



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1012 OF 2010**

**PAUL MISORI ORAGO .....CLAIMANT**

**AND**

**CITY COUNCIL OF NAIROBI .....RESPONDENT**

**M/s. Ogeto Advocate for the Claimant.**

**JUDGMENT**

This suit was filed on 3<sup>rd</sup> September, 2010 via a Memorandum of claim dated 30<sup>th</sup> August, 2010.

The Respondent filed a Memorandum of reply on 28<sup>th</sup> October, 2010.

Both memoranda contain documentations in support of the respective cases.

The Claimant testified under oath in support of his case and called **Mr. Boniface Wafula** who testified under oath in support of the claimant's case.

The facts not in dispute in this matter are that the Claimant was employed on 28<sup>th</sup> June, 1996 as a City *Askari* in the City Inspectorate Department, a permanent post within the Nairobi City Council establishment.

He worked continuously in that position until the 4<sup>th</sup> July, 2005 when the Claimant was transferred to Dagoretti Training College and was allocated duties of watering flowers and cleaning the compound.

The Claimant wrote a letter dated 29<sup>th</sup> July, 2005 to protest the transfer and his allocation of duties to him.

On 19<sup>th</sup> August, 2005, the Claimant lost his son and applied for 21 days off duty by a letter dated 22<sup>nd</sup> August, 2005 starting from 24<sup>th</sup> August, 2005 to 21<sup>st</sup> September, 2005.

Upon his return from leave he was not allocated any duties and on 18<sup>th</sup> July, 2007 the Claimant received a letter stating that he had absconded from duty from 26<sup>th</sup> July, 2005 to the date of the letter without any explanation and was to show cause why he should not be dismissed.

The Claimant responded within 10 days but received no response to his letter.

On 2<sup>nd</sup> October, 2008, the Claimant was reinstated to his job and the period of absence treated as unpaid leave.

He was required to report to the Director City Inspectorate for allocation of duties.

The Claimant also produced a letter dated 23<sup>rd</sup> August, 2005 from **Ojele Memorial Hospital – Migori**, indicating that the Claimant's son had died while admitted there on 19<sup>th</sup> August, 2005. A Burial Permit **No. 795273** was also produced in respect of the Claimant's son.

The Claimant was however never reinstated to his job nor was he paid any salary.

The Claimant called one Boniface Wafula in support of his case. The witness (CW2) told the court that he worked as a Deputy Director City Inspectorate in-charge of Administration but was now retired. That sometimes in 2005, the Claimant came to his office and informed him that he was bereaved. His son had passed on.

Upon confirmation that the Claimant had enough leave days due in his personal file, he approved 21 days leave to the Claimant on 22<sup>nd</sup> August, 2005.

Upon his return, the Claimant informed him that he had been suspended from work.

As the head of the department, he was not aware of the suspension. The witness complained and the Claimant was reinstated to his job on 2<sup>nd</sup> October, 2008.

In 2008 the witness went on long retirement leave for more than a year, when he came back he found that the claimant had not been reinstated and was not receiving any salary. He told the court that he was helpless in the circumstances and was unable to assist the Claimant.

The witness was presently a farmer in Bungoma. He told the court that he had served the City Council for 36 years prior to his retirement.

The witness was not aware of any disciplinary issue by the Respondent against the Claimant.

The Respondent failed to call any witnesses in support of its case.

The Claimant's case therefore remains uncontroverted.

This is a clear case where an employee, who was lawfully recruited as an *Askari* was mistreated by his superiors.

He was allocated work that did not match his job description. When he complained his pleas were not heeded.

The mistreatment became worse when he lost his son in that his immediate superior denied him leave to go and bury his son.

The leave was however granted by the head of department but he was constructively dismissed under the pretext that he had absconded his work station.

The witness who had approved his leave testified candidly in court and the court accepts his evidence as credible. The court is therefore satisfied that the Claimant's employment was unlawfully and unfairly terminated and he is entitled to payment of terminal benefits and compensation as a result thereof.

