



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.1513 OF 2012**

**DR. JAMES P. SAWE.....CLAIMANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**JUDGEMENT**

**Appearance**

**Mr Rakoro, instructed by Rakoro & Co. Advocates for the Claimant**

**Ms B. Akuno, State Counsel, Attorney General's Office for the Respondents**

1. The issue in dispute is the unlawful, unfair and unprocedural dismissal from service.
2. The memorandum of claim was filed on 29<sup>th</sup> August 2012 and a defence filed on 21<sup>st</sup> November 2012. Both parties were heard in evidence where the Claimant supported his case and the Respondent called Nahashon Kimamo in evidence. At the close of the hearing each party filed their written submissions.

The claim is that the Claimant is a medical Doctor who upon his graduation from the University of Nairobi was employed by the Public Service Commission who is herein represented by the office of the Attorney General as the government advisor. The Claimant was in 1987 employed as a Medical Officer in the Ministry of Health and posted to Provincial General Hospital, Nakuru. In February 1999, the Claimant completed his Masters of Medicine and on 3<sup>rd</sup> May 1999 was posted to Machakos District Hospital as a specialist. He reported to the new station on 7<sup>th</sup> May 1999.

3. On 1<sup>st</sup> September 1999, the Claimant was promoted and appointed as an Assistant Director of Medical Services as a Medical Specialist at job group "N" and later in 2003 he was upgraded to job Group "P". While serving at Machakos, with a colleague they begun the amenities ward project. On 21<sup>st</sup> October 1999 the Claimant was posted to Embu Provincial Hospital but the Medical Superintendent at Machakos Rd. Mueke refused to release him citing the crucial role he was playing in the amenities project and informed the claimant that after talking to the Provincial Medical officer Eastern Province the order of transfer was withheld. The claimant remained serving at Machakos.

4. In March 2000, the claimant was later accused of absconding duty and his salary was stopped. In October 2000 he was served with a show cause letter on absconding from the Ministry of Health. In December 2000 the case was referred to the Ministerial Advisory Committee (MAC also called MAC 1)

which met and absolved the Claimant and recommended his reinstatement on 21<sup>st</sup> December 2000. In the meantime the claimant applied for a Master of Public Health at the University of Nairobi in June 2000 and was admitted but due to lack of funding he postponed admission to January 2001. He commenced the Masters programme in January 2001 with approval, release and sponsorship of the Ministry of Health which paid the fees to University of Nairobi. By September 2001 the claimant had completed part 1 of the programme but was frustrated by stoppage of salary and dismissal from service and the claimant opted to apply for a posting as he thought the programme support had been stopped. There was no response until 2009 when the Ministry of Health wrote to him indicating fees for part 2 of the programme had been paid.

5. On 4<sup>th</sup> June 2002, the claimant's salary was stopped on the grounds that he had absconded duty – an issue that had been resolved at Ministerial Advisory Committee 1. In April 2003, there was a Ministerial Advisory Committee 2 that recommended that the claimant's salary be reinstated per Ministerial Advisory Committee 1 and that he be posted to a new province other than Eastern Province. His salary was however stopped again in October 2004 despite decisions in Ministerial Advisory Committee 1 and 2. The Claimant was then earning Kshs.100, 840.00.

6. The Claimant made efforts to see the Deputy Director of Medical Services (DDMS) on several occasions to discuss his situation but was ignored. In February 2005 the Claimant applied for the position of DDMS and was called for an interview but the outcome was never shared with him despite the fact he believes to have passed for the position.

7. On 29<sup>th</sup> August 2009 the Minister for Medical Services wrote to the Claimant on his dismissal from service on 1<sup>st</sup> June 1999. He appealed against the dismissal but this was dismissed. By this time of dismissal on August 2009, the claimant was aged 49 years which was unfair as his service was cut short before his retirement age and no terminal dues were paid. The Claimant is therefore seeking notice pay, salary and allowances from September 2004 to August 2020 and compensation herein. The claimant is also seeking a reinstatement into service without loss of benefits from September 2004 to date. He is also seeking for an order that the Public Service Commission through the Ministry of Medical Services should put his record clean. That the Respondent should meet costs herein.

