



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
PETITION NO. 29 OF 2012

LABAN WAHOME MATIRU CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL RESPONDENT

JUDGEMENT

1. This matter commenced as Misc. High Court Application No. 1525 of 2001, filed at the High Court Nairobi as an Originating Summons by the claimant herein on 21st December 2001. The Originating Summons was supported by the affidavit of the claimant Laban Matiru. In Response, there is a Replying Affidavit sworn by William Ouko which was filed on 28th March 2002. The claimant filed a Further Affidavit on 7th November 2002. The matter has gone through various hands and motions and on 22nd October 2012, the High Court transferred this matter to the Industrial Court and registered as **Petition No. 29 of 2012**. The court gave directions on 11th March 2013 and parties allowed to file their written submissions.
2. The background of this case is that the claimant was employed by the government on 15th May 1972; he served in various government divisions and at the material time subjection to the proceedings herein was the Executive Officer II at Nanyuki Law Court. That on 28th June 1996, he was charged with four counts of false assumption of authority and four counts of forgery under sections 104(c) and 31 of the Penal Code respectively before the Principal Magistrate Nanyuki in Criminal Case No.741 of 1996. On 30th June 1998, he was convicted on eight counts and sentenced to 3 years imprisonment or a fine of Kshs.5, 000.00 for each of the counts. The claimant lodged an appeal against this conviction and sentence at High Court Nakuru in Criminal Appeal No. 103 of 1998 and on 17th December 1999 the Court quashed the conviction and set aside the sentence. He informed his employer the Judicial Service Commission (JSC) of the result of the appeal but on 6th November 2000, he received communication from the JSC that he was terminated with effect from 1st July 1996 on grounds of gross misconduct. This was a surprise to him as no disciplinary process had been conducted in his case after his interdiction letter dated 8th July 1996.
3. The claimant stated that the decision of the JSC to terminate him on the grounds of gross misconduct was made with disregard to the fact that the High Court had quashed the conviction and set aside the sentence against him and that by the JSC use of these ground to terminate him was double jeopardy. The claimant lodged an appeal with JSC on 23rd November 2000 which was dismissed on 12th March 2001. on these reasons, the claimant felt aggrieved and filed this case and claimed that he should be paid his salary due until 12th March 2001 as the JSC decision to terminate him was wrong as the same was on ground and or reasons that had been quashed by the High Court that acquitted him of the criminal charges.

