



Metto v Uasin Gishu County Public Service Board & 3 others (Cause 35 of 2020) [2023] KEELRC 363 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 363 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 35 OF 2020
NJ ABUODHA, J
FEBRUARY 3, 2023**

BETWEEN

SYLVESTER KIPKEMEI METTO CLAIMANT

AND

UASIN GISHU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

COUNTY SECRETARY UASIN GISHU COUNTY 2ND RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU 3RD RESPONDENT

COUNTY ATTORNEY, UASIN GISHU COUNTY 4TH RESPONDENT

JUDGMENT

1. The claimant herein pleaded in the main that he was employed by the County Government of Uasin Gishu on September 2, 2013. According to the claimant, he was employed as a public officer and posted to serve the County Government which service he rendered until September 5, 2017 when he received a letter purporting to terminate his employment.
2. The claimant is an Advocate of the High Court of Kenya and prior to his employment was running a private law firm and practice.
3. The claimant further averred that at the time he was employed, the respondent had just come into being and was at the nascent stages. Upon promulgation of the Constitution of Kenya 2010 two levels of Government were established. The National and County Government. The County Government's functions were apportioned under schedule IV of the Constitution.
4. According to the claimant, his employment was done pursuant to article 259 of the Constitution that made provisions for public officers under the County Government. Prior to the devolution all legal services were rendered to Government by the Attorney General. It was at the said stage that the office



- of the Legal Advisor was created and later succeeded by the establishment of the office of the County Attorney under the [County Attorney's Act, 2016](#).
5. The claimant further averred that at the time his appointment he was the only advocate serving the County Government until later on when legal officers were employed to work under his office.
 6. The claimant pleaded that it was an express term of his contract that it would be governed by the terms and conditions of service as set by the SRC, PSC and provisions of the [Employment Act](#).
 7. The claimant further averred that the respondents were public bodies as defined under section 3 of the [Interpretation and General Provisions Act](#) and Article 259 of the [Constitution](#). The respondents were thus bound by the Public Service Code of Conduct [2006] and as revised, known as Public Service Commission Human Resource Policy, 2016 which were more particularly set out in circulars that were issued by the State Department for Public Service and SRC.
 8. The claimant further contended that during his entire service to the respondent, he was responsible for legal advice to the respondents, prosecution of offence under County Legislation and those of former local authorities that fall under the establishment of the respondent prior to the same being vested on the ODDPP. The claimant further averred that he was engaged at a salary scale which was equivalent to job group "S" and assigned to the office of the Head of Legal Department and Chief Government Legal Advisor.
 9. The claimant further pleaded that during his term of employment with the respondent, the respondent reduced his basic salary from an initially agreed amount of Basic Salary of Ksh 138,501/= without notice, consent or justifiable cause whatsoever which was against public policy and amounted to unfair labour practice. The respondent further failed to pay him allowances permitted by his contract.
 10. The claimant therefore sought against the respondents, judgment for unpaid emoluments as set out in the statement of claim and several declarations including that the respondents action of deducting his salary without notice or consent was wrong, illegal and unlawful and further that the action of termination his employment without notice and contrary to the conditions of the contract was unlawful and illegal.
 11. The respondents in response to the claim stated inter alia that the claimant was engaged as by the County Government of Uasin Gishu as a legal Advisor to the Governor on September 2, 2013 and that he accepted the appointment and the terms espoused in the in the contract of employment as Legal Advisor to the Governor by signing the declaration of acceptance on September 2, 2013.
 12. According to the respondent, the appointment to the position of the Legal Advisor to the Governor was to the extent that the claimant was to be responsible to the Governor for providing legal services as well as represent the Governor in all legal matters. The claimant's contract was to be governed by the terms and conditions of service as set out by the SRC, PSC and [Employment Act](#). Further that the contract was for a fixed term commencing on September 2, 2013 until the end of the Governor's tenure of office.
 13. The respondent denied that the appointment of the claimant as the Legal Advisor to the Governor conferred upon him the status similar to that of a State Counsel or Public Prosecutor so as to entitle him to allowances payable to Advocates serving in those capacities in Public Service. Further the claimant was not a County Attorney or a Legal Officer with the mandate of advising the respondents and prosecuting offences under the County Legislation.



