



Biwott v Uasin Gishu County Public Service Board (Cause E014 of 2022) [2023] KEELRC 1412 (KLR) (8 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1412 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E014 OF 2022
MA ONYANGO, J
JUNE 8, 2023**

BETWEEN

PHILIP KIMUTAI BIWOTT CLAIMANT

AND

UASIN GISHU COUNTY PUBLIC SERVICE BOARD RESPONDENT

JUDGMENT

1. The Claimant herein filed a Statement of Claim dated June 2022 against the Respondent seeking the following reliefs;
 - a. A declaration that the interdiction and subsequent termination of the Claimant was unfair and unlawful coupled with an order of reinstatement of the Claimant to employment without loss of benefit and/or seniority and/or victimization and/or harassment;
 - b. A declaration that the Respondent engaged in unfair labour practices and acted unlawfully by withholding the Claimant's salary during the interdiction period;
 - c. A declaration that the Claimant's right to fair administrative action has been breached;
 - d. General damages for violation of the Claimant's constitutional rights;
 - e. One month's salary in lieu of notice @ Kshs 178,210, 13 months half withheld salary totalling to Kshs 913,260 and 12 months compensation for loss of employment totalling to Kshs 2,138,520.
 - f. Costs of the suit
 - g. Interest on (e) and (f) above
 - h. Certificate of service



- i. Any other relief that this Honourable Court may deem fit and expedient to grant.
2. The Claimant avers that he entered into a contract of employment with the Respondent on 6th December 2013 wherein the claimant was employed as a Sub County Administrator on permanent terms.
3. It was the Claimant's contention that he worked for 5 years without any disciplinary complaint made or action taken against him until 10th April 2019 when the Respondent without any lawful or justifiable cause/reason issued the claimant with a letter of interdiction citing gross misconduct.
4. He further contends that vide a letter dated 18th June 2019, he was invited to appear before a disciplinary committee and that on 19th March 2020, he was unlawfully and unfairly terminated from service.
5. According to the Claimant, he was not issued with any show cause letter nor disciplinary rules and as such, he contends that his dismissal was not done in accordance with the law.
6. He states that he was informed of the decision on his appeal two months later via a letter dated 18th May 2021 and according to him, the appeal was dismissed as he did not file the necessary documents after the Respondent failed to supply him with the minutes of the disciplinary hearing.
7. The Claimant maintained that his termination was unlawful and unfair as the Respondent did not act in accordance with the principles of justice and equity; that the respondent did not subject him to any disciplinary process which is fair and just and that further, the Respondent did not accord him the right to defend himself.
8. In response to the Memorandum of Claim the Respondent filed a Memorandum of Defence on 29th July 2022 in which it denied that the Claimant was unfairly, illegally, unprocedurally and wrongfully terminated from employment.
9. In rebuttal, the Respondent explained that between 4th and 5th April 2019, it was reported to the Respondent's office that the Claimant had posted some comments on his facebook page which were deemed to bring to bad light the Respondent's officers who were on official duty in Kisumu. It was averred that on 7th April 2019, the Claimant made another post of nearly the same content.
10. According to the Respondent, the said comments were tantamount to disclosure of confidential government information by a senior officer contrary to the provisions of the Public Service Commission Discipline Manual for Public Service and County Public Service Human Resource manual (2013).
11. It was contended that the Claimant's conduct amounted to gross misconduct hence he was issued with an interdiction letter dated 10th April 2019 requiring him to show cause why disciplinary action should not be taken against him. He was also given 21 days to give his response.
12. It was the Respondent's case that the Claimant responded to the interdiction letter vide a letter dated 23rd April 2019 in which he admitted to making the impugned comments on his facebook page which explanation according to the respondent was not satisfactory.
13. The Respondent stated that having found the Claimant's response to be unsatisfactory, the Claimant was invited to a disciplinary hearing scheduled for 10th July 2019 vide a letter dated 18th June 2019 where the Claimant personally attended the disciplinary hearing and defended himself.
14. According to the Respondent, the County Public Service Board considered the findings of the Disciplinary Committee on the Claimant's case and approved its recommendation that the Claimant



