred me to several cases in support of its prayer. I am aware that some of the cases were decided before the Employment Act came into force and applied principles for compensation that are no longer applicable following the enactment of the Act which specifies what is payable to an employee upon unfair termination. Any general damages outside those set out in Section 49 are in my opinion only payable for other wrongs committed by an employer separate from unfair termination such as discrimination or defamation, exposure to sexual harassment or infringement of Constitutional rights such as denial of right to freedom of association. The same are recognized by both the Employment Act and the Industrial Court Act. In this respect I am in agreement with **Justice Ojwang's** decision in **Menginya Salim Murgani V Kenya Revenue Authority (HCCC No. 1139 of 2002)** and **Justice Rika** in **D. K. Njagi Marete V Teachers Service Commission [2013]** eKLR where it was decided that an aggrieved employee must mitigate his losses, and must move on and further that it is injudicious to find an award of damages upon sanguine assessments of prospects. Termination of employment does not make an employee incapable of earning a living and therefore determination of damages can not be based on years remaining to retirement as in cases of damages in permanent incapacity cases where an aggrieved person's ability to earn a living is compromised. In my mind, the position of **Mustafa, Ag VP** in the Court of Appeal decision in **East African Airways V Knight [1975] E. A. 165 at 170 and 171** still holds today where he stated as follows:-

"I would normally consider that a contract of service between an employer and an employee for an indeterminate duration is intended to be determinable. Such a contract, similar to a contract of partnership or one of principal and agent involves more or less of trust and confidence, more or less of the necessity of being mutually satisfied with each other's conduct, and more or less of personal relations between the parties. Such a contract is normally liable to be determined by reasonable notice, if no period is provided, in the absence of custom, legislation or provision expressed or implied to the contrary.

Permanent employment does not mean that it is necessarily employment for life or until

retirement; it merely means the employment is to continue for an indefinite period with an element of permanency and a degree of security of tenure. It is not necessarily a life appointment with the status of irremovability".

Our Employment Act now provides for up to 12 months compensation. This means that the common law or any other position inconsistent with the law is no longer valid.

The foregoing being the case, the claimant's prayer for general damages based on 11 years' salary must fail. I dismiss the same.

Having proved that he was unfairly terminated, I award the claimant costs of this case.

The decretal sum shall attract interest at court rates from date of judgment.

Orders accordingly.

Dated and delivered in Nairobi this 13th day of March, 2015

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)