The Claimant was a union member and his terminal benefits are governed by the Collective Bargaining Agreement (CBA). At the time of termination the Claimant earned a basic salary of Kshs.11,385/= and

house allowance of Kshs.6,750/=. His gross salary was therefore Kshs.18,135/= as per the payslip produced for the month of July, 2006.

### **Prayers**

The Claimant seeks reinstatement and in the alternative maximum compensation for the unlawful and unfair termination. With regard to the prayer for reinstatement the court has to make the following considerations first in terms of **Section 49 (4)** of the Employment Act;

- a. *the wishes of the employee and in this case the Claimant wishes that he be reinstated;*
- b. *the circumstances in which the termination took place and in this case, the Claimant was victimized for attending his son's funeral and for protesting misallocation of duties to him;*
- c. *the practicability of reinstatement or re-engagement and in this case, the Claimant received his last salary in July, 2006, he was not paid his salary since and for all in and purpose, he remained constructively dismissed since then notwithstanding a letter of reinstatement to his job dated 2<sup>nd</sup> October, 2008 which was not honoured by the Respondent.*

The court will also take into consideration the provisions of **Section 12 (3)** (vii) which provides that the court may grant

*“an order of reinstatement of any employee within three years of dismissal”*

At least five (5) years have lapsed since the constructive termination of employment took place.

The Claimant had served from 28<sup>th</sup> June, 1996, a period of about ten (10) years.

As at the time of going to court he had not obtained alternative employment and had not received a Certificate of Service from the Respondent to assist him in that regard.

He has clearly suffered immense loss and damage as a result of the unlawful termination. He lost his salary from July, 2006 to-date though he was not formally dismissed and remained unemployed while looking towards reinstatement till October, 2008 when it happened.

Notwithstanding reinstatement he was not given any work nor a salary till he came to court.

The court awards him in this circumstances, 12 months salary being maximum compensation for the unlawful termination in the sum of Kshs.217,620/=. The court notes that this award cannot sufficiently compensate the loss the Respondent incurred but will to a reasonable extent mitigate the same.

However, to mitigate the lost salary, pain and suffering sustained by the Claimant, the court will in addition award exemplary damages to the Claimant in the sum of Kshs.500,000/= to cover the humiliation and mistreatment the Claimant suffered at the hands of his superiors as enumerated in this case. This is in line with prayer 16 (e) of the memorandum of Claim and in lieu of an order of reinstatement as prayed in prayer 16 (a) since the court finds that its hands are tied in this respect.

It is noteworthy that an order for reinstatement carries with it payment of all arrear salary from the date of termination which in this case would have exceeded the award of damages aforesaid.

### **Termination Benefits.**

In terms of Clause 29 (ii) of the Collective Bargaining Agreement operational in 2006 when the employment of the Claimant was unlawfully terminated, he is entitled to three months notice or payment in lieu thereof. Accordingly the Respondent will pay the Claimant three (3) months salary in lieu of notice in the sum of Kshs.54,405/=.

The Claimant like other Local Government officers was covered under the Superannuation Fund and the Provident Fund and would be entitled to benefits in accordance with the applicable rules. Consequently, the court makes no order regarding serve gratuity with regard to the Claimant.

There being no evidence regarding any other terminal benefits due to the Claimant no further orders in this regard are awarded.

The final award to the Claimant is as follows;

- a. Kshs.217,620/= being maximum compensation for unlawful termination;
- b. Kshs.500,000/= being exemplary damages for pain and suffering at the hands of the employer; and
- c. Kshs.54,405/= being three (3) months notice in terms of the Collective Bargaining Agreement.

Total award Kshs.772,025/=.

- d. Costs of the suit to be paid by the Respondent to the Claimant.

It is so ordered

***Dated and delivered at Nairobi this 8<sup>th</sup> day of November, 2013.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**