



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT NAIROBI  
CAUSE NUMBER 981 OF 2011

**BETWEEN**

JAMES MUGERA IGATI ..... CLAIMANT

**VERSUS**

THE PUBLIC SERVICE COMMISSION OF KENYA..... RESPONDENT

*Rika J*

*CC. Leah Muthaka*

*James Igati Mugera the Claimant, in Person*

*Ms. Mwihaki Gathoga Litigation Counsel instructed by the Attorney General for the Respondent*

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ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 17<sup>th</sup> June 2011. The Claimant filed an Application seeking extension of time, which was disposed of in a Ruling of the Court made on 21<sup>st</sup> November 2011. Thereafter the Respondent filed a bundle of documents in response to the Claim. The Claimant testified and closed his case on 2<sup>nd</sup> November 2012. The Human Resource Manager Salome Ringera from the Ministry of State for Public Service testified for the Respondent on 31<sup>st</sup> January 2013, while the Human Resource Manager of the Respondent Avisia Kiguhi Harold testified for the Respondent on 6<sup>th</sup> June 2013 when the hearing closed.

2. The Claimant's position is that he was employed by the Respondent on or about 12<sup>th</sup> October 1982 as a Subordinate Staff in the Civil Service and later re-designated as a Machine Operator. On 19<sup>th</sup> July 2005, the Claimant was arrested and charged with the offence of making a document without authority. He was charged in the Chief Magistrate's Court at Nairobi Criminal

Case Number 1602 of 2005. The Permanent Secretary, Directorate of Personnel Management in the Office of the President interdicted the Claimant through a letter dated 28<sup>th</sup> July 2005. The letter reads,

*“ Following your appearance in a court of law charged with the offence of making document without*

authority, you are hereby interdicted with effect from 19<sup>th</sup> July 2005, pending the outcome of your case.....”

3. On 13<sup>th</sup> September 2006 while the criminal case was still unresolved, the Ministry wrote to the Claimant a letter asking him to show cause why disciplinary action should not be taken against him for gross misconduct. The letters states,

*“It has been reported to this office that you are accused of making a document without authority contrary to section 357 [9] of the Penal Code. This is viewed as gross breach of discipline and this office is contemplating your dismissal on account of gross misconduct. However, before it is done, you are hereby called upon to show cause why such action should not be taken against you. Your representations if any should reach this office within 21 days from the date of this letter, failure to which contemplated action will be taken against you without further reference to you.”*

4. The Claimant, on 25<sup>th</sup> September 2006 responded,

*“..... I humbly wish to inform you that the case about making document without authority is still pending in court awaiting ruling and therefore, I cannot incriminate myself before the outcome of the court. I request the office to give me time until the outcome of the court when I will be in a position to comment on the issue.”*

The Court rendered its decision in the criminal case on the same date, the 25<sup>th</sup> September 2006, ruling that the prosecution had failed to establish its case to the required standard, and therefore acquitted the Claimant.

5. The Claimant forwarded the ruling in the criminal case expecting the Respondent to lift the interdiction; instead, the Respondent insisted on the Claimant showing cause why he should not be disciplined.

6. On 20<sup>th</sup> February 2007, the Permanent Secretary in the Ministry of State for Public Service in the Office of the President issued the Claimant a letter of dismissal. Dismissal was effective from 31<sup>st</sup> October 2006, and the reason for dismissal was alleged to be gross misconduct. The Claimant was advised he had lost all his benefits on dismissal, and had the right to appeal against the decision to the Public Service Commission within 42 days.

7. The Claimant appealed on 28<sup>th</sup> February 2007, retracing the history of the criminal matter and its relation to the disciplinary process. He alleged that the allegations against him had been dealt with by a court of competent jurisdiction, and the employer was bound to respect the decision. The Claimant alleged further that his Supervisor one Jane Chege had made a decision to have the Claimant dismissed even before the criminal findings. The Respondent only made its decision on 6<sup>th</sup> June 2008 advising the Claimant,

*“.....this is to inform you that the Public Service Commission of Kenya considered but disallowed your application. Please be advised that the Commission has closed its case.”*

The Claimant subsequently made further applications for review to the Public Service Commission both of which were rejected. The last letter from the Public Service Commission is dated 11<sup>th</sup> March 2009, and advised the Claimant there existed no fresh grounds, to merit interference with the dismissal decision. This paved way for the Claim in Court filed on 17<sup>th</sup> June 2011.