8. In support of his case the Claimant gave his evidence that he is currently in private practice, facilitates medical talks, he is teaching at various higher learning institutions after his termination. He commenced work with the government in 1987 as an Intern and left as Assistant Director medical Services. He worked at various stations and then posted to Machakos District Hospital on 3<sup>rd</sup> May 1999. On 21<sup>st</sup> October 1999 he got a letter posting him to Embu Provincial Hospital and noting the project he was working on at Machakos, the Medical Superintendent Dr Wazombe refused to give him a release letter to Embu. On 23<sup>rd</sup> October 2000 the claimant got a show cause letter that he had absconded duty for not reporting to Embu. He responded on 14<sup>th</sup> November 2000 giving reasons that he had not been released and was working at Machakos in the Amenities Ward project. His salary was stopped and a Ministerial Advisory Committee was held on 21<sup>st</sup> December 2000 that reinstated the claimant and his salary was paid.

9. The Claimant was admitted for studies in Public Health which the Ministry allowed him to do and sponsored him as he was at the University of Nairobi. His salary was however stopped again and a show cause issued on absconding on similar grounds as Ministerial Advisory Committee 1. He asked to be posted as he had difficulties supporting himself. He was not posted. A Ministerial Advisory Committee 2 was constituted and it was resolved that the claimant should be posted to a new province and his salary paid. His salary was stopped for the third time on similar grounds of absconding duty and efforts to understand the root cause of these problems was ignored by the Deputy Director of Medical Services. His case kept on recurring and there seemed to be a personal vendetta from Dr Kimani the DDMS who portrayed the claimant as incompetent and does not pay attention to duty; corrupt person; and ought to be dismissed from service. When the claimant applied to the position of DDMS he was interviewed and he believes he passed well but was never given feedback to date.

10. When the claimant's salary was stopped for a third time, Ministerial Advisory Committee 3 was

constituted and the same issue of absconding was discussed. He was never informed of the seating or hearing at Ministerial Advisory Committee 3 which resolved that;

The claimant is dismissed;

Salary overpayment be recovered; and

There was right of appeal.

11. On 10<sup>th</sup> September 2008, the claimant met the Permanent Secretary for Health and he requested for information with regard to his employment, the masters programme he had been sponsored for, but there was no response. For 3 years he waited for feedback but there was none. He got information that his case had been referred to the Kenya Anti-Corruption Commission to investigate salary overpayment on the basis that he was corrupt. The salary overpayments should be recovered from the claimant. All this happened without the knowledge of the claimant

12. On 26<sup>th</sup> August 2009 the Permanent Secretary wrote to the Claimant informing him that he had been dismissed with effect from June 1999 on account of absence from duty without lawful authority; that he owed the government Kshs.3, 843,237.00 from salary paid while not rendering any service. The claimant was not satisfied with the reasons for his dismissal and he appealed on 21<sup>st</sup> April 2010 and a response dated 29<sup>th</sup> September 2010 noting that the Public Service Commission had dismissed his appeal.

13. The claimant is seeking a reinstatement with all his dues paid as this was a case of unfair dismissal and his defence was never considered and civil service regulations were never followed. He is also seeking compensation and salaries he could have earned that are now lost due to the unfair treatment.

## **Defence**

14. In defence the Respondent avers that they employed the Claimant and when he was posted to Embu Provincial Hospital by posting order number 12/99 dated 21<sup>st</sup> October 1999 he never reported on duty to his new station as required on 11<sup>st</sup> November 1999. Since he failed to report, the hospital management had no communication of his whereabouts and his salary was then stopped. The Claimant appeared before the Ministerial Advisory Committee on 21<sup>st</sup> December 2000, defended himself and had his salary reinstated. He started a Masters programme in public health which the Respondent Ministry funded partly. A second show cause letter was issued on 5<sup>th</sup> July 2002 as the Claimant was absent from office without authority and the Claimant response was that his case had been addressed and he was taking his Masters at the University of Nairobi. The second Masters programme was taken without due process and when the Claimant failed to attend work this amounted to absconding duty. The Claimant was called before Ministerial Advisory Committee 2 on 30<sup>th</sup> April 2003 on the grounds that he was not at work yet he was earning a salary that was stopped. On 23<sup>rd</sup> September 2004 the claimant's salary was stopped on the grounds that he had obtained scholarship through dubious means and that he had absconded duty.

15. The Respondent also stated that the Claimant had applied for the position of Deputy Director of Medical Services and was interviewed but he was not successful. Only the successful candidate was informed. On 18<sup>th</sup> March 2005 due to absence from duty without lawful authority and failure to refund government monies that were overpaid, the Claimant was issued with another notice and Ministerial Advisory Committee 3 met on 4<sup>th</sup> May 2005 and recommended dismissal of the Claimant from service. The Respondent Ministry also wrote to the Kenya Anti-Corruption Commission to institute recovery proceedings for the salary received during the period the Claimant was absent from the office. The Commission gave a response on 17<sup>th</sup> June 2008.

