



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 38 OF 2012**

**WILBERFORCE OSODO ..... PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**THE PERMANENT SECRETARY TO THE TREASURY ... 3<sup>RD</sup> RESPONDENT**

Mr. Mwenesi for the Petitioner

Mr. Moyimbo for the Respondents

**JUDGEMENT**

1. The Petition was filed on 28<sup>th</sup> June, 2007, seeking Kshs. 73,158,205. The Petitioner alleges that the said sum is compensation by way of general damages for alleged violation of his rights and freedoms under *Sections 70(9), 74(1) and 77(9) and (10)* of the Kenya Constitution (now repealed).

2. The Respondents filed a Replying Affidavit sworn by **Bernadette Mwihaki Nzioki** the Secretary of the Public Service Commission of Kenya at the time, sworn on 2<sup>nd</sup> October 2007.

**Uncontested facts**

3. It is common cause that the Petitioner was identified for retirement under reorganization and abolition of office in the programme undertaken by the government in the year 2000. The Petitioner was retired with effect from 1<sup>st</sup> October 2000.

Subsequently it was observed that the Petitioner had a pending discipline case before the retirement decision was made.

4. In view of this, on 6<sup>th</sup> December, 2000, the Commission rescinded the decision retiring the Petitioner and decided that the Petitioner be dismissed from the service with effect from 15<sup>th</sup> July 1998 on account of gross misconduct.

5. The Petitioner appealed the decision which appeal was rejected. The Petitioner was summarily dismissed and all his retirement rights and privileges that he would have enjoyed were rescinded.

6. The Petitioner prays that the Court do;

- a. declare that the Petitioner as a public officer was entitled to the protection of the law as set out in *Section 77(9) and (10)* of the erstwhile Constitution of Kenya and accordingly entitled to the right to a fair hearing and treatment under the Constitution, the Service Commission's Act and regulations thereunder and the Code of Regulations for the Public Service by the relevant bodies and persons established by law to deal with disciplinary issues affecting him as a public officer.
- b. That it be declared that upon service of over 18 years, he was subjected to inhuman and degrading treatment within the meaning of *Section 74(1)* of the Constitution when he was unprocedurally and unconstitutionally dismissed on 15/7/98.
- c. That he was denied the right to earn a living for himself and his family and dependants and was rendered jobless by a process that was skewed and unconstitutional.
- d. That the Petitioner is entitled to compensation for unwarranted and unconstitutional termination of his employment in the sum of Kshs. 73,158,205.
- e. That the Petitioner is entitled to compensation by way of general damages for violation of his rights and freedoms under *Sections 70(9), 74(1) and 77(9) and (10)*.
- f. That the Petitioner be paid costs of the Petition.

7. **Particulars of Employment and termination**

The Petitioner was employed on 2<sup>nd</sup> December 1980 as an Administrative Officer and on 1<sup>st</sup> April 1987 was promoted to a District Officer. On 15 July 1998, he was deployed to the office of the Attorney General as a Senior Assistant Secretary and was subsequently promoted to the position of under-secretary earning a salary of Kshs. 21,770 per month.

8. On 15<sup>th</sup> July 1998, the petitioner along with other officers was arrested on allegations of conspiracy to defraud contrary to *Section 317 of the Penal Code*.

On 16 July 1998, he was interdicted from the public service and was charged in the Chief Magistrate's Court Criminal case No. 1633 of 1998.

On 23<sup>rd</sup> April 1999 the Petitioner was discharged for lack of evidence.

On 30<sup>th</sup> April 1999, he wrote to the Attorney General seeking reinstatement.

On 11<sup>th</sup> June 1999, the Petitioner received a letter dated 28<sup>th</sup> January 1999, stating that the Petitioner's promotion had been rescinded to under secretary because the Petitioner was on interdiction.

On 27<sup>th</sup> September 1999 the Petitioner received a letter stating that he had been suspended and was not entitled to any salary.

9. On 18<sup>th</sup> November 1999, Petitioner received a letter dated 12<sup>th</sup> November 1999 preferring charges of disciplinary action against him. He was asked to show cause why he should not be dismissed. The charges were on the same line as those he faced in the criminal trial.

