



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

**AT NAIROBI**

**CAUSE NO. 565 OF 2012**

**GEOFFREY MWAKIO ..... CLAIMANT**

**VERSUS**

**THE KENYA BROADCASTING CORPORATION ..... RESPONDENT**

**Mr. Ogeto for Claimant**

**Mr. Ochore for Respondent**

**JUDGEMENT**

1. The Claimant has sued the Respondent for alleged unlawful and unfair termination of employment and seeks;

- i. Payment of half ( $\frac{1}{2}$ ) salary for the period of interdiction;
- ii. Reinstatement with full payment of salary arrears and in the alternative;
- iii. Compensation for the unlawful and unfair termination of employment.

2. **Summary of facts on which the Claim is based**

The Claimant was employed by the Respondent then known as Voice of Kenya on 30<sup>th</sup> October 1984 in the position of Inspector (Electronic). He served the Respondent continuously for a period of about 25 years, during which period he rose through the ranks and kept a clean record of service.

He was a graduate of the Kenya Institute of Communication (KIMC).

3. On 7<sup>th</sup> June 1994, he was promoted to the position of Senior Inspector job group BA6; between 24<sup>th</sup> February 1995 to 8<sup>th</sup> April 1995 he acted as a senior Superintendent (electronic) job group BA4; by letter dated 25<sup>th</sup> September 1998, he was transferred to Webuye as the Engineer in-charge of Webuye T.V. transmitting station. This was upon return from a training programme in Slovenia on factory acceptance tests for transmitter, to be used by the Respondent.

4. On 1<sup>st</sup> December 2002, he was promoted to the position of Senior Superintendent job group BA4.

On 18<sup>th</sup> May 1999 he received commendation for good work performance and on 20<sup>th</sup> August 2004, he

received a letter informing him that his work performance review was rated good for the year 2003.

5. On 2<sup>nd</sup> January 2005 he was transferred to Nakuru TV /FM transmitting station on job group BAG. On February 2005, the job group BA4 was upgraded to BA4 on the same job title Senior Superintendent. Between 26<sup>th</sup> September 2005, he attended a digital production and distribution course at the Kenya Institute of Education (KIE).

6. **Arrest and charge**

On 6<sup>th</sup> October 2005, he was arrested and charged with fraud. He was interdicted on 14<sup>th</sup> December 2005, and to be put on half (½) pay until the case ended.

The payment was however not made for the entire period of the case until 2011 when he was acquitted of the charges when the half (½) salary was paid for the period December 2005 to June 2006.

7. The Claimant states that the Respondent did not follow the **Public Service Act, Part IV** and in particular **Section 23 (1 – 6)**.

That the basis of the interdiction was the **Criminal Case No. 1188 of 2006** and he ought to have been paid the full salary for the entire period of interdiction upon acquittal.

8. Furthermore he ought to have been reinstated to his job upon acquittal especially because he did not participate at all in the alleged bank fraud and indeed, a **Mr. Njeru**, the auditor on the matter, testified in his defence.

9. That he was hardly four (4) months at the Nakuru station before the arrest and he was charged together with 10 other persons who had colluded with his supervisor at the Nakuru station to fraudulently withdraw monies belonging to the Respondent.

That he was able to show that he was completely unaware of the conspiracy between his supervisor and others with whose help he had defrauded the Respondent.

10. That those guilty of the charges, including his supervisor were found guilty and convicted.

That his supervisor personally apologized to him and had told the Magistrate Court that the Claimant was not involved at all in the fraud.

11. It was therefore wrong for the Respondent not to reinstate him to his job with full payment of arrear salary and seeks the Court to declare that the interdiction and subsequent dismissal was unlawful, order the Respondent to pay him all the arrear salary and reinstate him to his job.

12. The Claimant testified under oath in support of his case and withstood cross-examination well. He was candid in his answers and the Court views his evidence as consistent and credible.

