



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NYERI**  
**CAUSE NO. 119 OF 2013**

**(Formerly Civil Case No. 13 of 2011 at the High Court of Kenya in Embu)**

**SAMMY BENTLY ALUSO.....1<sup>ST</sup> CLAIMANT**

**CHARLES KARANI.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**COMMISSIONER OF POLICE.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22<sup>nd</sup> May, 2015)

**JUDGMENT**

The claimants filed the plaint on 02.02.2011 through Eddie Njiru & Company Advocates. The claimants prayed for judgment against the respondents for:

- a. Reinstatement of the plaintiffs to the Force and payment of the plaintiffs' full salary and benefits from the period between 12.06.2005 to the date of reinstatement or any other date deemed just and fair by the court for they (plaintiffs) have remained to be police officers within the meaning of section 44 of the Police Act, Cap.84, Laws of Kenya from the time they were interdicted until their wrongful dismissal from Police Force by the 1<sup>st</sup> Defendant on 4<sup>th</sup> March, 2010.
- b. Damages for wrongful dismissal.
- c. Cost of the suit and interest thereon at court rate.
- d. Any further relief deemed just and fit to grant.

The defendants filed the statement of defence on 08.05.2011 and prayed that the plaintiff's suit be dismissed with costs.

The case came up for hearing on 11.03.2014 when with the consent of the parties' advocates, the following orders were made:

- a. Case be determined on the basis of documents and pleadings on record.

- b. Issues for determination are whether the claimants' termination was unfair and whether claimants are entitled to any of the reliefs as prayed for.
- c. Parties to file written submissions. Claimants to file and serve by 25.03.2015 and the respondent by 8.04.2015.
- d. Highlighting of submissions on 29.04.2015 at 9am for 20 minutes, each advocate 10 minutes.
- e. Costs in the cause.

The parties filed the submissions and opted to fully rely on the submissions without making the highlights.

The **1<sup>st</sup> issue** for determination is whether the claimants' termination was unfair. For the claimants it was submitted that the High Court in **Sammy Bentley Aluso and Another –Versus- The Commissioner of Police and 2 Others, Judicial Review Application No. 22 of 2009 at Embu** in a ruling delivered on 27.09.2010 (W.Karanja J.) found that the claimants' dismissal was unlawful because it was in disobedience of the stay orders given at the leave stage stopping the disciplinary proceedings ; and further, the orderly room proceedings leading to the claimants' termination were in violation of the law, without jurisdiction, null and void and therefore the court issued certiorari to quash the proceedings. It was submitted that once the court found that the dismissal was unlawful, the court's decision remained binding to the world and the court in the present case should find as much.

For the respondents it was submitted that in the judicial review proceedings the court found that the dismissal was unfair but the court lacked jurisdiction in the judicial review application to make an order of reinstatement.

The court has considered the submissions made for the parties. There is no dispute that the High Court in the cited ruling in the judicial review proceedings found that the dismissal was unlawful. The decision of the High Court was not reviewed or set aside on appeal as there was no such review or appeal. It remains a valid finding by a court of competent jurisdiction and this court finds as much; the claimants' dismissal was unfair as it was unlawful. In such circumstances, the court considers that it will not be useful for this court to revisit the issues and analysis of the merits of the dispute leading to the finding that the claimants' dismissal was unlawful as the facts, the law and the parties have not changed at all or substantially. The court finds that such inquiry will in any event be superfluous as it will not serve a constructive purpose.

To answer the 1<sup>st</sup> issue for determination, the court finds that the claimants' dismissal was unfair.

The **2<sup>nd</sup> issue** for determination is whether the claimants are entitled to the remedies as prayed for. The respondents submitted that the claimants were not entitled to any remedy and if any, it should be compensation through one years' salary. The claimants submitted that they be awarded Kshs. 5 million for compensation for unfair treatment, economic hardship and deprivation of their right to a decent livelihood for a period of 10 years being the date of interdiction on 27.06.2005 to date. Further during interdiction from 27.06.2005 to 30.03.2010(date of dismissal) it was submitted that the claimants were subjected to the criminal trial for which they were acquitted and they are entitled to the release of their withheld half salary over the period; their full monthly salary having been Kshs.24,935.00 each. The months over the period, it was submitted for the claimants, made 57 months from the date of interdiction on 27.06.2005 to the date of dismissal on 30.03.2010 being Kshs.12,467.50 times 57 months making Kshs.710,647.50 for each claimant.

The court has considered the submissions and makes findings that the claimants were unlawfully terminated from employment and they are entitled to compensation and other remedies. The court makes specific findings as follows:

- a. The court has considered the long period of time from the date of interdiction on 27.06.2005 and

then the date of dismissal on 30.03.2010 during which the claimants have been out of work. The court finds that in view of the lapsed time and in view of lost opportunities in terms of training and promotions, it will not be convenient and therefore just to reinstate the claimants into employment. The court has considered the ranking and command structure of the Police Service and it is the opinion of the court that should the claimants be reinstated they may be required to serve under officers who substantially would be their juniors and therefore not desirable. The prayer for reinstatement will therefore be declined.

b. The court has found that the dismissal was unfair and the court further finds that the claimants are entitled to the withheld half salaries from the date of interdiction to the date of the dismissal being **Kshs.710,647.50** for each claimant as submitted.

c. In view of the unlawful termination, in view of the aggravating situation that the termination was in breach of the stay order made in the judicial review application and taking into account the claimants' long service, the court finds that each claimant is entitled to 12 months' salaries for unfair termination at Kshs. 24, 935.00 per month making **Kshs.299,220.00** each.

d. From 30.03.2010 to the date of this judgment the claimants were not sure of the destiny of their employment. They were entitled to consider themselves in the respondents' employment until the present suit was determined. The court finds that they are entitled to the full pay from March 2010 till the date of this judgment making 61 full months. The court finds that each of the claimants will therefore be paid Kshs.24,935.00 times 61 months making **Kshs.1,521,035.00** each. While making that finding and award, the court upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’.** The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.”

e. The claimant's case was that they were due to retire in June 2019. The court considers that as at the date of this judgment the claimants have already attained the age of 50 years. They prayed for any further relief the court may deem fit and just to make. The court has considered the claimants' long police service that took away all their youthful energy and brain. The court has further considered the finding that reinstatement would not be appropriate in the face of the unlawful termination. In the circumstances, the court considers that it will be just for the claimants to be

deemed to have retired from the police service under the 50 years' rule with unbroken service from their respective dates of appointment. The court considers that the date of this judgment will be a just effective date of that retirement with full pension benefits paid in accordance with the rates as provided for in the Pensions Act and regulations.

In conclusion, judgment is entered for the claimants against the respondents for:

- a. The declaration that the termination of the claimants' employment as police officers was unlawful and unfair.
- b. The respondents to pay each claimant **Kshs.2,530,902.50** by 1.08.2015 failing interest at court rates to be payable thereon till full payment.
- c. Each claimant is hereby deemed to have served without a break in the Police Service of the Republic of Kenya from the respective date of appointment and is deemed to have retired from that service under the 50 years' rule with effect from the date of this judgment, 22.05.2015, with full pension benefits to be paid in accordance with the rates as provided for in the Pensions Act and regulations.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 22<sup>nd</sup> May, 2015.**

**BYRAM ONGAYA**

**JUDGE**