8. The Claimant holds the decision by the employer was wrongful. He prays the Court to grant him-

- a. Salary for 5 years at 15,000 per month [2006- 2011] at Kshs. 900,000;
- b. Severance pay for 5 years at Kshs. 2,220,000;

- c. 3 months' salary in lieu of notice at Kshs. 45,000;
- d. Annual leave for 8 years at Kshs. 80,000;
- e. Unpaid salary for the month of July 2005 at Kshs. 15,000;
- f. Annual increments for 5 years at Kshs. 1,000;
- g. Salary increments for 2007 at the rate of 20% for 4 years at Kshs. 1,008,000;
- h. Other benefits for 5 years at Kshs. 2,960,000;

Total ..... 7,229,000

The Claimant also wishes to be paid compensation for wrongful dismissal and general damages; costs; interest; full service benefits or the Claimant is reinstated in service; and any other relief the Court may deem fit to grant.

9. On cross-examination, the Claimant denied that he forged any letter to obtain a loan from Equity Bank. The Criminal Court absolved him. He was acquitted under Section 110 of the Criminal Procedure Code for lack of evidence. It meant he was innocent. He was interdicted, informed of the charge against him and dismissed. He was informed of his right of appeal and appealed. He was not involved in the investigations carried out by the Respondent, and was not invited at the hearing of the Appeal.

10. The Claimant submits that he had served the Government loyally and diligently from 12<sup>th</sup> October 1982 to 31<sup>st</sup> October 2006. The Respondent was bound by the decision of the Criminal Court. Regulation 25 [3] of the Public Service Commission Regulations 2005 provided that no punishment would be inflicted on any public officer contrary to the law. An acquitted public officer could not be treated the same way as a convict. Interdiction should have been lifted after the acquittal. It was legally unacceptable to dismiss the Claimant for the same offence he was acquitted by the Criminal Court. This amounted to double jeopardy. He was interdicted to give the criminal case a chance for ventilation on merit. He submits he is now 53 years old, and cannot obtain alternative employment because the records show he has a pending criminal case. The Claimant urges the Court to grant his prayers.

11. The Respondent does not deny that it employed the Claimant as a Civil Servant between 12<sup>th</sup> October 1982 and 31<sup>st</sup> October 2006. Salome Ringera testified that the Claimant wanted to take a loan with Equity Bank Limited. He forged documents to make the loan application, purporting the documents required by the Bank to have originated from the employer. The Respondent came to learn he had been charged and interdicted the Claimant. The case took long to be heard and finalized by the Criminal Court, and the Respondent opted to proceed with the disciplinary procedure. The Claimant was issued a letter to show cause. He declined to defend himself, stating he did not wish to incriminate himself, in light of the pending criminal case. The case was referred to the Ministerial Human Resource Management Advisory Committee. This Committee deliberated and decided to dismiss the Claimant. The Committee placed its deliberations before the Public Service Commission for approval. The decision was upheld and the Claimant dismissed. The criminal case ended in acquittal. The Ministry was not bound by the outcome of the criminal trial. The Claimant was not shown to be innocent, but was acquitted for lack of evidence. The right procedure was followed.

12. On cross-examination Salome stated that the Claimant was given the opportunity to exonerate himself, but failed to do so, holding that the criminal case was pending and he would therefore incriminate himself by defending the disciplinary charges. The Respondent followed the provisions of the Services Act Cap 185 the laws of Kenya. The Ministry could not dismiss the Claimant without the concurrence of the Public Service Commission. The letter of interdiction informed the Claimant he would be interdicted pending the outcome of the criminal case. The Regulations say the criminal case does not bind the employer. The appeal goes to the Respondent. The role of the Ministry was to forward the employee's file to the Respondent. Redirected, Salome clarified that the Claimant faced the offence of forging loan application forms, using the Ministry's letterhead, and official rubberstamp. He never responded to the issues.

13. Avisa Kiguhi testified that the Claimant is a former public officer employed by the Ministry of State for Public Service. It was reported by Equity Bank Limited that he forged documents to help him obtain a

loan. The Ministry learnt Equity had initiated criminal proceedings. The Claimant was placed under interdiction pending the conclusion of the criminal case. The Ministry carried out its own investigations during interdiction. It found out that documents given by the Claimant to the Bank, purported to have originated from the Ministry, were not from the employer. The signatory disowned the documents. The Ministry took action in accordance with the Code of Regulations and was entitled to do so regardless of the outcome of the criminal case. He was asked to show cause, but opted not to answer to the substantive issues. He was found to have two previous disciplinary offences in his file. The employer arrived at its decision on the basis that the Claimant failed to defend himself. He was not called to defend himself at the criminal trial, and did not defend himself at the disciplinary process. The substantive accusations against him remained unanswered. He lodged appeal against the decision of the employer; the appeal was rejected. There was no malice on the part of the Respondent. The criminal case was initiated by the Bank, not the Ministry or the Commission. Once dismissed, he lost his terminal benefits. Investigations by the employer revealed that the Claimant's loan deductions would have exceeded two-third of his basic monthly salary contrary to the law. Documents supporting the loan application were disowned by Officers who were said to have appended their signatures to them.

