



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NO. 772(N) OF 2009**

**(Before Hon. Justice Maureen Onyango on 3.3.2014)**

**JOHN OCHIENG ODIE ..... CLAIMANT**

**-VERSUS-**

**KENYA NATIONAL EXAMINATION COUNCIL ..... RESPONDENT**

**JUDGMENT**

John Ochieng Odie the claimant instituted this suit against the respondent Kenya National Examinations Council by memorandum of Claim dated 2nd December 2009 and filed on 7th December 2009. The claimant filed an Amended Memorandum of Claim on 8th June 2012 pursuant to leave granted on 22nd May 2012. He seeks the following orders:-

- a. A declaration that the claimant's services with the respondent was terminated unlawfully.
- b. An order directing the respondent to pay the claimant the following terminal benefits:-
  - i. Twelve months salaries being compensation for unlawful loss of employment that is Kshs 1,227,000/=
  - ii. Loss of earning (salary) for 12 years and 10 months Kshs 15,746,500/=
  - iii. Loss of house allowance for 12 years and 10 months Kshs 7,392,000/=
  - iv. Loss of medical allowance for 12 years and 10 months Kshs 693,000/=
  - v. Loss of responsibility allowance for 12 years and 10 months Kshs 1,232,000/=
  - vi. Loss of commuter allowance for 12 years and 10 months Kshs 2,464,000/=
  - vii. Loss of pension right
  - viii. Loss of insurance cover right
  - ix. Kenya Commercial Bank loan arrears and interest Kshs 609,490.93
  - x. Loss of career and promotional prospects
  - xi. Damages

xii. Interest

xiii. Costs of this suit.

The respondent filed its Reply to the Memorandum of Claim on 8th March 2010 and an Amended Reply on 22nd June 2012 denying the allegations in the Memorandum of Claim and the Amended Memorandum of Claim respectively.

The case was heard on 24th January and 14th March 2013 when the claimant's evidence was taken and on 21st May and 3rd July 2013 when respondent's evidence was taken. The claimant testified on his behalf while the respondent called Florence Wanyanga, a Senior Deputy Secretary in charge of General Administration and Human Resource Management.

The claimant was represented by Mr. J. V. Juma Advocate while the respondent was represented by Mrs. M. W. Kiarie instructed by Kiarie, Kariuki & Associates.

### **Brief facts of the case:**

The claimant was employed by the respondent on 1st December 2008 as Deputy Secretary in charge of Administrative Services. Prior to appointment by the respondent the claimant was an undersecretary in the Ministry of Information and Communication. His appointment by the respondent was a transfer of service within the public service. His employment was terminated on 25th May 2009 and was communicated to him by letter dated 22nd May 2009.

According to the claimant, the termination was due to a disagreement with his supervisor, Ms. Florence Wanyanga (RW1) against whom he had filed a letter of complaint with the Chief Executive Officer but no action was taken. According to RW1, the claimant was terminated due to non-performance. He failed to meet targets and when summoned by RW1 to her office, he refused to comply even after RW1 went personally to his office to call him.

On 27th March 2009 the claimant received a letter from RW1 accusing him of insubordination. The letter required him to explain why he refused to comply with lawful instructions by refusing to see her. The claimant responded to the letter on the same day accusing RW1 of abusing her powers and acting arbitrarily against officers working under her.

On 20th April 2009 the claimant received a second letter on insubordination detailing specific incidents of under performance by the claimant and requiring the claimant to show cause why disciplinary action should not be taken against him for insubordination and failure to perform his duties properly. On 22nd April 2009 RW1 referred the claimant's case to the CEO. The claimant responded to the show cause letter on 27th April 2009. The claimant's case was referred to the respondent's council on 21st May 2009 which resolved that the claimant be terminated.

### **Submissions by claimant**

The claimant's submissions addressed the issues as set out in the submissions as follows:-

1. Was the claimant on probation or on permanent and pensionable terms of service at the time his employment was terminated?
2. Were there valid reasons for dismissal of the claimant?
  - a. Were these reasons proved?
  - b. Were they grave enough to warrant dismissal?
  - c. Was the dismissal the appropriate penalty in the circumstances?
  - d. Had the relationship irretrievably broken down?
3. Were proper and fair procedures followed before the dismissal of the claimant?

