



REPUBLIC OF KENYA



Njoroge v County Government of Machakos & another (Appeal E002 of 2021) [2023] KEELRC 184 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 184 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E002 OF 2021
J RIKA, J
JANUARY 31, 2023**

BETWEEN

ANDERSON KIMANI NJOROGE CLAIMANT

AND

THE COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF MACHAKOS 2ND RESPONDENT

JUDGMENT

Rika J

Court Assistant: Emmanuel Kiprono

Mwathi Njue & Company Advocates for the Appellant

Gichimu Mung'ata & Company Advocates for the Respondents

1. The Appellant presented a Claim before the Trial Court, where he sought the following orders: -
 - a. Reinstatement and re-engagement.
 - b. Absorption by Machakos County Public Service Board.
 - c. Salary arrears from April 2015 to the date of Judgment with interest.
 - d. Severance pay for the years worked from 2nd November 2010 to the date of Judgment with interest.
 - e. Damages for unlawful, unfair and wrongful termination.
 - f. Issue of Certificate of Service and Recommendation Letter.



- g. Notice Pay.
 - h. Salary during suspension.
 - i. General damages for wrongful and malicious prosecution.
 - j. Costs.
 - k. Interest.
 - l. Any other suitable orders.
2. The Trial Court granted to the Appellant, the following orders: -
- a. 9 months' salary for the period of suspension.
 - b. Severance pay at Kshs. 63,035.
 - c. Certificate of Service and/or Recommendation Letter.
 - d. Compensation for un-procedural and unlawful termination at Kshs. 432,240.
 - e. Costs and interest.
3. The Appellant filed this Appeal based on 5 Grounds, which are summarized as follows: -
- a. The Trial Court did not give adequate consideration to the evidence adduced by the Appellant.
 - b. The Trial Court erred in failing to grant the orders of reinstatement or re-engagement despite clear finding that termination was unfair.
 - c. The Trial Court erred in failing to grant the order of reabsorption.
 - d. The Trial Court erred by concluding that reabsorption would mean the Appellant had not been suspended.
 - e. The Trial Court erred in failure to appreciate the doctrine of legitimate expectation, the Appellant having been unequivocally promised by the Cabinet Secretary for Health and Chairman of Health Committee Council of Governors, that he would be reabsorbed.
4. The Appellant proposes that: -
- a. The Appeal is allowed with costs.
 - b. The Appellant is absorbed, reinstated or re-engaged in Respondents' Organization.
 - c. The Judgment and Orders of the Trial Court are set aside.
 - d. Such other orders as the Court deems fit.
5. Parties agreed that the Appeal is heard by way of written submissions, which they confirmed to have been filed and served at the last mention on 15th November 2022.
6. The Appellant submits that the Trial Court erred by concluding that the Appellant could not be reabsorbed because his contract was for 3 years, ending on 28th May 2015. The Council of Governors Health Committee Chairman, and the Cabinet Secretary for Health, issued circulars on 23rd October 2014 and 22nd May 2015 respectively, asking County Governments to consider absorbing Accountants in their service in permanent and pensionable positions, once their contracts expired.



7. It is the Appellant's Submission that his Co-Accused in the criminal proceedings which led to termination, one Dr. James Weyaa, whose criminal case was discontinued, was reinstated and paid all back-dated salary. Reinstatement was the appropriate remedy, as held in *Salome Lilian Etenyi v. Kenya Ports Authority* [2017] e-KLR where the Employee was reinstated, after the Court found that 11 of her colleagues had been reinstated, after they were cleared of criminal allegations. Invoking *Kenya Airways Limited v. Aviation Workers Union Kenya & 3 others* [2014] e-KLR, the Appellant submits that reinstatement is practicable, because he was acquitted in the criminal proceedings which led to his loss of employment, and because he was an outstanding Employee, and was a junior Employee on termination. The Respondents' County Government is large enough to accommodate the Appellant.
8. The Appellant submits that he was awarded a total of Kshs. 819,455 which the Respondents have never paid and which continues to attract interest. Monetary compensation is not sufficient. The Appellant submits that he is 42 years and not likely to secure alternative work in the job market. Apparently going way out of his Memorandum of Appeal, the Appellant urges the Court to, in addition to reinstatement/re-engagement order that he is awarded enhanced compensation for lost salary of 8 years; withheld salary for July 2014 to May 2015; severance pay; and compensation for unfair termination- all added-up at Kshs. 4,340,240.
9. The Respondents submit that Respondents entered appearance in the Trial Court proceedings on 5th September 2019, but failed to file Response. The Appellant then asked for Judgment in default, which the Trial Court granted, and proceeded to hear the Appellant on formal proof.
10. It is the Respondents' submission that this was erroneous from the outset. They cite order 10 rule 8 of the *Civil Procedure Act*, which stipulates that no Judgment in default of appearance or pleading, may be entered against the Government without the leave of the Court and any application for leave, shall be served not less than 7 days before the return day.
11. The Application for Interlocutory Judgment was not served upon Counsel on record for the Respondents. The Proceedings of the Trial Court were a nullity, and ought to be set aside. The Trial Court rightly declined to grant an order of reinstatement.
12. The Respondents submit that the Appellant's contract expired on 28th May 2015. He was constructively dismissed on 30th August 2014, after he was charged with a criminal offence on 19th August 2015. The Respondents submit that the Appellant was correctly awarded salary for the period that remained to his contract, at Kshs. 324,180. The Respondents pray the Court to uphold this finding and award. The Trial Court awarded the Appellant maximum compensation, after finding that he was unfairly dismissed. This award should be sustained. The Respondents similarly urge the Court to uphold the grant of severance pay.

