



**Musonye v County Government of Bungoma (Cause 28 of 2021)  
[2023] KEELRC 510 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 510 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 28 OF 2021  
JW KELI, J  
FEBRUARY 28, 2023**

**BETWEEN**

**MOSES INGANJI MUSONYE ..... CLAIMANT**

**AND**

**THE COUNTY GOVERNMENT OF BUNGOMA ..... RESPONDENT**

**JUDGMENT**

1. The claimant, an employee of the respondent, pursuant to the stoppage of his salary while at work filed the instant claim dated February 8, 2021 against the respondent seeking the following reliefs :-
  - a. A declaration that the chronology of events particularized at paragraphs 10 to 28 of the memorandum of claim as perpetrated by the officers of the respondent against the claimant constitutes unfair labour practices against the claimant.
  - b. A declaration that the withholding of the claimant's salary without any disciplinary process, suspension, interdiction and/or of his services as has happened in this case constitutes an unfair labour practice and the same is unlawful.
  - c. An order for an immediate reinstatement of the claimants salary and benefits by the respondent and an immediate payment of the withheld arrears of the claimant's salary from December 2021 to date.
  - d. General damages for unfair labour practices.
  - e. Costs of and incidental to this claim.
  - f. Interest on (c),(d) and (e) above from the date of institution of this claim till payment in full.
2. Despite the respondent being duly served they did not file defence nor having been served with the Hearing Notice attend the hearing of the matter.



3. The claimant's evidence against the respondent therefore remains unchallenged.

**claimant's Uncontroverted Evidence Against The respondent.**

4. The claimant is an employee of the County Government of Bungoma as a Chief Fire Officer. The claimant has served in the position of Chief Fire Officer from 2016 to date. See Exhibits 1 and 2 being the claimant's letters of appointment referenced numbers CPSBB/INT. APPT/VOL.1/34 dated September 14, 2016 and letter referenced CG/BGM/CS/CONF/VOLI/(20)dated September 16, 2016. Prior to this, the claimant served as Inspector of Fire Services following his secondment to the County Government from the National Government in the period of transitions to County Government all over the Country.
5. As the Chief Fire Officer, the claimant has been effectively responding to emergency operations within Bungoma County and neighbouring counties as expected of him.
6. Despite his foregoing determination to make a contribution in the service of Bungoma County, the claimant has suffered multiple episodes of deliberate frustrations, threats, intimidation and humiliation by the Chief Officer for Roads , Engineer Maurice Marango particulars of which are as follows:-
  - a. With effect from April 5, 2020, on the instructions of the Governor, the County Fire Services was spearheading the fumigation exercise in offices, markets and shops as part of the responses to the global COVID 19 pandemic. The offices were closed on 15.4.2020 to facilitate routine exercise which was carried out every evening . On the April 16, 2020 , the claimant was given a letter signed by the Chief Officer Eng. Marango, to proceed on leave. This letter was issued notwithstanding the fact that the claimant was the head of the Fire Services Department that was spearheading the daily fumigation exercise. Faced with this dilemma, the claimant attempted to remain at the work station to ensure that the fumigation exercise which was his programmatic responsibility does not grind to a coordination halt. At the behest of the chief Officer, all furniture, electronics and other office facilities at the claimant's office were removed to push him out of office.
7. The claimant proceeded on leave under the above cloud of humiliation. The claimant resumed duty on June 4, 2022. On resumption of duty, the claimant's office items had not been returned and the Office locks had been changed with no alternative office being assigned to the claimant. Since then the claimant has never been assigned duties since he cannot access his offices to discharge his usual functions. As all these transgressions were happening, there was no written , verbal or other from of discussion or communication from the office of the Chief Officer explaining the rationale for the foregoing humiliating acts.
8. That the functions of the office of County Fire Services have all along been discharged by the claimant's juniors with no communication to the claimant as the head of the Department of Fire Services. Procurement of items for the Fire Services such as purchase of tyres for the vehicles, servicing of fire engines etc. has been undertaken without any requisitions arising from the claimant as the head of the Fire Services Department/Section. There have been multiple episodes of abuse of procurement process without meaningful consultation with the claimant as the head of the end user department.
9. That from April, 2020, the claimant has been denied access to allocated airtime as the Chief Fire Officer for purposes of emergency response coordination and operations. The work tickets for the emergency response vehicle previously under the claimant were taken away by the administrator, one Thomas Obunga, at the behest of the Chief Officer, Eng. Marango. Similarly, the emergency phones and cell