4. Were the claimant's fundamental rights and freedoms breached or violated?
5. Is the claimant entitled to the reliefs claimed?
6. Is the claimant entitled to interest?
7. Is the claimant entitled to costs of this claim?

The claimant submitted that his employment was terminated due to the fact that he did not get along well with his supervisor, RW1 due to their different approaches to management. That the claimant's terms of employment were pensionable and his letter of appointment clearly stated that he was under observation for one year but his pensionable service was transferred from the public service.

The claimant submitted that there were no valid grounds for his termination, that the letter of termination did not state the reasons for termination. It was also submitted that the grounds for termination as stated in his show cause letter being insubordination and failure to perform duties assigned to him were not proved. The claimant relied on Industrial Court **Cause No. 621 of 2012; Jane Wairimu Macharia V Mugo Waweru & Associates** in which the court stated that an employer is required to prove the reasons for termination as provided in Section 45 of the Employment Act (The Act). The claimant also relied on Industrial Court **Cause No. 273 of 2010; KSRITAWU V Stanley Kinyanjui and Magnate Ventures Limited** where the court stated that the proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give him an opportunity to improve over a reasonable period, and that 2 to 3 months would be a reasonable period. In that case the court further stated that a performance appraisal process must be evidently participatory, and a comment made by a supervisor without participation of an employee cannot pass for performance appraisal.

It was also submitted for the claimant that the reasons given for termination of the claimant's services were not sufficient reasons to warrant termination of employment. It was further submitted that the respondent ignored the procedure set out in its terms and conditions of service relating to due process of discipline, and that the relationship between the claimant and the respondent had not broken down irretrievably to warrant the termination.

It was submitted that the CEO, the Staff Affairs Committee (SAC) and the full council did not call the claimant to defend himself against the allegations against him before employment was terminated. It was further submitted that the composition of the members of the council meeting at which the decision to terminate the claimant's employment was made was unlawful. There were 9 members, 5 of whom sat in the SAC meeting. That those who sat in the SAC meeting should have been excluded. It was also submitted that the *ex officio* members who were 5 heads of Departments, were never involved in the meeting. The claimant doubted that the SAC meeting ever took place. The SAC minutes were not signed and were not referred to at the Full Council Meeting. The meeting of the SAC which was composed of 9 members, had no quorum in the absence of the 5 *ex - officio* members.

The claimant referred to the case of **KADAMAS V Municipality of Kisumu [1985] KLR 954** in which the Court of Appeal relied on the decision in **Leeson V General Council of Medical Education 43CHD** at page 379 where it held that no man can be plaintiff, or prosecutor, in any action, and at the same time sit either in his own case, or in any accusation or complaint on which the order is made.

It was further submitted that the claimant's fundamental rights to fair hearing as provided in Article 50 of the Constitution was breached by the respondent as the claimant was not present at the hearing.

The claimant prayed that the court finds that he had proved his case and grants him orders as prayed for in the claim.

#### **Respondent's submissions:**

It was submitted for the respondent that the claimant admitted to not having completed some tasks given

to him by his supervisor. His explanations on failure to perform in his response to the show cause letter were found unsatisfactory. The claimant also failed to honour summons issued by his supervisor on 27th March 2009 on phone and even after the supervisor went to call him personally when he did not as much as look up to acknowledge the presence of the supervisor in his office. That in his response to the show cause letter the claimant, apart from failing to offer satisfactory explanation to his supervisor, perpetuated the insubordination by reprimanding his supervisor and her style of management.

It was further submitted that the claimant did not contest the termination of his employment. That he provided details of his account where the terminal benefits were to be deposited and requested the respondent to communicate with his former employer, the Ministry of Information and Communication.

