



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NO. 214 OF 2014

MARO BWANAIDI ADECLAIMANT

VERSUS

- 1 THE ATTORNEY GENERAL
- 2 THE COMMISSIONER OF POLICERESPONDENT

J U D G M E N T

INTRODUCTION

1. The Claimant herein sued the respondent before the High Court vide the plaint filed on 1-4-2010. The reliefs sought included:

- (a) **Declaration that the claimant was wrongfully dismissed by the 2nd respondent**
- (b) **An order reviewing the wrongful dismissal to a normal termination.**
- (c) **An order that the claimant is entitled to:**
 - (i) **service pay of ksh.74475.**
 - (ii) **3 months salary in lieu of notice being ksh.64545**
 - (iii) **lost earning of ksh.21515 per month for 22 years.**
 - (iv) **unpaid transfer allowance being ksh.43030**
- (d) **Costs and interest from the date of the judgment.**

2. The respondent filed defence on 3/9/2010 denying liability. They averred that the dismissal was fair and in strict compliance with the law and the force standing orders (FSO).

3. The hearing was done on 22/9/2014 when the claimant testified as Cw1 and CIP Muhammed Baa Amin and IP Simon Nzuki testified for the defence as RW1 and RW2 respectively. Before the hearing commenced the counsel for the 2 sides agreed to have all the documents filed on behalf of the claimants and the defence be marked as exhibits.

CLAIMANT'S CASE

4. CW1 told the court that he was employed by the respondent on 11/12/1999 and served in various stations for 9 years until he was summarily dismissed on 3-4-2009 while stationed at Miritini police post. The reason for his dismissal is that he absented himself from duty without permission and secondly that he disobeyed a lawful command without any good cause. He admitted that after being denied leave from 2007 and an off duty to take his children to a school near his rural home at Hola, CW1 booked his absence in the OB and took his family home and managed to secure a school for his children and returned to work after several days.

5. When he reported back to the station, RW2 directed corporal Mwiricha to charge him for absenteeism without permission, which was done vide form P6 which CW1 refused to sign. The reason for refusing to sign according to CW1 was because it would have meant that he had admitted the offence yet he had booked his absence in the OB. RW2 referred the case to RW1 but CW1 never complied and the matter ended at that.

6. CW1 explained that on 2/3/2009, Corporal Mwirichia showed him a signal requiring CW1 to go for an operation in Isiolo for several days. CW1 responded by requesting for exemption because he had family problems involving the schooling of his children. That led to his being charged on 3/3/2009 for the alleged disobedience to a lawful command before CIP Baa (RW1) at Siakago Police Station. CW1 was asked by RW1 why he went home without permission and was now refusing to go for the operations. His response was a request for his witness Mr. Abdi and corporal Mwiricha to be called but the request was declined. When he protested about the unfairness of the proceedings continuing without his witnesses, he was thrown out and the case proceeded in his absence. Henceforth he was not assigned duty until 3-4-2009 when RW2 served him with a signal stating that CW1 had been dismissed.

7. According to CW1 his dismissal was wrongful and unfair and was due to bad blood between him and corporal Mwiricha and RW2 whose root was the refusal by CW1 to pay a ksh.1000 daily to the duo as levy to enable CW1 to continue with traffic duties. He maintained that he would have served until the age of 55 years were it not for the said wrongful dismissal which was done when he was only 30 years. He prayed for a total of ksh.5,859,010 including 3 months pay in lieu of notice, service pay, transfer allowance and lost earning for 22 years.

8. On cross examination by the defence counsel, CW1 maintained that although he applied for leave, he was never granted from 2007 until he was dismissed. The reason given for the denial of his leave was that there were few officers. CW1 maintained that he was entitled to 30 leave days per year. He admitted that in 2009 he was charged with the offence of losing exhibits and was fined ksh.500. He further admitted that on 2/3/2009 he received a signal ordering him to report to Provincial Police Headquarters on 3/3/2009 in uniform and with a gun in order to proceed to Isiolo for an operation. He however never complied and on 4/3/2009 he was charged before CIP Baa(RW1) in an Orderly Room at Siakago Police Station. He admitted that he was accompanied by RW2 to the Orderly Room. He contended that the Deputy OCPD who was around threatened to lock CW1 in the cells but RW1 told CW1 to go away. CW1 denied ever obstructing the Orderly Room Proceedings through chaos. He maintained that he was not given any chance to defence himself and his witnesses were never called.

DEFENCE CASE

9. RW1 was the OCS siakago Police Station on 4/3/2009 when he was asked to conduct an Orderly Room Proceedings on the CW1. CW1 was brought to the proceedings by RW2 to face the charges of failing to obey a lawful command without any lawful cause contrary to Regulation 3(8) of the Police Regulations. RW1 explained that RW2 read the charges and CW1 pleaded not guilty and the proceedings commenced. When RW2 started his testimony, CW1 became violent and complained that he was getting unfair trail and walked out.

10. As a result of the walk out RW1 adjourned the hearing to 5/3/2009 when he summoned Inspector Njoroge to represent CW1 and hearing proceeded in the absence of CW1. RW2 and corporal Mwiricha testified and RW1 convicted CW1 and forwarded the proceedings to the PPO through the OCPD Siakago to pass sentence because the offence committed was serious. The PPO sentence was the dismissal of the CW1 which was communicated through a signal on 3-4-2009.