phone sim cards which were previously under the claimant's care have been taken away which has raised a question as to who is exactly in charge of the County Fire Services.

10. On November 12, 2022, the claimant wrote to the County Secretary of Bungoma County Government drawing his attention to the foregoing mistreatment at the behest of the chief officer, Eng. Marango. ( see exhibit 3).
11. As the above acts of harassment, intimidation and indignity were being perpetrated against the claimant, he had never been served with any written communication, surcharged or reprimanded for any wrong doing.
12. Following the claimant's complaint to the County Secretary dated November 12, 2020, on December 1, 2020, the claimant received an SMS communication from the Secretary to the Chief Officer, Eng. Marango in the words that "hallo sir, please come and pick your letter from the office of the chief officer. Thank you. ( see exhibit Number 5).
13. It is curious that the chief officer in this case never forwarded the claimant's case, if any, to the County Public Service Board for processing as expected under the *County Government's Act*.

#### **Written Submissions.**

14. The court, after the hearing, directed that the respondent despite not having filed defence to be informed to file submissions if they so desired.
15. The claimant's written submissions drawn by Ongoya & Wambola Advocates were dated October 27, 2022 and received in court on the October 31, 2022.
16. The respondent's written submissions drawn by Cyril Wanyong'o, the county attorney were dated November 30, 2022 and received in court on even date.

#### **Determination**

17. The claimant addressed the following issues in their submissions:-
  - a. Whether the claimant was obliged to comply with section 77 of the *County Government's Act* before approaching this court
  - b. Withholding of the claimant's salary without any disciplinary process, suspension, interdiction and /or of his services.
  - c. Whether the claimant is entitled to reliefs sought.
18. The respondent seized the opportunity extended by the court to file written submissions despite not filing defence and identified the following issues for determination in the suit.
  - a. Whether the court had jurisdiction to entertain the matter.
  - b. Whether the salary stoppage was done procedurally and lawfully.
  - c. Whether the claimant's right to fair hearing was violated.
  - d. Whether the claimant is entitled to reliefs sought.
19. The court having heard the claimant's undefended case and considered the issues under the claim and the submissions by both parties was of the considered opinion that the issues for determination in the claim were as follows: -



- a. Whether the court had jurisdiction to entertain the matter.
- b. Whether the salary stoppage was done procedurally and lawfully.
- c. Whether the claimant is entitled to reliefs sought.

#### **Whether the court had jurisdiction to entertain the matter.**

20. The issue of the jurisdiction of the court was not challenged. Nevertheless the court ought to satisfy itself of jurisdiction lest its decision amount to nothing as held in Court of Appeal decision in *Owners of the Motor vessel "Lilian S" v Caltex Oil (Kenya) Ltd* (1989) eKLR the decision of Nyarangi J on jurisdiction being everything and that without it the court must down its tools.
21. The court bearing in mind that the respondent was a county government specifically requested the claimant to address the issue in their submissions. The respondent also addressed the issue.

#### **The claimant's submissions**

22. The claimant submits that section 77 of the County Governments Act provides:-

‘77.

