



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS INDUSTRIAL COURT**  
**AT NAKURU**  
**CAUSE NO. 49 OF 2013**

**MICHAEL KAGOMA MAINA**

**CLAIMANT**

**V**

**INSPECTOR GENERAL OF POLICE**

**1<sup>ST</sup> RESPONDENT**

**NATIONAL POLICE SERVICE**

**COMMISSION**

**2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL**

**3<sup>RD</sup> RESPONDENT**

**RULING**

1. Michael Kagoma Maina (Claimant) was enlisted into the Kenya Police Force on 19 July 1971 as a constable. The Claimant was promoted in 1996 to the rank of Superintendent of Police and in 2000 he was posted to Mwingi Police Division as Deputy Officer Commanding Police Division.
2. In 2001, the Claimant was posted to Eastern Provincial Police Headquarters as Staff Officer Quartermaster. In 2004, the Claimant was arrested and charged with various offences of stealing by person employed in the public service after he was verbally interdicted on 22 October 2004. He was eventually acquitted on 2 March 2011.
3. After the acquittal, the Claimant's interdiction was lifted and he was discharged/retired but backdated to 27 September 2007.
4. On 19 February 2013, the Claimant commenced legal proceedings against the Respondents alleging violation of his rights and seeking
  - a) A declaration that, the verbal interdiction was wrongful, in breach of the law and/or regulations and therefore illegal.
  - b) A declaration that the Claimant's discharge and/or retirement before attaining of the amended age of 60 years was unjustifiable, malicious, illegal and a breach of the Claimant's rights under the Constitution and the Law.
  - c) A declaration that the investigations and consequent prosecution were malicious and that the same inhibited the Claimants promotional progression.
  - d) An order that the Respondents do pay the Claimant damages for intentionally, in breach of the law and without justifiable cause inhibiting the Claimants promotional progression

by institution of malicious investigations and prosecution.

e) A order that the Respondents jointly and/or severally do pay the Claimant Kshs 51,170/-  $\times 12 \times 5$  years= Kshs 3,070,200/- being salary for the 5 years he ought to have worked before retirement at the age of 60 years and/or any reasonable figure this Honourable court may deem fit to grant.

f) An order that, the Respondents jointly and/or severally do pay the Claimant Kshs 51,170  $\times 12$  = Kshs 614,040/= being general damages for illegal and/or unlawful termination.

5. The Respondents were served, and on 20 March 2013, they filed a joint Response. The Claimant joined issue with the Response. The Claimant thereafter filed several volumes of documents in support of his case.

6. On 4 July 2013, the Claimant was granted leave to amend the Memorandum of Claim

7. After hearing submissions from the parties, Ongaya J delivered judgment on 20 December 2013 in which he entered judgment in favour of the Claimant as follows:

1. A declaration that the retrospective termination of the Claimant's employment by way of retirement on account of attaining the age of 55 years as conveyed in the letter dated 18.03.2011 was unfair and the claimant was entitled to retire upon attaining 60 years of age effective 27.9.2012 with due pension benefits.

2. A declaration that the abrupt severance of the claimant's half salary with effect from 27.9.2007 which he used to earn while in the police service and on interdiction was illegal and unlawful.

3. The respondents to pay the claimant Kshs 3,884,240.00 by 1.3.2014 failing interest to be payable at court rates from the date of judgment till full payment.

8. The Claimant and the Respondents were all aggrieved with the judgment. The Respondents filed a Notice of Appeal on 27 December 2013, while the Claimant filed an application for review on 17 July 2014.

9. The review application is the subject of this ruling.

### **Claimant's submissions**

10. To make sense out the Claimant's papers as filed requires some keen reading. For the sake of brevity, I will outline what I perceive to be the substance of the grounds set out in the motion.

11. The first is that the judgment delivered by Ongaya J on 20 December 2013 should be reviewed to await the outcome of Embu High Court Civil Case No. 136 of 2011 to avoid conflicting decisions.

12. The second ground advanced by the Claimant is that the judgment by Ongaya J failed to comprehensively capture the real issues raised by the parties. The reasons given are that the Judge did not address the question of the investigation and prosecution of the Claimant being malicious and damages for inhibiting the Claimant's promotional progression.

### **Respondents' submissions**

13. The Respondents filed grounds of opposition and written submissions on 26 September 2014. The thrust of the grounds advanced were that the review application was brought after an inordinate delay, was an afterthought and under the wrong provisions of the law and contravened the express provisions of the Civil Procedure Rules and was frivolous, vexatious and an abuse of court process.

14. The Respondents submitted that there was a pending suit on the question of malicious prosecution of the Claimant before the High Court in Embu and that the claims are independent and distinct.

### **Evaluation**

15. Rule 32 of the Industrial Court (Procedure) Rules, 2010 provide 5 grounds upon which if satisfied, the Court may review its decisions. The grounds briefly are where there is *discovery of new matter or evidence which was not within the knowledge of applicant, mistake or error apparent on the face of the record, decision being in breach of a written law, decision needing clarification and lastly for sufficient reasons.*
16. The Claimant did not suggest that he had come upon any new matter or evidence or that there was an error apparent on the face of the record. He equally did not suggest that the judgment was in breach of a written law or needed clarification.
17. The application therefore falls for discussion under *sufficient reasons*. The first ground/reason cited by the Claimant was in relation to the Embu High Court proceedings.
18. The gravamen of cause of action before the Embu High Court is malicious prosecution. The Embu Court at some point adverted to the fact that it had no jurisdiction over the employment complaint. The Industrial Court dealt with and rendered its decision on the employment question. The complaint on malicious prosecution is still pending before the High Court in Embu.
19. This Court has no power and it cannot be a sufficient reason to review a judgment already delivered to await another decision of a competent Court exercising its jurisdiction.
20. The Claimant was at all times aware of the real issues in dispute before the Employment and Labour Relations Court and the High Court in Embu.
21. Indeed it was incumbent upon him to make material disclosures to both Courts if he felt that similar or interlinked issues arose so that each Court could delimit the extent of their respective jurisdictions. The Claimant made that disclosure and the Embu High Court addressed the issue very competently as deposed in paragraph 9 of the Claimant's supporting affidavit.
22. On the question of inhibited promotional progression, this is an issue which the Claimant should properly take up on appeal. He raised the issue but he feels the trial Court did not address it.
23. The Employment Act, 2007 protects employees from procedurally and substantively unfair terminations. In cases where the Court finds unfair termination, the remedies have been provided in section 49 of the Act. And in determining appropriate compensation section 49(4), of the Act has outlined the factors to consider.
24. The Respondents raised an objection on the ground that the Claimant did not cite the correct legal provisions to anchor the review application. I do not think that the Respondents were prejudiced by the failure by the Claimant to set out the correct legal provisions applicable in review cases.
25. Because of the conclusion reached, I do not think it necessary to discuss the other grounds of objection advanced by the Respondents.

## **Conclusion and Orders**

26. The Court is not satisfied that the Claimant has met the threshold for review of the judgment delivered on 20 December 2013. The upshot being that the motion filed in Court on 17 July 2014 is dismissed with costs to the Respondents.

**Delivered, dated and signed in Nakuru on this 18<sup>th</sup> day of December 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

Respondents Mr. Mbaka, Litigation Counsel, Office of the Attorney General