



Loronyokwe v County Government of Samburu & 2 others (Cause E051 of 2022) [2023] KEELRC 1852 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1852 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E051 OF 2022
ON MAKAU, J
JULY 28, 2023

BETWEEN

FRED MARMALEI LORONYOKWE CLAIMANT

AND

COUNTY GOVERNMENT OF SAMBURU 1ST RESPONDENT

**THE COUNTY PUBLIC SERVICE BOARD SAMBURU
COUNTY 2ND RESPONDENT**

BOSCO N.SAMBU 3RD RESPONDENT

JUDGMENT

1. The claimant brought this suit on 23rd December 2022 alleging that he was employed as the Government Spokesperson in the Office of the Governor Samburu County Government. His job Group was CPSB 05. By a letter dated 8th May, 2018 he was appointed as the acting Secretary/Coordinator of Public Participation and Civic education in the County. On 28th October, 2019 he appeared in his capacity as the Government spokesperson alongside the Deputy Governor Samburu County and other County officials in a County Government press release at the County Headquarters. Thereafter he received a call from one Liten Lelesit, the Governor's Political Advisor informing him that his contract of employment had been terminated and he should collect his termination letter from the Chief of Staff, the 3rd Respondent herein. He collected the termination letter dated 28th October, 2019.
2. Aggrieved by the said termination, the claimant lodged a complaint with the Commission on Administrative Justice (Ombudsman) and a letter dated 7th November, 2019 was written to the 3rd respondent that the summary dismissal of the claimant failed to meet the constitutional test of legality, reasonableness and procedural fairness as the right to fair Administrative action under Article 47 of the *Constitution* was not observed.



3. The respondents failed to heed to the advise by the Ombudsman to reinstate the claimant, but it reinstated his colleague Joyce Lengeiya. As a result, the claimant filed Cause No.1 of 2020 at Meru seeking to dislodge the summary dismissal and be reinstated. However, by a ruling delivered on 21st July 2020 by Nzioki wa Makau J, the suit was struck out on ground that under section 77 of the County Government Act, the claimant ought to have first appealed to the Public Service Commission (PSC) before filing suit in court.
4. The claimant filed his appeal at the Public Service Commission and the same was heard and a decision was delivered in 2021 upholding the dismissal of the claimant. The claimant was aggrieved and he brought this suit seeking the following reliefs:-
 - a. A declaration that the termination by the Respondents was unfair and unlawful.
 - b. Award of general damages for the violation of his Constitutional rights of not to be discriminated against as set out in Article 27(5) of the Constitution and the right to fair labour practices as set out in Article 41 of the Constitution of Kenya at Kshs.10,000,000.00
 - c. 12 months' salary as compensation for unfair termination in the sum of Kshs.1,745,400/-
 - d. Salary for the month of August, September and October Kshs.436,350/-
 - e. 1 months' salary in lieu of notice in the sum of Kshs.145,450/-
 - f. Gratuity at 31% of the basic salary for the 22 months worked under the contract Kshs.991,969/-
 - g. Pro rata Annual leave pay for 1 year and 10 months Kshs.186,660/-
 - h. A certificate of service to issue to the claimant.
 - i. Costs of the suit.
 - j. Interests at the court's rate from the date of the filing of the case till payment in full.
 - k. Any other award that a court shall deem fit to award in the interest of justice.
5. The respondents were served with summons, pleadings and notice to attend court for pretrial hearing but they failed to enter appearance and file defence to controvert the averments by the claimant.

Evidence

6. The claimant testified as CW1 and adopted his written statement dated 22nd December, 2022 as his evidence in chief. He further produced a bundle of 9 documents in the list dated even date as exhibits. He amended paragraph 5 of his statement to indicate his salary as Kshs.145,450.00 and paragraph 3 and 8 to read that he was dismissed by the 3rd Respondent. Save for the said amendments, the written statement was just a summary of the facts highlighted above. In addition the claimant contended that his dismissal was politically motivated and not for any valid reasons. Besides he was not accorded any hearing before the termination. Consequently, he contended that he was discriminated against and condemned unheard contrary to Article 27(5) and 47 of the Constitution. Further, that his right to fair Labour practices and fair hearing were violated contrary to Article 41 and 50 of the Constitution.



Submissions

7. The claimant submitted that the respondents has not proved that the reason cited in the dismissal letter was valid. He submitted that the respondents has failed to discharge his burden of proof of the reason for dismissing him as required by Section 43 of the *Employment Act*.
8. As regards the procedure followed, he submitted that the failure to accord him a hearing before the termination meant that his dismissal was not in accordance with section 41 of the *Employment Act*. Consequently, he urged the court to find that fair procedure was not followed before the dismissal and the same was unfair and unlawful.
9. Finally he submitted that he is entitled to the reliefs sought in his claim.

Issues for determination

10. I have considered the pleadings, evidence and submissions filed by the claimant. It is a fact that he was employed by the respondents as the Government Spokesperson and acting Secretary/Coordinator Public Participation and Civic Education. It is also a fact that he was dismissed from service by the 1st respondent's Chief of Staff vide the letter dated 28th October, 2019.