14. Regarding remuneration, the respondent averred that the claimant through the office of the Secretary, County Public Service Board made several inquiries about payment of allowances which inquiries prompted the Secretary to write to SRC on July 11, 2016 seeking advisory opinion on the same.
15. The SRC responded on July 28, 2016 advising that most of the allowances including non-practicing allowances were under review and therefore the Commission would be constrained to award the benefits whose eligibility was under review. The SRC thus advised that the 1st respondent awaits policy directions on the matter. This was communicated to the claimant.
16. As a Legal Advisor to the Governor, the claimant was entitled to a monthly remuneration of a basic salary of ksh 138,501/=, house allowance of Ksh 20,000/= and commuter allowance of Ksh 16,000/= . The claimant's remuneration for the period of September, 2013 to May, 2014 was manual as the claimant had not been allocated a PF number and neither had he been entered into the IPPD System.
17. Following a circular issued by SRC sometime in the year 2014 all staff serving in the County Government were required to be allocated PF Number and included in the IPPD System. This was done to the claimant and he was allocated PF number 201xxxx and included in the IPPD System. The claimant being a Legal Advisor to the Governor was allocated Job Group "R" in the system and was entitled to a monthly remuneration to a monthly remuneration of Ksh 109,089/=, house allowance of Ksh 40,000/= and other allowances of Ksh 16,000/=. This was in accordance with the SRC Circular dated July 29, 2013. The claimant's initial remuneration was therefore automatically adjusted by the IPPD System to reflect this position and being that the claimant had been overpaid for some period, the overpaid sums were recovered from the claimant's salary through the IPPD system.
18. Concerning termination of the claimant's service, the respondent pleaded that his tenure as the Legal Advisor to the Governor came to an end upon the lapse of the Governor's first term in office and the claimant was issued with a formal termination notice on August 21, 2017.
19. At the oral hearing, the claimant testified among others that he wrote a witness statement on August 25, 2020 which he relied on as his evidence in chief. He further stated that he was a public officer and that his employment was on permanent and pensionable terms. He sought to be paid as claimed in his memorandum of claim.
20. In cross-examination he stated that he was employed as a legal advisor as per his contract and that he signed the same. It was his evidence that he was the Legal Advisor to the Governor and that the appointment was by Public Service. He applied for the position although he did not produce the application letter. He was interviewed by the County Public Service Board. The claimant denied that he was on a fixed term contract and further that he was a personal staff to the Governor.
21. Regarding payment of salary, he stated that his salary was paid through the Bank and that in September and October he was not allocated a PF number. He could not remember when he was allocated the PF number. It was further his evidence that his contract was terminated on September 5, 2017 after the Governor had been sworn for the second term. The termination letter was dated August 23, 2017 and it stated that his contract had expired on August 21, 2017.
22. Regarding his allowance, he stated that he wrote to the respondent enquiring about the allowances he thought he was entitled to and the respondent sought advisory opinion from SRC. He conceded that the respondents were bound by the contract and SRC's advisory opinion. He however stated that by the time he left, SRC had not given an advisory. The claimant contended that there was a difference between what he did and what the letter said. He however stated that he was not appointed as a state counsel or state Attorney but was engaged as a public officer and that the allowances he claimed accrued