16. The Respondent also stated that the Claimant was dismissed upon careful considerations by Ministerial Advisory Committee 3 on 25<sup>th</sup> July 2005. The case was referred to the Public Service Commission and on 1<sup>st</sup> June 2009 it was recommended that the Claimant be dismissed on account of

absence from duty without lawful authority. On 29<sup>th</sup> August 2009, the Ministry of Medical Services dismissed the Claimant from service with effect from 1<sup>st</sup> June 1999. The Claimant applied for a review of the dismissal but this was rejected on 22<sup>nd</sup> October 2010.

17. The Respondent stated that the dismissal of the Claimant was procedural and legal since he was informed of the offence he had committed and given an opportunity to defend himself. Amounts claimed are not due based on Regulation 26(2) of the Public Service Code of regulations.

18. In evidence, the Respondent called Dr Francis Kimani in the office of the Director for Medical Services but he was stepped down to be able to prepare his evidence.

19. The next witness called was Bernard Otieno Ngaa with Public Service Commission (PSC) as the Deputy Security responsible for disciplinary cases. He dealt with the claimant's case that was at Machakos and was posted to Embu and he refused to report. The Claimant went to the Public Service Commission complaining that he had been interdicted and his case had not been concluded. The Public Service Commission wrote to the Ministry where the permanent secretary replied that the Claimant had been dismissed for absconding duty. Upon analysis of the case, the Public Service Commission was convinced that the facts were valid and thus decided the Claimant be dismissed for absconding. The Claimant had proceeded on his Masters Studies without prior approval; there were no minutes or course approval which was irregular. The Claimant applied for a review of the Public Service Commission decision but this was rejected noting that the Claimant had defended himself on the grounds that his studies had been approved but this approval was not given. The Claimant had defended himself stating that the approval had been released from duty in July 2001 yet the course had started in January 2001. There was a contradiction. There was no rationale that the Claimant got sponsorship for a 2 years course whereas just before being posted to Machakos he had been on study. It was not possible to get the second Masters in such a short time.

20. Upon cross-examination, the witness confirmed that the decision by the Public Service Commission was based on evidence on file as the Claimant was not called. Public Service Commission procedure is to hear a Claimant through show cause letter. Only written submissions are accepted and there is no responsibility to hear the claimant. The Ministry staff were heard and noted that the Claimant has refused to respond to the show cause. The Public Service Commission recommended a dismissal on the evidence that the Claimant had not responded. The allegation that the Claimant was on study leave was not confirmed and where the Claimant took study leave, this had no approval by the Ministry. The witness also could not explain how the claimant's studies were paid for by the government as the course outlined was contrary to the one issued by Director of Personnel Management. The basis of the dismissal was on the reasons of absconding duty.

21. The next witness was Nahashon Kimamo Thiongo, Principal Human Resource Management officer with the Respondent and based on the record on file gave evidence that the Claimant was dismissed from service for absconding duty. Upon employment, the Claimant was sent to various stations and in 1991 to 1999 the Claimant was sponsored for further studies while his salary was paid. Upon completion, he was posted to Machakos in May 1999 and it was reported that he left the station immediately and did not perform his duties as he reported and then left. He was issued with notice of absence from duty without cause as his whereabouts were unknown. His salary was stopped. On 1<sup>st</sup> October 1999 the Claimant was posted to Embu Provincial Hospital but never reported. He deserted work and was being paid without working. On 17<sup>th</sup> February 2000 the Ministry wrote to the Claimant on the issue of absconding as he had failed to report to Embu.

22. On the evidence that the Claimant absconded duty, on 21<sup>st</sup> December 2000 the Respondent held Ministerial Advisory Committee 1 which resolved that he be reinstated back into service. The Claimant again failed to report on duty and his salary was stopped and upon convening Ministerial Advisory Committee 2 it was recommended that he be reinstated and posted to a new Province. His salary was also reinstated.

23. The witness also stated that the second masters that the Claimant took was irregular as his course was not approved as his station was not known and failed to comply when told to report to Embu on duty.

24. The Claimant is not justified as the Claimant had been given time study and after completing, he did not give service to the government. Despite several efforts attempts to have the Claimant go back to work failed, he was given a hearing but he remained adamant. All this time the Claimant remained on pay. The claim should be dismissed as it has no merit or justification.

25. On cross-examination, the witness confirmed that the Claimant was posted to Embu but failed to report. He proceeded on study without following proper procedures. He was however never issued with a show cause on the irregular study leave and this issue was never included in the Ministerial Advisory Committee minutes. The course he took was running for 2 years in 2001 and 2002. There is no evidence when the Ministry cancelled funding for the study programme.