11. On cross examination by the claimant's counsel, RW1 explained that the hearing was done under the FSO which are under the Police Act. He admitted that under the FSO, CW1 was entitled to a 24 hour notification of the Orderly Room proceedings but he was not granted the said notice after the OCPD waved it in order to teach other officers a lesson. RW1 maintained that such discretion to wave the notification is provided for under the FSO.

12. RW1 further admitted that after taking RW2's testimony on 4/3/2009, he never recalled him on 5/3/2009 when Inspector Njoroge appeared for CW1 but only took the evidence of corporal Mwiricha. He admitted that Njoroge was a stranger to the facts in proceedings because he never discussed the case with CW1 before appearing for him in the Orderly Room Proceedings. He denied that CW1 requested for Abdi and Mwiricha to be called as his witnesses even after he asked CW1 whether he had any witnesses to call.

13. RW2 was the officer in charge of Miritini Police Post when he received a signal dated 2/3/2009 calling CW1 to go for an operation in Isiolo. RW2 briefed CW1 that he was to be issued with a gun and 2 rounds of ammunition on 3/3/2009 by corporal Mwiricha and report to Embu Provincial Headquarters at 8.30am on 3/3/2009. On 3/3/2009, CW1 refused to go for the operation and instead damped his uniform on the Armory Box in RW2's office and left. RW2 then reported the matter to the Deputy OCPD and recorded the matter in the OB. An Orderly Room Proceedings were conducted by RW1 on 4/3/2009 where RW2 testified in the absence of CW1 after CW1 obstructed the presiding officer. Later the Orderly Room Proceedings were forwarded to the PPO and on 9/4/2009, RW2 received a letter from PPO's office in Embu dismissing CW1.

14. On cross examination by the claimant's counsel, RW2 admitted that after corporal Mwiricha told him that CW1 had refused to go for the operations, RW2 never called CW1 to verify the refusal. He also admitted that he went with CW1 to the Orderly Room proceedings on 4/3/2009 before talking to CW1 or giving him any papers. RW1 stated that on 4/3/2009 CW1 was never asked whether he had any witnesses to call. He contended that the Deputy OCPD issued a waiver of notification on 4/3/2009 to serve as a lesson to others. He explained that CW1 never asked him any questions but instead he walked out and the case proceeded in his absence. He concluded by stating that he was not sure whether Inspector Njoroge met CW1 before he represented CW1 in the hearing.

15. After close of the hearing the parties filed written submission of which the court has considered herein alongside the pleadings and the evidence adduced.

ANALYSIS AND DETERMINATION

16. It is not in dispute that CW1 disobeyed a lawful command to go for an operation at Isiolo for no good cause. It is also not in dispute that he was accorded an Orderly Room hearing within the provisions of FSO on 4/3/2009 and 5/3/2009. It is also not in dispute that CW1 walked out of the said proceedings complaining of unfairness and as such he offered no defence to the charges and the PPO dismissed him from the force with loss of benefits for the offence of disobeying lawful command without any good cause.

17. The issues for determination are whether the dismissal was unfair and wrongful and whether the reliefs sought ought to issue.

UNFAIR AND WRONGFUL DISMISSAL

18. The main question to answer is whether CW1 was accorded a fair hearing before dismissal. After perusing the FSO number 16 and the Orderly Room Proceedings conducted by RW1 on 4/3/2009 and 5/3/2009, this court is satisfied that a fair disciplinary hearing was accorded to the claimant. Although written notification of the charges was not served on the CW1 24 hours prior to the hearing, the waiver was explained to the CW1 and the reason noted in the proceedings as provided under FSO number 16(x) (b). The charge was read to the claimant and he pleaded not guilty.

Thereafter he obstructed the proceedings by waking out after complaining that he would not get justice in the proceedings. The proceedings were thereafter conducted in his absence under FSO number 16(iv) after RW1 appointed Inspector Njoroge to represent the interests of CW1 in the proceedings. Finally RW1 forwarded the proceedings to the PPO to pass a sentence in form of a severe punishment. The sentence passed by the PPO was dismissal and communicated on 3-4-2009 and no appeal was preferred from the claimant's end. Consequently the answer to the first issue for determination is that the dismissal of the claimant was fairly and lawfully done under the FSO and for a valid and fair reason namely disobeying a lawful command without a good cause.

19. The alleged malice emanating from extortion of ksh.1000 as a kick back in order for CW1 to be allocated Traffic duties is hereby dismissed as baseless or coming too late. If CW1 was extorted any money and victimized through malicious transfers and even nomination for a risky operations (assignment) at Isiolo or denial of leave and offs, CW1 ought to have raised the issue earlier through, the various government agencies including Senior Police Officers, Anti Corruption Authority, Criminal Investigation Agency, Ombudsman to name but a few. In any case the said malice was never pleaded or stated in the written statements filed and as such the court finds it to be an afterthought.

RELIEFS

20. In view of the foregoing finding, the court declines to make the orders sought. The only prayer which the court could have granted is for transfer allowance but unfortunately it was not proved and also it was made out of time. Had he also prayed for leave the court would have awarded the same. Even if the court has the power to make such award under Section 12 of the Industrial Court Act, the same is time barred now considering that the right to leave accrued over 5 years ago. In conclusion the court was also surprised that the claimant did not amend the suit to be in tune with the current constitutional reality regarding the management of the Police Service.

DISPOSITION

For the reasons stated above the suit is dismissed with no order as to costs.

Dated signed and delivered this 5th December 2014

O. N. Makau

Judge