



**Lwenyi v Tourism Regulatory Authority & 2 others (Cause E795 of 2022)
[2024] KEELRC 13336 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13336 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E795 OF 2022
DKN MARETE, J
NOVEMBER 27, 2024**

BETWEEN

KENNEDY LUGOHE LWENYI CLAIMANT

AND

TOURISM REGULATORY AUTHORITY 1ST RESPONDENT

CABINET SECRETARY, TOURISM & WILDLIFE 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. This matter was originated vide a Memorandum of Claim dated 11th October, 2022. It does not disclose any issue in dispute on its face.
2. The Respondent in an Amended Reply to Memorandum of Claim dated 16th March, 2023 denies the Claim and prays that it be dismissed with costs.
3. The Claimant's case is that at all material times to this cause, he was an employee of the 1st Respondent as its Acting Director General appointed on terms until the position is substantially filled. This was vide letter SDT/2/7/7 and TRIAL/1/20 dated 20th January, 2021 and 21st January, 2001 respectively.
4. The Claimant's further case is that in the letter refence No. TRA/1/1/30 of 21st January, 2021, the Claimant terms of employment were espoused as follows;
 - i. You will be entitled to the difference in basic salary between your current entitlement and that of the position of TRA 1.
 - ii. You will be entitled to airtime worth Kshs.20,000/- and extraneous allowance of Kshs.60,000/-.
 - iii. You will be entitled to official transport and any other privileges commensurate to this position.



5. He avers that at the time, he was serving as Chief of Staff, in the cabinet secretary's office, Ministry of Tourism and Wildlife and earned a basic monthly salary of Kshs.59,120.00.
6. The Claimant further avers as follows;In accordance with his letter of appointment and the 1st Respondent salary scale, the applicable determinant for acting allowance was Kshs.340,000/- per month from which the difference was to be derived.He was therefore entitled to Kshs.280,880/- per month as acting allowance from 21st January, 2024.His duties included;

- a. Secretary to the Board of Director's and Chief Executive Officer of the 1st Respondent.
- b. Carrying out the decisions of the Board of the 1st Respondent, day to day administration and management of the affairs of the 1st Respondent.
- c. Supervision of all employees of the 1st Respondent.
- d. Performance of other such duties as assigned by the Board of the 1st Respondent from time to time.

Others were;

- a. Approval of special duty allowance upon approval of the Human Resource Administration Committee.
- b. Leave approvals of all employees of the 1st Respondent.

The Claimant was promoted on merit based on exemplary performance.Upon promotion his terms of service were subject to the 1st Respondent's Human Resource instruments with 15% of the basic pay of the position acted upon or the difference of the basic pay of the two whichever is the higher.He was also entitled to an entertainment allowance of Kshs.60,000/- per month with effect from 21/01/2021.He was also entitled to an extraneous allowance of Kshs.60,000/- per month.

7. The Claimant's further case is that on 26th January, 2022 while attending official duty, he was summoned by the Chairperson of the 1st Respondent to her room at 22.00hrs to discuss an official issue while other board members were retiring to sleep at the Rift Valley Hills Resort in Kabarnet Town. It is here and then that the Chairperson of the 1st Respondent attempted to seduce him to sexual activity which he declined and left the room immediately.
8. The Claimant's other case is that subsequent to the foregoing and consequent o the Claimant's fortitude against the seduction, his woes manifested sequentially leading to his recall back to the Ministry by a letter dated 6th May, 2022. This, to him was underhand, unprocedural and without giving valid reasons.
9. Other grievances by the Claimant in particular include;
 30. Upon his recall for deployment, the Claimant also avers that he was not assigned an office or any tasks by the 2nd Respondent for a period of 29 work days until his transfer to his current work station.
 31. Based on his employment history, ascendancy and record, the Claimant avers that he was grossly mistreated, maligned, embarrassed and demeaned through a termination process that was overtly chaotic, public and manifestly unjustified.