The witness also confirmed that there were three (3) Ministerial Advisory Committees;

1<sup>st</sup> Ministerial Advisory Committee was held on 21<sup>st</sup> December 2002 dealt with the Claimant absconding duty while at Machakos

Ministerial Advisory Committee 2 was held in May 2003 and dealt with the Claimant absconding duty while on study under Respondent sponsorship. He was supposed to finish and be posted.

Ministerial Advisory Committee 3 was held in May 2005 and was based on the Claimant absconding duty. His scholarship was withdrawn and salary stopped.

## **Submissions**

26. In submissions, the Claimant stated that upon his employment by the Public Service Commission and posted to the Ministry of Health and to various stations thereof. In May 1999 the Claimant was posted to Machakos Hospital and later to Embu hospital but the management in Machakos refused to release him to report to Embu that was to take effect on 1<sup>st</sup> November 1999. He remained at Machakos hospital but in March 2000 his salary was stopped and a show cause issued for absconding duty. Ministerial Advisory Committee 1 was convened and after hearing the case, the Claimant was reinstated. Within this time the Claimant had applied for study which was granted a scholarship by the Ministry, but his salary was stopped and a show cause issued for absconding. Ministerial Advisory Committee 2 was convened and his salary was reinstated and further held that he should be posted to a new province. Another show case was issued on the reasons of the Claimant absconding duty and being on pay without work and it recommended that he be dismissed and the salaries recovered through the Kenya Anti-Corruption Commission.

27. The Claimant thus submitted that his dismissal was unlawful and unprocedural as it failed to comply with the provisions of section 47 of the Employment Act where the employer must prove grounds of dismissal. The dismissal offends section 43 of the Act where the Respondent failed to give reasons for the dismissal. The provisions of section 45 were not adhered to as the dismissal was unfair as there was no hearing of the Claimant before his case was dismissed and a decision to remove him from service was made.

28. The Claimant in submissions challenged the defence case in that all the witnesses insisted that the Claimant was dismissed for persistent reporting to work which was not the case as he had reasons which were never given a hearing. The allegations that the Claimant took an irregular study leave was not supported in evidence and the hearing of the case by Public Service Commission was one sided as crucial material and evidence was not made available before a decision to dismiss was made.

29. The Claimant further submitted that this is a case of unfair dismissal as the reasons and procedure applied was irregular. The Claimant relied on the case of **Sylvester Odour Oyile versus Prime Fuels (K) Limited [2013] eKRL**. Where the Court held that the terminating party must give the reason or reasons

for termination which reasons must be fair, justification and valid as required under sections 43 and 45.

30. Where the Respondent relied on the provisions of section 44 of the Employment Act, for the employer to issue summary dismissal the Court must examine and be satisfied that the reasons given are valid, justifiable and fair as this was not the case here.

31. The Respondent submitted that this is a case where the Claimant absconded duty on several occasions in 1999, while he was on posting to Machakos Hospital and when he was posted to Embu Hospital he did not report. In both cases he was issued with show cause letters and was reinstated and his salaries stopped resumed. This notwithstanding, the Claimant took study leave unprocedural and also failed to report on duty and while away continued earning salaries without working. He became a habitual absconder. The Claimant was heard before Ministerial Advisory Committee on 21<sup>st</sup> December 2000 and on 30<sup>th</sup> April 2003 and despite these efforts, he continued to be absent from work. Other third Ministerial Advisory Committee meeting in May 2005 it was recommended that the Claimant be dismissed from service and that he should return all salaries paid while he was not at work.

32. In this case the Respondent complied with the provisions of section 41 of the Employment Act. Before dismissal the Claimant was given a hearing before Ministerial Advisory Committee that recommended his dismissal and was confirmed by the Public Service Commission. The offences of absconding duty are regulated under section 44 of the Act to which the Respondent complied with and thus the dismissal was justified and had a basis. The Respondent relied on **Banking, Insurance & Finance union (Kenya) versus Barclays Bank of Kenya Ltd [2014] eKLR** where an employee who absconded duty and failed to attend hearing of his case was found have been fairly dismissed.

33. In this case the Claimant walked out on his employment and cannot be said to have been unfairly dismissed. When he was resisted on two occasions, he did not report to allocated station. Due process was followed in the dismissal of the claimant. When he refused to report on duty at Embu hospital, a show cause was issued and he appeared before Ministerial Advisory Committee and was heard and reinstated. Upon his further refusal to report on duty, another Ministerial Advisory Committee was convened and he was heard and reinstated and was to be posted to a new province but the Claimant did not oblige as he continued to be absent from work and earned a salary irregularly.

