



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 534(N) OF 2009

KIPKEMBOI CHERONO.....CLAIMANT

VERSUS

TANA & ATHI RIVERS DEVELOPMENT AUTHORITY.....RESPONDENT

consolidated with

CAUSE NO. 806(N) OF 2009

JUSTUS MIKE KITTIVO.....CLAIMANT

VERSUS

TANA & ATHI RIVERS DEVELOPMENT AUTHORITY...RESPONDENT

JUDGMENT

1. The Claimants filed their cases in 2009. In the case of Kipkemboi Cheron, his suit was filed on 22nd September 2009 while for Justus Mike Kittivo it was on 18th December 2009. They sought redress against the Respondent for the termination of their services on 18th June 2009. The Claimants averred the dismissal was unfair and unlawful in the circumstances. The Respondent filed defences to the suit on 27th November 2009 in respect of Kemboi's case and 17th June 2010 in the case of Kittivo. The cases were consolidated on 23rd February 2011 by Chemmutut J. I will refer to Kipkemboi Cheron as 1st Claimant and Justus Mike Kittivo as the 2nd Claimant for purposes of this judgment.

2. The 1st Claimant testified on 2nd March 2011 and stated that he was employed on 11th September 1987 as an Administrative officer and that he was unfairly suspended on 22nd September 2006 on grounds of indiscipline and fraud. He responded with an undated letter which he had attached as Claimant's Appendix 6. After suspension, he was summarily dismissed vide the letter dated 18th June 2009. He was earning a gross salary of Kshs. 101,795/- per month and after summary dismissal he only received pension dues. He testified that on the fraud allegations, he was never charged in any court of law and that he was not called to answer any audit query. He testified that the Inspectorate of State Corporations did not call or investigate him on any of the allegations. At the time of dismissal he was an Administration Manager and the Managing Director could not summarily dismiss his as a decision had to be made at the Board of Directors' level. He testified that the Mercedes Benz purchase for the Managing Director was a subject of matter of crucial proceedings against the MD where he participated as a witness and that the

MD was acquitted. At the time of his dismissal, he was 46 years in 2009 and that he expected to retire at the age of 60. He thus sought the remedies in his claim and also costs.

3. In cross-examination by Mr. Moya he testified that the letter of employment read with the Code of Regulations para 7.15.4 on suspension from duty permitted suspension of an employee. He was referred to the Respondent's letter in response to his undated letter and stated that his letter requested for specific allegations to his suspension. He testified that he was not called to defend himself. He stated that during the investigations on the purchase of the Mercedes Benz he recorded a statement in May 2006 and that is why he was a witness against the MD. He confirmed that in the purchase of the vehicle there was a procurement problem and that the case was against the MD and that was why he gave evidence against the MD. He stated that one of the grounds of dismissal is negligence or careless performance of work but that he did not agree to that. He had anticipated to retire at 60 and had not anticipated leaving earlier. He confirmed that he received his pension dues but had not received any contribution from his employer. On the State Corporation report dated 11th June 2006 he testified that he was suspended on 22nd September 2006 and had not seen the report before his testimony in Court. He stated that the Board did not call him to answer any query pertaining to the report. He testified that the State Corporation did not surcharged him for any loss and the Respondent had not stated before the court any quantified sum as being lost and he did not know of any loss that he had occasioned to his employer.

4. The case was adjourned to 31st October 2011 for further hearing when Mr. Justus M. Kitivo the 2nd Claimant testified. He testified that he was employed on 3rd August 1992 and was suspended on 22nd September 2006 and later his services were terminated through a letter dated 18th June 2009. He was earning a gross pay of Kshs. 100,595/- a month. He testified that he received ½ pay with effect from September 2006 and that his services were terminated on 18th June 2009 and he was never called to give any explanation by the Board of Directors. He testified that he was never called by investigators or inspectors of the Efficiency Monitoring and Evaluation nor was he served with any finding of the Inspectorate of State Corporation. He denied that he was ever charged in any court of law and had not been served with the civil recovery proceedings under the State Corporation Act. He was referred to some documents before Court and conceded that he was charged with the offence in the charge sheet and that 2 witnesses gave evidence and case terminated on 24th August 2007 under Section 87(a). He testified that the same charges are visited on him on his termination letter and the employer had not faced him with any other charges. He stated that the person who testified against him, Mr. Gathaiga is the same person who signed the termination letter dated 18th June 2009. He testified that Mr. Gathaiga terminated his services as the Ag. Managing Director and that he had not been gazetted. He testified that at the time of termination he was 37 years old and retirement age was 55 years. He requested the court that he be paid for the remaining period.