- (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary against any county public officer may appeal to the Public Service Commission against the decision”. And that regulation 18 of the *Public Service Commission (County Government Public Service Appeal Procedures) Regulations 2016* provides that the Public Service Commission may in relation to appeal grant the following orders:-
  - a. Uphold the decision of the county government public service
  - b. Set aside the decision of the county government public service
  - c. Vary the decision of the county government public service as the Commission considers just, or
  - d. Give such directions as the commission may consider appropriate.
23. That from the provision's of section 77 of the *County Government Act* above and the regulations the Commission does not award a complainant for compensation for infringement of constitutional rights and yet the claimant sought declaration for violations of article 41 for general damages for unfair labour practices. That jurisdiction to hear and determine questions on violations of rights and fundamental freedoms or contravention of the *Constitution* in regard to employment matters is granted to this honourable court under article 162(2)(a) of the *Constitution*.
24. The claimant relying on the foregoing provisions of the law submits that the Public Service Commission does not have :
  1. Jurisdiction to enforce rights under article 41 of the *Constitution*
  2. Jurisdiction to hear appeals where what is complained of is not a decision but a series of actions and omissions intended to frustrate an employee and create a hostile work environment.
25. The claimant to buttress their submissions relied on the decision in *Republic v Kenya School of Law & 2 others exparte Kgaborone Tshlofelo Wekesa* (2019)e KLR where it was held that the High Court in exceptional Cases may find that exhaustion requirement would not serve the values enshrined in the



Constitution or law and permit the suit to proceed before it. The Claimant further relied on the decision in Chief Justice and President of the Supreme Court of Kenya & another v Bryan Mandila Khaemba (2021)e KLR where the Court of Appeal held that the doctrine of exhaustion notwithstanding courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities. In the instant case the claimant submits that as an employee of the respondent he faced unfair labour practices meted out by the Chief officer for Roads Engineer Maurice Marango who denied him access to his office to perform his duties after resuming duty from leave, had his office facilities removed from the office, humiliated, harassed and intimidated and had the claimant's functions at the office of the county Fire Services discharged by his juniors. That despite the claimant writing to the County Secretary raising issue of mistreatment under the hands of the said Chief officer, the claimant never received any communication nor was he reprimanded for any wrong doing. That these illegalities were outside the mandate of the Commission. The claimant further relied on the decision in Abdikadir Suleiman v County Government of Isiolo & another (2015)e KLR where the court having considered the illegalities and breaches of constitutional rights complained of held it was difficult to find that the cited alternative procedure and remedy under section 77 of the County Government Act was available to the claimant. The court stated:- 'even if it is said that it was a case of mixed jurisdiction of the Commission and the court, it is the court's opinion that the legitimate path was to invoke the court's jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute.'

### **Respondent's submissions**

26. The respondent submits that the court had no jurisdiction to handle this matter as its jurisdiction had been invoked prematurely. The respondent relied on the following provisions of the law:-
27. Article 234(2)(i) of the Constitution which provides that the Commission shall hear and determine appeals in respect of County Governments' Public Service and further on section 77 of the County Government Act (supra) and section 85 and 86 of the Public Service Commission Act which mirror section 77 of the County Government Act.
28. Section 87 (2) of the Public Service Commission Act which reads:-

“A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.”
29. The respondent submits that the decision on show cause and directive on salary stoppage was communicated through letter dated November 19, 2020 from the chief officer roads which was a decision that fell under section 77 of the County Governments Act and appealable to the Public Service Commission. To buttress this Submission the respondent relied on the decision of the court of Appeal in Secretary County Public Service Board & another v Hulbhai Gedi Abdille (2017)e KLR to wit :- “There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent's. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance..... Her contention that she disregarded the appeal because it could not afford her an opportunity to



question the procedure followed by the appellant is in our view, without basis because section 77 has placed no fetter to the jurisdiction of the Public Service Commission. There is no requirement for instance that reasons for the decision be availed to an aggrieved party before he can prosecute an appeal before it.”