10. By a letter dated 22<sup>nd</sup> September 2000, the Solicitor General suggested that he should be retired with effect from 1<sup>st</sup> October 2000.

11. The Petitioner was happy with this suggestion but on 23<sup>rd</sup> October 2000 he received a

further letter from the Solicitor General informing him that the decision to retire him had been put on hold pending a disciplinary case against him.

12. On 15<sup>th</sup> December 2000, he received a letter signed by the Solicitor General, summarily dismissing him. All the benefits of retirement were rescinded.

13. He lodged an appeal dated 10<sup>th</sup> January 2001 but same was declined.

The Petitioner states that the summary dismissal did not follow the laid down procedures and he was not given any hearing or due process hence the Petition before Court.

14. In particular Regulation 34(2)(b) of the Public Service Commission Regulations was flouted since no committee headed by a Judge, Magistrate or other person with legal qualification to investigate and adjudicate in the matter was appointed.

The Petitioner was never given a chance to rebut allegations levelled against him. The principle of natural justice was therefore violated.

15. **Issues for determination**

- i. Was there a violation of the rights of the Petitioner guaranteed under *Articles 70(9), 74(1), 77(9) and (10) and 107 of the Constitution*?
- ii. If the answer to (i) above is in the affirmative, what remedies are available to the Petitioner?

Issue I

16. From the facts that are common cause, the Petitioner had served the Respondent in various capacities for a period of over 18 years.

The petitioner was identified for retirement under reorganization and abolition of the office by the Respondent in the year 2000 and was in fact retired from the public service effective 1<sup>st</sup> October 2000.

17. Upon retirement the Petitioner was entitled to all the benefits attributed to the retirement in terms of the relevant law and the retirement package offered at the time.

18. The Respondent arbitrarily rescinded its decision to retire the Petitioner without giving him an opportunity to be heard on the matter.

Instead the Respondent revived a disciplinary case that was purportedly pending against the Petitioner, notwithstanding that it was based on allegations on which he was charged in **criminal case No. 1633/98** being conspiracy to defraud contrary to *Section 317* of the Penal Code. The case was subsequently terminated by the Court for lack of evidence and a letter to that effect was written to the Petitioner on 3<sup>rd</sup> May 1999. The termination of the case by the Court was on 29<sup>th</sup> April 1999 prior to the institution of the disciplinary hearing.

19. The Petitioner alleges that in terms of *Regulation 34(2)* of the Public Service Commission Regulations (then in force), the Respondent was obliged to constitute a committee headed by a judge, magistrate or other person with legal qualifications to investigate and adjudicate the disciplinary matter against the Petitioner.

That this did not take place and therefore, the Petitioner's right to a fair hearing under *Section 77 (9) and (10)* of the then Constitution of Kenya was violated.

Section 77(9) reads:

**“..... a Court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a Court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”**

20. It is apposite to note that the Petitioner was suspended from office with effect from 19<sup>th</sup> August 1999 without a salary and was not to leave his duty station without the express permission of the head of department to whom he was to report at least twice a month until the disciplinary case was finalized.

The letter dated 12<sup>th</sup> November 1999 written to the petitioner by the Principal Personnel Officer L. Mwaliki, accused the Petitioner of three (3) offences including;

- i. authorizing irregular payment of honoraria vide payment voucher No. 6117 for alleged participation on Bank Reconciliation while you were on overseas service;
- ii. irregular payments of honoraria for allegedly participating in various task forces while you did not participate amounting to Kshs. 583,235/=, and
- iii. jointly conspired to defraud the Government of Kenya Kshs. 134,850 by signing and authorizing the payment voucher No. 6707 payable to Mr. Mugoya (under secretary).
- iv. The author acknowledges that the allegations constituted the basis of criminal charges preferred against the Petitioner that were withdrawn under *Section 87* of the Criminal Procedure Code.