14. Kiguhi insisted under cross-examination that the Claimant had other disciplinary incidents in his employment file. He had at one time failed to post a letter from the Respondent inviting a potential employee to an interview, which led to the said potential employee missing the interview. He failed to post an international job advertisement. If the Claimant had been convicted, the Respondent would still have dismissed the Claimant. The Commission undertakes its own process, independent from the criminal process. The Respondent relied on both the Public Service Commission Regulations of 2005 and the Employment Act Cap 226 the Laws of Kenya. Kiguhi conceded the letter of interdiction advised the action was taken pending the outcome of the case. The Witness reiterated in redirection that the Respondent was not bound by the decision of the Court in the criminal trial. The Claimant was called upon to defend himself by his employer but refused to do so.

15. The Respondent submits that dismissal was proper and well grounded on fact and the law. The Respondent relied on the Public Service Commission Regulations 2005 and the Employment Act Cap 226 the Laws of Kenya. The Claim has no merit. The Respondent urges the Court to uphold the decision dismissing the Claimant from service.

#### *The Court Finds and Awards:-*

16. The Claimant was employed as a Subordinate Officer by the Office of the President on or about 12<sup>th</sup> October 1982. He later became a Machine Operator. In July 2005, he was arrested on the allegation that he falsified employment records, to support an application for a loan amounting to Kshs. 226,501 from Equity Bank Limited. The documents alleged to have been falsified were the Loan Application Form, which was said to be endorsed by Respondent's Personnel Officer Francis Kibanda. The Officer is alleged to have committed the employer to pay the Claimant's final salary, leave entitlement and bonus to the Bank in event the Claimant's contract of employment was terminated before the Claimant had completed loan repayment. Investigations carried out by the employer concluded Kibanda had not signed any such endorsement. The second document from the bundle availed by the Respondent was a letter from the Permanent Secretary/Director of Personnel Management B.E. Arwara. It is dated 22<sup>nd</sup> June 2005, and confirmed to the Bank that James Igati Mugera was an employee of the Ministry, Department of Directorate of Personnel Management. Again, investigations carried out by the Respondent revealed no such Officer had written to the Bank introducing the Claimant. The criminal proceedings show that the Bank also complained about the different figures contained in the pay slips availed by the Claimant in his application for the loan.

17. Arising from these suspicions, it is the common position of the Parties that the Claimant was arrested and appeared in Court on 21<sup>st</sup> July 2005 charged with the offences of making a document without authority, uttering a false document, and stealing. A week later on the 28<sup>th</sup> July 2005, the Respondent interdicted the Claimant with effect from 19<sup>th</sup> July 2005, '*pending the outcome of your case.*' It is agreed that on 13<sup>th</sup> September 2006, the Respondent invited the Claimant to show cause why he should not be

dismissed on account of gross misconduct. He replied on 25<sup>th</sup> September 2006, refusing to answer the substantive charges against him, ostensibly because the same case was pending in the Criminal Court, and he had the right not to incriminate himself. By coincidence, he was acquitted the same day under Section 210 of the Criminal Procedure Code.

18. The Ministerial Human Resource Management Advisory Committee held a meeting on 31<sup>st</sup> October 2006, and determined that the Claimant be dismissed from employment. The decision was forwarded to the Public Service Commission and approved. The Claimant then appealed the decision under the Public Service Commission Regulations 2005. Both the appeal and subsequent applications for review were rejected by the Public Service Commission. Not one to give up easily, the Claimant then approached the High Court in Judicial Review Miscellaneous Application Number 457 of 2009. He asked the High Court to quash the decision of the Public Service Commission and order he is returned to service. The Court rejected his Application, mainly on the ground that he should have filed a claim for wrongful termination of employment. He promptly approached the Industrial Court.

19. The Claim rests on the question whether the Respondent was bound by the outcome of the criminal proceedings in *the Nairobi Chief Magistrate's Criminal Case Number 1602 of 2005 R v. James Igati Mugeria*. There is nothing in the repealed Employment Act Cap 226 the Laws of Kenya, and the Public Service Commission Regulations 2005 which applied to the dismissal of the Claimant from service, that suggest the disciplinary process, is tied to the criminal process that may arise from the same facts. Section 17 of the repealed Employment Act did not make disciplinary proceedings at the workplace subject to any criminal investigations, trial or convictions. The Claimant appears to confuse the disciplinary process, which is properly a private process between an employer and its employee, whose aim is to ensure the employer's business is not harmed by delinquent employee behaviour, with a criminal trial which is a public process where prosecution is carried out by the state and is purposed on securing the safety of the general population, and on maintenance of a stable social order. This Court has expressed the view in the past that the two processes are independent of each other; the standards of proof are different; and an acquittal or conviction at the public process does not bind the employer in conduct of the disciplinary process. There is no provision in the old or the new Employment Act, or the Public Service Commission Regulations, which make it necessary for employers to follow police investigations, or findings, or indeed Criminal Court decisions, in resolving employment disputes based on cross-cutting facts.

