



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 235 of 2012

ALI MAHMUD MBWARALI.....CLAIMANT

VERSUS

1. MINISTRY OF LANDS.....1ST RESPONDENT

2. PUBLIC SERVICE COMMISSION OF KENYA.....2ND RESPONDENT

3.THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. By a Memorandum of Claim dated 13th February 2012 and filed in Court on 15^h February 2012 the claimant **ALI MAHMUD MBWARALI** prays for judgement against the Respondents for the following orders:-

1. The summary dismissal of the grievant/claimant be declared unlawful and hence null and void.
2. The Respondent be ordered to compensate the claimant for the unlawful and prolonged delay resulting to severe mental anguish and loss of self esteem and lack of economic independence.
3. The Respondent do re-engage the grievant/claimant in work comparable to that in which the grievant/claimant was employed prior to the termination or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period the grievant has been working and out of office/work.
4. Reinstate the grievant/claimant and treat him in all aspects as if the grievant/claimant employment had not been terminated.

In the alternative to the demand for reinstatement of the grievant/claimant demands for payment as under:-

1. Terminal dues as enumerated under Clause No.3 [q] above.
2. Interest on clause 2 [q] from the dates of dismissal until payment in full at Court rates.
3. Any other statutory entitlements.
4. The Respondent does issue the grievant/claimant with Certificates of Service.
5. The Respondent to pay legal costs in this suit.

2. The Respondents, the Ministry of Lands, Public Service Commission of Kenya and the Hon. Attorney General filed their reply to the claim dated 26th April 2012 on 27th April 2012. In the reply the Respondents deny the claim by the claimant. The case was first mentioned before Hon. Justice Isaac E.K. Mukunya on 11th April for directions when Mr. Ongicho of Ongicho- Ongicho Advocates appeared for the claimant while Mr. Fedha from the Office of the Attorney General appeared for the Respondents. The hearing date was fixed for 25th July 2012, when the parties appeared on 25th July 2012 they agreed to proceed by way of written submissions.

3. The claimant's case is that he was a permanent employee of the 2nd Respondent for 22 years from 1987 to 2009. He was employed as a District Officer and rose through the ranks. At the time of leaving the 2nd Respondent's employment he was a PA/OC [Nairobi. His last salary was Shs.94,425 [ninety four thousand, four hundred and twenty five only].

5. In January 2005 the claimant was admitted for a degree course on Environment Studies Community Development at Kenyatta University commencing 6th January 2005. He applied for study leave by letter dated 17th January 2005. It would appear from the record that he started his studies immediately, before he received a response to his application for study leave. The reply to his application date 28th February 2005 declined the study leave on the grounds that he had not applied for training through the Departmental Training Committee and that the application for study leave was also addressed to the Permanent Secretary without passing it through the Chairman of the Departmental Training Committee. He was advised to follow protocol in his application. He was also advised that the course he was pursuing was not in conformity with his Scheme of Service or in the existing guidelines for human resource development in the civil service.

6. On 21st March 2005 the claimant applied for unpaid study leave for 2 years. He at the same time applied for his annual leave from 10th March 2005. He was expected to resume duty on 25th April 2005. The claimant did not resume duty on the assumption that his application for unpaid study leave would be granted.

7. On 13th May 2005 the Permanent Secretary wrote him a letter to show cause why he should not be dismissed for absence without permission from 25th April 2005. His salary was stopped from 1st May 2005 by the same letter. He was given 21 days within which to respond. He however did not reply to the letter until 17th June 2005.

8. The claimant did nothing further about his case until 9th June 2008 when he wrote a letter to the Permanent Secretary, Ministry of Lands wondering what happened to his disciplinary case and seeking review and reinstatement. He also informed the Permanent Secretary that his course was ending on 23rd June 2008. He was dismissed from service by letter dated 1st December 2009. He appealed on 27th January 2010 and he was informed of the rejection of his appeal by letter dated 15th May 2012.

9. He now seeks a declaration that his dismissal was unlawful hence null and void, compensation, re-engagement, reinstatement or in the alternative, terminal dues, certificate of service and costs.

10. The Respondents' position is that the summary dismissal of the claimant was justified based on his own admission of desertion of duty and that it was procedural.

11. The issues for determination by the Court are whether the grounds of termination were valid, whether the Respondents followed due process and whether the claimant is entitled to the reliefs sought.

12. It is unfortunate that neither the claimant nor the Respondent supplied a copy of the Respondents disciplinary procedure to the Court. In **Githinji Karoki versus Egerton University Nakuru Civil Appeal No.47 of 2006**, the Court of Appeal observed as follows:-

“The failure by the respondent to call any evidence was inconsequential as under Section 108 of the Evidence Act, **“The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side”**. In this case, that person was the appellant”.

In **Stephen Wasike Wakhu & another V Security Express Limited Nairobi HCCC No.292 of 2002**, Mugo J. held as follows:-

“With due respect to counsel, I find that this suit was not properly prosecuted and counsel did not assist the Court in a manner that would lead the court to determining the questions or issues for determination with a view to arriving at a properly considered judgement. A party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that **“he who alleges must prove”**. Without evidence as to the terms of the agreement allegedly giving rise to the Plaintiffs' claim the court is unable to establish a basis or foundation for the same”.

In this case it was the responsibility of the claimant to ensure that the relevant documents were submitted to court including the code of regulations governing the terms and conditions of employment of the claimant. This was not done. The Court is therefore left to make reference only to the pleadings and documents as filed.

13. The claimant admits being absent from work without permission from 25th April 2005. There is no indication that he attempted to come back to work after learning that his application for unpaid leave was not approved. He did not even attempt to regularize his absence from work. After his letter dated 17th June 2005, he did nothing until 9th June 2008, when he was about to complete his course. In the circumstances I find that the Respondents had valid reasons to dismiss the claimant.

14. The next issue for determination is whether the Respondents acted fairly. Although the Respondent had valid reason to dismiss the claimant, they did not proceed to conclude the case. They left the issue in limbo and then only concluded it almost 3 years later after the Respondent asked about his fate. When they reacted, it was to dismiss the claimant without notice. At the time of the dismissal the Employment Act 2007 was in force and the Respondents failed to comply with the provisions thereof in respect of the disciplinary procedure as provided in section 41 of the Act. For this reason the dismissal was unfair.

15. Section 49 of the Employment Act as read with section 50 sets out factors to be considered in awarding compensation to an employee who has been unfairly dismissed or terminated. One of the grounds to be considered is culpability of the claimant. As I have already stated above, the claimant was responsible for the situation that befell him. It would therefore not be fair to grant him the orders for reinstatement or re-employment as prayed. He has been out of work without pay since May 2005 due to his absence without permission. He did not do anything about his case until it was convenient for him to do so after he finished his studies. However he had given long service to the Respondents with no adverse record.

16. For the foregoing reasons I award as follows-

(i) The dismissal of the Claimant be reduced to retirement in public interest,

(ii) The period the Claimant was away without authority be treated as non incremental earning leave without pay,

(iii) Payment of I months' salary in lieu of notice based on his salary of April 2005

(iv) Payment of pension as if he left employment on 30th April 2005.

There will be no orders for costs.

Orders according.

DATED AND DELIVERED IN NAIROBI THIS 30TH DAY OF OCTOBER 2012

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

For Claimant_____

For Respondent_____