34. The Claimant is not entitled to his claims as the dismissal was justified and should be confirmed as valid.

### **Determination of the issues**

Whether the dismissal was unfair

Whether there are remedies

35. Before examining into the issues set out above, I wish to refer parties herein to the requirements set out under Rule 4(e) of the industrial Court (Procedure) Rules.

*4. A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out—*

...

*(e) Any principle or policy, convention, law or industrial relations issue or management practice to be relied upon*

36. Parties are required to set out and indicate in the pleadings or submissions, *any principle or policy, convention, law or industrial relations issue or management practice* relied on. This gives the other party and the Court the basis of the claim or defence well in advance of putting this at the submissions stage. The nature of proceedings before this Court is to allow the other party have the evidence to be relied upon

well in advance which is a procedure slightly different from the Civil Procedure Act and the Rules thereto.

37. It was the claimant's evidence that upon his employment by the Respondent Ministry of Health he diligently served at various stations, he was able to take sponsored studies from 1991 to 1999 after which he was posted to Machakos District Hospital in May 1999 and while there he started the Amenities Ward project but before long he was transferred to Embu Provincial Hospital with effect from 1<sup>st</sup> November 1999 but was not released by Machakos Hospital management. He remained at Machakos Hospital but he was served with a show cause letter and his salary stopped on grounds of absconding duty. This was resolved by Ministerial Advisory Committee 1 and he was reinstated. He was sponsored for a Masters programme from 2001 at the University of Nairobi but before completing he was again issued with a show because letter on grounds of absconding duty and his salary was stopped. He was heard by Ministerial Advisory Committee 2 and reinstated and his salary paid. He was issued with a 3<sup>rd</sup> show cause letter and when Ministerial Advisory Committee 3 met, he was dismissed from service for absconding duty. This was confirmed by the PSC. His appeal was rejected.

38. The Respondent on their part assert that the Claimant was a habitual absconder and his eventual dismissal was justified as he had been reinstated on two occasions and had not respected direction to report on duty. The Respondent then decided to dismiss the Claimant and have him refund the paid salaries on account that he had not earned such salaries.

39. The question of summary dismissal, where an employer does terminate an employee, sections 43 and 47 of the Employment Act applies. In a case of summary dismissal the legal requirements are set out under section 47. The burden is upon the employee complaining of unfair termination of employment or wrongful dismissal to prove such dismissal as wrongful. Section 47(5) of the Employment Act. The section provides that;

**For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

40. An unfair dismissal may be proved on the grounds that there was no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be varied based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer. On the side of the employer, apart from the requirement in section 47(5) of the Employment Act to justify the grounds of termination, section 43 demand that the employer prove the reasons for the termination, while section 45(2)(a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons.

*43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

41. In a case of summary dismissal for fundamental breach of contractual obligations or gross misconduct, section 41(2) of the Employment Act obliges the employer to hear and consider any representations which the employee may wish to make. Section 41 thereof creates a statutory obligation upon employers to notify and hear representations from employees when contemplating termination the employment contract. This is what is called *natural justice* under the common law. In the Industrial relations/employment relationship it is known as *procedural fairness*. Dismissals pursuant to section 44 of the Employment Act, 2007 are also subjected to the requirements of procedural fairness in section 41

of the Employment Act, 2007. the implications and import of section 41 of the Employment Act, 2007 and the requirements of procedural fairness is now established ***Gilbert Nyabuto Mosome v the Standard Limited, Cause No. 697 N of 2009*** and ***Jorum Gakumo v Thika Coffee Mills Ltd. Cause No.693 of 2012,***

42. In this case the Respondent issued the claimants with a show cause letter dated 23<sup>rd</sup> October 2000 that stated;

*23<sup>rd</sup> October 2000*

*RE: ABSENCE FROM DUTY WITHOUT PERMISSION*

*My attention has been drawn to the fact that you failed to honour the Provincial Medical Officer's posting order No.12/99 dated 21<sup>st</sup> October 1999. You were supposed to have reported to your new station by 1<sup>st</sup> November 1999, to date you have not reported and your whereabouts still remain unknown.*

*... The purpose of this letter is to afford you the opportunity to show because why the contemplated action should not be taken against you.*

43. Upon this first show cause letter o 21<sup>st</sup> December 2000 Ministerial Advisory Committee 1 met and deliberated on his case and made a finding;

...