5. The matter was thereafter in abeyance for a while before it was placed before this Court on 18th October 2012. Directions were consequently given that the cases proceed from where Madzayo J. had reached. The Claimant was cross-examined by Mr. Wanga on 21st April 2015. He testified that he recalled being in Court in 2011 and testifying. He stated that he did not sign a contract but that he had signed a letter of appointment and that the letter has clause on termination where each party can give 30 days notice. He conceded that it is a mathematical possibility that his contract could end before 55 and that it was possible there could be resignation or termination before 55 years. He testified that he was charged in court and acquitted. He testified that he did not know where the case was terminated and that he had testified. He was referred to the Respondent's supplementary list of documents and confirmed that there were court proceedings in the case and that he did not testify as the case was terminated before he testified. He stated that he was not aware the issue was referred to KACC. He testified that the suspension letter was written by Acting MD and that he challenged the authority of the Ag. MD to suspend him. He stated that suspension was a matter which requires input by Board. He testified that the response he was given which did not address the issues he had raised but conceded that it referred to Tarda Code of Regulations and that it referred to authority of TARDA. He stated that it is not correct to say the Board made the decision to suspend and that the suspension was not made by Board. He read the minutes attached to the defence and stated that these were minutes of 7th December 2007 which was a year after his suspension. From the date of suspension he never earned anything up to date. He was

referred to his evidence in-chief where he had stated he earned ½ salary and stated that was wrong and that was not what he had said. He stated that the letter of employment had a provision on suspension. He conceded that there could be suspension with half pay of basic which is different from allowances. He testified that the letter states that there was investigation by state corporations. He admitted he was questioned by Inspectorate of State Corporations while in office and that he was questioned on things different from what is before court. He testified that he was heard on matters not before this court

6. In re-exam by Mr. Opiyo he testified that he was not given notice to show cause and that in the letter of suspension no indication is given on payment. He stated that he was charged in a court of law, witnesses were brought to court to testify and that he had seen one of them in court by name Stephen Githaiga who wrote the termination letter and that the letter referred to a matter that had been resolved by court. He testified that he did not record statement at KACC and that there is nothing from there to date.

7. The Respondent called Stephen Githaiga the Managing Director of the Respondent. He testified that the issue of the 2 Claimants is related to the investigation instituted by the Ministry through the Respondent's Board to investigate the malpractices in the authority in 2006. The investigation was conducted by Inspectorate of State Corporation. He referred to the document titled *Special Report on the Mismanagement of the Affairs of TARDA*, from Inspectorate of State Corporations, Cabinet Office, Office of the President its for June 2006. He testified that the summary and recommendations are contained in the report and the recommendations in report were that the Authority took a decision to suspend both Kittivo and Cherono pending investigation. He stated that the issue of 1st Claimant was in connection with the Mercedes Benz purchased for the then CEO Moses Chergony and that the issues for 2nd Claimant, was the procurement of 100 eucalyptus trees and misappropriation of revenue from firewood. He testified that the 2 Claimants were suspended, the Inspectorate made recommendation and forwarded the same to Ministry of Regional Development and that the Ministry forwarded the report to the Chairman of the Board of Directors for immediate action in line with the recommendations. He was referred to the suspension letters written by the then Acting MD under instructions of the Board. He stated that the Inspectorate team came to the office and met the MD, Board Chairman and because they had been told to thoroughly investigate were given an office at Queensway House 7th floor. The team changed the locks so that all documents would be secured without interference by the management. The immediate thing the inspectorate did was request for all files for senior management of the Authority and drew a chart or list of the people they were to meet at given times. This list was drawn by the team lead by a Mrs. Gichana. The team also sought documents and indicated what was required. He testified that both Mr. Cherono and Mr. Kittivo appeared before the team and that Cherono appeared on 13th March 2006 as Administrative Manager and also on the same day in relation to motor vehicles and log-books and also appeared with the procurement team. He testified that Mr. Cherono appeared with relevant documents and that Mr. Kitivo who was then Manager Monitoring and Evaluation appeared before Jane Weru, then before Mr. Mwangi on the matters being investigated. He testified that when the team completed the investigations on site, the team left with documents and went to KICC and after 2 or so weeks summoned some of the employees of Respondent. He testified that the 2 Claimants were called. Mr. Kitivo appeared on 11th April at 3.30 p.m. at KICC as per the letter written by Mr. Marima to Mr. Kitivo. He testified that the 2nd Claimant signed to confirm he received the summons and that Mr. Cherono appeared before the same team at KICC on 12th April 2006 at 11.00 a.m and signed the letter to appear. He testified that he was aware Cherono appeared. He testified that the Claimants were heard before the report was prepared. He stated that he was aware of the criminal case where he participated as a witness and that the case was terminated on advice of Attorney General. There were officials who were ready to testify but did not. He testified that the issue was brought to the Board of Directors and it was felt the case was terminated prematurely. The Board decided to refer case to Attorney General for review and also to Anti-Corruption. He was referred to the minutes of the Authority held at Queensway House, 7th Floor on 7th December 2007 and that the Board recommended and approved all evidence against the 2nd Claimant be compiled and forwarded to Attorney General for review. The suspension was upheld as KACC was investigating the matter. He testified that the 1st Claimant's case took a different route. Before the deliberation of the meeting Mr. Cherono sued the Board of Directors the Board made a recommendation that because he had sued the court would determine the issues. The Board determined that he remains under suspension until the Judicial Review was heard. He stated that he was not aware if