4. The claimant further stated that his termination was contrary to the law and was done with disregard to the fact that his conviction and sentence had been set aside by the court on 17th December 1999, and the JSC acted *ultra vires* contrary section 13 of the Judicial Commissions Act and that he should be restored back to his position and in the alternative that the claimant be granted his salary and benefits of employment up to March 2001.
5. The claimant further stated that the decision of the JSC to terminate him was a double jeopardy contrary to the Constitution, the right to be heard as part of natural justice was violated and no due process was followed in the termination of the claimant by the JSC.
6. In reply, the respondent through the affidavit of William Ouko the then Acting Registrar of the High Court and Secretary to the JSC stated that the claimant was first employed by the government on 1st April 1972 as a clerical officer in the Ministry of Research, Science and Technology and on 30th June 1991, he was transferred to the Judiciary and worked well until his interdiction arising from a series of actions during the course of his employment that constituted gross misconduct. That while the claimant served with the Conservator of Forests, he was surcharged for the delay in posting an officer, that while he was at the Ministry of Research, Science and Technology he was unable to account for Kshs.4,930.00 and in a memo dated 19th February 1988 he was described as an 'office security risk' for removing a letter relating to recoveries from his salary from his personal file and that while working at the Nanyuki Law Courts, the Senior Resident Magistrate in a letter dated 17th June 1996 he was accused of conduct incompatible with his office which culminated in his being charged before the Nyahururu Principal Magistrate Court under section 104 (c) and 351, of the Penal Code in Criminal Case No. 1741 of 1996.
7. Ouko further stated that on 8th July 1996 the claimant was interdicted and asked to show cause why disciplinary action should not be taken against him and upon his conviction by the Magistrate Court, he was dismissed from service by the JSC on grounds of gross misconduct. This conviction was quashed on appeal but the claimant appeal to JSC was not allowed on the basis that there were no grounds for allowing it and that this decision was conveyed to the claimant on 12th March 2001. That this decision of the JSC is not in contempt of the High Court or offend the double jeopardy rule within the meaning of section 77 of the Constitution [now repealed], and Legal Notice No.208 of 1991 is constitutional.
8. Upon this matter being referred to the Court, the claimant filed his written submission on 2nd May 2013 and the respondent resubmitted their previously filed submissions on 21st February 2012.
9. The claimant with regard to all the prayers outlined in the originating Summons submitted that the decision to dismiss him from government service was arrived at in blatant contravention of regulation 26 of the JSC Regulations applicable in his case, which stipulated a mandatory procedure for proceedings for dismissal against an officer on the ground of misconduct. Also under Regulation 17 and 26, JSC had no power to dismiss the claimant on charges arising from substantially the same issue as those upon which he had been acquitted by the High Court. The claimant's conviction having been quashed, the JSC had no powers to dismiss him on substantially the same issues as he was acquitted.
10. That the JSC is ranked lower with regard to a High Court decision and to discipline the claimant with a termination offends the double jeopardy rule of section 77 of the then Constitution and thus the order of the JSC made on 2nd May 1991 vide Legal Notice No. 208 of 1991, Regulation 19 was repealed which regulation provided that an officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted and therefore, the claimant could not be subjected to a disciplinary action on an issue that the High Court had already acquitted him of. That the amendment of Regulation 19 was unconstitutional. Therefore, the claimant reiterated his claim for half salary not paid during his interdiction until 6th November 2001 when JSC dismissed him. The salary to be paid with all benefits.
11. The claimant cited ***Ephantus Kiruhi versus Nanyuki Municipal Council [2006] eKLR*** as a case where the court awarded the plaintiff who had been unlawfully terminated and in this case the claimant should be paid all his salaries to the date of judgement.
12. The respondent opposed the claim and that Legal Notice No.208 of 1991 is not commensurate to the provisions of section 77(5) of the previous Constitution, as it governs criminal trials and forbids double jeopardy. This section cannot be implied to govern the same situation as regulation

19 of the JSC Regulations. That regulation 19 dealt only with the proceedings for dismissal from employment where the act leading to the proceedings under the regulation amount to a criminal offence or not. That under the previous Constitution, section 68(2) granted powers to the JSC to operate without being subject, direction or control of any person or authority and hence had the power to formulate regulations and hence was within its mandate to repeal Regulation 19 via Legal Notice No.208 of 1991.

13. With regard to the constitutional issues raised by the claimant, the respondent submitted that the relationship between the claimant and the respondent was contractual, an employer and employee relationship and the terms as between them were contractual and not constitutional. That the claim as commenced in the originating summons raises purely employment and not constitutional issues and that the same should be dismissed as being an abuse of the court process.

Assessment

14. The provisions of section 77(5) of the Constitution [repealed] relate to criminal justice and does not in any way relate to proceedings as outlined under Legal Notice No.208 of 1991. I agree with the arguments presented by the respondents that in the application by the JSC of Legal Notice No.208 of 1991 in view of the JSC Regulations, the double jeopardy rule does not apply as the regulations relate to JSC internal disciplinary procedures whereas section 77 of the Constitution relate to criminal hearing procedures. There are distinct differences between criminal and civil proceedings and more so as relates to internal disciplinary proceedings between an employer and an employee.
15. The claimant herein was an employee of the respondent; he was interdicted upon his arrest and charge before Magistrate Court Nyahururu hence the cause for his interdiction was with regard to his contractual duties with the respondent. To apply the provisions of section 77 of the constitution [repealed] would to infer that the respondent needed to prove their case against the claimant beyond reasonable doubt with regard to what is constitutionally acceptable under the Constitution. However with regard to an employer right to discipline an employee, internal procedures, regulations or policy apply before the eventual disciplinary action is taken that can be challenged in a civil claim unlike where one is arrested and accorded rights as under section 77 of the Constitution [repealed].
16. Further to seek for a revocation of JSC (amendment) Regulation would have the same effect as making these regulations inapplicable to an employee who on good cause is made to undergo internal disciplinary action by an employer. These were regulations as allowed under the Trade Disputes Act [repealed] for unionised employees, and the Employment Act, Cap 226 [repealed] that allow an employer to discipline an employee through the application of due process. The requirement that before any adverse action is taken against an employee is that there must be a hearing where such an employee is given a chance to make his presentation in defence. This is what relates to fair hearing and part of natural justice.