32. The Claimant also avers that during his tenure as Acting Director General, he was mandated as the liaison for the 1st Respondent to enlist and coordinate hospitality and accommodation facilities in preparation for the Africities Summit 2022 that was of monumental National significance to the Country.
33. That as the chairperson of the Africities Summit hospitality subcommittee, the Claimant performed all the preparatory actions necessary for the successful delivery of the Summit.
34. On 17/05/2022 to 21/5/2022, the Summit was held in Kisumu where the Claimant was facilitated by the replacement Acting Director General to attend based on his preceding role to officially represent the 1st Respondent at the Summit and further justified by the infancy of the tenure of his successor to sufficiently acquiesce with the nitty-gritty of the Summit as to immediately replace the Claimant for the Summit.
35. Despite the approval of the Claimant's Africities Daily Subsistence allowances and initial payment, the same was reversed by the 1st Respondent without lawful cause and remains unpaid to date.
36. Under the applicable Salaries and Remuneration Commission's scale, the Claimant was entitled to be paid Kshs. 18,200/- for each of the Summit days totaling Kshs. 109,200/- for the 6 nights the Claimant attended the Summit.
37. Accordingly, the Claimant avers that the incongruent treatment compared to that of all his colleagues who attended the Africities Summit amounted to discrimination and unfair labour practices as there was no basis for the different treatment of the Claimant, objective or reasonable justification to the refusal to pay the Summit allowance upon express approval and facilitation to attend by the 1st Respondent.
38. Throughout his employment at the Public Service, the Claimant has distinguished himself as an efficient public servant who continually executed his tasks diligently and progressed on account of merit, industry and competence.
39. Furthermore, the Claimant's service of employment with the 1st Respondent was exemplified variously including the Board Evaluation Report 2021 conducted by the State Corporations Advisory Committee and Statements of Financial Performance 2021 and 2022 of the 1st Respondent.
40. Prior to terminating the Claimant's employment, the Respondent did not issue two (2) months' notice or pay the Claimant equivalent salary in lieu of the termination notice.
41. The Claimant further avers that no exit interview was conducted in accordance with the 1st Respondent's HR instruments
42. The Claimant also avers that the 1st Respondent has hitherto failed to remit the Claimant's pension fund contribution or prorated gratuity to the Claimant as required under the 1st Respondent's HR instruments.
43. Further, the Claimant also avers that he was not issued his Certificate of Service by the 1st Respondent upon his termination as required by law.
44. Upon termination, the Claimant avers that the 1st Respondent has merely paid the Claimant a paltry Kshs. 98,841/- as terminal dues in further manifestation of the contemptuous manner



with which the tenure of the Claimant has been regarded from the commencement of the termination 'wars', or otherwise, woes.

45. To date, the 1st Respondent has ignored, failed and/or refused to pay the Claimant his salary arrears for the duration of days worked in acting capacity until 16/05/2022.
46. The Claimant also avers that his entertainment allowance for the duration of his employ as acting Director General remains unpaid.
47. Invariably, the wrongful termination has caused the Claimant mental anguish in the wake of a ploy that was purely orchestrated to unjustifiably rid the 1st Respondent of the services of the Claimant.
48. The Claimant's claim against the 1st Respondent was duly communicated to the 1st Respondent vide a demand letter and despite all efforts made to have the 1st Respondent satisfy the claim, the same have proven futile.
49. It is manifest and evident that the manner in which the Claimant's contract of employment was terminated was wrongful, illegal, unfair and a blatant disregard of the mandatory provisions of the *Employment Act*, 2007.
50. The Claimant contends that the laid down legal procedures for termination of his employment were not adhered to by the 1st and 2nd Respondents before and/or during and after termination.
51. By redeploying the Claimant as a Senior Assistant Secretary, the 2nd Respondent unlawfully reduced the rank and social standing of the Claimant thereby demoting the Claimant without due process of the law.
52. The Claimant avers that at the time of his appointment as an acting Director General, he had already been promoted to Chief of Staff and further avers that his redeployment as a Senior Assistant Secretary was a demotion and an unfair labour practice.
53. The Claimant claims for compensation for wrongful termination pursuant to the provisions of the *Employment Act*, 2007.
54. The claim herein falls within the jurisdiction of this Honourable Court.

10 He prays as follows;

- a. A declaration that the termination of the Claimant's employment as acting Director General was unlawful and/or irregular.
- b. A declaration that the redeployment and re-assignment of duties as a Senior Assistant Secretary constituted a demotion and unfair labour practice.
- c. An order be and is hereby issued that the recall of the Claimant to the 2nd Respondent and subsequent failure to assign the Claimant any duties for 29 work days constituted unfair labour practice.
- d. A declaration that the refusal by the Chairperson of the 1st Respondent and the Principal Secretary of the 2nd Respondent to approve the leave of the Claimant was unlawful and/or irregular, discriminatory and constituted an unfair labour practice.
- e. A declaration that the refusal to pay the Claimant his daily subsistence allowance for the Africities Summit 2022 amounted to discrimination and unfair labour practices on the part of the 1st Respondent.