*The medical superintendent, Machakos Hospital, while forwarding Dr Sewe's letter said that they still needed him in the station.*

*Resolution*

*The committee deliberated on his case and resolved that he be reinstated in the service ...*

44. While the above events were ongoing, the Claimant applied for a Master's in Public Health and was admitted. He received sponsorship from the Respondent Ministry. On 8<sup>th</sup> October 2001, the University of Nairobi wrote in confirmation of the admission of the claimant. On 13<sup>th</sup> March 2002, the University outlined the courses undertaken by the Claimant for Part I. On 13<sup>th</sup> March 2002, the claimant's sponsorship had been stopped and could not remain on study; he therefore wrote and requested the Respondent to post him to Eldoret or Kisumu Hospitals and requesting that he should not be taken back to Eastern Province.

45. However, on 5<sup>th</sup> July 2001 a 2<sup>nd</sup> show cause was issued stating;

*5<sup>th</sup> July 2002*

*ABSENCE FROM DUTY WITHOUT PERMISSION*

*It has been reported to this office that you deserted your duties with effect from 1<sup>st</sup> November 1999 when you failed to honour the Provincial Medial Officer's posting from Machakos District Hospital to Provincial General Hospital, Embu.*

*Following your desertion you continued receiving salary and allowances up to and including 30<sup>th</sup> April 2001 to the tune of Kshs.436, 798/- which you are hereby required to refund to the government.*

*... You are hereby called upon to show because why such action should not be taken against you and your representations, if any, should be received in this office within 21 days ...*

46. Therefore in essence from 21<sup>st</sup> December 2000 when Ministerial Advisory Committee 1 met and reinstated the claimant, he was not able to resume work as he had commenced his studies at the University of Nairobi under part sponsorship by the Respondent Ministry. The request to be posted to a new station on 13<sup>th</sup> March 2002 was based on the fact the part-funding was not adequate.

47. On 30<sup>th</sup> April 2003 Ministerial Advisory Committee II met to deliberate on the claimant's case upon the issuance of the second show cause letter. The meeting resolved;

#### *RESOLUTION*

*The committee deliberated on Dr Sewe's case and resolved that his salary be released as per the MAC meeting held on 21<sup>st</sup> December 2000 resolution and he be posted to a new province other than Eastern on completion of his post graduate degree course.*

48. By the time Ministerial Advisory Committee 2 was held, all factors with regard to the claimant's absence from duty had been addressed and he was reinstated back to work and his salaries resumed. However, Ministerial Advisory Committee 2 did not just reinstate the claimant, his reinstatement was conditional – he was to be posted to a new province other than Eastern and upon his completion of post graduate studies. This was on 30<sup>th</sup> April 2003 and previously on 13<sup>th</sup> March 2002, the Claimant had requested for a new posting noting that he was no longer able to finance his studies.

49. In the entire process of pleadings, hearing and submissions, the Respondent failed to outline how the Claimant was dealt with after Ministerial Advisory Committee 2. This is essentially on threefold;

First, was there a Respondent o the claimants request on 13<sup>th</sup> March 2002?

Secondly, was he posted to a new province other than Eastern: and

Thirdly, what was done after the Claimant completed the study he had been sponsored by the Respondent Ministry?

50. These are questions the Respondent has failed to address herein. What is clear is the report filed by Dr Simon W Mueke, Head of Obstetrics and Gynaecology Services Division and dated 24<sup>th</sup> March 2010. According to his updates on the claimant's case, he notes;

...

*Oct. 2003 Dr Sewe was upgraded again while on discipline/not working, notwithstanding where he got the recommendations, at least not from his former station*

*Mar. 2004 Dr Sewe went to Machakos looking for a letter to show that he was working in the hospital and also to recommend him for the post of Deputy Director of Medical Services but the medical Superintendent refused to give him; it was also discovered that he was getting his salaries through the Machakos General Hospital payroll but getting pay slips from Salaries Section in Afya House.*

*Jul. 2004 The Ag Medical Superintendent Machakos General Hospital in his letter ... informed this office that the officer was not working there and his pay slip indicated that he was under station 8490 but he collected pay slips at the headquarters.*

...

Sep. 2004 ...

*The DDMS/Head of CRHS undertook to unearth malpractices in the Human Resource (then Personnel) Department in Afya House and established that there was someone in Salaries Section Dr Sewe was colluding with to defraud the Ministry of money. Consequently, the Permanent Secretary, Ministry of Health withdrew Dr Sewe's scholarship*

*Oct. 2004 his salary was stopped yet again, for the third time, w.e.f 1/10/2004. The Med Surp, Machakos, vide c.4/134 dated 25/10/04, reconfirmed that Embu PGH required a gynaecologist more than Machakos GH at the time. Dr Sewe was posted there because there was none at Embu PHG while there were 2 in Machakos*

...