Was the claimant given a hearing before termination? Was the termination lawful?

17. On 8th July 1996, the claimant was interdicted and issued with a notice that stated;

... It has been established that on 3rd July 1996 you were remanded for a second time by Nyahururu Court after denying having falsely assumed the role of a Magistrate.

In view of the above, you are hereby interdicted from the functions and performance of your official duties with effect from 1st July 1996.

This office is intending to institute severe disciplinary action against you for indulging yourself in cases of gross misconduct but before this is done you are hereby called upon to show cause why such action should not be taken against you. ...

There is no record as to what was *instituted* against the claimant in view of the alleged *gross misconduct* even after he had written his defence indicting that he had been acquitted by the High

Court of the charges facing him.

18. Regulation 19 of the JSC Regulations [now repealed] related to internal organisational disciplinary mechanisms which an employer was and is allowed to have to address disciplinary proceedings within the work place before taking action against an employee. This procedure as under the Trade Disputes Act [repealed] can today be equated to section 41 of the Employment Act. An employee should be given a fair hearing by being allowed to make a presentation, the same heard on merit before a decision is made. Where an appeal is preferred as under Regulation 26 of the JSC Regulations, the same should be done within a reasonable time and its decision shared to the affected employee immediately. Where there is proof that the internal disciplinary procedures are conducted in a manner as to infer the process was undertaken in disregard to the tenets of natural justice, the same becomes a sham. A notice to show cause issued to an employee is an enquiry as to whether or not disciplinary proceedings should be commenced by an employer against such an employee if where the enquiry establishes that there is no good cause, there is no action taken and where the enquiry establishes that there is a good cause, then disciplinary can commence. Disciplinary proceedings require an employee being given a chance to defend themselves.
19. In this regard due process is important. where due process is applied with regard to employment, where there is a good cause to believe that an employee should be terminated due to any misconduct or gross misconduct, the use of internal regulations by an employer and the law applicable in each case for misconduct or gross misconduct must be applied in a manner that is reasonable in the circumstances of each case. Where there is a contract of service with no time limitation like the case of the claimant section 15(5) of the Employment Act, cap 226 [repealed] is imperative. At paragraph 15(5)(c), a notice of one month before termination is required for an employees whose salary was being paid periodically every month. However in a case where such an employee is found to have committed gross acts of misconduct, this amounts to summary dismissal as under section 17 of the Act [repealed]. This summary dismissal is on set grounds and at section 17(f) and (g) it states;

(f) If, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognisable offence punishable by imprisonment and is not within ten [10] days either released on bail or on bond or otherwise lawfully set at liberty.

(g) is an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

20. Therefore on the one part, an employee who is arrested for a cognisable offence and is not released within 10 days on bail or bond, an employer has a justifiable reason in law to summarily dismiss such an employee. I take the rationale for this to be that such an employee if not released within 10 days on bail or bond would not be able to be at their place of work to attend to his duties as under his contract. Also that such an employee by being arrested and cannot be released on bond or bail, under the provisions of the old constitutional order, they had committed a serious offence that could not attract bail or bond and hence likely to remain in custody for a long duration. In this regard, a cognisable offence is one that a police officer may arrest without a warrant.
21. On the other part, where an employee commits a criminal offence or is reasonably suspected to have committed a criminal offence that substantially affects the property of an employer, then summary dismissal is allowed. However, such a ground as with the case of the claimant, an employer must show that the gross misconduct committed by an employee led to the substantial detriment of the employer or the loss of the employee's property. The damage or harm that arose to the employer with the arrest of the claimant is not stated in the letter of interdiction or in the termination letter or in the reasons to reject his appeal. The law application with regard to a case of gross misconduct was the Employment Act, cap 226 [repealed] and in its rationale with regard to gross misconduct was specific in that this could only arise where an employee had acted in a gross