The respondent submitted that the claimant's employment was terminated while he was serving probationary period which according to his letter of appointment was one year. The respondent denied that the claimant's terms were on a transfer of service from the public service or secondment. That the transfer of service letter related only to pension benefits. The respondent submitted that according to Section 42 of the Act a person on probation would be terminated by either party giving 7 days notice or payment of 7 days salary. The respondent relied on **Mercy W. Kinyua V Westlife Construction Company Ltd [2013] eKLR** in which the court held that the termination of employment of an employee while on probation was expressly excluded from requirements of Section 41 of the Act by virtue of Section 42. In that case the court converted the claimant's dismissal to normal termination and awarded him one month's salary in lieu of notice in accordance with her contract of service. The respondent also referred to **David Mutegi Njue V Tanathi Water Services Board & Another [2013] eKLR** in which the court held that the claimant was not entitled to the protection under Section 41(1) and the employer need not prove valid reason for terminating an employee on probation. That the reason for this is that probation refers to "the process of testing or observing the character or abilities of a person who is new in a role or job" per Concise Oxford English Dictionary, 2011 Edition. That during this period each party is free to terminate the contract at will subject to payment of salary in lieu of notice.

The respondent submitted that the claimant was given more than fair treatment as he was invited to explain himself twice but failed to mitigate his case and that the claimant admitted that his terminal dues were paid in accordance with his letter of appointment. The respondent submitted that there was valid reason for termination of claimant's employment which were proved and further that the claimant was considered to be serving probationary period and an oral hearing was not a prerequisite to his termination.

It was submitted that the claimant was accorded proper and fair procedure before termination as he was issued with a letter to show cause on 27th March 2009 and another letter dated 24th April 2009 both of which the claimant responded to on 27th March and 27th April respectively which the respondent referred to the SAC at its meeting held on 14th May 2009. That the claimant's fundamental rights and freedoms were not breached or violated as the disciplinary process went Full Course even though the claimant was not entitled to such process as he was still on probation.

The respondent submitted that the claimant is not entitled to any damages as the termination of his employment was lawful and fair and he had been paid all his terminal dues. The respondent relied on the case of **Simon P. W. Kirimi V KCB Ltd and Another** (HCC No. 998 of 2001) where **Kasango J** held that where it is found that there is breach of contract of service, the only remedy is damages calculated in accordance with the terms of the contract. In that case the court relied on the case of **Addis V Gramophone (1909) AC483** in which the court held:-

**"If there is dismissal without notice ... the indemnity cannot include compensation for injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."**

The respondent submitted that the claimant is not entitled to damages for injured credit standing and reputation or for any other injury. And neither is he entitled to claim compensation up to retirement. That the only benefits the claimant is entitled to are those provided for in paragraph 6.0 of the respondent's terms and conditions of employment being that; employment may be terminated by either party giving to

the other one month's notice or one month's salary in lieu of notice, which had already been paid by the respondent to the claimant.

The respondent prayed that the claim be dismissed.

### **Issues for Determination**

I have considered the pleadings, the evidence adduced by either party, the documents relied upon and the written submissions filed by the parties. I have also considered the authorities cited by the parties.

The issues arising for determination from the evidence in my opinion are the following:-

1. Whether or not the claimant's terms of employment were on probation.
2. Whether or not the termination of the claimant's employment was fair, and
3. Whether the claimant is entitled to the remedies sought.

The claimant's letter of appointment at paragraph 1.0 under the title TERMS OF SERVICE reads:-

**"This appointment is on permanent and pensionable terms of service. You will however be deemed to be under observation for one (1) year owing to the nature of your duties. In this regard you are advised to make appropriate arrangements for transfer of your pensionable service to the Council if necessary."**

These are express and unambiguous provisions. The respondent's Terms and Conditions of Service (2003) provides for probation period of 2 years. The Act provides for maximum probation of 6 months which may be extended for up to a further 6 months. The claimant's letter which provides for "observation for one year" could not have been referring to either the probation period in the respondent's Terms and Conditions of Service or the Act. Nothing would have prevented the respondent from expressly providing for the claimant's probation if that was the intention.

I find that at the time of termination of the claimant's employment he was not on probation, indeed his employment was never subject to probation. He was on permanent and pensionable terms under transfer of pensionable service from public service.