- to public officers. It was the claimant's evidence that SRC advised that allowances payable to legal personnel be applicable to state counsel and prosecution staff.
23. Concerning salary deduction, it was his evidence that there were deductions on his salary and that it was for 48 months. He further stated that the document from Kakamega County referred to allowance payable to Legal Officer and not Legal Advisors to Governors.
 24. In re-examination he stated that he was appointed by the Public Service Board and that he never applied for the job but was interviewed by the Board.
 25. He further stated that he was the only Legal Officer in the County when he was employed and that although he was designated as Legal Advisor to the Governor, he was doing the work of County Attorney handling County matters.
 26. The respondent's witness Mr William Koech stated that he was the Secretary to the County Public Service Board and that he recorded a statement on July 22, 2021 which he relied on as his evidence in chief. He also relied on the bundle of documents filed with the claim.
 27. According to Mr Koech, the claimant was appointed as the Legal Advisor to the Governor. According to him, the Governor nominates his personal staff and forwards the names to County Public Service Board for appointment. This was why the position of Legal Advisor to the Governor was never advertised. The claimant was nominated by the Governor and forwarded for appointment by CPSB. Mr Koech further stated that the staff to the Governor serve so long as the Governor is in office. Their term ends with the Governor's term.
 28. In cross-examination he stated that he was not working for the respondent when the claimant was appointed but the proposed appointments by the Governor were documented. It was his evidence that when the Governor's first term ends, the contract to staff attached to his office also end. He however stated that the contract never provided for the expiry at the end of first term of the Governor. It was further his evidence that there was no County Attorney when the claimant was appointed. He however denied the claimant was a permanent and pensionable employee.
 29. The court having summarized the pleadings and evidence and having gone through submissions by counsel for either side, considers the main issues for determination in this claim to be:
 - i. Whether the claimant was hired as a public officer or a personal staff of the Governor.
 - ii. Was the claimant entitled to terms and conditions of service especially allowances payable to advocates serving as state counsel, prosecutors or Legal Officers in Public Service?
 - iii. Whether it was lawful to reduce the claimant's salary to align with the advisory of the SRC.
 - iv. What is the appropriate remedy to grant in the event the claimant is successful.
 30. It was not in dispute that by a letter dated September 2, 2013 the claimant was appointed as the Legal Advisor to the Governor. His role was stated therein as responsible to the Governor for providing legal advice as well as representing the Governor in legal matters. The appointment was to commence from September 2, 2013 but did not state when it would end. The respondent has contended that the appointment was coterminous with the political elective term of the Governor while the claimant has contended that the appointment was on permanent and pensionable terms.
 31. Appointments to public service are governed first of all by values and principles of Public Service which are encapsulated under article 232 of the *constitution* and more particularly article 232(g) which requires that recruitment be subject to fair competition and merit as the basis of appointment



and promotion. Further Part VI of the [Public Service Commission Act](#) makes elaborate provisions concerning appointments, confirmation of appointments and transfer of public officers. Of particular emphasis is section 37 which requires that whenever a vacancy in public office is to be filled, the Commission or the authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication so as to reach as wide a population of potential applicants as possible. This requirement is echoed under section 66 of the [County Government Act](#).

32. Article 260 of the [constitution](#) defines a public office as follows:

“an office in the National Government, a County Government or Public Service, if remuneration and benefits of the office are payable directly from Consolidated Fund or directly out of money provided by Parliament.”

33. It was not in dispute that the claimant's position was not advertised as required by section 37 of the [Public Service Act](#) read together section 66 of the [County Government Act](#). The claimant was however remunerated from Public funds thereby making him technically fall within the meaning of public officer by dint of article 260 of the [Constitution](#).

34. However not all Public Officers are hired on permanent and pensionable terms. The Court takes judicial notice that under Mwongozo Code of Governance CEO's of State Corporations are public officers within the meaning of article 260 of the [Constitution](#) but are as a matter of practice hired on fixed term contracts. For a public officer to be hired on permanent and pensionable terms, the letter of appointment has to specifically state so. It cannot be assumed.

35. From the foregoing and taking into consideration the manner in which the claimant was hired, it can only be logically concluded that he was a personal staff to the Governor and his contract of service was coterminous with the elective term of the Governor. His reappointment to office was at the discretion of the Governor if re-elected. Being on contract of personal service he did not have any guarantee that upon re-election the Governor would reappoint him. To this extent the Court finds and holds that the claimant's contract being twined with the elective term of the Governor, it ended when the Governor's five year term ended and new elections were called. It mattered not that the Governor was re-elected to office. A new appointment had to be made which did not happen in his case. The claim for unfair termination is therefore found without merit and is hereby rejected.

