



REPUBLIC OF KENYA



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Principal Secretary, National Treasury & another v Kimutai (Civil Appeal 95 of 2019) [2024] KECA 488 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 488 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 95 OF 2019
F SICHALE, FA OCHIENG & WK KORIR, JJA
MAY 9, 2024**

BETWEEN

THE PRINCIPAL SECRETARY, NATIONAL TREASURY 1ST APPELLANT

PUBLIC SERVICE COMMISSION 2ND APPELLANT

AND

ABRAHAM KIPCHUMBA KIMUTAI RESPONDENT

(An Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Eldoret (D.K. Marete, J.) dated 14th March 2019 in ELRC Petition No. 5 of 2018)

JUDGMENT

1. This appeal originates from the Employment and Labour Relations Court judgment in Eldoret (D.K. Marete, J.). The court, in its judgment, arrived at the following conclusions:
 - “a) A declaration that the resignation of the respondent pursuant to the letter dated 2nd February 2017 was unlawful, null and void, and of no effect.
 - b. A declaration that the resignation under Section 43(5) of the *Elections Act* is a statutory resignation as opposed to a voluntary resignation.
 - b. A declaration that the rejection of the respondent’s letter of reinstatement dated 21st April 2017 by the 2nd appellant was illegal and it contravened his rights under Articles 27, 28, 41, and 50 of *the Constitution*.



- c. An order of certiorari quashing the decision of the 2nd appellant contained in the letters dated 10th November 2017 and 31st January 2018 rejecting the respondent's reinstatement on the pretext that he voluntarily resigned.
 - d. The respondent is allowed to resume his employment with the 1st appellant without loss of benefits or promotion.
 - e. The respondent is to report to work and resume employment on 15th March 2019 at 0800hrs.
 - f. The appellants are to pay the respondent 12 months' gross salary being damages for treatment to unfair labour practices.
 - g. The commissioner of labour is to compute the relief, remedy, and award above within 120 days.
 - h. Mention on 19th September 2019 for report computation.
 - i. Costs to be borne by the appellants."
1. The respondent's case was that he was employed by the 2nd appellant as an Internal Auditor III on 7th April 2008 in the office of the 1st appellant, where he rose through the ranks to a Senior Internal Auditor, job group L.
 2. On 2nd February 2017, the respondent resigned from employment under Section 43(5) & (6) of the *Elections Act* to contest an elective post as a Member of Parliament for Keiyo North. However, the respondent was not successful in his bid, and he applied for his reinstatement vide a letter dated 21st April 2017.
 4. The 1st appellant declined the respondent's application for reinstatement vide a letter dated 19th May 2017. The respondent wrote a letter dated 27th June 2017 seeking the intervention of the Cabinet Secretary. In circular No. OP/CAB.1/388 dated 17th July 2017, the appellant was told to report to the 1st appellant.
 5. When he reported to the 1st appellant on 21st August 2017, he was reinstated to the payroll. The respondent was then deployed to Trans Nzoia East vide a letter dated 30th August 201, where he reported on 4th September 2017.
 6. However, in a letter dated 10th November 2017, the respondent was informed by the 1st appellant that the 2nd appellant had declined to approve his reinstatement.
 7. The respondent appealed against the decision of the 2nd appellant through a letter dated 15th November 2017. The 1st appellant while forwarding the appeal on 15th March 2018 recommended for the respondent's reinstatement. The respondent's appeal was, nevertheless, declined on the ground that he had resigned voluntarily.
 8. The appellants' case was that the petition was fatally defective in form and substance. The petition did not meet the constitutional threshold as the respondent did not in any way set out with a reasonable degree of precision, the rights allegedly violated, the provisions of *the Constitution* said to be infringed upon, and how the appellants had breached his rights.
 9. The appellants insisted that the respondent voluntarily resigned from employment. His application for reinstatement was disallowed and there is no law providing for the reinstatement of employees whose



resignation notices have been duly accepted. The appellants further stated that an order of certiorari cannot be sought in a petition.