it was withdrawn or not. He testified that Mr. Cherono's service was terminated by the Board on 18th June 2009 and that he signed the letter of dismissal as Acting MD. He testified that the 2nd Claimant was terminated on the same day as well and that the letter was conveying the Board's decision to terminate with effect from 2006 and that they were paid their pension.

8. In cross-exam by Mr. Opiyo he testified that he was aware that the 2nd Claimant was charged in a criminal case and that he was aware the 1st Claimant had testified against the former MD. He testified that on the charges against the Claimant it was indicated that the 2nd Claimant had been charged with issuing letters to Mary Ndila Munyao to collect firewood. He testified that this partly led to dismissal of the 2nd Claimant. He conceded that the case was withdrawn and the Board instructed management to seek review as the letter by Attorney General was erroneous. He testified that the authority did not accept the withdrawal of the case and wrote to the Attorney General. He admitted that he was the one who wrote the letter of termination as Acting Managing Director. He testified that the Acting Managing Directors are not gazetted. He was subsequently appointed MD and was gazetted. He was referred to TARDA Act, Cap 443 and confirmed that it does not have provision of Acting MD. He stated that the office cannot remain vacant and so one has to be appointed to act. He could not recall when the Rules and Regulations were done by HR department and stated that the 2 Claimants were part of senior management and as managers they were aware of the Regulations and that they were in possession of those documents of managers. He testified that the decision of the Board to terminate was made by the Board. He conceded he did not have the charge sheet for the 1st Claimant. He admitted he was under suspension in 2011 and that his suspension was lifted and that he resumed and rose to the position he currently occupied. He testified that the Claimants were given substantial time to respond to the letter of suspension. He admitted that there was no notice to show cause when they were asked to appear before the investigation team. It was his understanding that they were asked to show cause. He testified that the accusations are in the report and that it was an invitation against the issues raised by the investigators. He testified that on the basis of the Report the 2nd Claimant was arrested and charged in court of law. He stated that it was not necessary to invite the Claimants as they were engaged by inspectorate very thoroughly and were not invited to the Board meeting.

9. In re-exam by Mr. Wanga he testified that he saw later the case was terminated through advise of the Attorney General. He was referred to the Respondent's documents and confirmed that he testified against the 1st Claimant. He stated that the Acting Director is allowed to suspend and that he had not seen anything to show the 1st Claimant complained that letter was not properly done. He stated that he communicated the decision of the Board. He was referred to both claims and confirmed that the Claimant's had made reference to the Code of Regulations and even pleaded making reference to the code.