## Decision

30. In the instant case the claimant was a serving employee. The claimant led evidence vide his memorandum of claim dated February 8, 2021 and in his witness statement adopted affidavit in support of the application of even date and relied on the documents annexed therein to effect that as an employee of the respondent he faced unfair labour practices meted out by the Chief officer for Roads Engineer Maurice Marango who denied him access to his office to perform his duties after resuming duty from leave, had his office facilities were removed from the office, humiliated, harassed and intimidated and had the claimant’s functions at the office of the county Fire Services discharged by his juniors. That despite the claimant writing to the County Secretary raising issue of mistreatment under the hands of the said Chief officer, the claimant never received any communication nor was he reprimanded for any wrong doing. The claim was not opposed.
31. The court considered that the claimant had been deployed to the Ministry of Roads, Infrastructure and Public Works as the Chief Fire Officer. That he complained of the said harassment by the Chief Officer Roads. That the said show cause of November 11, 2020 did not address absence from work. In the response dated December 3, 2020 the claimant denied the accusation and informed the said Chief Officer Roads that the show cause was malicious as he had written a complaint letter against the chief officer and his office dated November 12, 2020. The letter was posted and received by the claimant on the December 3, 2020( MIM-4) The said Chief Officer on the November 19, 2020 addressed claimant with another letter on show cause of desertion from duty and stated salary be recovered from July 2020 in line with the Human Resource Manual. Now this letter was picked from the office and not posted The claimant received his salary for November 2020.
32. The court from the evidence before court was of the opinion that the disciplinary action was knee jerk reaction to the complaint by the claimant to the County Secretary on the mistreatment by the Chief Officer which facts were not controverted. The court is vindicated by the fact that the claimant was only informed of the said letter on December 1, 2020. Further the show letter alleged to have been authored by the said Chief Officer on 11<sup>th</sup> November 2020 did not raise issue of desertion of duty only for the issue to be raised in a subsequent letter of November 19, 2020.
33. The court finds that the fundamental right of the claimant to fair labour practices was under threat and indeed violated by acts of the Chief Officer Roads and the County Secretary having failed to address the claim of mistreatment by the Chief Officer, this was a case wherein the court was justified to invoke its residual jurisdiction and address the grievances. The court upholds the decision of the in *Chief Justice and President of the Supreme Court of Kenya & Another v Bryan Mandila Khaemba* (2021) eKLR where the Court of Appeal held that the doctrine of exhaustion notwithstanding courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities. The court upholds decision in *Abdikadir Suleiman v County Government of Isiolo & another* (2015) eKLR on the same jurisprudence.

## Whether the salary stoppage was done procedurally and lawfully.

34. The claimant submits that the salary was stopped in the month of December following the letter by the Chief Officer Roads of November 19, 2020 without rationale for the stoppage, that there was no



disciplinary process, suspension or interdiction of his service. The claimant submits that failure by the respondent to pay his salary for the month of January 2021 was contrary to section 5, 17 and 18 of the *Employment Act* amounts to violations of constitutional rights and relied on the decision in *Jonathan Spangler v Center for African Family Studies (CAFS)* 2017 eKLR and *Kusow Billow Isaack v Ministry of Interior and Coordination of National Government and 3 others* (2021) eKLR where the court held that failure to pay salary to an employee after rendering services amounts to subjecting him to degrading inhuman and tortious condition contrary to articles 28 and 30 of the *Constitution*. That the claimant received letter asking him to show cause why disciplinary action should not be taken against him. He responded and denied the allegation and stated the letter was backdated. That there was no communication of disciplinary process against him.