36. On the issue whether the claimant was entitled to allowances payable to advocates serving State Counsel, Prosecutor or Legal Officers in Public Service, the Court observes that the claimant prior to appointment, was an Advocate of the High Court of Kenya in private practice. By joining Public Service, it logically meant he was no longer available to practice hence attend to his clients.

37. The Court received in evidence by both sides that the claimant on not more than one occasion sought to be paid non practicing allowance alongside other allowances payable to State Counsel in the Office of the Attorney General and State Department of Justice. This prompted the respondent to seek the advisory opinion of the SRC. The latter in their letter dated July 28, 2016 stated that most of the allowances paid in Public Service including non-practicing allowance were under review following the recommendations of the study on allowances carried out by the Commission. The Commission therefore felt constrained to award benefits whose eligibility and terms of payment were under review. The Commission therefore advised the respondent to await the policy direction on the payment of the allowances. It is important to note that the letter from SRC herein did not suspend or stop the payment of the allowances pending review. The letter merely informed the respondent to await the outcome of the review.



38. It is noteworthy that by a letter dated June 11, 2010, SRC while declining to review separately salaries for personnel under Public Sector – Legal Personnel sub-sector and advising the then Solicitor General Mr Wanjuki Muchemi to await the outcome of the consultant’s report on the Rationalization and Harmonization of Public Service Legal Sub-Sector, permitted the enhancement of the allowances as stipulated in the letter. Further the County Government of Kakamega was actually paying their Legal Officers allowances as per the memo dated January 3, 2014 attached as part of the claimant’s documents.
39. The claimant as the Court has found was a public officer hence to deny him allowances payable to officers of his professional experience and level in public service would amount to discrimination which runs against the tenets of Public Service contained in article 232 of the *Constitution*.
40. The claimant’s letter of appointment did not place him in any Job Group in Public Service neither did the SRC’s circular dated July 29, 2013 to all Governors countrywide. It simply categorized them as Advisor. This circular placed the claimant’s salary at Ksh 165,089 inclusive of house and other allowances. The circular further stated that any salary structure existing before the salary structure provided in the circular ceased to apply forthwith. The claimant was a fairly senior officer in the County Government being a Legal Advisor to the County’s top officer, the Governor. Although nothing was mentioned in his contract over non-practicing allowance but as observed earlier it would be discriminatory to deny the claimant the allowance while other Legal Officers performing similar functions were paid the same. To this extent the Court will use as a guide on the non-practice and other allowances that were payable to officers of similar rank as per the SRC’s Circular dated September 17, 2012. That is to say the claimant was entitled to non-practice allowance of Ksh 30,000/= per month for the period he worked for the respondent. The other allowances claimed by the claimant not being conventional allowances payable to professionals in public employment will be disallowed because such allowances need to be specifically provided for in the contract. In this case the claimant’s contract only provided for house allowance and commuter allowance.
41. On the issue whether it was lawful to reduce the claimant’s salary to align with the advisory of the SRC, the Court would answer this question in affirmative for the reason that when the claimant was first appointed his salary was paid outside the formal structure for payment of salaries to public officers. He had no personnel number and his payment was not passed through the IPPD system which aligns to SRC’s advisory as per its Constitutional mandate under article 230 of the *Constitution*.
42. Article 230(4)(a) empowers SRC to set and regularly review the remuneration and benefits of all state officers and advise the National and County Government on the remuneration and benefits of all other public officers. It is through payment through formal channels that it can be ensured that salaries paid align to the advice of SRC. The claim for unlawfulness of the reduction in salary is hereby rejected.
43. On the issue whether it was lawful to recover the money paid to the claimant outside the recommended salary by SRC the Court would also for the reasons stated above concerning the role of SRC hold that the respondent was justified in recovering the said sums of money.
44. In conclusion the Court hereby awards the claimant non-practicing allowance for the five years he worked for the respondent being Ksh 1,800,000/= This amount is subject to taxes and statutory deductions. The claimant being partially successful, each party shall bear their own costs of the suit.
45. It is so ordered

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF FEBRUARY, 2023

ABUODHA NELSON JORUM



JUDGE ELRC