10. The learned Judge held that the resignation of the respondent was not valid in terms of the learned Judge's own findings and determination in the *Eric Cheruiyot & 7 Others v IEBC & 7 Others*, Petition 1 of 2017. He held that, the resignation was involuntary, as it had been occasioned by the requisition of Section 43(5) of the Election Act which had since been invalidated.
11. The learned Judge held that the issue of termination did not arise in this case, and therefore reinstatement would be inappropriate. In the circumstances, the right term would be the resumption of employment which he ordered forthwith.
12. The learned Judge also held that the respondent was entitled to the reliefs sought as enumerated in paragraph 1 of this judgment. The learned Judge also awarded damages under the prayer for any other order the court may deem fit and just to grant, because it would have been a grave injustice if no award of damages was granted.
13. Being dissatisfied with the judgment, the appellants lodged this appeal. They have raised five (5) grounds to wit that:
 - a) The learned Judge erred in failing to find that the respondent did not prove his case against the appellants.
 - b. The learned Judge erred in finding that the respondent's resignation was not valid.
 - c. The learned Judge erred in not finding that the employer-employee relationship between the respondent and the appellants had been terminated.
 - d. The learned Judge erred in awarding 12 months' salary as damages which was not prayed for in the petition.
 - e. The learned Judge erred in holding that the stay of execution orders issued in the case of *County Government of Embu & Another v Eric Cheruiyot & 15 Others*, Civil Application No. 62 of 2017 (UR 43/2017), could not apply to the petition."
1. When the appeal came up for hearing on 5th February 2024, Mr. Kwame, learned counsel appeared for the appellants while Mr. Mathai learned counsel appeared for the respondent. Counsel relied on their respective written submissions.
15. The appellants submitted that the respondent did not prove his case against the appellants to the required standard of a constitutional petition. They were of the view that the resignation by the respondent was lawful and valid, and it did not amount to a violation or the infringement of any of the respondent's rights. The resignation was also not in contravention of any provisions of the law.
16. The appellants submitted that the respondent did not demonstrate to the required standards, any grounds upon which he sought reinstatement. The respondent voluntarily resigned to vie for an elective position. Having lost the election, there was no known law that provided for automatic resumption of duties or reinstatement of individuals who chose to resign under Section 43(5) of the *Elections Act*.
17. The appellants pointed out that it was against the public interest to allow the respondent to resume work after he had been paid his terminal benefits upon resignation. In any event, any reinstatement



- based on the impugned decision in *Eric Cheruiyot & 7 Others v IEBC & 7 Others*, Petition 1 of 2017 that Section 43(5) of the *Elections Act* was unconstitutional, had been stayed pending the determination of the appeal therein, and the learned Judge erred in failing to take cognizance of this fact.
18. The appellants faulted the learned Judge for relying on his own decision which was pending appeal and had been stayed in determining the petition when he had the option of staying the said petition pending the outcome of the appeal or issuing alternative directions.
 19. The appellants pointed out that Section 43(5) & (6) of the *Elections Act* ought to be read together with Articles 10, 99(2), 193(2)(a) & 232 of *the Constitution*; Section 23(3) of the *Leadership and Integrity Act*, and Section 12(1)(d) of the *Political Parties Act*. In the circumstances, the respondent's resignation was valid and voluntary. It was not obtained through duress or coercion. To buttress this submission, the appellants relied on the case of *Public Service Commission & 4 Others v Cheruiyot & 20 Others* (consolidated) [2022] KECA 15 KLR where this Court (D.K. Musinga (P), W. Karanja & A.K. Murgor JJA) held that Section 43(5) & (6) of the *Elections Act* was justifiable, reasonable and not in contravention of any provisions of *the Constitution*, and that resignation pursuant to the said provision was voluntary.
 20. The appellants relied on the case of *Charles Omanga & Another v IEBC* [2012] eKLR in submitting that the respondent had one leg in public service and another in the political arena which was not reasonably expected of him as a public officer.
 21. The appellants faulted the learned Judge for holding that the respondent was deserving of 12 months' salary in damages when he had not pleaded for the same or demonstrated that his termination was unfair.
 22. Opposing the appeal, the respondent submitted that having been reinstated to the payroll of the 1st appellant, the subsequent nullification of his reinstatement was an unfair termination of service. The respondent relied on the provisions of Article 162(2)(a) of *the Constitution*, Section 12(1) of the *Employment and Labour Relations Court Act*, and Section 45 of the *Employment Act* in support of this submission.
 23. While relying on the cases of *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR and *Naima Khamisi v Oxford University (E.A) Limited*, the respondent submitted that he was not given a show cause letter, or subjected to a disciplinary hearing before his termination. The respondent was of the view that since he had been reinstated to the payroll, the issue of resignation had been overtaken by events.
 24. The respondent was of the view that the learned Judge was right in declaring that the refusal to reinstate him was illegal and contravened his rights under Articles 27, 28, 41, 47 and 50 of *the Constitution*.
 25. This is a first appeal. Rule 31(1)(a) of the Court of Appeal Rules provides that:

