



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 68 OF 2013**

**[Formerly High Court Civil Case No. 249 of 2012 at Nakuru]**

**ABDALLA MOHAMED MCHINGA.....CLAIMANT**

**- VERSUS -**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 4<sup>th</sup> April, 2014)

**JUDGMENT**

The claimant **Abdalla Mohamed Mchinga** filed the suit on 17.07.2012 through Olaly Cheche & Company Advocates. The claimant prayed for:

- a. **General and exemplary damages for unlawful interdiction, suspension, and demotion.**
- b. **Costs of the suit.**
- c. **Interest on (a) and (b).**

The case was transferred to the Industrial Court and the claimant filed the memorandum of claim and prayed for judgment against the respondent for:

- a. **General and exemplary damages for unlawful interdiction, suspension and demotion.**
- b. **A declaration that the respondent issues a certificate of service to the claimant.**
- c. **Costs of the claim and interest.**
- d. **Any other relief the hounourable court may deem fit to grant.**

The respondent filed the response to the claim on 05.02.2014 through Senior Litigation Counsel E. N. Njuguna for the respondent. The respondent prayed that the claim be dismissed with costs. The claimant filed the reply to the response on 27.02.2014 and prayed that the response be struck out with costs.

Parties opted to rely on the documents and pleadings on record without calling witnesses. The claimant's submissions were filed on 7.3.2014 and the respondent's on 27.03.2014.

The claimant is a civil servant employed by the Government as an Accounts Assistant (II) Job Group G . The issues for determination in this case are whether the claimant's interdiction, suspension and demotion

in rank was unfair; and whether the claimant is entitled to baggage allowance and certificate of service.

The claimant was interdicted with effect from 20.04.2006 by the letter dated 28.04.2006 on allegations of embezzlement of Kshs.172,800.00 being students' funds intended for March and November, 2006 examination fees. The letter conveyed to the claimant the intended disciplinary action for gross misconduct that might have concluded in a dismissal. The claimant was to make representations in 21 days from the date of the letter in self exculpation.

By the letter dated 23.11.2006, the claimant was notified about the funds he had failed to account for and also notified about contemplated dismissal from the civil service and a decision to be surcharged Kshs.124,407 which he had not accounted for and as established by the audit report. By that letter, the claimant was suspended from the service with effect from 15.11.2006 and was given 21 days to make representation in self-exculpation. Subsequently, the claimant was reduced in rank on account of the gross misconduct.

The court has considered the circumstances of the case and finds that the claimant was given an opportunity to make representations but was not accorded an opportunity to be heard in view of the allegations levelled against the claimant. The claimant was entitled to a notice of misconduct or poor performance and to be heard as prescribed in section 41 of the Employment Act, 2007. The court finds that whereas the notice was served, the claimant was not invited to a hearing and it was not proper for the claimant to be deemed or found culpable as charged without an opportunity to be heard in view of the allegations. The court holds that parties in an employment contract may agree upon a disciplinary procedure that includes the employee's making of written response or representation in event of desired termination on account of a misconduct or poor performance or ill health but such arrangement can only be in addition to and not in substitution to a hearing as envisaged in section 41 of the Act. Thus, the court finds that the interdiction, suspension and reduction in rank were unfair and are liable to be set aside for want of due process that entailed affording the claimant a hearing.

The next issue for determination is whether the claimant is entitled to baggage allowance and certificate of service.

By letter dated 12.01.2011, the claimant was posted from the Ministry of State at Baringo Government Training Institute to the Ministry of State for Immigration and Registration of Persons at Nairobi and with effect from 28.01.2010. He was accordingly released by the letter dated 3.02.2011. By the letter dated 4.02.2011, obviously having reported at Nairobi as deployed, the claimant was posted to the National Registration Bureau at Baringo. The letter dated 7.02.2011 confirms that the claimant reported as posted with effect from 4.02.2011. The letter dated 14.02.2011 confirms that the claimant had been referred to the Director of National Registration upon reporting at the National Registration Bureau in Baringo. The claimant claims allowance for travelling to Nairobi and back to Baringo. The respondent has acknowledged paying the claimant Kshs.20,580.00 as baggage allowance for the transfer from Baringo Government Training Institute to Nairobi. There is no evidence that the claimant was paid baggage allowance upon posting from Nairobi to the National Registration Bureau in Baringo. The court finds that the claimant travelled from Nairobi to take up the posting at Baringo and he is entitled to **Kshs.20,580.00** in view of that movement. The court further finds that a certificate of service is issued to an employee upon termination of employment as provided for in section 51 of the Employment Act, 2007. It is not disputed that the claimant is still in employment and has not been terminated. Thus, the court finds that the prayer for a certificate of service was misconceived and shall fail.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. A declaration that the interdiction, suspension and reduction in rank were unfair and are set aside for want of due process that entailed affording the claimant a hearing.

- b. A declaration that the claimant is entitled to full salaries, allowances and benefits flowing from (a) above to be computed by the claimant and filed in court in 7 days from the date of the judgment for recording the figures on a date convenient to the parties.
  
- c. The respondent to pay the claimant **Kshs.20,580.00** being baggage allowance for the posting from the National Registration Bureau at Nairobi to Baringo.
  
- d. The respondent to pay the dues in (b) and (c) above by 1.05.2014, failing, interest at court rates to be payable from the date of the suit (17.07.2012) till full payment.
  
- e. The respondent to pay costs of the suit.

**Signed, dated and delivered in court at Nakuru this Friday, 4<sup>th</sup> April, 2014.**

**BYRAM ONGAYA**

**JUDGE**