The Court Finds:-

13. Although the Respondents raise weighty matters of law on the manner Interlocutory Judgment was obtained at the Trial Court, and submit that the Trial Court proceedings were a nullity, and ought to be set aside, the Respondents did not file a Counter- Appeal.
14. Furthermore, the Respondents simultaneous with urging the Court to find the Trial Court proceedings a nullity, submit that awards made by the Trial Court were correctly made, and should be upheld on Appeal.
15. The Respondents do not have a Counter-Appeal, and their Submissions are somewhat inconsistent.



16. The Appellant himself is not clear, why in his Memorandum of Appeal, he indicates that he is appealing against the whole of the Judgment of the Trial Court. Is he asking the Court to set aside all the orders, including the monetary orders granted to him by the Trial Court?
17. He was granted 12 months' salary in compensation for unfair termination, and still submits that he should be granted compensation equivalent of 12 months' salary, at paragraph 27 [d] of his Submissions.
18. The Claimant left employment on 30th August 2014, over 8 years ago. An order of reinstatement when the Judgment was delivered in 2020, or today, would exceed the 3-year period allowed in granting the remedy of reinstatement, under Section 12 [3] [vii] of the E&LRC Act. Neither the Trial Court, nor this Court, would have legal justification, in granting reinstatement, 6 and 8 years respectively, after termination occurred.
19. The Court is doubtful whether the Claim in the Trial Court, was made within the time allowed under the Employment Act. The Memorandum of Claim was presented under the banner of "In the matter of the Employment Act 2007." The remedies sought are remedies given under the Employment Act. That Act clearly states under Section 90, that a Claim based on a contract of employment under the Act, shall be brought within 3 years from the date the cause of action arose. By the time the Appellant filed his Claim in 2019, 5 years had lapsed since he left employment.
20. In the view of this Court, the cause and the remedy were time-barred. But as stated with regard to other legal objections made by the Respondents, there was no Counter-Appeal and these objections did not crystallize.
21. Some of the items granted by the Trial Court such as severance pay, again have doubtful legal foundation. Severance pay under the Employment Act is granted under Section 40 on redundancy, so what was severance pay granted by the Trial Court based on? What law required the Respondents to issue the Appellant a recommendation letter?
22. Reinstatement is not an automatic remedy where the trier of facts reaches a finding that termination was unfair. There was no compelling reason for the Trial Court to order that the Claimant is reinstated, re-engaged or reabsorbed. It was in the discretion of the Trial Court, having evaluated all the circumstances, the legality, the reasonableness and practicability of the remedies, to grant the award the Trial Court made.
23. Circulars issued by the Cabinet Secretary and the Health Committee Council of Governors' Chairman, do not bind County Governments. County Governments manage their own affairs at their own level, and are not subject to the direction of the National Government and Council of Governors, in the management of their human resources. The Respondents were not bound by circulars recommending absorption of Accountants into County Public Service on permanent and pensionable terms, after Accountants fixed-term contracts expired. The Trial Court certainly was not bound to grant orders of reinstatement, re-engagement or reabsorption based on mere recommendations of a Cabinet Secretary and Council of Governors, neither of whom had any legal mandate to recruit Employees for the County Governments.
24. The Court has not come across any evidence from the Appellant which the Trial Court failed to consider in its Judgment. The Appellant submits that he has encountered difficulty, in receiving the monetary awards granted by the Trial Court, and that monetary compensation was therefore insufficient. This inability does not justify reinstatement. The Appellant ought to explore legal means of actualizing what was awarded, instead of pursuing unlikely orders of reinstatement, re-engagement and re-absorption.



25. The Appeal has no merit, and the Judgment granted in favour of the Appellant by the Trial Court was more than sufficient. In different circumstances, he could have left the corridors of justice empty-handed. There is no reason to interfere with the Judgment of the Trial Court.

It is Ordered: -

- a. The Appeal is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.

James Rika

Judge