The fact that he was not on probation means that he was entitled to be subjected to the procedure provided in Section 41 of the Act. The respondent's failure to do so makes that the termination of the claimant's employment unfair by virtue of Section 45 of the Act. The authorities relied upon by the respondent which were in respect of employees on probation are not relevant to this case.

Having found that termination of the claimant's employment was unfair, he was entitled to payment of 1 month's salary in lieu of notice which the claimant has confirmed having been paid.

The claimant is also entitled to compensation for unfair termination as provided in Section 49(1)(c) of the Act. Taking into account all the circumstances of this case including those set out in Section 49(4), I award the claimant 8 months salary as compensation. The claimant's salary at the time of termination of employment according to his payslip for May 2009 was Kshs 178,850. I therefore award him Kshs 1,430,000 as compensation.

The claimant prayed for loss of earning (salary) for 12 years and 10 months in the sum of Kshs 15,746,500/=. This is not provided for by the Act. In the case of **Menginya S. Salim V KRA, Ojuang J** declined to grant future earnings to an able bodied person. **Rika J** in the case of **Marete V TSC** also declined to grant future earnings on the basis that an employee must move on. I agree with the decisions in the 2 cases. The claimant was not rendered an invalid by the termination of his employment. Any employment even if termed as permanent and pensionable, is by its very nature, terminable by either the

employer or the employee. It can never be permanent in the sense of being incapable of termination. One of the main terms of any employment contract is to provide for the manner in which it may be terminated. There is no reference to permanent employment in any one of the labour Laws. The Act provides for termination of employment directly under Section 10(3)(b), 35 and 44 and indirectly in many other sections. Since from the very onset of employment both the employer and the employee are aware that the contract is terminable there is no legal or contractual reason why an employee or an employer should demand payment for any period not worked for beyond compensation provided for by law or in the terms of the contract employment.

For these reasons I decline to grant the claimant salary that he would have earned from date of termination to date of retirement and dismiss the claim.

The claimant also prayed for house allowance, medical allowance, responsibility allowance, commuter allowance and insurance cover upto the date of retirement. Since these are all future earnings and similar to the prayer for payment of future salary, I dismiss the prayers for the same reasons.

The claimant also prayed for loss of pension right. Claims for pension are provided for under Retirement Benefits Act which has elaborate and effective mechanisms for resolving any disagreements relating to pensions and all other retirement benefits claims. Such claims can only come to this court as appeals from decisions of the Tribunal created under the Act. The claim can therefore not be entertained as prayed by the claimant and is dismissed.

The claimant prayed for payment of Kenya Commercial bank Loan arrears and interest of Kshs 609,490.93. No evidence was adduced to the effect that the respondent undertook such liability. The respondent cannot be made responsible for payment of claimant's personal loan in which its role was limited to deducting and remitting certain agreed sums from the claimant's salary to the bank. I find no merit in the prayer and dismiss it.

The claimant further prayed for loss of career and promotional prospects. Courts can not grant speculative prayers. I find no merit in the prayer and dismiss it.

The claimant further prayer for damages. In the written submissions of the claimant it is stated that this is for pain and suffering as a result of sudden loss of employment and loss of dignity. The claimant relied on the case of **Banking Insurance & Finance Union (Kenya) V Kipsigis Teachers Sacco Society Limited [2013] eKLR** in which the court awarded Kshs 1,791,526 for contravention of fundamental rights in addition to Kshs 977,196 awarded as compensation for unfair dismissal. I do not find any relevance of the case to the claimant's. The claimant did not allege any contravention of fundamental rights other than lack of a fair hearing for which I have already awarded him compensation as provided in Section 49 of the Act.

I find no merit in the prayer and dismiss it.

The claimant also prayed for costs and interest. Having found that the termination of his employment was unfair, I award the claimant costs of this suit. I further award him interest at court rates from date of judgment.

Orders accordingly.

**Dated and delivered in Nairobi this 3rd day of March, 2014.**

**MAUREEN ONYANGO**

**JUDGE**

*In the presence of:*

Odie claimant present in person

Miss Njenga for respondent present

Mukira CC.