



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT KISUMU

CAUSE NO. 111 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 18th September, 2014)

MOSES MAJALE SHAVALEJI.....CLAIMANT

-VERSUS-

THE PS MINISTRY OF LANDS.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The claimant Moses Majale Shavaleji filed his memo of claim on 13.7.2012 through the firm of J. I. Khayumbi & Co. Advocates. He claimed that he was unlawfully and wrongfully terminated by the respondents, the PS Ministry of Lands and The Hon. Attorney General. His case is that he was initially employed in the public service on 21.11.85 and posted in the Department of Police in the Office of President and worked in Crimes Statistics section at CID Headquarters before being transferred to the Provincial CID Headquarters Kakamega on 6th January 1992 in the same capacity.

On 15.7.2008, he was transferred to the Ministry of Lands Kakamega where he was assigned clerical duties. On 22.6.2009, the claimant received a letter of suspension from the District Lands Officer Mr. Obutu L. J. of Kakamega District Lands Office. He was to be on suspension for 14 days within which he was to reply to the events that occurred on 17.7.2009. He replied to this letter vide his *App 5* explaining that he erroneously carried out of the office an envelope containing some search certificate and green card in respect of **Mun Block IV/607** that one Jackline (Lands Officer) had given him to keep under lock and key.

On 19.8.2009, he was interdicted as per *App 6*. In the interdiction letter, the claimant was forbidden from going to the office. Various accusations were also levelled against him being that;

1. On 17.6.2009 at 5 pm, he was spotted by the District Lands Officer with (2) envelopes that appeared to contain certain documents and on being asked to show the contents, he defied the orders and started running away. He was finally caught and produced only one envelope in the presence of the Land Registrar and it contained several searches that he had personally prepared and for which he was unable to explain where he was taking them.
2. On 18.6.2009, he produced th 2nd envelope despite having sworn the previous day that he had only one envelope. It contained more official searches and a green card and white card for Kak Munic Block IV/607 and which appeared to have been ripped off from the

Kalamazoo and had been tampered with by changing entries on it.

The claimant was asked to show cause within 21 days why disciplinary action could not be taken against him. He was put on ½ salary. Vide a letter dated 7.9.2009 **App 7** the claimant made his reply denying the allegations of running away and stating that he had taken the 2 envelopes by mistake thinking that they contained his personal effects.

Despite all these happening, the claimant was charged before court on 2.3.2010 for 2 offences of stealing by a person employed in the public service contrary to Section 352(b) of Penal Code. The criminal hearing proceeded but in the end, he was acquitted under S. 215 of Criminal Procedure Code on 27.1.2011 as per judgment **App 25**. In the meantime, on 7.5.2010, the claimant was suspended from work with effect from 5.6.2010 and on 11.6.2010 he was dismissed from service. His dismissal letter was sent to an address 229 by registered mail yet his current address is 2500 Kakamega. One **Beatrice Walubuka** rung and informed him of the letter and he went and picked it after 6 days.

On 28.10.2010 he appealed against the dismissal **App 13**. On 23.12.2010, he received another letter indicating that his appeal had been rejected **App 14**. No reason for rejecting the appeal was given. After the criminal case ended, he wrote to his employer on 24.2.2011 requesting that he be reinstated into service. On 7.6.2011, the respondent wrote him a letter disallowing his dismissal from service **App 16**. On 22.6.2011, he wrote thanking them accordingly **App 17**. On 29.6.2011, he got another letter canceling the reinstatement **App 18**. His contention is he was sacked before the criminal case was over. The respondents even wrote to him demanding Kshs 17,734.60 which they alleged he owe the government but he denied the same. He now seeks an order from court reinstating him to work and payment of his unpaid salary since dismissal. At time of dismissal he was earning Ksh 15,800/=.

In cross-examination the claimant told court that he explained why he was found with a green card and searches and he exercised his avenues for appeal with the PSC.

The respondents on the other hand filed their response on 19.3.2014 through **Sara Alingo** Litigation Counsel for the Attorney General. It is their defence that the claimant was indeed arrested and prosecuted in Kakamega Criminal Case No. 387/2010. They deny that claimant was suspended from duty with effect from 5.5.2010. They deny that they did not pay the claimant his terminal dues. It is further respondents case that the claimant exhausted his two rights of appeal as provided for in the Civil Service Code of Regulations and that the claimants rights were duly protected and principles of natural justice followed as the claimant was heard and given a chance to defend himself. They want the claim against respondents dismissed with costs.

Upon hearing both parties, the issues for consideration are as follows:-

- 1. Whether there was a valid reason to warrant claimant's dismissal.**
- 2. Whether due process was followed before claimant was dismissed.**
- 3. Whether claimant is entitled to prayers sought.**

On 1st issue, the allegations against claimant are as contained in the charge sheet in Criminal Case No. 387/10 before Chief Magistrate's court Kakamega. Where claimant was charged with offences of stealing by a person employed in the public service contrary to S. 28 of Penal Code and of forgery of stamp contrary to S. 352(b) of Penal Code. Accused was found innocent on both counts and acquitted under S. 215 of Criminal Procedure Code. The reasons leading to claimant's suspension and interdiction were also given in the letters interdicting and suspending him which reasons also relate to the events of the documents apparently recovered from the claimant.

The reasons given could amount to valid reasons for dismissal if found true. However, from the evidence adduced, there was no proof that the documents were found in claimant's house and his defence was that he erroneously carried an envelop from his desk assuming it contained personal documents just to find it

had official documents.

On issue of due process, the claimant was initially accorded due process by being interdicted and being asked to show cause why disciplinary action should not be taken against him. He made his explanation in writing. In the meantime, he was suspended as the criminal case went on. This was on 7th May 2010. He was thereafter dismissed from service on 11.6.2010.

There is however no evidence that the claimant was given any hearing as envisaged under S. 41 of Employment Act and under the Public Service Commission of Kenya. Discipline Manual July 2008. Article 5(part 11) of the Manual para(a) states as follows:-

“The disciplinary process in the public service shall be governed by the principles of natural justice which require that any officer charged with any offence is given an opportunity to defend himself or herself before an impartial adjudicator.”

It is clear that the claimant was not accorded any hearing and therefore his rights under S. 41 of Employment Act which states:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”

And Article 50(1) of Constitution which states:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal and body.”

were flouted.

Given this fact, any decision made against claimant including dismissal was null and void and I declare it so.

Is the claimant entitled to a reinstatement? I find that, by virtue of the provisions of S. 12(3) (vii) – which provides that reinstatement can be ordered by court within 3 years from date of dismissal, the claimant cannot be reinstated having been dismissed in June 2011 and 3 years having lapsed since his dismissal.

I find claimant is however entitled to the following orders, which I now grant:-

1. **12 months salary as compensation for unlawful termination = 12,416 X 12 = Kshs 148,992/=**
2. **Salary lost from time of dismissal to-date = (12,416 X 12 X 3) + 3 months salary = 446,976 + 37,248 = Kshs 484,224.**

TOTAL = KSHS 633,216/=

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As to other claims of pension, and NSSF, the claimant shall pursue them as provided for under the relevant statutes.

The claimant shall be issued with a certificate of service. Respondent to pay costs of this suit.

HELLEN S. WASILWA

JUDGE

18/9/2014

Appearances:-

Claimant present

N/A for Respondent

CC. Wamache