- manner and caused substantial harm to the employer or the employer's property. The case of the claimant does not stand out as one such case where the employer had a good basis to terminate him for gross misconduct as there is no evidence to indicate acts of damage or loss of property. Further to this, once the claimant was acquitted of his charges by the high Court in his appeal, he reverted to his clean record as there was no record on him for criminal behaviour as he had been acquitted and his sentence set aside. In the strict sense, there is no indication by the respondent that the claimant was in custody for over 10 days to warrant dismissal on the ground of being absent from his work station.
22. In this case the respondent outlined that upon learning that the claimant had been charged with 8 counts in Criminal Case No.741 of 1996 before the Nyahururu Magistrate Court, he was interdicted and put on half pay and then eventually terminated and his appeal dismissed. There is no record or evidence that after the interdiction the claimant was given a hearing. Rather, the claimant on being acquitted of the criminal charges, he wrote to his employer, JCS, to confirm his acquittal, and the response was that he had been terminated well before his inquisition and when he lodged his appeal, the same was dismissed on the grounds that the JSC had found no good ground for his appeal. There is no record that the claimant was given a chance before the JSC to defend himself. Even in a case where the claimant stated that he was subjected to double jeopardy as against the provisions of section 77(5), which relate to criminal proceedings, fair disciplinary processes for any employee dictates that due process be applied. In this case the JSC did not use the very Regulations they had put in place with regard to disciplinary proceedings in cases of employee misconduct and in disregard of these Regulations, went ahead and terminated the claimant. This is contrary to what is just and reasonable and against the tenets of natural justice.
23. Under labour law, employment is a contract. Like all contracts it implies good faith.^[1] This common law position is fortified by the constitutional right of 'everyone' to fair labour practices as under Article 41 of the Constitution and equality as under Article 27 of the Constitution. Consequently, the duty to exhibit good faith is mutual, weighing as much on employees as it does on employers. For the purposes of this case therefore, the administrative action taken by the JSC as the employer against the claimant, the employee should have promoted administrative justice's failure in this respect call for a decision taken as a result to be subjected to review as the same was arbitrary or capricious. The decision to interdict the claimant was triggered by his arrest and even before he could be subject to due process, he was terminated and his appeal dismissed. This is a case that called for the exercise of public power granted to the JSC be exercised reasonably, in good faith, in the public interest and not be whimsical.
24. Therefore, the JSC power to discipline the claimant in this case fell within the ambit of administrative labour law and the principle of legality applied, which principle demanded that they exercise their public power reasonably, in good faith. The compliance with the internal regulations as established by the JSC was called for in this case. When these regulations were not applied with regard to the claimant, the decision taken against him was not legitimate.

Remedies

On the claims outlined by the claimant, there was no evidence or submissions with regard to how the claimant mitigated his circumstances once he found himself terminated by the respondent and no damages will be paid in this regard. On the finding that his termination was not justified, the claimant is entitled to notice pay as well as any unpaid salaries to the date termination being 12th March when his appeal was rejected in the letter dated 12th March 2001. Under the claimant's terms of contract, he could be terminated upon one month notice or payment of one month salary in lieu of notice. There was no notice and He is therefore entitled to pay of one month amounting to his last salary.

The claimant was on half salary during his interdiction period. His appeal dismissed on 12th March 2001. He is therefore entitled to his half pay not remitted to him for the period upto the day of 12th March 2001.

The records before court are not clear with respect to the half salary amount not remitted to the

claimant and the benefits not paid for the period of interdiction and up and until 12th March 2001. The respondent shall confirm to this Court these dues and benefits calculated upto and until the 12th March 2001 within 14 days for the court to confirm the final award due to the claimant.

Delivered in open Court and dated at Nairobi this 30th day of October 2013.

M. Mbaru

Judge

In the presence of

See Martin Brassey *Employment and Labour Law* Vol 1 Chapter 26