- be dismissed from service on account of gross misconduct which decision was upheld by the Public Service Board.
15. The Respondent averred that it adhered to the provisions of the *Employment Act* in terminating the services of the Claimant.
 16. At the hearing the Claimant testified as CW1. He adopted his witness statement recorded on 13th June 2022 as his evidence in chief.
 17. It was his testimony that he was employed by the Respondent on permanent and pensionable terms and that on 10th April 2019, he was issued with an interdiction letter, that he was subsequently summarily dismissed from employment on 19th March 2020.
 18. He stated that he was interdicted from employment following a post he made on his facebook page. He testified that he wrote a letter dated 23rd April 2019 upon being issued with an interdiction letter where he apologized for the said post.
 19. The Claimant maintained that he was invited for a disciplinary hearing where he was asked if he wanted to appear with someone else but he opted to appear alone.
 20. The Claimant stated that on 19th March 2020 he received a dismissal letter after which he applied for minutes from the Respondent so as to enable him appeal but the said minutes were never issued to him.
 21. The Claimant testified that he nonetheless preferred an appeal to the Public Service Board which appeal was dismissed on the grounds that he did not give any new grounds.
 22. The Claimant in his testimony stated that he was never given any rules on how to manage social media and that he never got any training on managing social media.
 23. The Claimant prayed for compensation for the unlawful and unfair termination.
 24. On cross examination, the Claimant admitted that he made the impugned post on facebook and apologized for the said mistake in his response to the letter of interdiction.
 25. The Respondent called one Silas Rono who testified as RW1. He introduced himself as the Acting Secretary and CEO, Uasin Gishu County Public Service Board.
 26. According to RW1, the Claimant was summarily dismissed from employment because he breached s. 4.6 of the Public Service Commission Discipline Manual terms.
 27. RW1 maintained that in dismissing the Claimant from employment, the Respondent followed the procedure as required by the *Employment Act* from the interdiction process up until the Claimant was dismissed from employment.
 28. During cross examination RW1 testified that although the County Secretary did not chair the disciplinary meeting that heard the Claimant's case which was chaired by RW1 who was at the time the Deputy County Secretary, he signed the minutes of the Disciplinary Committee.
 29. RW1 further testified that although the Disciplinary Committee recommended the dismissal of the Claimant, the County Public Service Board which is the body mandated by law to discipline employees passed a resolution at its meeting held on to the effect that the Claimant be reinstated, given a warning and forfeits the salary withheld during interdiction. He testified that the dismissal letter was against what the Board had resolved according to the Boards minutes which although not on record, he made reference to in Court.
 30. Both parties filed their written submissions which I have considered.



Determination

31. From the pleadings on record, the evidence of the parties and the submissions, the issues that arise for determination in this case are as follows:-
 - i. Whether the Claimant's employment was terminated fairly and procedurally
 - ii. Whether the reliefs sought are merited
32. It is not in dispute that the Claimant was an employee of the Respondent since December 2013. It is also common ground that the Claimant was interdicted from employment following 2 facebook posts he made on his handle sometimes in 2019 as a result of which he was summarily dismissed from employment.
33. The Claimant has come to court seeking that this court finds his interdiction and the subsequent dismissal unfair and unlawful.
34. It is trite law that before an employer terminates an employee's employment, the employer must not only prove that it had valid reasons for the said termination but must also ensure that the laid down procedure has been followed.
35. Section 45(2) of the *Employment Act* provides that termination of employment by an employer is unfair if the employer fails to prove valid reason and fair procedure. The burden of proof in employment claims as stipulated in Section 43 of the *Employment Act* is on the employer to prove the reason for the termination as valid in any legal proceedings.
36. Section 43(2) of the *Employment Act* defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the employee.
37. In the case of *British Leyland UK Ltd v Swift* (1981) I.R.L.R 91 Lord Denning observed;

“The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.”
38. In this case, the reason for taking disciplinary action against the claimant was his posts on his facebook handle on 5th and 7th April which I reproduce hereunder:

Allowances. Kisumu is 14,250 per day. It is called per diem. In government, when you are broke you create a workshop, training, seminar, interrelationships to cover up.
39. The second post which was made on April 7 at 18:50 read, Now MCAs from Uasin Gishu County are in Kisumu to represent their electorates. Now you know
40. In this case however, although the Respondent's Disciplinary Committee was of the view that the social media posts constituted valid reason for the dismissal of the Claimant, the County Public Service Board, the body statutorily charged with the Responsibility of discipline, was of the view that the



Claimant should be punished with the lesser punishment of a warning and forfeiture of the half salary withheld during interdiction.

41. It is evident that the author of the letter of dismissal acted without authority and contrary to the decision of the County Public Service Board in dismissing the Claimant. His statement in the dismissal letter that he was conveying the decision of the County Public Service Board that the Claimant be dismissed from employment was a departure from the decision of the said body.
42. This may also explain the reason why the Respondent did not respond to the Claimant's letter dated 21st April 2020 seeking among other documents from the Respondent, certified copy of the County Public Service Board resolutions. The letter is reproduced below:

The Secretary
County Public Service Board,
Uasin Gishu County
Box 1175-30100
Eldoret

Dated; 21st April, 2020

Dear Sir

Request for Documents Relied Upon for my Dismissal

The above subject matter refers.

The purpose of this letter is to request the County Public Service Board (CPSB) to provide me with the information, reasons and documents used to arrive at the decision of Summary Dismissal as envisaged in Section 6 of the Fair Administrative Act 2015. It inter alia states, "Every person has the right to be given written reasons for any administrative action that is taken against him". It also provides for request of reasons for administrative action.

