



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 531 OF 2013

CLEMENT MUREITHI CLAIMANT

VS

THE HON. ATTORNEY GENERAL & ANOTHER.....RESPONDENT

Mr Serem for the Plaintiff

M/s Kassim for the Respondent

JUDGEMENT

1. The Plaintiff, Clement Mureithi is presently a farmer. He was previously employed as a police constable working with Criminal Investigations Division, Kakamega as an investigator. The Plaintiff filed a plaint at the High Court at Nairobi on 31st August, 2012. The suit was subsequently transferred to this court;

Facts of the Claim

2. The Plaintiff was employed on 1st May 1979 and worked as a police constable until 12th June 2008 when he was given a letter of dismissal.
3. The plaintiff avers that on 4th April, 2008, he was assigned to investigate a case of robbery with violence where Mrs Margret Aoko and her family were attacked by a gang of about ten (10) men who robbed her valuables in her home at Khayega within Kakamega.
4. The Plaintiff arrested four suspects and arraigned them before court vide Kakamega CID 921/156/08 CF 2058/08. On 18th May 2008, the Plaintiff arrested four other suspects in relation to the same case he was investigating and amongst them was one Kai nyama from whom the plaintiff had recovered a remote control of a television that was part of the valuables stolen.
5. The Plaintiff states that he removed Kai nyama from custody for interrogation and booked him on temporary removal to that effect and later returned him after alerting the report officer on duty Alex Kipkemboi to indicate in the occurrence book.
6. On 22nd May 2008 the four suspects arrested on 18th May 2008 escaped from custody. The Plaintiff was arrested and detained on suspicion of being an accomplice to the escape of the prisoners.
7. The Plaintiff was in custody for seven days and was subjected to orderly room proceedings being

- charged with the offence of negligence in the performance of his duties as a result of failing to book in the occurrence book a return to custody of the prisoner.
8. The plaintiff was fined Kshs 1500 after the orderly room proceedings and was later issued with a dismissal letter on 18th June 2008. The Plaintiff states that the escapee Kai nyama was later arrested and the escapee exonerated the plaintiff from being part of the escape plan organized by the four prisoners.
 9. The Plaintiff states that the two officers No 40013 PC Alex Kipkemboi and No 910020 PC (W) Grace Gikombo who were charged with him bore the greatest responsibility of the escape as they were in charge of security of prisoners as cell sentry and report office personnel but were reinstated yet they had been dismissed over the same issue.
 10. The Plaintiff, states that he appealed against his wrongful dismissal to the Commissioner of Police vide letter dated 2nd July 2008 and 11th September 2009 but his appeal was not given consideration. The Plaintiff states that as a result of the wrongful dismissal he has suffered serious economic and social loss personally and his family.
 11. The Plaintiff states that he wrote a demand letter which was not acted upon by the Respondent. The Plaintiff seeks reinstatement to his employment and payment of general damages for wrongful dismissal from the police service.
 12. The Plaintiff filed a witness statement on 31st August 2012 which he adopted as his sworn testimony in this case. The statement supports the narrative above in all material respects. The Plaintiff explained that on 18th May 2008 when he returned Kai Nyama to custody the occurrence book was busy, he then requested Constable Alex Kipkemboi to book the person later.
 13. The prisoners escaped in the night of 22nd May 2008. The Plaintiff denies any involvement or negligence in the escape. The escapee was booked at 11 a.m. in the occurrence on that day. The Plaintiff was not in charge of the prisoners in custody. He was however charged for failure to indicate in the occurrence book escape of prisoners which allegation was not true.
 14. At the time of dismissal, the Plaintiff earned Kshs 18,000 per month and was paid Kshs 1,600 house allowance, he was paid Kshs 30,000 clothes allowance per year. The retirement age was 55 years, but the Plaintiff was dismissed at 50 years of age. The statement of Kai Nyama under inquiry exonerated the Plaintiff from any complicity in the escape.
 15. The Plaintiff was now fifty six (56) years old but is not pensionable due to the summary dismissal. The Claimant seeks reinstatement and in the alternative payment of damages. The Claimant admits previous record of five 5 disciplinary cases and the last one was in 1994. The Plaintiff said that he did not receive the record and decision of the orderly room proceedings to enable him file a proper appeal. That he nevertheless filed an appeal but it was not considered.
 16. The Plaintiff states that the Respondent should have been lenient on him in view of his 29 years' service to the force. He had completed the last thirteen (13) years with a clean record.