21. The Petitioner was asked to show cause why he should not be dismissed from the service on account of gross misconduct, in writing within 10 days from the date of the letter failing which the **“contemplated action will be taken against you without further reference to you.”**

22. Meanwhile, the solicitor General, the substantive Administrative head of the Attorney General’s Chamber, where the Petitioner worked by a letter dated 22<sup>nd</sup> September, 2000 wrote thus **“I wish to convey the decision of the Public Service Commission that you be retired from the Public Service on re-organization of Government/abolition of the office with effect from 1<sup>st</sup> October 2000.”**

The Petitioner was given six (6) weeks within which to appeal the decision but he did not. Effectively, he accepted the early retirement.

The Solicitor General continued by thanking the Petitioner **“for the services you have rendered and wish you success in all your future endeavours.”**

23. The retirement followed a letter dated 8<sup>th</sup> September 2000 written to the Petitioner by the solicitor General Mr. J. K. Kandie, informing him of the decision to retire him following re-organization and abolition of office.

In terms thereof, he was to vacate office and cease to perform duties of that office with effect from 6<sup>th</sup> September 2000 but continue to draw salary, house and medical allowances upto and including 30<sup>th</sup> September 2000 **“after which your name will be deleted from the payroll.”**

A list of requirements to finalise the process are indicated in the letter.

24. On 15<sup>th</sup> September 2000, the Petitioner responded to the letter aforesaid forwarding all the stated requirements and providing his bank details for the remittance of **“Retirement benefits in accordance with the provisions of the Pensions Act and/or National Social Security Fund Act.”**

The retirement was all but sealed and the Petitioner had ceased to be in office with effect from 6<sup>th</sup> September 2000.

25. It is the Court's considered view that the contract of service of the Petitioner ceased to exist as soon as he accepted the decision to take early retirement and all the benefits pursuant to the early retirement accrued henceforth.

26. The Respondent lacked capacity to withdraw the benefits that had already accrued to the Petitioner arbitrarily without his consent and without giving him a hearing on the matter. This in itself constituted a violation of the Petitioner's right to due process of the law and a fair hearing in terms of *Section 77(9) and (10)* of the erstwhile Constitution.

27. Any subsequent action by the Respondent to require the Petitioner to keep on reporting to work without pay and to subject him to a disciplinary process based upon allegations on which he had been acquitted by a competent court of law was a further violation of *Section 77(9) and (10)* of the Constitution.

28. The withdrawal of the retirement benefits accrued to him, violated the principle of legitimate expectation well enunciated in the case of **Pravin Bowry Vs. Ethics and Anti-corruption Commission I.C. Case No. 1168 of 2012**, in which this Court upheld this doctrine relying on the case of **R. Vs. The Hon. Chief Justice of Kenya and others** as follows:

**“it is however also clear that the concept of legitimate expectation like many concepts can be used in more than one way, it does not have to be given a restrictive interpretation thus more recently cases have in principle at least given a broader meaning to that term utilizing it as the foundation for procedural consultation rights to be given to immigrant workers and local authorities. Thus if an individual is to be deprived of a benefit which was enjoyed in the past and which he could legitimately expect to continue or he has received assurance from the decision makers that such a benefit will not be withdrawn without giving him some opportunity to argue the contrary is in either instances an opportunity for the individual to make representations will be accorded.”**

29. In light of the above, the Respondent could not lawfully, withdraw retirement benefits which had already accrued to the Petitioner without seeking his consent or in the least giving him an opportunity to be heard on the matter.

The Respondent effectively conducted a disciplinary hearing in a vacuum since the contract of service between the Petitioner and the Respondent had ceased to exist upon his retirement by the Public Service Commission.

30. The termination of the employment of the Petitioner without any terminal benefits after 18 years of service; suspending him without pay for a considerable period of time and denial of the retirement benefits viewed in the context of this case was in the Court's view, unfair, unlawful and amounted to inhuman and degrading treatment contrary to *Section 74(1)* of the Constitution.