- f. A declaration that the Claimant was entitled to two (2) months' notice of termination or payment of two (2) months' salary in lieu of termination notice.
 - g. Compensation for unlawful and/or irregular termination of the Claimant's employment by the Respondent.
 - h. An order directing the 1st Respondent to pay the following:
 - i. Acting Allowance (Kshs. 340,000 - 59,120 - 213,474) X 15 months 27 days} Kshs.1,093,755.40/-
 - ii. Extraneous Allowance (Kshs. 60,000 X 15months + 27days) . Kshs. 932,000/-
 - iii. Entertainment Allowance (Kshs. 60,000 X 15months + 27 days) Kshs. 932,000/-
 - iv. Compensation for twelve 12 months (Kshs. 340,000 X 12)... Kshs. 4,080,000/-
 - v. Two (2) months' salary in lieu of notice (Kshs. 340,000 X 2) Kshs. 680,000/-
 - vi. 16 days Salary arrears for May 2022 (16/30 X Kshs. 280,880 - 98,841.37) Kshs. 50,961.36/-
 - vii. Unpaid Daily Subsistence Allowance, Africities Summit (Kshs.18,200X6 nights) Kshs.109,200/-
 - viii. 50 days leave earned but not taken (50/60x280,880) Kshs. 234,066.67/-
 - ix. Pension fund contribution or prorated gratuity (Kshs. 340,000x30/100) x 15 months 27 days) 1,315,8000/- Total Kshs. 9,427,783.43/= __
 - i. General Damages for discrimination
 - j. An order that the Respondent issue a Certificate of Service to the Claimant;
 - k. Any other remedy that this Honorable Court may deem fit to grant; and
 - l. Costs of the cause.
11. The Respondent's case is a denial of the claim. In as much, she admits the averments of paragraph 5 of the claim on the issue of employer/employee relationship regarding the position of Acting Director of the 1st Respondent in this case.
 12. The Respondent denies being privy to paragraphs 8 – 16 of the Memorandum of Claim and also the allegations of sexual harassment and maintains that this is an afterthought as this were never reported to the relevant authorities and puts the Claimant to strict proof thereof.
 13. The Respondent further denies being privy to the contents of paragraph 19 – 22 of the claim regarding the machinations of the Chairperson of the 1st Respondent for removal/termination of the Claimant's from the position of Director General of the 1st Respondent.
 14. It is the Respondent's overall case that the termination of the employment of the Claimant, if at all and which is denied, was carried out procedurally and lawfully and therefore calls for proof to the contrary by the Claimant.
 15. The 1st Respondent's position and case is that the Claimant was never an employee and maintains that there was no termination of his employment but a recall by the Ministry on 6th June, 2022 from where he continues service as a Senior Assistant Secretary. All allegations on leave earned but not taken, daily



subsistence allowance to attend Africities Summit, Acting allowance, 16 days salary arrears for May 2022, entertainment allowance, extraneous allowance, salary in lieu of termination notice and pension fund contribution or prorated gratuity are denied.

16. The issues for determination therefore are;
 1. Whether there was a termination of the employment of the Claimant by the Respondent.
 2. Whether the termination, if at all, was wrongful, unfair and unlawful.
 3. Whether the Claimant is entitled to the reliefs sought.
 4. Who bears the cost of this cause
17. The first issue for determination is whether there was a termination of employment of the Claimant by the Respondent. The Claimant in his written submissions dated 13th December, 2023 does not address this subject but gets out of his way to reiterate his case and submit a case of unlawful termination of employment.
18. The Respondent on the other hand from the onset denies a case of termination, let alone unlawful termination of employment by the Respondent. It is her case and submission that in the first place, the Claimant was never her employee. He had been seconded from his parent ministry in an acting capacity in the position of Acting Director General. A case of termination of employment would therefore never arise in the absence of an employer/employee relationship like in the presence case.
19. The Respondent further submits that the Claimant was on 6th May 2022 recalled to the Ministry by his appointing authority, the Cabinet Secretary/2nd Respondent. This action was legitimate and within the confines and powers bestowed upon this office by law.
20. The Respondent again draws this court to the provisions of Section 51(1) of the Interpretations and General Provisions Act, Chapter 2, Laws of Kenya which provides thus;

“51. Power to appoint to include power to suspend, dismiss, etc., and to reappoint, etc.

 - (1) Whether by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.”
21. The Respondent thus submits that the 2nd Respondent acted within the confines of the law to appoint the Claimant as Acting Director General and also recall him to the Ministry.
22. This matter is as simple. It is a scrutiny into the exercise of the powers of the 2nd Respondent in acting in exercise of her powers in accordance with the law. The Respondent’s case comes out clearly in resonance with the action of appointment and recall of the Claimant by the 2nd Respondent. A case of illegality does not and did not arise in the circumstances. I therefore find a case of no termination of the employment of the Claimant by the Respondent and hold as such. And this answers the 1st issue for determination.



23. On a finding of no termination of employment as above, the 2nd issue for determination fall by the way side.
24. The 3rd issue for determination is whether the Claimant is entitled to the reliefs sought. He is not. Having lost on a case of termination of employment, he becomes disentitled to the reliefs sought.
25. I am therefore inclined to dismiss the claim with orders that each party bear their cost of the same.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Mr. Senaji instructed by Senaji & Associates Advocate for the Claimant.
2. Mr. Kioko instructed by State Law Office for the Respondent.