10. The Claimants and Respondent both filed submissions. The Claimants filed submissions on 2nd June 2015. In their submissions the Claimants sought a declaration that the purported dismissal of the Claimants was illegal and unlawful and that they are entitled to full benefits from the Respondent and that they are entitled to special damages being salary from the date of the unlawful dismissal to anticipated date of retirement, damages for wrongful dismissal, interest and costs of the suit. The Claimants submitted that the issues to determine where 2

a. Whether the Claimants termination was unfair

b. Whether the Claimants are entitled to the reliefs sought.

11. The Claimants submitted that the dismissal was unfair as the Respondent had failed to prove the reasons for Claimants termination. It was submitted that from the date of suspension the Respondent did not reveal the details or state what exactly the Claimants had done to warrant the suspension. The Claimants submitted that it was mischievous for the Respondent to claim to have conducted investigations then acted on the same and proceeded to dismiss the Claimant without showing the Claimant what exactly the Claimant had done. The Claimant relied on Section 43 of the Employment Act

which made provision on the reasons for termination. The Claimant submitted that the dismissal was thus unfair within the meaning of Section 45. The Claimant relied on the case of **Nicholas Ontinyu Muruka v Equity Bank Ltd** where Mbaru J. held that the employer must demonstrate reasonable and sufficient grounds that link an employee to acts of criminal nature that amount to gross misconduct to justify a summary dismissal. The Claimant submitted that the Respondent did not give them a chance to be heard before the wrongful suspension and thus violated his rights to fair administrative action contrary to Article 47 of the Constitution. The Claimants relied on the case of **Prof. Francis M. Njeruh v Jomo Kenyatta University of Agriculture and Technology [2013] eKLR** and submitted that there was no disciplinary hearing and there was no show cause letter issued to the Claimants. The Claimants relied on the case of **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**. The Claimants submitted that the backdating of the termination letter to the date of suspension was unlawful and unfair and that it was in breach of Article 50 of the Constitution. The Claimants also relied on the case of **Philemon Wachara Obenge v Easy Mart Ltd [2013] eKLR** and also the case of **Donald Avude v Kenya Forest Service [2015] eKLR**. On compensation the Claimants relied on the case of **Alphonse Maghanga Mwachanya v Operation 680 Ltd [2013] eKLR**.

12. The Respondent submitted that the 2 Claimants were former employees of the Respondent and that the 2 were suspended after investigations undertaken during the financial year 2004-2005 by the Inspectorate of State Corporations and following the investigations the Inspectorate prepared reports which revealed serious cases of mismanagement. The Respondent submitted that the reports unveiled abuse of office and fraud in the Respondent by the 2 Claimants. The adverse findings on the 1st Claimant included irregular procurement of a Mercedes Benz car as well as irregular procurement of diesel. For the 2nd Claimant it was submitted that the adverse report concerned the irregular procurement of 100,000 eucalyptus trees and the irregular sale of firewood leading to loss of Kshs. 26,000/-. The Respondent submitted that the services of the Claimants were terminated vide letter dated 18th June 2009 backdated to 22nd September 2006 when the suspension took effect. The Respondent submitted that the termination was fair and relied on the case of **Abraham Gumba v Kenya Medical Supplies Authority [2104] eKLR** and stated that the Respondent had proved it had valid reasons for the termination. The Respondent submitted that the Claimants were not entitled to the sums sought under the claims. Reliance was placed on the case of **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR** and **James Omwoyo Nyang'au v Heritage Insurance Company Limited [2014] eKLR** where the Courts held that there could be no exemplary damages or special damages and that prospective salary was in the category of sanguine prospects and not payable. The Respondent submitted that even where the Court finds that the termination of the employee failed the test of either procedural or substantive justification or both the court's discretion to grant the remedies under Section 49(1) Employment Act ought to be exercised judiciously. The Respondent submitted that the maximum compensation should not be awarded if at all and relied on the cases of **Samson Buluma Mumia v DPL Festive Limited [2012] eKLR** and **Dishon Onkoba v Factory Guards (MSA) Limited [2014] eKLR**. The Respondent submitted that the consolidated case was clearly without merit and should be dismissed with costs.