50. From these highlights of the updates, what is clear is that after Ministerial Advisory Committee 2 deliberations and reinstatement of the claimant, various officers still reopened resolved issues for various reasons some being that the Claimant had been reinstated back in office in collusion with personnel staff; that he was not working at Machakos and had been posted to Embu hospital where he was needed; and his salary should be stopped. Beyond this, there was a new recommendation to stop his salaries that had been reinstated on following Ministerial Advisory Committee 2.

51. On this basis on 18<sup>th</sup> March 2005 the 3<sup>rd</sup> show cause letter was issued thus;

*18<sup>th</sup> March 2005*

*RE: DESERTION FROM DUTY*

*It has been reported to this office that you deserted your duties after you were posted from Machakos to Embu. It is further noted that you have been earning government money without working since 1999.*

*Consequently, you are required to:*

*i. Show cause why you should not be dismissed from service on account of desertion from duty with effect from 1.6.99. This should be within twenty one (21) days from the date of this letter.*

*ii. Refund to the government the kshs.3, 843,277.00 paid to you as salary and allowances for the period 1.6.99 to 31.8.2004. This is because you had not worked for the period of payment. We are in the process of establishing any additional liabilities owed to the government.*

52. Ministerial Advisory Committee 3 is crucial here. From this meeting, the Claimant was dismissed from service with effect from 1<sup>st</sup> June 1999. However this was not communicated to the Claimant until 29<sup>th</sup> August 2009 vide letter from the Respondent Ministry that also informed the Claimant that he had a right to apply for a review of the decision to dismiss him to the Secretary, Public Service Commission of Kenya. This letter of dismissal was sent via registered post and I take it must have taken time to reach the claimant. He lodged his appeal vide his letter dated 21<sup>st</sup> April 2010. This appeal for review was rejected and communicated to the Claimant vide letter dated 29<sup>th</sup> September 2010.

53. Ministerial Advisory Committee 3 is also crucial as there was a decision made against the Claimant that all his paid salaries and allowances for the period of 1<sup>st</sup> June 1999 to 31<sup>st</sup> August 2004 should be recovered. His case was also referred to the Kenya Anti-Corruption Commission for corruption investigations and recovery of the monies owed to the government.

54. So where was the Claimant from 1<sup>st</sup> June 1999 to 29<sup>th</sup> September 2010? Was he at work and if not at work was he absent with authority? I find that based on a the decision in Ministerial Advisory Committee

1, 2, and 3, the issues relating to the whereabouts of the Claimant from 1<sup>st</sup> June 1999 to 30<sup>th</sup> April 2004 are resolved by Ministerial Advisory Committee 1 and 2. The deliberations of these meetings with regard to matters before them were dully assessed, the Claimant was invited to give his defence and the outcome decisions resolved. To go back to issues already settled by these very high level committees of the Respondent Ministry to form the basis of Ministerial Advisory Committee 3 is an unfair process. Where new evidence arose with regard to instructions given to the Claimant on his absconding duty, failure to comply with lawful orders or non-compliance with directions as given by the employer, this should have been treated outside settled matters as in Ministerial Advisory Committee 1 and 2. To go back on similar matters/issues/cases without separating what had been resolved, amounted to double jeopardy and thus victimisation in labour relations.

55. Allegations that there are officers inside of the Respondent ministry who were helping the Claimant access records, reinstatement, payments or access services such as sponsorship, these are matters that the Respondent had the duty to investigate, invite the concerned personnel officers to Respondent and where the Claimant was required as a witness or as a person to offer his defence, this duty vested in the Respondent Ministry to initiate and not the claimant. It is however not lost to the Court that various officers of the Respondent may have colluded directly or indirectly to facilitate malpractices, but these are not for the Court to address herein – the release letter from Machakos, the second sponsorship of the Claimant for Masters in Public Health, failure to issue posting letter despite request and Ministerial Advisory Committee 2 recommendations. All these are processes done with serious flaws that were sanctioned internally in the Respondent Ministry, but the duty to deal is vested in the respondent.