The issues for determination are:-

- a. Whether the reason for the summary dismissal was valid and fair.
- b. Whether the procedure followed was fair.
- c. Whether the termination violated claimant's Constitutional rights.
- d. Whether claimant is entitled to the reliefs sought.

Reason for dismissal

11. The termination letter dated 28th October, 2019 stated as follows:-

“Fredrick M.Loronyokwe

Government Spokesman

Office of the Governor

o Box 3, Maralal.

Dear Sir,

Re: Termination of Contract

It has come to the attention of this office that you absconded your duties and failed to participate in this year's Kenya Devolution Support Programme annual assessment between 24th and 28th October, 2019, being the County Coordinator for Civil Education and team lead for Key Result Area 4. Additionally you participated in an unlawful media engagement at the County Government headquarters in Maralal on 28th October, 2019 being the Government spokesperson.

These are grave misdemeanors and are in serious breach of the code of conduct of an officer of your stature. Your general conduct and work performance has been found wanting and warrants dismissal on account of gross misconduct. Being an appointee of the Governor



and in view of the gravity of the above misconduct, it has been decided that you be and are hereby summarily dismissed.

Please handover all government property in your possession to the undersigned immediately.

Respectfully,

Chief of Staff

Cc: H.E Governor, Samburu County.

Chief Officer-Finance

Secretary County Public Service Board

Director Human Resource Development”

12. The claimant denied the alleged offences and maintained that he was a victim of political battles. The respondents have not controverted the averments and evidence by the claimant. Section 43 of the *Employment Act* provides that in any legal proceedings challenging termination of employee’s employment, the employer has the burden of proving the reason for the termination.
13. In this case the respondent has not discharged that burden of proof and has not rebutted the evidence by the claimant that the reason for the termination of his contract was not valid. Consequently, I find and hold that the respondents have not proved that the reasons cited for termination of the claimant’s contract of employment were valid and fair.

Procedure followed

14. Section 41 of the *Employment Act* provides that:-
 - “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
15. The claimant contended that he was not accorded a hearing before the termination of his contract. He was just called by phone by the Governor’s Political Advisor to collect his termination letter from the Chief of Staff in the Office of the Governor. The foregoing evidence has not been rebutted and therefore I find and hold that the termination of claimant’s service was not in accordance with a fair procedure.

Violation of Constitutional rights

16. The termination was done by the Chief of Staff Samburu County and not by the County Public Service Board (PSB). Such decision was ultra vires as the said officer usurped the mandate of the County



Public Service Board which under the County Government Act, has the sole mandate of disciplining officers in the County Public Service. The conduct by the Chief of Staff therefore amounted to breach of the claimant's right to fair labour practices and right to fair administrative action under Article 41 and 47 of the Constitution. Further, the termination breached the rules of natural justice and Article 236 of the Constitution which bars dismissal of a public officer without following the due process of law.

Reliefs

17. In view of the finding that the employer have failed to prove valid and fair reason, and that a fair procedure was followed I make declaration that the termination of the claimant's contract of service was unfair and unlawful. Accordingly, the claimant is entitled to salary in lieu of notice plus compensation for unfair termination under section 49 of the Employment Act.
18. I award one month salary in lieu of notice based on section 35 of the Employment Act. I further award him 10 months' salary compensation for unfair termination considering that he had a legitimate expectation to continue working for more than a year before his contract lapsed. In addition he did not contribute to his dismissal through misconduct and he had no warning letters before the termination.
19. The claimant prayed for Kshs.10,000,000.00 as compensation for violation of his rights not to be discriminated and right to fair labour practices. The claimant has not proved discrimination since he has not demonstrated by evidence that he was dismissed for the same reasons with Joyce Legeiya but only the latter was reinstated after the letter by the ombudsman.
20. However, I have already made a finding of fact that the termination was done by unqualified person and without according the claimant a chance to defend himself contrary to his rights to fair labour practices and fair administrative action as envisaged under Article 41 and 47 of the Constitution. Consequently, I award the claimant Kshs.2,000,000.00 as general damages for the violation of his constitutional rights aforementioned.
21. The claim for gratuity is granted for the 22 months he served from January 2018 to October 2019. The award is calculated using basic salary of Kshs.89,350 x 31% x 12 months equaling to Kshs.609,367.00.
22. The claim for leave is not controverted and therefore I award him at the rate of 21 days per year equaling to 1.75 days per month on prorata basis. Hence 22 months x 1.75 x the basic salary of Kshs.89,350.30 =Kshs.114,665.83.
23. The prayer for a certificate of service is a legal right under section 51 of the Employment Act and therefore I grant it as prayed.

Conclusion

24. I have found that the termination of the claimant's contract of employment was unfair and unlawful. I have further found that the claimant's constitutional rights were violated during the termination of his contract. Finally I have found that the claimant is entitled to the following reliefs:-
 - a. A declaration that the termination of his contract was unfair and unlawful.
 - b. Payment of
 - Notice.....Kshs.145,450.00
 - Compensation..... Kshs.1,454,500.00
 - Leave.....Kshs.114,665.83



Gratuity.....Kshs.609,367.00
General damages.....Kshs.2,000,000.00
Total Kshs.4,323,982.83

c. Costs and interest at court rates from the date hereof, but the award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 28TH DAY OF JULY, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

