



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 979 OF 2012

FIDELIUS K. MICHIRA.....CLAIMANT

VS

KENYA WILDLIFE SERVICES.....RESPONDENT

AWARD

Introduction

1. Kenya Wildlife Services, the body charged with wildlife conservation in this country has found its way into the jungle of litigation with its former employee, Fidelius K. Michira. The Claimant's claim is contained in a Memorandum of Claim dated 30th April and filed in Court on 8th June 2012. The Respondent filed a Memorandum of Reply on 31st October 2012. The Claimant testified on his own behalf and the Respondent called its Human Capital Officer, Vincent Makari Samoo, Assistant Director-Security Division, Nancy Muthoni Kabete and Investigation Officer, Ignatius Ipapo.

The Claimant's Case

2. The Claimant was recruited by the Respondent as a Ranger in 1989. He rose through the ranks to the position of Assistant Warden II, Officer level at the time of leaving the Respondent's employment.

3. The Claimant states that he was interdicted on 2nd September 2009 whereupon he was ordered to leave the KWS staff quarters where he lived with his school going children. He claims that he was not informed of any charges against him and on 6th January 2010, he was called to record a statement. He left his statement with Chief Inspector Ignatius Ipapo. On 1st March 2010, the Claimant received a letter removing him from service. The letter did not disclose the reason for removal. His appeal did not elicit any response from the Respondent.

4. The Claimant claims the following:

- a. 1 month's salary in lieu of notice and salary for March 2010.....Kshs.44,000.00
- b. Compensation on expected salary and allowances from March 2010.....Kshs.528,000.00
- c. Redundancy, gratuity and severance pay
- d. Damages for unfair and unlawful termination.....Kshs.200,000.00
- e. Terminal dues and benefits
- f. Costs and interest

The Respondent's Case

5. In its Memorandum of Reply filed on 31st October 2012, the Respondent states that the Claimant was in its employment until 1st March 2010 when he was removed from the Service. The reason for the Claimant's removal was his association in activities and behaviour which the Respondent's management considered likely to be prejudicial to good order and discipline of the Service that led to insecurity at the Kenya Wildlife Service Headquarters in 2009.

6. The Respondent further states that the Claimant was in breach of the terms of his employment as the commander of the security unit at the Headquarters, in that he planned and directed many house break-ins and burglaries that took place in 2009 at the Respondent's Headquarters and at Nairobi National Park. The Respondent contends that the Claimant's service was unsatisfactory and his acts amounted to breach of contract and trust in that he either failed to prevent or was involved in the commission of felonies.

7. The Respondent sets out the following particulars of breach on the part of the Claimant:

- a. Implication in theft of electronic items and hard drinks from the Club House, Staff Quarters and Headquarters;
- b. Aiding break-ins through targeted staff deployment leading to security lapses;
- c. Associating with former staff members who had left the Respondent's employment under dishonourable circumstances. Eric Sakala was cited as one such person;
- d. Collaborating with the watchman at Rangers Restaurant to facilitate a burglary at the Restaurant.

8. The Respondent concludes that its decision to dismiss the Claimant was lawful and justifiable. In removing the Claimant from the Service, the Respondent was guided by Regulation 12(d) of the Kenya Wildlife (Armed Wing) Disciplinary Code, 1990. Upon removal, the Claimant was paid all his dues.

Findings and Determination

9. The following are the issues for determination before the Court:

- a) Whether the Claimant's removal from service was justifiable and lawful;
- b) Whether the Claimant is entitled to the remedies sought.

The Claimant's Removal10. The Claimant's removal from Service was communicated by letter dated 1st March 2010 stating as follows:

“Dear Sir;

SUBJECT: REMOVAL FROM THE SERVICE

*In the exercise of the powers bestowed upon the Director in Regulation 12(d) of the Kenya Wildlife Service (Armed Wing) (Disciplinary) Code 1990, this is to inform you that the management has decided that you be **Removed** from the service **with effect from 1st March 2010. This is on the basis of your association in activities/behaviour which the management considers likely to have been prejudicial to good order and discipline of the Service that led to insecurity at KWS Hq in 2009.**(emphasis added)*

*This letter therefore is the formal communication to you that you have been **removed** from the **Service with effect from 1st March 2010.***

Upon removal, you will be entitled to payment of the following dues subject to clearance.

- i. *Full salary and applicable allowances up to and including 28th February, 2010.*

- ii. *Payment of benefits under the KWS Superannuation Scheme as per the Scheme Rules and the Retirement Benefits Act Regulations.*

You must sign the Official Secrets Act Declaration Form, Appendix 'E' herewith attached, in the presence of the SOOPS who will return the same duly signed to the Director for retention and record.