Response

17. The Respondent relies on the orderly room proceedings, default sheet, Memorandum of Appeal dated 8th July 2008 and Headquarters Disciplinary Appeal Board minutes of the meeting held on 21st April 2009 in support of its case.
18. The Respondent states that the plaintiff removed one of the suspects from the cells on 22nd May 2008 and booked him for temporary removal in the occurrence book but failed to book him on return. It was later discovered that the said suspect was missing from the cells and preliminary

investigations revealed that the escapee was aided as the windows and doors were intact.

19. The sentence of Kshs 1,500 fine by the orderly from proceedings was later enhanced to a dismissal by the provincial police officer. The Claimant appealed the decision on 13th October 2009 and he was informed that the appeal was unsuccessful.

20. That the Plaintiff admitted to have made a mistake by not filling in the occurrence book when he returned Kai Nyama to custody. The Respondent called Mr Titi Ayiera a legal officer in the 2nd Respondent's office. The witness told the court that an officer cannot delegate an entry to the Occurrence Book and failure to record amounts to gross misconduct.

Determination

21. In the Appeal record produced by the Respondent, the Claimant under item 10 and 11 stated that he had last committed a disciplinary offence on 2nd August 1994 and had a clean record for 13 years in which period he had worked with dedication and integrity.

22. In total, the Plaintiff had served the police for 29 years and was 50 years at the time of dismissal with only five years remaining to retirement. The Plaintiff accepted he was guilty of negligence by delegating an OB entry to Constable Alex Kipkemboi. He prayed that the sentence be commuted because this was just an oversight for the sake of his family, especially the children.

23. The recommendation by the Provincial Police Officer Western Province caught the attention of the Court in this respect. Whereas, the Plaintiff was prosecuted and fined Kshs 1,500 for the failure to make an OB entry, the Provincial Officer enhanced the sentence to that of dismissal without affording the Plaintiff any further hearing. This amounted in the Court's view to double jeopardy without affording the Plaintiff a further hearing.

24. The record of the Disciplinary Appeal Board meeting held on 21st April 2009 reveals the following;

- a. The Board noted that an inquiry file in respect to the escape of suspects from lawful custody was opened after the three officers (including the Plaintiff) had been dismissed which was unprocedural.
- b. The Commissioner of Police directed only the Plaintiff be dismissed and No 41013 Ex-Pc Alex Kipkemboi and No 91020 Ex Pc (w) Grace Waitherero Gikonyo be reinstated.

25. It is the Plaintiff's case that the two bore the highest responsibility and there was no valid reason to discriminate against him yet he was not in charge of custody of the prisoners.

26. Considering the circumstance of the case and in particular the need to have a valid reason to dismiss an employee under Section 43(1) and (2) of the Employment Act and the requirement that an employee who is charged for misconduct likely to result to his summary dismissal, need to be given opportunity to explain himself in terms of section 41 of the Employment Act, 2007 before the summary dismissal is meted on him.

27. The Court finds that the Respondent ought not to have enhanced the initial sentence of a fine to summary dismissal without giving the Plaintiff an opportunity to be heard before the enhancement.

28. The Court also finds that the enhancement from a fine of Kshs 1,500 to summary dismissal amounted to double jeopardy, which is contrary to the principle of legality.

29. Furthermore, the court finds that, the Plaintiff having served the Police for a total of 29 years and

had a clean record for the last 13 years and was aged 50 years at the time of dismissal was a suitable candidate for early retirement rather than summary dismissal which in practical terms meant he had lost his pension earned over a period of 29 years.

30.The Court therefore commutes the summary dismissal to a normal termination with full entitlement to pension benefits for the 29 years' service.

31.The Respondents are directed to cause processing of the pension benefits due to the Plaintiff from date of termination within 30 days from date of this Judgement.

32.The Plaintiff is partly successful and is entitled to the costs of the suit.

Dated and Delivered at Nairobi this 28th day August, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE