



**Yaa & another (Suing as Administrators of the Estate of the Late Fredrick
Yaa Charo - Deceased) v Kilifi County Government & another (Cause
76 of 2017) [2024] KEELRC 441 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 441 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE 76 OF 2017
M MBARŪ, J
FEBRUARY 29, 2024**

BETWEEN

**FIKIRI FREDRICK YAA 1ST CLAIMANT
BEATRICE JUMWA KAINGU 2ND CLAIMANT
SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE FREDRICK
YAA CHARO - DECEASED**

AND

**KILIFI COUNTY GOVERNMENT 1ST RESPONDENT
KILIFI COUNTY GOVERNMENT PUBLIC SERVICE BOARD 2ND
RESPONDENT**

JUDGMENT

1. The claimants as Administrators of the Estate of the late Fredrick Yaa Charo filed the claim herein seeking the following orders;
 - a. 6 months' pay in lieu of notice Kshs. $43,085 \times 6 =$ Kshs. 258,510;
 - b. Half salary for 3 months during suspension Kshs. 64,627.50;
 - c. Salary from until retirement December 2016 to May 2011 for 68 months Kshs. 2,929,780;
 - d. Leave for 5.6 years Kshs. 2,929,780;
 - e. 12 months' compensation Kshs. 517,020;
 - f. Pension Kshs. 36,622.25;
 - g. Pension since retirement in 2016 Kshs. 36,020 per year;



- h. Certificate of service;
- i. Costs.

Claim

2. The claimants are Administrators of the Estate of the late Frederick Yaa Charo (Deceased). Their claim is that the deceased was employed on 19 March 1983 by the defunct Municipal Council of Malindi as a Storekeeper and in the year 2008 he had been promoted to the position of Supplies Assistant (SS. II) Officer earning a basic wage of Kshs. 32,085, a house allowance of Kshs. 10,000, and commuter allowance of Kshs. 1,000 all Kshs. 43,085 per month.
3. On 16 May 2011 the 1st respondent convened a meeting with the agenda of purchasing of hardware material and detergents for toilets and drainage systems through the procurement committee which included the Town Clerk, Town Engineers, and other heads of departments including the deceased. The meeting resolved that the respondent would purchase hardware materials that were not reflected in the Tender for 2011/2012 and to spare materials that were urgently required for the *Kazi kwa Vijana* project. The deceased was to buy these materials in separate Local Purchase Orders (LPOs) for the project and would be paid through a different account other than that of the 1st respondent.
4. Through letter dated 22 September 2011, the 1st respondent wrote to the deceased directing him to show cause why disciplinary action should not be taken against him over allegations that he had grossly breached the terms of his employment and had been found to be of gross misconduct. He was alleged to have issued LPOs amounting to Kshs. 4,165,000 to Pekatwa Agencies. The deceased responded to the allegations made against him through letter dated 23 September 2011 and denied issuing the LPOs and whatever he did was based on directions from the Procurement Committee on 16 May 2011.
5. On 7 February 2012 the deceased was suspended by the 1st respondent on account of alleged gross misconduct and that he would not be entitled to any salary during suspension. The respondent made reference to the provisions of the *Local Government Act*, the *Public Service Commission (Local Authority Officers) Regulations, 1984* and Terms and Conditions of Service for Officers of Local Authorities as agreed in the CBA dated 9 April 2010.
6. On 9 February 2012 the deceased wrote to the 2nd respondent and protested the suspension and indicated this intention of appeal against the same as being unlawful and without due process. On 7 March 2012, wrote a protest letter to the PS Ministry of Local Government who referred the matter back to the respondents through letter dated 12 July 2013.
7. On 19 December 2013 the 2nd respondent wrote to the deceased informing him that he had been deployed to the Finance and Economic Planning Department of the newly established 1st Respondent County. The deceased complied and through letter dated 18 July 2014 the 2nd respondent indicated his suspension was without due process but the human resources department failed to effect the reinstatement.
8. The deceased wrote to the human resources department on 2 February 2015 on the refusal to reinstate him. the 2nd respondent re-issued the deceased with the same letter of gross misconduct but dated it 30 March 2015 citing the same allegations and that the 2nd respondent contemplated summary dismissal. The deceased attained his retirement age by the tie of filing his claim in the year 2017. The 2nd respondent's issue was that they needed to employ somebody else instead of the deceased at a much cheaper cost.