13. Reviewing the pleadings, documents, testimony, submissions of parties and the relevant case law, the issues that have to be determined are two fold. Was the termination of the Claimants lawful? If not what remedies lie? The Claimants assert they were terminated without cause. The Respondent asserts there was reason. The Claimants were former employees of the Respondent who were dismissed for having allegedly been involved in irregularities. The Respondent backdated the terminations to the date of suspension. It is not in doubt that the contracts of service aka letters of employment had provision for suspension and termination. Both the Claimants had knowledge of the Respondent's Code of Regulations as was clear from their pleadings and the documents they attached. The Respondent's Code of Regulations had provisions on suspension and termination. It therefore follows there could be suspension or termination. The suspensions were in September 2006. Was the suspension in 2006 valid? In the Tana Athi River Development Authority Act, the Respondent could suspend the employees. The fact that there was no substantive Managing Director does not mean that there could be no suspension of the 2 Claimants. There was cause to suspend and the effect was that even termination was contemplated. There was basis for termination. In investigations undertaken during the fiscal year 2004-2005 by the Inspectorate of State Corporations serious cases of mismanagement against the Claimants emerged. The reports unveiled abuse of office and fraud in the Respondent allegedly by the 2 Claimants and the adverse

findings on the 1st Claimant included irregular procurement of a Mercedes Benz car as well as irregular procurement of diesel. For the 2nd Claimant it was indicated that the Claimant was guilty of the irregular procurement of 100,000 eucalyptus trees and the irregular sale of firewood leading to loss of Kshs. 26,000/-. The allegations even led to the arraignment of the 2nd Claimant in Court while the 1st Claimant succeeded in forestalling any criminal charges. The Claimants were therefore terminated with cause. However, there is the troubling aspect of the termination. The termination was effected on 18th June 2009 and backdated to September 2006. That surely cannot be the intention of the law. If they wished to challenge the termination on the basis of the process when would the period of limitation run? If they wished to prefer an appeal or administrative action such as judicial review when would they be out of time to move the Court? It is not feasible or even legal to backdate the termination to a date now past. That would amount to depriving the Claimants of a legitimate right to the safeguards of Article 47(1) and 50(1) of the Constitution of Kenya. The Claimants were entitled to have these safeguards notwithstanding the circumstances of the termination. The purported termination in June 2009 effecting the termination to September 2006 was thus illegal and manifestly unfair. The remedies that would apply are those that are in keeping with the dictates of the law. There is no provision for future salaries and I am in total agreement with my fellow Judges in this. I concur with Onyango J. and Rika J. when they hold that sanguine prospects are not available. In the realm of employment law practice in Kenya, there is no justification for future salary to the date of retirement. The Claimants would therefore not be entitled to recover the millions in salary from 2006 till the year 2023 and 2027 respectively.

14. Suspension should and definitely must be for a finite period. I find that the extended period of suspension from September 2006 till June 2009 inordinately long and without any justification. In the premises the Court holds that the period of suspension was until December 2006 whereupon the suspension became illegal as it was unending. The letters on administrative action that could be taken are on record and there should have been a show cause and even an attempt at procedural fairness as contemplated in Section 41 of the Employment Act. They however will be entitled to recover the salaries from December 2006 till 18th June 2009 when the contracts were terminated. In the premises and on the basis of the foregoing I will enter the following judgment for the 2 Claimants:-

1st Claimant Kipkemboi Cheronno

- a. Declaration that termination in June 2009 backdated to September 2006 was illegal.
- b. Salary from December 2006 till 18th June 2009 Kshs. 3,114,927/-
- c. Certificate of service

15. The 2nd Claimant Justin Mike Kittivo

- a. Declaration that termination in June 2009 backdated to September 2006 was illegal.
- b. Salary from December 2006 till 18th June 2009 Kshs. 3,114,927/-
- c. Certificate of service

16. The Claimants to each be paid costs of the suit and interest on the sums in 14 and 15 above from date of judgment till payment in full. The sums in para 14(b) and 15(b) to be subject to statutory deductions as provided for in Section 49 of the Employment Act.

Orders accordingly.

Dated at Nairobi this 10th day of August 2015

Nzioki wa Makau

JUDGE

Delivered at Nairobi this **20th** day of **August** 2015

Hellen Wasilwa

JUDGE