Please provide the following documents:

1. Investigation Committee appointed in writing by the Authorized Officer stating the terms of reference and specific timeline within which to carry out the investigation.
2. Letter of the complainants(s) since the Ag Chief Officer Administration and Coordination indicated inter alia that it had been reported
3. Certified Investigation Report that was conducted between 10th April, 2019 and 10th July, 2019 as envisaged in Part 4.8 of the Discipline Manual for the Public Service of May, 2016.
4. Certified Minutes of the Disciplinary Committee hearing held on 10th July, 2019
5. Certified Minutes of the County Public Service Board Resolutions

I believe I am entitled to collect these documents in person within fourteen (14) days from the date of this letter.

Your prompt action in this matter will be highly appreciated.



Yours faithfully

Signed

Philip Kimutai Biwott

PF:2013xxxx

Cell: 0721xxxx

Cc. Uasin Gishu County Attorney

43. It is also evident that these minutes were never placed before the Public Service Commission hence its decision to uphold the dismissal of the Claimant. In his appeal to the Public Service Commission the Claimant stated that He Had Filed The Appeal Without the Benefit of Documents Relied Upon By the County Public Service Board to Reach its Decision. The letter of appeal is reproduced below:

Philip Kimutai Biwott

Pers No 2013xxxx

Cell. 0721xxxx

BOC 9329-30100

Eldoret

27th May, 2020

The Secretary

Public Service Commission of Kenya

Box 30095-00100

Nairobi

Dear Sir/Madam,

Re: Appeal Against Dismissal from Service by Uasin Gishu County Public Service Board.

The above matter refers.

Please find attached detailed document for my appeal against dismissal from Service at the County Government of Uasin Gishu by the County Public Service Board.

I humbly ask for your indulgence to go through my detailed reasons as to why I believe that the Dismissal was unfair, unethical, illegal and unjustified.

I am sending this document on the backdrop of lack of documents relied upon by the County Public Service Board to reach on both interdiction and summary dismissal decision as my "Request for Documents" letter was not answered by the date of this letter.

I look forward to your kind response as soon as possible.

Yours faithfully,

Signed

Philip Kimutai Biwott



44. Section D28 of the Public Service Commission: County Public Service Human Resource Manual provides as follows:

D.28 Disciplinary Powers and Procedures

(1) The powers of disciplinary control and removal of county public officers from service are vested in the CPSBs or Authorized Officers as specified in the County Government Act.

45. Section 59 of the County Government Act gives the power of appointment, discipline and removal from office to the County Public Service Board. The disciplinary Committee to which the power of conducting disciplinary hearing is delegated only recommends action to the Board which ultimately makes the decision either agreeing with or departing from the recommendation.

46. Section 76 of the County Government Act provides for discipline of County public officers as follows:

1. In exercising its disciplinary powers, the County Public Service Board shall observe the principles of natural justice.
2. No public officer may be punished in a manner contrary to any provision of *the Constitution* or any Act of Parliament.

47. From the foregoing it is evident that the power of removal of county public service officers from office vests in the County Public Service Boards. The Secretary to the County Public Service Board does not have authority to implement any decision contrary to the resolution of the Board.

48. The dismissal of the Claimant having been contrary to the resolution of the County Public Service Board, was a nullity.

Remedies

49. The Claimant sought a raft of remedies from this court. I do not find the claimant's interdiction unlawful as it was in compliance with the relevant procedure. Only the dismissal was unlawful as it was contrary to the decision of the County Public Service Board which resolved that the Claimant be reinstated back to work with loss of the salary withheld during interdiction. I therefore declare the termination of the Claimant unlawful having found above that it was contrary to the resolution of the County Public Service Board. The same is therefore null and void.

50. The Claimant prayed for reinstatement. Having declared the dismissal a nullity, it follows that the Claimant's dismissal is deemed as if it never happened. This means that the Claimant is reinstated back to work without loss of seniority or benefits.

51. I must before leaving this issue comment on the implication of 12(3)(Vii) of ELRC Act that reinstatement can only be ordered within 3 years from the date of leaving service. Although the Claimant's letter of dismissal is dated 19th March 2020 which is 3 years and about 3 months, the law provides that an employee of the County Public Service Board has no access to this court until after determination of his appeal by the Public Service Commission. It is therefore the date of the decision of the Public Service Commission that is reckoned for purposes of employees of the County Public Service Boards. The decision of the Public Service Commission which confirmed the dismissal of the Claimant was communicated to the Claimant by letter from the Respondent dated 18th May 2021. I thus find that 3 years have not lapsed from the reckoning date of the Claimant's removal from office.



52. Having made an order for reinstatement of the Claimant, it is my view that the claimant would be reasonably assuaged. The prayers for compensation and damages are therefore in my view, superfluous as are all other prayers of the claimant. The same are declined.
53. In the end I make the following orders:
- a. The letter of dismissal of the Claimant is declared null and void. The Respondent is directed to withdraw the letter and in place thereof the Respondent is directed to issue a letter to give effect to the resolution of the County Public Service Board to issue a letter of warning to the Claimant with loss of withheld salary with effect from the date of the decision;
 - b. The Respondent shall bear the claimant's costs of the suit.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF JUNE, 2023

MAUREEN ONYANGO

JUDGE