9. This resulted in unfair contravention of the law as the respondents failed to engage the deceased to determine his case or process and pay his terminal dues and dues withheld during the suspension period. The deceased filed suit but denied before he could prosecute the same. His Administrators filed an Amended Claim upon obtaining Letters of Administrators through Malindi Chief Magistrate Succession Cause No. E55 of 2021 and also included the 2nd respondent as a respondent.
10. The claimants filed this cause upon the demise of the employee and the respondents have failed to pay his terminal dues to the Estate.
11. The claimants filed the witness statements of Beatrice Jumwa Kaingu and Fikiri Fredrick Yaa. The deceased filed this claim on 29 November 2017 but died before prosecuting the same on 15 June 2018. The claimants obtained Letters of Administration through Malindi Succession Cause E55 of 2021.
12. Ms Beatrice Jumwa Kaingu testified that the deceased was at all material times employed by the respondents and then suspended from duty but later recalled without payment of his dues. after being recalled back, the respondents suspended him again. There were no reasons given for stoppage of employment or payment of his terminal dues. The respondents alleged that there was theft but there was no hearing too make a determination. The claimants have never been paid the terminal dues owed to the deceased's Estate as claimed herein.

Fikiri Fredrick Yaa testified in support of the claim.

Response

13. In response, the respondent's case is that the deceased was employed by the defunct Municipal Council of Malindi as a store keeper on 19 March 1983 and was promoted to the position of Supplies Assistant earning Kshs. 43,085 per month. on 16 May 2011 there was a meeting held by the defunct Council of Malindi with the agenda to discuss the purchase of hardware material. On 22 September 2011 the Town Clerk issued the deceased with a show cause notice on the basis that he had been found to be of gross misconduct. the allegations were that he had issued handwritten LPOs purporting to be from the Municipal council of Malindi to Pekewa Investment Limited for supply of goods he acknowledged to have received. Being aware of the approval of such supply had not been requested nor awarded to Pekewa Investments or any firm for the supply. He precipitated the Council to incur financial loss amounting to Kshs. 4,165,000 being a claim by the supplier for the supply of good.
14. In response to the show cause notice, the deceased through letter dated 23 September 2011 stated that his actions were in line with the meeting held in his department. He did not deny the allegations set out in the notice to show cause.
15. On 7 February 2012 the respondents issued the deceased with another show cause notice for gross misconduct. He was also suspended from duty pending finalisation of his case.
16. On 9 February 2012 the deceased wrote to the respondents and noted that his suspension was unprocedural and as investigations were ongoing, the 2nd respondent was established in the year 2013 and through letter dated 19 December 2013, the County Secretary assigned him to the department of Finance and Economy and Planning to the 1st respondent with effect from 6 January 2014. The deceased was required to report to the Chief Officer on deployment.
17. Upon the 2nd respondent taking over from the Defunct Municipal Council of Malindi, it was noted that the deceased had been suspended but resolved to reinstate him upon conclusion of procedures that the deceased should have been taken through and that he had remained for two years on suspension. However, his conduct remained under investigations the reinstatement notwithstanding and on 30



March 2015 he was issued with notice to show cause why he should not be dismissed for gross misconduct which had occasioned loss of Kshs. 18,918,200 together with legal costs to defend the respondents against legal claim. The deceased failed to show good cause.

18. The claims made against the 2nd respondent are time barred and should be dismissed with costs.
No witness was called.
19. Parties agreed to file written submissions. Only the claimants complied and filed written submissions on 5 February 2024.

Determination

20. The employment of the deceased, Fredrick Yaa Charo is not denied. He joined the employment of the defunct Municipal Council of Malindi from 19 March 1983 which transitioned under Constitution, 2010 to Kilifi County in terms of Article 176 with the 2nd respondent taking over the human resource function for the 1st respondent in accordance with the Section 57 of the County Government Act. Due to these constitutional and legal changes, the deceased was absorbed by the respondents who were in held administrative authority and human resources respectively.
21. It is not contested that on 22nd September 2011 the respondents issued the deceased with a notice to show cause over alleged gross misconduct and that they had caused them financial loss of Kshs. 4,165,000 for allocation of an LPO to Pekatewa Investment for supply of good without the respondents' knowledge. It is also agreed that on 7 February 2012 the deceased was suspended from duty over alleged loss of Kshs. 18,910,200.
22. It is also not contested that through letter dated 19 December 2013 the 2nd respondent reinstated and deployed the deceased to the department of Finance and Economic Planning with effect from 6 January 2014. He was also informed that his matter was still pending investigations by the 2nd respondent and through letter dated 18 July 2014 the 2nd respondent informed the deceased that his matter had not been addressed through the correct procedures and that is why he had been reinstated from his suspension.
23. On 30 March 2015 the 2nd respondent issued the deceased with a suspension notice on the grounds of gross misconduct and that he had caused the respondents financial loss of Kshs. 18,910,200. There is no conclusion of this matter until the deceased retired from service.
24. The respondents have not filed any work records with regard to the deceased employee. The only records available to the court are the one attached by the deceased in his claim.
25. As a general principle in employment and labour relations, an employer is allowed to suspend an employee to allow for investigations. the respondents first suspended he deceased on 7 February 2012 on the grounds that he had issued handwritten LPOs and the matter was under investigation. He was again suspended through notice dated 30 March 2015. As noted above, there is no recall to address this suspension.
26. In the case of *Mutwol v Moi University* (Civil Appeal 118 of 2019) [2022] KECA 537 (KLR) (28 April 2022) (Judgment) the Court of Appeal held that;

... we are not persuaded that there must be provision in the contract of employment providing for compulsory leave before an employee can be sent on such leave. The flip side of it is that there is no law that prohibits the placement of an employee on compulsory leave. It is our further view that it was necessary to have the appellant sent on compulsory



leave to enable the respondent to carry out meaningful investigation. It is not possible for an employer to carry out effective investigations against an employee who, in spite of accusations of wrong doing, continues to occupy her/his office. In any case, looking at the circumstances of this matter, the appellant was informed and understood that she was being placed on compulsory leave to allow for investigations and she was given the opportunity to show cause why disciplinary action should not be taken against her. We do not find any good grounds to impugn the decision of the respondent which in our view was fair, reasonable and justifiable.

27. In *Bernard Mwaura Mbutia v Nyakururu Water & Sanitation Company Limited, County Government of Laikipia (Interested Party)* [2019] eKLR, the court held that;

... the sending of an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure is within the purview of the employer. Such action only removes the employee from the workplace temporarily without interfering with his terms of service. Where the employer finds it necessary to thus remove the employee from the workplace to undertake comprehensive investigations into a matter or alleged misconduct, by allowing the same to conclude could vindicate the employee or allow for him to be invited to show cause over specific allegations following the investigations.

28. Such prerogative once applied, the employer has duty to recall the employee back to work to respond to any matter arising out of the investigations and which necessitated the suspension. Where investigations establish that the employee is innocent, the employee should be reinstated and where found culpable, a notice to show cause must issue to allow the subject employee a fair chance to respond as held in the case of *Samson Ole Kisirkoi v Maasai Mara University & 3 others* [2018] eKLR.