31. The Petitioner prays for:

- a. *a declaration that his rights under Section 77(9) and (10) of the Constitution of Kenya were violated;*
- b. *reinstatement and to serve until lawfully and constitutionally removed or until he retired at age 55;*
- c. *payment in respect of revised terms of service which he would have been entitled to but for the termination;*
- d. *compensation for the wrongful and unfair dismissal calculated at Kshs.73,158,205 or such sum as the Court would deem just and fair in the circumstance of the case;*
- e. *general damages for violation of his rights under Section 70(9), 74(1) and 77(9) and (10) of the*

Constitution.

32. *Section 84* of the erstwhile Constitution empowered the Court to hear and determine Petitions concerning alleged violation of the rights and freedoms protected under *Sections 70 to 83* of the Constitution.

33. In the case of **Angela Innis V. Attorney General of St. Christopher and Nevis, Appeal No. 29 of 2007**, The privy Council found that the remedy or redress has a number of components namely damages under the contract of service and vindicatory damages which are damages to vindicate one's constitutional right which is contravened. The third component constitutes costs of the suit.

34. The Petitioner had served the Respondent for 18 years. He was born in 1969, and as at the time his employment was unfairly and unlawfully terminated he was only 32 years old and was due to retire 23 years later upon attaining the age of 55 years. That notwithstanding he had accepted the early retirement offered him, which offer he had accepted and the Respondent is bound by that offer.

In addition, the Petitioner was kept on suspension without pay from August 1999 until the 5<sup>th</sup> January 2001 when he received a letter of dismissal dated 15<sup>th</sup> December 2001. The dismissal was effective 15<sup>th</sup> July 1998. The Petitioner is entitled to his full salary for the entire period of suspension without pay.

35. Furthermore, considering the passage of time since the dismissal took place effective 15<sup>th</sup> July, 1998, it would not be practical to reinstate the Petitioner to his job, however in the alternative, the Claimant in addition to payment of the retirement benefits offered at the time he was retired is entitled to General damages for the gross violation of his fundamental rights in terms of *Section 77(9) and (10) and 74(1)* of the Constitution and to mitigate the loss of income the Petitioner lost and loss of user of the retirement benefits that was due and payable then and continue to suffer such loss to date. The humiliation he underwent by the sudden withdrawal of the offer of retirement; the false imprisonment and prosecution at the instance of the Respondent which ended up in a discharge due to lack of evidence among other dehumanizing conducted chronicled in this judgment.

36. In the case of **Gilbert Mwangi Njuguna V. Attorney General I.C. NRB Petition No. 17 of 2013**, the Court awarded General damages of Kshs. 2 million in addition to an award for re-engagement from the date of the judgment.

In that case, the Petitioner had been retired in public interest without due process contrary to *Section 77(9)* of the Constitution.

In the instant case, we have found that the Respondents violated both *Section 74(1) and 77(9) and (10)* of the Constitution.

37. In the circumstance of this case we award General damages in the sum of Kshs.4 million.

38. In the final analysis the Court finds for the Petitioner and awards the Petitioner as against the Respondents jointly and severally as follows;

- i. the petitioner was a public officer of over 18 years standing and is to be retired with full benefits in terms of the Notification for early retirement dated 22<sup>nd</sup> September 2000 by **Mr. J. K. Kandie** Solicitor General.
- ii. that the subsequent dismissal was unlawful, unfair and was done in gross violation of the rights of the Petitioner protected under *Section 74(1) and 77(9) and (10)* of the Kenya Constitution (now repealed).

- iii. that the Petitioner is awarded the full salary and benefits for the entire period he was under suspension with no pay from 19<sup>th</sup> August 1999 until the 15<sup>th</sup> January 2001, when he received the letter of termination.
- iv. that the Petitioner is awarded general damages in the sum of Kshs.4 million (four million) for the violation of his constitutional rights under *Section 74(1) and 77(9) and (10)* of the Kenya Constitution (now repealed).
- v. that the Respondents are directed to compute orders (i) and (iii) above and file with the Court upon service on the Petitioner within 30 days from the date of this judgment for consideration and approval.
- vi. the Respondents to meet the costs of this Petition.

***Dated and Delivered at Nairobi this 16th day of April, 2014.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**