20. The Public Service Commission Regulations 2005 are framed in such a way as to leave no doubt that the Respondent intends any criminal processes are not merged with the disciplinary processes in the service. Regulation 23 distinguishes between '*proceedings leading to dismissal being taken*' and '*criminal proceedings being instituted.*' Regulation 24 requires an officer to be suspended where convicted of a serious criminal offence, pending consideration of the case under the Regulations. Conviction like acquittal would not be binding on the employer. The punishments under Regulation 25 are as a result of the disciplinary process, not criminal trial in a court of law. The Claimant misconceived his criminal trial to be the same process as the disciplinary process.

21. The Court has taken the position in the past that the employer may nonetheless opt to expressly make its disciplinary decision, dependent on the outcome of the police investigations, or on a Court decision in a criminal trial. In such a case, such as where the employer advises the employee that he is suspended pending the outcome of police investigations or decision of the Criminal Court, then it may be taken that the employer has forfeited the right to steer the disciplinary process, and subordinated the managerial prerogative in disciplining the employee, to third parties. To base a disciplinary process on the outcome of a criminal trial is risky, as the employer has no control over the criminal proceedings. If the criminal trial fails, as a good number of them do, the underlying disciplinary action would fail. Employees given assurances that their fate lies with the criminal proceedings normally do not cooperate with any disciplinary processes the employer may initiate. The Respondent in this case had no say for instance, in the shoddy manner in which the Police chose to prosecute the criminal case leading to the acquittal of the Claimant. The Respondent was not the complainant, and even if it was, would have limited influence on the direction the Police chose to move the prosecution of the Claimant in.

22. The Respondent suggested in the letter of interdiction that the Claimant had been interdicted pending

the outcome of his case. This could be interpreted that the Respondent had surrendered its prerogative to internally investigate the allegations against the Claimant and make an independent administrative decision based on its own internal disciplinary mechanisms. The Court decision would simply be endorsed as the outcome of the dispute between the employer and the employee. The Court is not persuaded this was the case with regard to the Claimant's interdiction and subsequent dismissal.

23. Firstly, the wording of the interdiction letter leaves doubt as to what case the Respondent was referring to. Was it the criminal case to the exclusion of the disciplinary case? Secondly, the Respondent took secondary disciplinary action before the pronouncement of the outcome of the criminal case. There was a change in the original communication, making it clear to the Claimant that the Respondent no longer wished to rely on the outcome of the criminal proceedings. The Claimant was invited on 13<sup>th</sup> September 2006, before the Judgment of 25<sup>th</sup> September 2006 was rendered, asking the Claimant to show cause why he should not be dismissed for gross misconduct. The Claimant lost his opportunity to clear his name. In his response, he told the Respondent he would not defend himself as the case was pending in Court. It was his misconception on the two processes, which informed him to take this course. There was nothing in the criminal trial said by the Claimant, in answer to the serious offences which he was charged with as he was never put on his defence. The criminal trial collapsed principally because the Police did not call the Investigating Officer. The Claimant had another opportunity to explain the allegations that he falsified documents, to the Industrial Court when this current dispute was heard. In his evidence and pleadings he just waved the short ruling of the Criminal Court. Under Section 17 of the repealed Employment Act, the Respondent would be justified in finding the Claimant's activities at Equity Bank to amount to gross misconduct. In the entire records of the three Courts through which the facts in this dispute have been stated and analyzed, there is nothing from the Claimant explaining what he failed to explain in notice to show cause. There was nothing that barred the Claimant from explaining to this Court what really happened revolving around his application for the Equity Bank Loan.

24. The Court is satisfied the Claimant, even considering the jurisprudence of the old Industrial Court under the Trade Disputes Act, in particular Section 15, was properly treated by the Respondent. The decision by the Respondent was consistent with the law.

25. And even barring this conclusion, it is highly unlikely that the Court would have granted the Claimant his prayers. The prayers were poorly pleaded, contained highly inflated figures, and were not grounded on any law or fact. He seeks salary of 5 years during a period he has not rendered any service. He similarly seeks increments based on percentages that have not been taken from any collective agreement, individual review, or wage adjustment order. He prays for severance pay of 5 years but gave no evidence of redundancy, or even suggested where the 5 years are taken from. He pleads 8 years' annual leave entitlement, without informing the Court what period in his long service, the 8 years refer to. Strangely, the Claimant even pleads for '*other benefits for 5 years*' which he calculates at Kshs. 2,960,000. He did not give the Court any idea what these benefits are, or the formula used at arriving at the figure. ***All in all, the Court finds that the Claim has no merit. It is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 23<sup>rd</sup> day of January 2014

James Rika

Judge