



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.117 OF 2014

DISHON KAMAU MUIRURI.....CLAIMANT

-VERSUS-

KENYA REVENUE AUTHORITY..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2015)

JUDGMENT

The claimant filed the statement of claim on 08.09.2014 through Gori Ombongi & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) General damages for unlawful dismissal.
- b) Full payment of the claimant's salary and all allowances until such a time when the outcome of the appeal will be delivered.
- c) A declaration that the said dismissal was unprocedural and unlawful.
- d) In the alternative and without prejudice to the foregoing the claimant be reinstated to his job.
- e) Interest on (b) above at court rates from the date of the claimant's dismissal until full payment.
- f) Costs of the suit plus interest.
- g) Such further or other relief as the honourable court may deem fit to grant.

The respondent filed the statement of response on 10.10.2014 through Dianah .W. Githuku Advocate. The respondent prayed that the suit be dismissed with costs.

The respondent subjected the claimant to disciplinary proceedings commenced by the letter dated 26.11.2012. By that letter it was alleged that the claimant corruptly solicited a bribe on 12.06.2010 from one Peter Nderitu, a hardware shopkeeper in Nyeri while acting in concert with Steve Raydon Erima the acting Principal Revenue officer with a view to reducing tax liability to the respondent and contrary to section 39(3) (a) of the Anti-Corruption and Economic Crimes Act, 2003. It was stated that the claimant had acted in contravention of section 6.2.2.2 of the respondent's code of conduct which prohibited employees from directly or indirectly soliciting or accepting any gift or consideration or any pecuniary advantage, as an inducement or reward from members of the public for any act or omission to do anything in the employee's official capacity or for showing favour or disfavour to any person.

The main issue for determination in this suit is whether the reason for termination was genuine. The court has considered the evidence on record and makes observations as follows:

a) The investigations by F.A Otory, the respondent's Regional Manager, Central Region established that the taxpayer in issue had absolutely no complaints against the claimant and the taxpayer was ready to record a statement at the respondent's head office and even to see the respondent's Commissioner General to arbitrate the case. The Regional Manager therefore recommended that the interdiction be withdrawn, the claimant be given a chance to defend himself and the taxpayer be asked to record the relevant statement.

b) The taxpayer made the statement dated 28.11.2012. The taxpayer confirmed that the respondent's officers Kabue, Erima and the claimant conducted an audit at his business and upon conclusion of the audit Kabue and the claimant advised on separation of his private construction material from his hardware stocks. On the other hand, the taxpayer stated that one Erima had asked him to give a bribe of Kshs. 200,000 so as to adjust the due tax as per the advisory he had been given. The taxpayer confirmed that he knew the claimant as a person of high integrity who feared God and there was no time the claimant asked the taxpayer to give a bribe. The taxpayer stated that he knew the claimant well because they worshiped and fellowshipped at the same church.

c) The claimant wrote the memorandum of 6.12.2012 and denied ever soliciting or receiving a bribe from the tax payer in issue.

d) By the memorandum dated 16.01.2013, the respondent's Senior Assistant Commissioner –DTD (MST) Nyeri recommended that the claimant should be given chance to explain himself regarding the case and in the meantime, the interdiction be withdrawn to allow the officer to resume his duties as soon as possible.

e) By the memorandum dated 17.01.2013, Senior Assistant Commissioner DTD/MST Kisii one S.N.O. Dianga who had worked with the claimant in Nyeri for 4 years and throughout the time material to the case stated that the belated allegations against the claimant could best be described only as fallacious.

f) The claimant was retired in public interest by the letter dated 8.10.2013 following deliberations by the Disciplinary Committee on 14.03.2012 and taking into account the claimant's personal presentation on 14.03.2012. The letter stated that the respondent had lost confidence in the claimant and decided that the claimant be retired in the respondent's interest with immediate effect (8.10.2013). The letter advised the claimant to appeal within 30 days from 8.10.2013 and his appeal is dated 4.11.2013. The claimant stated that the audio recording relied upon by the Disciplinary Committee had not been played to him or shown to him, the taxpayer in issue had not been called despite his request that he is called, and the taxpayer had sworn on 1.11.2013 the affidavit attached to the appeal showing that the claimant was innocent as the allegations were not true. On 29.06.2014 the claimant wrote to the respondent's Commissioner General stating that he had not received the response to his appeal. The suit was filed on 08.09.2014. The response upholding the retirement was exhibit C16 dated 29.10.2014, coming long after the filing of the suit and without any explanation of the obvious delay.

The court has considered the pleadings, the evidence and the submissions. The court finds that the decision to retire the claimant was not founded upon any justifiable reason. The evidence shows that the claimant did not solicit or receive bribe from the concerned taxpayer. It is difficult to establish valid reasons for the retirement decision made by the respondent's Disciplinary Committee as upheld by the respondent's Commissioner General. In absence of a valid reason for termination, the court finds that the termination was unfair under section 43 of the Employment Act, 2007.

The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1) The court finds that the claimant is entitled to the declaration that his termination from employment by the letter of retirement in the respondent's interest dated 8.10.2013 was unfair. While making this finding the court notes the glaring discrepancies in the letter of retirement suggesting that the deliberations by the Disciplinary Committee and the termination decision came long before the investigations and recommendations by the claimant's workmates or supervisors in Nyeri at the material time of the allegations. Such laxity in documentation on the part of the respondent shows obvious lack of seriousness in the manner the respondent handled the claimant's case and serves as an impetus for a finding that the termination was unfair as the respondent clearly failed to apply its mind to the pertinent issues at hand. The court's finding is buttressed with the fact that despite appealing, the appeal decision came after inordinate delay and the appeal decision did not correct the errors in the termination letter. The court finds that the termination proceedings were therefore on their face recklessly undertaken and resulted in an unfair termination.

2) The claimant has prayed for reinstatement. Article 236 of the Constitution provides that a public officer like the claimant shall not be victimised or discriminated against for having performed the functions of office in accordance with the Constitution or other applicable law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. All evidence on record shows that the claimant performed his duties in accordance with the applicable law but was unfairly terminated by way of retirement in alleged interest of the respondent. The claimant was protected by Article 236 and is entitled to continue in public employment in the service of the respondent. The court finds that he is entitled to reinstatement with effect from 8.10.2013 and to all half basic salary due to him but withheld between 26.11.2012 to 8.10.2013.

3) The court finds that the claimant had served the respondent with due diligence and honestly since 1.10.2003 to 8.08.2013. The claimant did not contribute to his termination in any manner. The court finds that for the unfair termination the claimant is entitled to maximum 12 months compensation being his monthly gross salary of Kshs.128, 000.00 for 12 months making a sum of **Kshs.1, 536,000.00**.

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

1) A declaration that the termination of the claimant by the respondent from employment by the letter of retirement in the respondent's interest dated 8.10.2013 and as upheld in the respondent's decision on the claimant's appeal as conveyed in the letter dated 29.10.2014 was unfair and is set aside.

2) The respondent to pay the claimant **Kshs.1,536,000.00** for the unfair termination plus all that half basic salary due to the claimant and withheld between 26.11.2012 to 8.10.2013; and the respondent to pay by 1.05.2015 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

3) The claimant is reinstated in the service of the respondent as a Revenue Officer I with effect from 8.10.2013, without break in service, with full benefits, as per prevailing terms of service, and to continue in service till the due date of retirement or until the otherwise date of lawful separation; and for that purpose the claimant shall report to the respondent's Commissioner General on 9.03.2015 for deployment accordingly.

4) The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 6th March, 2015**.

BYRAM ONGAYA

JUDGE