29. The employer has a legal duty to complete and conclude the suspension whichever way. Reinstatement the employee or issue a notice to show cause. The court in *Elizabeth Cherono Kurgat versus Kenya Literature Bureau* [2014] eKLR held that;

... the Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.

30. The due process of Section 35, 41 and 44 of the *Employment Act*, 2007 must be adhered to.

31. In this case, after the deceased's suspension through notice dated 30 March 2015, the respondents have failed to render an account of what action(s) was taken against him. He filed the instant suit on 29 November 2017 on the grounds that while on suspension, he attained retirement age, and his matter was not heard and his terminal dues were not paid. This is contrary to Section 41 and 45 of the *Employment Act*, 2007 which mandates the employer to take an employee through the due process where there is any alleged misconduct. Failure to render such account, the resulting termination of employment is unfair.



32. The lapse by the respondents should not deny the deceased and his Estate the employment benefits accrued during his employment for good cause in terms of Section 18(5) of the *Employment Act*, 2007. His dues were lawfully due and owing ought to be paid accordingly.
33. The deceased claimed payment of 6 months' notice pay. His claim is based on the provisions of *Local Government Act*, the *Public Service Commission (Local Authority Officers) Regulations*, 1984 and Terms and Conditions of Service for Officers of Local Authorities as agreed in the CBA dated 9 April 2010. The subject CBA on the agreed terms and conditions of service is not attached to this claim. Save for a payment statement for the month of January 2012 that is attached indicating the wage due was Kshs. 43,085 indicating he was paying to his union Ksh.140 and COTU Ksh.30, the required details thereof are not gone into. The claimants enjoy legal representation and I take it these aspects were deliberately not gone into.
34. Under the provisions of Section 35 of the Act, notice pay due is for one month in the absence of any other contract conferring other benefits. Notice pay awarded at Kshs. 43,085.
35. On the claim for unpaid salary during suspension, upon the reinstatement of the deceased and the lapse in addressing his suspension, all his owing dues accrued including half salary for 3 months during suspension Kshs. 64,627.50.
36. The claim is also that the deceased was entitled to his wages for the entire period until retirement for 68 months from May 2011 to December 2016. As noted above, the respondents failed to file any work records to indicate how the deceased was treated upon suspension on 7 February 2012 and until he retired in December 2016 upon the second suspension on 30 March 2015. For lack of evidence, the wages due for this period are due at Kshs. 2,929,780.
37. On the claim for pay in lieu of taking leave for 5.6 years, the claimant was on unpaid suspension and not at work for this period. His wages for this period while out of office is addressed above.
38. Upon retirement at the allowed age of 60 years, the deceased who was pensionable under his employment terms his Estate is entitled to the due pension. Under the payment statement for January 2012, this is evidence that the deceased was contributing to LAPROFUND and was pensionable. His estate is entitled to the payment thereof and the respondent shall issue the necessary letters to allow the claimants and Administrators of the Estate of the deceased access to the due benefits thereof.
39. The claimants are also entitled to be issued with Certificate of Service for the deceased in accordance with Section 51 of the *Employment Act*, 2007.
40. On costs, this being an employment claim, the claimants urging the case of the deceased, on the awards outlined above, each party to bear own costs.
41. Accordingly, judgment is hereby entered for the claimants against the respondents jointly and severally in the following terms;
 - a. Notice pay Kshs. 43,085;
 - b. Unpaid wages during suspension Kshs. 64,627.50.
 - c. Unpaid wages from May 2011 to December 2016 Kshs. 2,929,780;
 - d. The respondents shall issue the claimants and or the Administrators of the Estate of the deceased with the necessary letter(s) to access pension and LAPROFUND dues with regard to the deceased;



- e. All pension dues shall be processed and paid to the claimants within the next thirty (30) days from the date hereon;
- f. The 2nd respondent shall issue the claimants with the Certificate of Service with regard to the deceased in accordance with Section 51 of the *Employment Act*, 2007; and
- g. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29TH DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

