



**Ong'ang'o v Nairobi County Government (Cause 205 of 2018)
[2023] KEELRC 408 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 408 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 205 OF 2018
L NDOLO, J
FEBRUARY 16, 2023**

BETWEEN

AGGREY OUTA ONG'ANG'O CLAIMANT

AND

NAIROBI COUNTY GOVERNMENT RESPONDENT

JUDGMENT

Introduction

1. The claimant initiated his claim against the respondent by a memorandum of claim dated February 7, 2018.
2. Upon being served with the claim, the respondent filed a notice of preliminary objection dated May 28, 2018, challenging the jurisdiction of the court to entertain the claimant's claim on account of limitation of action under section 90 of the *Employment Act*.
3. By a ruling delivered on September 20, 2019, ON Makau, J overruled the respondent's preliminary objection. The respondent did not file a response and the matter therefore proceeded as an undefended claim.

The Claimant's Case

4. The Claimant states that he was employed by the defunct Nairobi City Council on January 11, 1990. He rose through the ranks from a manual worker to Acting Administrative Officer in the Valuation Section, earning a monthly salary of Kshs 34,075 as at February 2011.
5. The Claimant adds that his employment contract provided that he was to retire in July 2020.
6. On March 2, 2011, the Claimant was suspended by a show cause letter on allegations of gross misconduct, details being forgery of his academic certificate.



7. The claimant was subsequently charged with the offences of making a document without authority contrary to section 357(a) of the *Penal Code* and uttering a false document contrary to section 353 of the *Penal Code*. He was acquitted of both charges on September 19, 2014.
8. While the criminal proceedings were going on, the following internal processes took place:
 - a. On November 11, 2011, the Staff Committee of the Respondent held a meeting, in the Claimant's absence, and recommended that the Claimant be dismissed from employment;
 - b. The Finance Committee of the Respondent held a meeting on February 17, 2012, in the Claimant's absence, and recommended that the Claimant's employment be terminated;
 - c. The City Council held a meeting on June 27, 2017, in the claimant's absence, and approved the recommendations in (a) and (b) above. This decision was communicated to the claimant by letter dated July 5, 2012.
9. The Claimant's appeal to the Public Service Commission was disallowed.
10. The claimant claims that there was no valid reason for the termination of his employment and that he was not afforded a fair hearing as required under section 41 of the *Employment Act*.
11. He points out that all meetings at which his case was discussed were held in his absence. The claimant also faults the respondent for terminating his employment before conclusion of the criminal case.
12. The claimant tabulates his claim as follows:
 - a. 3 months' salary in lieu of notice.....Kshs 102,225.00
 - b. 12 month's salary in compensation.....408,900.00
 - c. Anticipatory salary to date of retirement.....3,850,275.00
 - d. Unremitted NSSF payments for 7 years.....16,800.00
 - e. Leave pay for March 2011 to March 2018.....222,622.68
 - f. Certificate of service
 - g. Costs plus interest

Findings and Determination

13. There are two (2) issues for determination in this case:
 - a. Whether the termination of the claimant's employment was lawful and fair;
 - b. Whether the claimant is entitled to the remedies sought.

The Termination

14. The Claimant's employment was terminated by letter dated July 5, 2012 stating as follows:

“Termination Of Appointment

The City Council of Nairobi at its meeting held on June 27, 2012, approved a recommendation under minute 11/9 of the Staff Committee meeting held on November 11, 2011 and minute 41/11/9 of the Finance Committee meeting held on February 17,



2012 that your appointment be terminated with effect from March 2, 2011 the date of your suspension on account of presentation of fake academic certificates to the Council.

Under section 32(1) of the Public Service Commission (Local Authority Officers’) Regulations, 2007, you may appeal against this decision to the Secretary, Public Service Commission within forty two (42) days from the date of this letter. Such appeal should be channelled through the Town Clerk, City Council of Nairobi.

You should get in touch with the Assistant Director Human Resource Management (payroll & compliment control) for clearance before your final dues are prepared.

(signed)

JI Nyagah (Mrs)

For: Town Clerk”

15. In his letter of appeal against the termination dated November 27, 2015, the Claimant sought to explain the discrepancy in the names appearing on his National Identity Card and his East African Certificate of Education (EACE), which he is said to have forged. In the said letter, the Claimant makes a plea to be availed an opportunity to defend himself. In the said letter, which he addressed to the Nairobi County Secretary, the Claimant states *inter alia*:

“Let me be called inside your office for more details. I say so because I was not summoned in any of the organs to answer questions like disciplinary committee and others. I can get a quick communication through valuation section – City Hall.”

16. I have looked at the explanation given by the claimant regarding the discrepancy in the names appearing in his National Identity Card, being Aggrey Outa Onyango and the one on the subject EACE Certificate, being Aggrey Odhiambo Outa and find that had his employer bothered to give the claimant a chance to explain himself as required under section 41 of the Employment Act, a different verdict might have been reached.
17. From the evidence on record, three different committees; the Staff Committee, the Finance Committee and the City Council met, in the Claimant’s absence, and decided to terminate his employment. This was a travesty of the right to be heard and the charge against the Claimant was not proved to the standard set by section 43 of the Employment Act.
18. Consequently, I find and hold that the termination of the Claimant’s employment was substantively and procedurally unfair and he is entitled to compensation.

Remedies

19. In the result, I award the claimant twelve (12) months’ salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have taken into account the Claimant’s long service and the employer’s unlawful conduct in effecting the termination.
20. I further award the claimant three (3) months’ salary in lieu of notice as provided in the letter dated July 16, 1999 appointing him to a permanent post.
21. No basis was established for the claims for anticipatory salary and unremitted NSSF payments, which therefore fail and are dismissed.
22. No particulars were provided for the claim for leave pay which is disallowed.



23. Finally, I enter judgment in favour of the claimant as follows:
- a. 12 months' salary in compensation.....Kshs. 408,900
 - b. 3 months' salary in lieu of notice.....102,225
- Total.....511,125

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The claimant is also entitled to a certificate of service plus costs of the case.

26. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2023

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JUDGE

Appearance:

Miss Mwikali h/b Miss Jin for the Claimant

No appearance for the Respondent

