



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.123 OF 2015

(Formerly HCCC No. 111 OF 2006 at Meru)

GEORGE GITONGA KIRIKA..... PLAINTIFF

VERSUS

PERMANENT SECRETARY, OFFICE OF THE PRESIDENT

AND PROVINCIAL ADMINISTRATION1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 16th December, 2016)

JUDGMENT

The plaintiff filed the plaint on 20.11.2006 through Mithega & Company Advocates. The plaintiff prayed for judgment against the defendants, jointly and severally, for:

- a) Declaration that the plaintiff's dismissal from service was wrongful and unlawful and that he is entitled to be reinstated and to be paid all accumulated salary arrears up to the date of reinstatement.
- b) An order directing the 1st defendant to reinstate the plaintiff into employment unconditionally.
- c) Costs of the suit and interest.

The defence was filed for the defendants on 02.02.2007 through Grace Kamau, Litigation Counsel, for the Attorney General. The defendants prayed that the plaintiff's suit be dismissed with costs.

By consent, the parties resolved that the suit be decided on the basis of the pleadings, documents, and submissions on record and without the calling of witnesses.

The plaintiff was employed by the government to serve as the assistant chief for Mituntu Sub-location of the then Meru-North District effective 14.09.1989. He says that he served with dedication and discharged his duties with utmost honesty and commitment until 26.12.2002 when he received the letter dated 21.11.2002 from the 1st defendant alleging gross misconduct against the plaintiff. The allegations were as follows:

- a) In 2001 the plaintiff misappropriated Kshs.11, 800.00 being public fund meant for Ruiru Water Project.
- b) On 09.03.1995 the plaintiff failed to surrender public funds meant for Maua Methodist Harambee.
- c) The plaintiff allocated to individuals, at a fee, public land which was set aside for an airstrip.
- d) On 30.04.1991 the plaintiff refused to meet his District Commissioner on a familiarization tour in the plaintiff's Sub-location.
- e) On 01.10.1991 the plaintiff refused to appear before his District Officer after being summoned on account of insubordination towards his seniors.
- f) The plaintiff had the habit of making false accusations against his chief and showed no respect for the chief.
- g) The plaintiff associated with anti-government characters.

The letter stated that the mentioned acts amounted to gross misconduct rendering the plaintiff liable to disciplinary action including dismissal from the service with loss of all claims to terminal benefits from the government. The letter conveyed that it was contemplated to dismiss the plaintiff from the public service and he was to show-cause why he should not be dismissed. The letter required the plaintiff to make representation within 21 days from the date of the letter.

The plaintiff replied by his letter dated 27.12.2002. The plaintiff stated that had received the show-cause letter on 26.12.2002 (after lapsing of the 21 days for making representation on or about 12.12.2002). The plaintiff stated that the allegations had been considered and nullified by the District Officer and the Provincial Commissioner as they were belated, over 12 years since he joined the service. The plaintiff pledged that he was committed in the discharge of his duties. The plaintiff attached letters showing that the accusations had previously been levelled against him and found unjustified by the District Officer and the Provincial Commissioner.

The claimant's case was that there was no evidence to establish the allegations but he was nevertheless served with a suspension letter dated 30.04.2003 and subsequently the dismissal letter dated 20.02.2004. The plaintiff's case is that the suspension and the dismissal were without a valid reason. The plaintiff lamented that he was not heard by his employer and he appealed thrice and the appeals were turned down without his being heard. His case was that he was denied the right to natural justice. His further case was that he was a victim of political machination, intimidation and coercion noting that his misery was initiated in December on the eve of the 2002 general elections. Further, the plaintiff's case was that the accusations dated back in 1991 in the eve of restoration of multi-party politics and the dismissal was concocted to deprive him his employment and its benefits.

By the letter dated 23.06.2005 the Public Service Commission did not consider the plaintiff's appeal against the dismissal because it was time barred. By the letter dated 05.12.2005 the Commission considered but disallowed the plaintiff's application for review and closed the case.

The **1st issue** for consideration is whether the dismissal was unfair. The plaintiff was dismissed by the letter dated 20.02.2004 by the 1st defendant on account of the allegations that had been levelled against the plaintiff. It is submitted for the plaintiff that the dismissal was unlawful because the allegations were not established and were with respect to matters that the plaintiff had previously been required to answer and the allegations in the previous proceedings found untenable as the plaintiff was allowed to continue

in employment. As submitted for the plaintiff the reasons for dismissal had been subject of the previous disciplinary proceedings and the plaintiff had been exculpated. Further, the court finds that the allegations as levelled were not established by way of evidence so that as at the time of the dismissal, the allegations have not been shown to have been proved. The court finds that the plaintiff's right to natural justice or due process was undermined when the show-cause letter was forwarded to him long after the lapsing of the 21 days that were prescribed for making representation. The plaintiff provided his written reply to the allegations as was levelled against him and it is not clear how the same was established towards returning that the plaintiff was culpable. The court returns that the dismissal was unlawful for want of valid reasons for the dismissal because the reasons as advanced for the dismissal on account of gross misconduct were not established as was envisaged in section 17 of the then Employment Act, Cap 226, Laws of Kenya; and as found, due process was not upheld in serving the show-cause letter upon the plaintiff.

The 2nd issue for determination is whether the plaintiff is entitled to the remedies as prayed for. There is no material before the court to show that the public office held by the plaintiff is still in the government establishment and a vacancy would be available in that regard. The court has taken judicial notice of the reorganised government following the Constitution of Kenya, 2010. Time has run and the court considers that it would not be balanced justice for the parties if the plaintiff was to resume duty consequential to an order of reinstatement by the court. However, in view of the unlawful termination, the court considers that the plaintiff would be entitled to partial reinstatement from 30.04.2003 to 20.02.2004 with full monthly pay including basic pay and allowances prevailing as at 30.04.2003. The court further considers that consequential to the partial reinstatement, the plaintiff is deemed to have retired from the service effective 21.02.2004 on account of reorganisation of government and to be paid his due pension benefits per the applicable law.

While making that finding, the court further considers and upholds its opinion in **Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11**, where the court stated thus **“In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’**. The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful

employment or the employee fails to exculpate oneself as charged.”

In conclusion, judgment is hereby entered for the plaintiff against the defendants for:

- a) The declaration that the plaintiff's dismissal from the public service was wrongful and unlawful and the plaintiff is entitled to be reinstated and be paid all the accumulated salary as per the terms of the reinstatement.
- b) The declaration that that the plaintiff is entitled to partial reinstatement from 30.04.2003 to 20.02.2004 with full monthly pay including basic pay and allowances prevailing as at 30.04.2003.
- c) The declaration that consequential to the partial reinstatement, the plaintiff is deemed to have retired from the service effective 21.02.2004 on account of reorganisation of government and to be paid his due pension benefits per the applicable law.
- d) The parties to compute, file, and serve the dues in (b) and (c) above in 60 days from the date of this judgment with a view of recording the same in court on a convenient date.
- e) The defendants to pay the plaintiff the judgment dues by 01.08.2017 failing interest to be payable at court rates from the date of this judgment till full payment.
- f) The defendants to pay the plaintiff's costs of the suit

Signed, dated and delivered in court at Nyeri this Friday, 16th December, 2016.

BYRAM ONGAYA

JUDGE



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