



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 32 OF 2013**

**(Formerly Civil Case No. 159 of 2009 in the High Court at Nyeri)**

**SIMON GIKUNGU KARIUKI..... PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

**(Before Hon. Justice Byram Ongaya on Friday 31<sup>st</sup> July, 2015)**

**JUDGMENT**

The plaintiff filed the plaint on 05.11.2009 in person and prayed for judgment against the respondent for :

- a. Payment of salary for 83 months at the rate of Kshs.10, 717.00 per month.
- b. Costs of the suit.
- c. Interest on (a) and (b).
- d. Any other or better relief the court may deem fit.

The defendant filed the defence on 2.12.2009. The defendant prayed that the suit be dismissed with costs.

The plaintiff's case is clearly set out. The plaintiff was employed by the government as a civil servant in the position of an Assistance Chief in the Office of the President, Provincial Administration and Internal Security with effect from 27.11.2001. By the letter dated 13.03.2002 the plaintiff was suspended from the service. The suspension was on account of an allegation that at the time the claimant was employed he failed to disclose that he had been convicted and sentenced in a court of law in February 1995 for the offence of stealing, a fact which the plaintiff failed to disclose to the government. The claimant was therefore suspended from performing his official duties until the matter was investigated, finalised and determined.

By the letter dated 23.04.2004 the claimant received a letter on gross misconduct to show-cause why he should not be dismissed from the service on account of failure to disclose the alleged conviction at the time he applied for the job. The letter confirmed the earlier suspension as imposed by the letter of 13.03.2002.

The ministerial human resource advisory committee deliberated the plaintiff's case and recommended at the meeting of 28.04.2005 that the plaintiff be admitted into the permanent and pensionable establishment and he be dismissed from the service with effect from 13.03.2002 on account of gross misconduct. The minutes show that the plaintiff had replied to the show cause letter and answered as follows:

- a. That he filled the application form with the assistance of somebody else since it was his first time

- to fill the PSC 2 forms.
- b. That for the short duration he had been working as an Assistance Chief he had no complaints filed against him by his subjects.
  - c. That his appointment may not have gone well with his enemies.

In recommending the dismissal the committee considered that the offence in issue was serious and the omission concerning the officer's criminal record was unacceptable.

The letter dated 5.11.2008 shows that the Public Service Commission considered the plaintiff's application for review regarding his dismissal from the service and the Commission disallowed the appeal on account of gross misconduct and the case was closed. Another letter dated 28.11.2008 filed by the plaintiff shows that the ministry informed the plaintiff that the Commission considered but disallowed the plaintiff's application for review of the Commission's decision regarding retirement from the service in the public interest and decided the case be closed. The copy of the letter dated 28.11.2008 was forwarded to the plaintiff by the ministry's letter dated 16.04.2009 after the plaintiff complained about failure to receive feedback on his appeal by his letter dated 16.04.2009.

The **1<sup>st</sup> issue** for determination is whether the plaintiff was retired in public interest or dismissed from the public service; and whether the reason for termination was valid. The court has noted the disturbing and contradictory record on that issue. The letter dated 5.11.2008 shows that the Public Service Commission considered the plaintiff's application for review regarding his dismissal from the service and the Commission disallowed the appeal on account of gross misconduct and the case was closed. That letter means, if the Commission was the final authority in the matter, the plaintiff was dismissed from the service. Another letter dated 28.11.2008 filed by the plaintiff shows that the ministry informed the plaintiff that the Commission considered but disallowed the plaintiff's application for review of the Commission's decision regarding retirement from the service in the public interest and decided the case be closed. That letter suggests that the plaintiff was retired in the public interest but it has no basis by way of exhibiting the Commission's letter conveying the decision in that regard. Thus, the court finds that the Commission dismissed the claimant from public service on account of gross misconduct by failing to disclose his criminal record at the time the plaintiff completed the relevant application forms for the employment. It was not denied by the plaintiff that he possessed the criminal record as it was levelled against him and that he failed to disclose the criminal record at the time he applied for the job as it was again levelled against him. The court finds that the reason for termination was valid as it was genuine and it was not disputed between the parties.

The **2<sup>nd</sup> issue** for determination is whether the claimant would be entitled to pay for the period he was on suspension. The suspension was effective 13.03.2002. The show cause notice was dated 23.04.2004. It is on 16.04.2009 that the ministry wrote to inform the claimant's advocate about retirement in the public interest. The respondent admits in the submissions that the relevant letter was posted to a wrong address and there is no evidence that the plaintiff received the letter when it was reposted. The court finds the outcome of the appeal or review in the Commission's decision was communicated by the ministry's letter of 16.04.2009 and that is the date the cause of action accrued so that the suit was filed on 05.11.2009 within the 3 years of limitation prescribed under section 90 of the Employment Act, 2007.

The guiding principles on pay during the period of suspension were set out in the case of **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** where this court stated thus,

**“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary**

**process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional."**

In this case the plaintiff was found culpable in view of the allegations that were levelled against him and the termination followed accordingly. The claimant did not dispute the reason or procedure for the termination. Applying the principles as set out in the cited case, the court finds that the plaintiff is not entitled to the pay throughout the period of suspension as prayed for.

The court has considered the confusing manner that the relevant government officers communicated to the claimant during the ensuing disciplinary process and further considered the unexplained delays towards conclusion of the disciplinary case. Thus the court finds that in such circumstances, it will be fair that each party carries own costs of the suit.

In conclusion the plaintiff's suit is dismissed and the respondent is directed to serve this judgment upon the Public Service Commission within 7 days from the date of this judgment for the Commission to investigate whether its decision in the plaintiff's disciplinary case was communicated and implemented accurately and for appropriate Commission's action in accordance with the Commission's constitutional powers and functions.

**Signed, dated and delivered in court at Nyeri this Friday, 31<sup>st</sup> July, 2015.**

**BYRAM ONGAYA**

**JUDGE**