“(1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power— Power to reappraise evidence and to take additional evidence. (a) to re-appraise the evidence and to draw inferences of fact;”
 26. It follows therefore that the primary role of this court as a first appellate court is to re-analyze and re-evaluate the evidence that was placed before the learned trial Judge and draw its inferences of fact. However, in doing so, we bear in mind that the trial court had the advantage of seeing and hearing the



witnesses and we give allowance for the same. In the case of *Peters v Sunday Post Ltd* [1958] EA 424, at P 429 O'Connor P. stated thus:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand”.

27. We have thoroughly reviewed all the evidence presented, submissions made by both parties, legal precedents, and applicable laws. The issues to be determined are; whether or not the respondent's resignation was valid and voluntary, and whether or not the respondent was properly reinstated.

28. It is common ground that the respondent resigned from employment on 2nd February 2017 to vie for an elective post in the 2017 general elections in line with the provisions of Section 43(5) of the *Elections Act*. What is resignation? The Black's Law Dictionary 10th Edition defines Resignation as;

“the act or an instance of surrendering or relinquishing an office, right or claim.; a formal notification of relinquishing an office or position; an official announcement that one has decided to leave one's job or organization, often in the form of a written statement.”

29. In the case of *Public Service Commission & 4 Others v Cheruiyot & 20 Others* [2022] KECA 15 (KLR) this Court held that:

“A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act.”

30. In this instance, there was no evidence placed before the learned Judge to show that the resignation by the respondent was involuntary. The respondent confirmed that he had resigned in compliance with Section 43(5) of the *Elections Act*, to pursue an elective post and he could not present himself for clearance if he was still in the employment of the appellants as a civil servant.

31. Section 43(5) of the *Elections Act* provides that:

“A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of the election.”

32. This Section conforms with Articles 99, 180 and 193 of *the Constitution* which provide that a person seeking to be elected to a political office must not be a state or public officer.

33. Following the resignation, the respondent was paid his dues. The employer-employee relationship between the parties had come to an end. This Court in *Public Service Commission & 4 Others v Cheruiyot & 20 Others*, (supra), acknowledged the mandatory requirement for a public officer to resign before vying for an elective post by holding that:

“The provisions of sections 43(5) are not hollow Lenaola, J in the Charles Omanga petition (supra) observed as follows at paragraph 26 of his judgment: “26. I also wish to state the impartiality of public servants is a cardinal value enshrined in Article 232(1)(a) of *the Constitution* which provides that the public servant and service must be responsive, prompt, impartial, and equitable in the provision of services. How can a public servant espouse those principles if he is allowed to remain in office until the election date? Suppose a Judge who intends to run for an elective post (it is his right) is allowed to sit on the bench and preside over election-related cases until the election date, where is his impartiality? Similarly, how can a Commissioner of the Independent Election and Boundaries Commission serving his last year in office and with ambition to run for elective office, be allowed to remain in office



and oversee an election in which he is a candidate? The absurdity of both situations merely serves to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they will be candidates.”