You must also surrender the Service identity card and all items of uniform and Service property as part of the clearance.

Yours faithfully,

R.M. MUASYA, HSC

FOR: DIRECTOR.

11. Prior to this letter, the Claimant had been interdicted on half pay effective 2nd September 2009. A reading of the interdiction and removal letters reveals that the Claimant's removal was informed by incidences of theft at the KWS Headquarters where the Claimant was deployed as commander of the H Company which was in charge of security.

12. The Respondent's line of defence suggests that because the Claimant was a uniformed officer governed under the Kenya Wildlife Service (Armed Wing) Disciplinary Code, 1990 then he could be removed from service without being subjected to any disciplinary process. The three witnesses called by the Respondent confirmed that there was indeed a disciplinary process in place but the Claimant was not subjected to this process.

13. According to the Respondent's witnesses, it was not necessary for every uniformed officer to be taken through the disciplinary process; the Director of KWS could choose which officers would be subjected to the disciplinary process and which ones would not have this benefit. This assertion sounds like a restatement of the now retired pleasure principle where persons held public office at the pleasure of the appointing authority. Not only is this principle irreconcilable with existing employment law but it dims to oblivion under the glare of our present constitutional dispensation.

14. In ***Richard Bwago Birir v Narok County Government & 2 Others [2014] ECLR Ongaya J*** rightly held that the pleasure principle is no longer applicable in the Kenya Public Service. In similar fashion, ***Rika J in D.K Njagi Marete v Teachers Service Commission [2013] ECLR*** held that retirement in public interest must operate within the purview of the Employment Act, 2007. The effect of the positions taken by my brother Judges with which I fully associate myself is that any disciplinary regulations, including those codified under subsidiary legislation which derogate from the provisions of the Constitution and the Employment Act, 2007 must give way.

15. Section 43 of the Employment Act, 2007 provides that:

(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.

16. Section 45 (2) of the Act goes on to provide that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer and that

(c) That the employment was terminated in accordance with fair procedure.

17. The charges made against the Claimant would ordinarily fall under misconduct or poor performance and Section 41 of the Act sets out the following mandatory procedure to be followed in handling such cases:

- a. That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b. That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c. That the employer has heard and considered any explanations by the employee or their representative;

18. In addition, an employer with more than 50 employees in its employment is required to document its own internal disciplinary procedural rules for use in handling disciplinary cases. Needless to say, such internal disciplinary rules must not depart from the dictates of Section 41.

19. The Respondent's 2nd witness, Nancy Muthoni Kabete told the Court that she was notified by an informer that the Claimant was at the centre of the theft incidences at the KWS Headquarters. Kabete believed the informer's report and did not find it necessary to interview the Claimant. The Court was unable to understand why Kabete returned a verdict of guilt against the Claimant without giving him an opportunity to respond to the accusations made against him; yet she had given a similar opportunity to a Mr. Osoro on whom she had received similar reports.

20. The 2nd defence witness, Ignatius Ipapo testified that he recorded the Claimant's statement which was not available at the hearing. Ipapo also recorded a statement under inquiry from one Eric Sikala who implicated the Claimant. From Sikala's statement, Ipapo reached the conclusion that the Claimant was not fit to continue in the Respondent's employment. Ipapo added that Sikala's statement did not provide sufficient evidence to sustain a criminal charge against the Claimant but it was adequate for departmental action.

21. However, in view of the fact that the Claimant was not afforded an opportunity to present his defence, the Court could not tell if the Respondent applied any standard of proof in dealing with the Claimant's case. For the foregoing reasons the Court finds that the Claimant's removal from the Respondent's service was unjustifiable and unlawful.

Remedies

22. Following my finding that the Claimant's removal was substantively and procedurally unfair I award him twelve (12) months' salary in compensation. In making this award I have taken into account the Claimant's length of service coupled with the Respondent's callous conduct in the removal process. I also award him one (1) month's salary in lieu of notice.

23. No basis was laid for the claim for expected salary and allowances which is hereby dismissed. The claims for redundancy, gratuity, severance pay and terminal dues were abandoned at the trial.

24. Ultimately I make an award in favour of the Claimant in the following terms:

(a) 12 months' salary in compensation for unfair termination.....Kshs.528,000.00

(b) 1 month's salary in lieu of notice.....Kshs.44,000.00

Total.....Kshs.572,000.00

25. The award amount shall attract interest at court rates from the date of the award until payment in full. The Claimant will have the costs of this case

26. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF AUGUST 2015

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JUDGE

Appearance:

Miss Makori for the Claimant

Mrs. Wachira for the Respondent