Indeed the witness for the Respondent **Mr. Pius Mutuku Mueke**, the Acting Chief Human Resource Officer adduced evidence which was in many respects in favour of the Claimant's case.

He said, for example, that he was not aware of the Claimant having appeared before the Board for a disciplinary hearing before the dismissal. He also testified that the Claimant ought to have been paid half (½) salary for the entire period of the interdiction.

That he was not aware of any adverse record against the Claimant prior to the interdiction and was surprised that the Claimant had just been transferred from Webuye to the Nakuru Station.

The witness however, said that the Board had expressed lack of confidence in the three (3) officers who

had been charged with fraud and the Claimant's appeal after acquittal by the Court was rejected by the Board. He said that the Claimant ought to have been paid up to the date of termination which was on 21<sup>st</sup> June 2006 which happened before the Claimant was acquitted of the Criminal charges.

13. According to the pay-slip for December 2005, the Claimant earned a gross salary of Kshs.25,967 and was registered with the National Hospital Insurance Fund (NHIF) and was a member of a Benevolent Fund and Staff Pension Scheme to which he contributed monthly.

#### 14. Conclusion

The Respondent did not place any evidence before Court to show that the Claimant was guilty of any fraudulent conduct that warranted dismissal from work.

Indeed the testimony of the Principal Internal Auditor of the Respondent fully exonerated the Claimant from any wrong doing during the trial and his internal memo to the Managing Director of the Respondent dated 22<sup>nd</sup> August 2005, did not implicate the Claimant with the fraud committed through the Respondent's imprest account.

He also stated that though **Mr. Mark Phalen Were** and others were involved in the fraud, they only used the corporation's Account to convey the money but the corporation did not lose any money.

15. Accordingly, the Claimant has on a balance of probability shown that his dismissal from the employment of the Respondent was wrongful and the Respondent has failed to discharge its onus to justify the dismissal.

The dismissal was therefore unfair in terms of **Section 43(1)** as read with **Section 45(1)** and **45(2)(a)** and **(c)** of the **Employment Act, 2007** in that the dismissal was not for a valid reason and was not done in accordance with a fair procedure.

#### 16. Remedy

The Court upholds the prayers by the Claimant and awards him the full salary for the entire period he was under interdiction from 6<sup>th</sup> December 2005 to the date of judgment by the Chief Magistrate on 11<sup>th</sup> November 2011 less any amount already paid since the same was premised on the charges in Criminal case No. 1188/06. Indeed the letter of interdiction as earlier said required the Claimant to remain at work all the time. The amount to be computed by the Claimant and served on the Respondent and filed with the Court for consideration and approval within 30 days from date of Judgment.

The dismissal on 21<sup>st</sup> June 2006, was unlawful and unfair taking all the circumstances of the case into account and the Court in view of the immense loss suffered by the Claimant including having to persevere a lengthy criminal trial in which he was fully exonerated from any wrong doing based on the evidence of the Principal Internal Auditor of the Respondent, the Claimant fully deserves to go back to his employment.

17. However, a lot of time has elapsed since the dismissal took place and it is impractical in the Court's view to reinstate the Claimant back to his position since a lot may have changed at the Respondent's work place.

It is the Court's considered view that the limited maximum compensation of 12 months' salary is inadequate to mitigate the loss and damage the Claimant has undergone pursuant to the unlawful and unfair action by the Respondent.

The Court in the circumstances awards the Claimant general damages in lieu of reinstatement which I assess at Kshs.3million. The Respondent has however in the alternative the option of re-engaging the Claimant to his previous job or to any other suitable position within 30 days from the date of this

judgment and in addition pay twelve (12) months' salary in the sum of Kshs.311,604/= being compensation for the unlawful dismissal. If the Claimant is not re-engaged within the stipulated 30 days then this alternative remedy shall abate and the Respondent shall pay the Kshs.3million general damages to the Claimant as directed above.

**Dated and Delivered at Nairobi this 9<sup>th</sup> day of May, 2014**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**