



**REPUBLIC OF KENYA**

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

**CAUSE NO. 49/2013**

(formerly NRB HCC No. 1007 of 2012)

(Before Hon. Justice Hellen Wasilwa on 31<sup>st</sup> July, 2013)

ISAAC ONCHERE ONGERI ..... CLAIMANT

**-VERSUS-**

TOWN COUNCIL OF MASIMBA ..... RESPONDENT

**JUDGMENT**

The claimant herein Isaac Onchere Ongeri filed his Memorandum of Claim through the firm of Soire & Co. Advocates on 14.6.2012. His case is that he was initially employed by the Gusii Town Council in 1978. He was later transferred to Masimba in 1998 and appointed as an Administrative Officer and Accountant III. Annexure App B is his letter of promotion to the said rank. On 5.12.2008, he was served with a suspension letter App. 11 which cited absenteeism, and insubordination as reason for the suspension. He was then served with a letter to attend a meeting on 24.6.2009 (App. 10) before the Finance Staff and General Purposes Committee. He attended this meeting 7 months after the suspension. He avers that this was contrary to their terms and conditions of service which required that this should have been determined within 90 days or about 5.4.2009. He was thereafter served with a dismissal letter dated 29.7.2009 (App. C). The respondents claimed in the letter that he was guilty of misuse of funds and misconduct. They asked him to appeal to the Public Service Commission or go to court if he was not satisfied.

He avers that the clerk to the Council made a unilateral decision to dismiss him unprocedurally without the backing of the full Council of the respondent. The claimant chose to seek help from the Provincial Local Government Officer Nyanza who directed the respondents to reinstate him but the respondent didn't comply. The letter from the Provincial Local Government Officer is annexed as App C1.

Later the claimant sought help from his counsel who filed this claim. Claimant's contention is that he had never been involved in any indiscipline whatsoever for the 30 years he had worked and he had a clean record. He avers that he was unprocedurally terminated and seeks orders that he be reinstated and be compensated for the unlawful unprocedural dismissal and be paid his salary arrears as set out in his memo of claim.

The respondents on the other hand filed their memorandum of reply on 5.12.2012 through the firm of Omwoyo, Momanyi, Gichuki & Co. Advocates. They also called one witness who testified that indeed the claimant was employed by Masimba Town Council in 1998 after serving at Gusii Town Council from 1978. He was an administrative officer and an accountant. That from their records, the claimant was dismissed after being involved in some malpractices ranging from absenteeism, insubordination and

fraud. On 24.6.2009, there was a disciplinary committee meeting held by the Finance Staff and General Purposes Committee. The committee deliberated on conduct of eight members of staff including the claimant. The eight were given audience and time to reply to the allegations levelled against them. The committee reached a verdict that the eight staff members be dismissed. The respondent's witness stated that the Town Clerk had problems working with the claimant due to his absenteeism and the claimant been previously been suspended. The full council meeting later sat and ratified the decision to dismiss the claimant on 4.3.2010.

The claimant had a right of appeal to the Public Service Commission and he didn't pursue the appeal. The respondents contend that the respondent is not entitled to any salary arrears nor any compensation. In cross examination by counsel for the claimant, the respondent's witness stated that the council operates at two committees and it was needful that the committees decision be ratified by full council meeting. He also admits that the decision of the finance committee was ratified in 2010 and therefore it was irregular to dismiss the claimant before ratification of the committee's decision by the full council meeting.

I have considered the evidence of the parties plus the submissions by their counsels on record. Issues for determination are two fold:-

1. Whether the decision by the respondent to terminate the services of the claimant was justified.
2. Whether the claimant is entitled to any remedies.

In deciding on whether the decision to terminate the claimant was justified or not, I will examine the reason for which he was dismissed and the procedure adopted in the disciplinary proceedings prior to the dismissal. The respondents aver that the claimant was a problematic employee and had previously been on suspension for indiscipline. The respondents however did not exhibit before court any evidence of this previous indiscipline. However the respondents Appendix C which is the letter of dismissal of the claimant mentioned that on 28.10.2001, the claimant had been suspended for gross misconduct, absenteeism, insubordination to the Town Clerk and misappropriation of council funds. The same letter also mention that on 5.7.2001 the claimant had also been issued with a warning letter regarding absenteeism. It is worth noting that this was nine years before the dismissal and therefore whether there was any reform or not on the part of the claimant following the warning and suspension is not clear.

Indeed it is imperative that the respondent must give valid reasons before dismissing an employee. This is provided under S. 45(2) of the Employment Act 2007 which states that:-

**“A termination of employment by the employer is unfair if the employer fails to prove;**

**(a) that the reason for the termination is valid**

**(b) that the reason for termination is a fair reason (i)related to the employee's conduct, capacity and compatibility or (ii) bared on the operational requirements of the employer.”**

The employer seems to have given reasons for this dismissal but whether they are valid or not, this can only be assessed from the procedure adopted in establishing the validity of the said reasons including the mode of the disciplinary hearing accorded to the employee.

Section 45(2)(c) of the Employment Act 2007 states that:-

**“A termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure.”**

The fair procedure includes a right to be heard. This right is envisaged under S. 41(1) of the Employment Act 2007 which provides that:-

**“Subject to S. 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.”**

Under S. 42(2) -

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

The procedure adopted by the employer herein is wanting in that the committee met and made its findings. However, the claimant was not part of that meeting as evidenced from the minutes of the said meeting. Other than that, the committee meeting's resolution was only ratified in October 2010 whereas the claimant was dismissed in September 2009. This was in breach of the terms and conditions of service from Local Government Authority Officers. A decision to terminate the claimant was reached before the full council's meeting's resolution to ratify the committee's meeting. The dismissal of the claimant by the respondent was therefore unfair and unjustified.

What remedies then is the claimant entitled to?

I find that the claimant is entitled to the following remedies:-

1. 1 month's salary in lieu of notice = Ksh 25,027/=
2. Severance pay calculated at 15 days pay for each year worked =  $15/30 \times 30 \times 25,027 = 375,405/=$
3. I also award the claimant 12 months salary as compensation for the wrongful termination

$$= 12 \times 25,027 = 300,324/=$$

**TOTAL AWARDED = 700,756/=**

4. He should also be issued with a certificate of service.
5. The respondents shall meet costs of this case.

**HELLEN WASILWA**

**JUDGE**

**31/07/2013**

**Appearances:-**

Claimant present

Mr. Ondego for respondent present

CC. Sammy Wamache.