34. The importance of neutrality and impartiality of public officers during their term of employment cannot be overemphasized. Sections 23(2) and (3) of the *Leadership and Integrity Act* states as follows:

“An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality to the office subject to any laws relating to elections. (3) Without prejudice to the generality of subsection (2) a public officer shall not -

- a. engage in the activities of any political candidate or act as an agent of a political party or a candidate in an election.
- b. publicly indicate support for or opposition against any political party or candidate participating in an election.”

35. It follows therefore that the respondent’s employment came to a close on 2nd February 2017, through his own choice to vie for a political post; and any subsequent engagements by the appellant ought to have been done under new terms of engagement or employment. The respondent voluntarily resigned to seek an elective position. He was not coerced to do so. He made an informed decision as provided for by the law.

36. The cabinet secretary purported to reinstate the respondent to the payroll through the circular dated 17th July 2017. The question that now begs to be answered is whether the cabinet secretary had the authority to reinstate the respondent. It is common ground that the 2nd appellant was the respondent’s employer. It accepted his resignation, reviewed his application for reinstatement, and found that he had voluntarily resigned and therefore declined to reinstate him.

37. The respondent was well aware that his employer was the Public Service Commission. It is for that reason that he wrote to the Commission seeking for reinstatement. In the case of *Geoffrey Kiragu Njogu v Public Service Commission & 2 Others* [2015] eKLR, this Court held that:

“Regulation 25 (2) of the Public Service Commission Regulations 2005 (Legal Notice 28 of 2005) empowered the 1st and 2nd respondent in a disciplinary process to retire the appellant from the public service in public interest. That being the case only the 1st or 2nd respondents could reinstate the appellant and not the District Commissioner. The powers and duties of the 1st respondent to discipline or reinstate an officer cannot and was never delegated to the District Commissioner. The legal effect of an improper or unauthorized exercise of delegation is to render the decision of the delegate invalid. (See *Allingham -v- Minister for Agriculture, Fisheries and Food*, [1948] 1 All ER 780; *Municipal Board of Mombasa -v- Kala* (1955)22 EACA 319; and *Karia - v- Dhananin* [1969] EA 392). The 1st and 2nd respondents have no power to divest themselves of their functions and delegate the same to the District Commissioner. The contention that the appellant had resumed duty after he had been retired on the verbal instructions of the District Commissioner has no legal foothold and cannot bind the 1st and 2nd respondents. We find that the alleged resumption of duty by the appellant on the verbal instructions of the District Commissioner was null and void. It is not one of the duties, powers or functions of a District Commissioner to reinstate an officer who has been suspended or interdicted. The appellant has not cited to this Court any express provision legitimizing delegation of the powers of the 1st and 2nd



respondents to the District Commissioner. We are convinced that the appellant was aware of this position; after retirement vide letter dated 8th January 2008, he was not on the payroll of the 1st respondent and both the District Commissioner and the appellant requested the 2nd respondent on several occasions to reinstate the appellant as an Assistant Chief.”

38. It follows therefore that only the appellants could reinstate the respondent following his resignation. In this instance, when the 1st appellant declined to reinstate the respondent, he appealed to the 2nd appellant who in turn declined to grant the reinstatement. However, pending the decision of the 2nd appellant, the respondent sought recourse from the cabinet secretary. We find that the Cabinet Secretary had no legal authority to reinstate the respondent as it is not the duty of a cabinet secretary to employ or reinstate an employee of the Public Service Commission.
39. Therefore, the reinstatement of the respondent, by the Cabinet Secretary was null and void. Accordingly, the rejection of the letter of reinstatement was in accordance with the law. The rejection by the Public Service Commission did not constitute a violation of the respondent’s rights. If anything, the step taken by the said Commission complied with the law.
40. In the result, we find that the appeal is merited and we allow the same.
41. As regards the issue of costs, in the Supreme Court case of Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others [2014] eKLR it was held that a court has the discretion in awarding costs, depending on the circumstances prevailing in the particular case. However, in this case, we find no reason to deviate from the general rule, that costs ought to follow the event. Accordingly, the respondent is ordered to pay the cost of the appeal to the appellants.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