### respondent's submissions

35. The respondent submits that the salary stoppage was done procedurally and lawfully in compliance with section K8 of the Human Resources Policies and Procedures Manual for the public service commissions, May 2016 to wit: - 'Absence from Duty without leave or reasonable or lawful cause K.8 (1) Where a public officer is absent from duty without leave or reasonable or lawful cause for a period exceeding twenty four (24) hours, and is not traced within a period of ten (10) days from the commencement of such absence, the officer's salary shall be stopped and action to dismiss the officer initiated. (2) The public officer shall be addressed a 'show cause' letter through his last known address by registered post. (3) If the officer does not resume duty or respond to the 'show cause' letter within a period of twenty-one (21) days, from the date of the show 'cause letter', the case shall be referred to the respective Human Resource Management Advisory Committee for summary dismissal. (4) When an officer has been absent from duty without permission and subsequently resumes duty, he shall not be eligible for payment of salary for the period of absence and any amount erroneously paid to him shall be recovered from his salary.'
36. That section 76(6) of the *County Governments Act* reads: - 'Nothing in subsection (5) shall be interpreted as prohibiting or restricting the power of the county government or the concerned county chief officer or other lawful authority to interdict or suspend or take any interlocutory decision against the public officer' Relying on the foregoing the respondent submits that the decision of the respondent through the Chief Officer directing the human resources to stop salary as they commence disciplinary action against the claimant was procedural and lawful.

### Decision

37. The court finds that the letter of November 19, 2020 was knee jerk reaction to the complaint by the claimant against the said Chief Officer Roads the County Secretary dated November 12, 2021. The court found so as the prior show cause letter dated 11<sup>th</sup> November 2020 by the Chief Officer did not raise issue of absence. K8 of the Human Resources Policies and Procedures Manual for the Public Service Commission, May 2016 reads: - 'K.8 (1) Where a public officer is absent from duty without leave or reasonable or lawful cause for a period exceeding twenty four (24) hours, and is not traced within a period of ten (10) days from the commencement of such absence, the officer's salary shall be stopped and action to dismiss the officer initiated.'
38. The Court finds that 10 days had not lapsed since the letter of 11<sup>th</sup> November 2020 when the said Chief Officer allegedly wrote the letter of November 19, 2020 alleging desertion of duty by the claimant. The court found that the said show cause letter of 19<sup>th</sup> November 2020 did not disclose the specific period of absence.



39. The Court finds and determines that there was no evidence of the claimant's absence from duty, that his salary was stopped irregularly and the act itself was contrary provision of section 18 of the Employment Act and amounts to unfair labour practice.

#### **Whether the claimant is entitled to reliefs sought.**

40. Having found in the affirmative that the salary was stopped irregularly and that the said show cause letters were knee jerk reaction to the claimant having reported the Chief Officer Roads for mistreatment. That there was no evidence of the claimant's absence from work without leave as alleged nor were the specific dates of absence disclosed in the show cause letter. The letter was vague to say the least. The court finds that the claimant has succeeded in his claim. The claimant submits he be awarded KES 100,000 for the breach of fair labour practices against him by the respondent as held in the case of Onesmus Kinyua Magoiya v Prudential life Assurance Kenya (2022)e KLR where on finding breach of article 41 of the Constitution and finding the acts of the respondents amounted to unfair labour practice the court awarded general damages of KES 100,000/- . The court upholds the authority to apply in the instant case the court having found that the claimant was exposed to unfair labour practice by the respondent.

#### **Conclusion and disposition**

41. The court found breach of fair labour practices committed against the claimant by the respondent and entered judgment for the claimant against the respondent as follows:-

- a. A declaration that the chronology of events particularized at paragraphs 10 to 28 of the memorandum of claim as perpetrated by the Officers of the respondent against the claimant constitutes unfair labour practices against the claimant.
- b. A declaration that the withholding of the claimant's salary without any disciplinary process, suspension, interdiction and/or of his services as has happened in this case constitutes an unfair labour practice and the same is unlawful.
- c. An order for an immediate reinstatement of the claimants salary and benefits by the respondent and an immediate payment of any arrears of the claimant's salary from December 2021 to date.
- d. Award of compensation damages for unfair labour practices of Kes.100,000/- (one hundred thousand Kenya Shillings ) with interest from date of judgment to payment in full.
- e. The respondent to bear costs of the claim

42. Right of appeal in 30 days.

43. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA ON THE 28<sup>TH</sup> DAY OF FEBRUARY , 2023.**

**J.W.KELI,**

**JUDGE.**

In the presence of:-

C/A Brenda Wesonga

For claimant: Ongoya



For respondent- Absent.