56. Noting the provisions of section 47 of the Employment Act, the Claimant hence has addressed the fact that his dismissal lacked substance and was unprocedural. Where there was established fault on the part of the Claimant in the course of his work, due process required that before his summary dismissal, the Respondent should have complied with section 41, 43, and 47. These are mandatory steps that give an employee faced with serious suspicions such as the d] Claimant had, that of fraud, to have a chance to defend himself. To summarily terminate the Claimant without affording him the opportunity to be heard resulted in an unfair process and the resultant effect of the dismissal a nullity.

57. The defence offered by the Claimant in the course of the various investigations are that he procedurally went through all the stages of Ministerial Advisory Committee and was reinstated on good cause and to thus be dismissed by Ministerial Advisory Committee 3 on similar grounds and without invitation to defend himself or being informed of his dismissal from 2005 to 2010 was an unfair procedure. The subsequent proceedings to recover salaries and monies paid to the Claimant in such circumstances had no basis.

58. The acts of omission or commission by the Respondent through its officers cannot be visited against the claimant. To do so in a work environment is tantamount to unfair labour practice outlawed under Article 41 of the Constitution a matter addressed by this Court in **Frederick Kamau Kariuki versus Bank of India, Cause 2424 of 2012**. The Respondent witness Bernard Otieno Ngaa admitted that at the appeal stage, the Public Service Commission relied on the record and any clarifications were only done by the Respondent Ministry. The Claimant was not called despite the fact that he is the one who was pursuing a resolution of his case and move to the PSC. The Public Service Commission decision was eschewed to one side lacking in a material way any submissions or the presence of the claimant. Where the Rules of the Public Service Commission disciplinary process go contrary to the Employment Act in terms of complying with the provisions of section 41 and 43, such a process is a nullity and has no legal standing. It thus resulted in an injustice not to hear the Claimant noting the serious charges that he faced and convoluting issues going back to matters already addressed at Ministerial Advisory Committee 1 and 2. I find the dismissal of the Claimant was thus substantively and procedurally unfair.

## **Remedies**

59. On the finding on the finding that the summary dismissal of the Claimant was unfair, the Claimant is entitled to his terminal dues. The Claimant is seeking notice pay based on his last salary at KShs.100,840.00; salary and allowances from September 2004 to August 2020 his retirement age; and

compensation. In this regard on the finding that the dismissal lacked merit and was unjustified in this case section 35 and 36 of the Employment Act provide for notice pay at one month's salary and are awarded at kshs.100, 840.00.

60. The Claimant for salaries and allowances from 2004 to August 2020 is made on the basis that he expected to retire in August 2020 upon attaining the legal retirement age. The Claimant was dismissed from service vide letter dated 29<sup>th</sup> August 2009 that was made effective from 1<sup>st</sup> June 1999. Upon the grant of notice pay that is justified here for the unfair process the Claimant was taken through, the Court shall only grant salaries and allowances due as at the date of dismissal this being 29<sup>th</sup> August 2009 and not 1<sup>st</sup> June 1999. There is no merit as to why the dismissal notice was back-tracked to 1<sup>st</sup> June 1999 on the face of the findings herein. The Claimant is thus awarded salaries and allowances due for the 64 months he remained an employee of the Respondent and was not remunerated until his dismissal. The Claimant is granted Kshs.6, 050,400.00. The recovery proceedings initiated on an eschewed process with the Kenya Anti-corruption Commission is set aside; such a process lacks justification on the finding that the dismissal of the Claimant was unfair.

61. Reinstatement though not specifically pleaded was intimated. This shall not be granted in this case. The work relations at the Respondent have changed since the dismissal of the claimant, he can always put his skills into good use in the current sectors he is working in. The Claimant is therefore awarded compensation for the unfair dismissal at 6 months' pay all being Kshs.605, 040.00.

62. As I wind up the matter herein, I wish to single out both Counsels for the parties, Mr D O Rakoro and Ms Akuno Beatrice, State Counsel from the Attorney General's office for the meticulous work they have put in this matter. The submissions details were exceptional and the State Counsel, though taking over the matter from previous officers took it upon herself to ensure the ends of justice were met through her appearance and ensuring the Respondent was heard on merit. The Court appreciates these efforts immensely.

### **Conclusion and Orders**

**In conclusion, I do find and declare that the summary dismissal of the Claimant was unfair in procedure and substance or in accordance with justice and equity and therefore enter judgement for the Claimant against the Respondent for;**

- a. **Notice pay at Kshs.100,840.00;**
- b. **Salaries and allowances due at kshs.6,050,400.00;**
- c. **Compensation at kshs.606,040.00;**
- d. **The Claimant shall be awarded costs at 50% percent.**

**Delivered in open Court dated and signed in Nairobi on this 25<sup>th</sup> day of May 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

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