



**Musau v Nairobi City County (Cause 318 of 2022)  
[2023] KEELRC 2411 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2411 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 318 OF 2022  
DKN MARETE, J  
OCTOBER 3, 2023**

**BETWEEN**

**TOM KILONZO MUSAU ..... CLAIMANT**

**AND**

**NAIROBI CITY COUNTY ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a Memorandum of Claim dated 16th May, 2022. It does not any display on issue in dispute on its face.
2. The Respondent in a Response to claim dated 5th October, 2022 denies the claims and prays that the same be dismissed with cost to himself.
3. The claimant's case is that at all material times he was an employee of the Respondent duly appointed as an Advisor- Information, Communication and Technology- (ICT)- Nairobi City County. This was via a letter of appointment dated 9th May, 2019 and duly executed by the then County governor. He had been shortlisted to the appointment by the Respondents agents and Senior Officials.
4. The terms of offer were as follows;-
  - a. Appointed as an Advisor – Information, Communication and Technology, Nairobi City County effective from 9/5/2019, reporting directly to the office of the Governor for day-to-day allocation of duties and responsibilities and was to serve at the pleasure of and to remain in office over that Governor's entire term in office;
  - b. To earn a basic monthly salary of Kshs 109,089/=, a housing allowance of Kshs 40,000/= and a commuter allowance of Kshs 16,000/= making in total Kshs 165,089/= payable in arrears at the end of each month;



- c. To be entitled to a month's annual leave to be taken at such time as the Governor would deem convenient, upon completing a year in service and annually subsequent thereto;
  - d. At the end of such service term, to be entitled to a service gratuity at the rate of 31% of his annual basic pay for every year served;
  - e. To be entitled to Medical Insurance Benefits as provided for in the then existing Staff Health Insurance Scheme while the [Work Injury Benefits Act](#) was to be applicable for purposes of work related injury;
  - f. To work from eight to five for five days a week while ensuring flexibility on matters time, to be able to execute the responsibilities of my advisory role but with no entitlement to overtime;
  - g. To be obligated to observe the Governor's office's legitimate need for confidentiality as well as obtain and submit to the Governor, clearances from the Ethics and Anti-Corruption Commission (EACC), Kenya Revenue Authority (KRA), Credit Reference Bureau (CRB), Higher Education Loans Board (HELB) as well as a Certificate of Good Conduct from the Directorate of Criminal Investigations (DCI), not later than Fourteen(14) day from the date of such appointment failure which such appointment would be voided.
5. The claimant's further case is that his state of service was unhappy due to various constraints by the Respondent and lack of facilitation and support hereby occasioning a gross violation of its obligations towards the claimant which were contrary to industry best practices.
  6. His other case is that he was treated inhumanely and was not rewarded for service rendered.
  7. The Claimants other case comes out thus;
    19. The Claimant avers that in the course of his follow ups on those matters his recruiting officer installed in July of 2019 as the "Super CEC" to serve as the overall head of all County Executive Committees and in charge of the implementation and coordination of various county programs and projects who also was his direct liaison to the Governor recommended that the Claimant applies for a then advertised position of a County Chief Officer – Information, Communication and Technology so as to be considered for recruitment in order to be logged in to the Respondent's payroll system to access a salary and the Claimant avers that he accordingly applied and received an acknowledgement email from the Secretary County Public Service Board, Nairobi City County but no further communication followed. He was later to learn that no appointments were made to that position at the time and the officer that served in that capacity continued to so serve.
    20. The Claimant avers that he interpreted such advise coming from the same officer that recruited him to fill up the position of an Adviser-ICT, Nairobi City County, particularly advise to apply for another position for which no interviews were conducted despite it being advertised, as an indirect indication by that officer that the Respondent was unable to resolve whatever technicalities it faced on the matter of the Claimant's salary and office allocation and that the Respondent sought to discreetly revoke his appointment.
    25. With no pay for services rendered, no real office, devoid of a superior to report to given the inability to access the Governor, the Claimant avers that he could no longer account for his presence at the County or justify its entitlement to further benefit from his professional advisory services on matter ICT. Further, in the absence of a Revocation, Redeployment or Termination Letter to indicate the true status of his employment and with no fresh tasks to undertake as the Governor was by then hardly at City Hall and was evidently, inaccessible



even at his Upper Hill premises doubling up as his office, the Claimant avers that he was circumstantially constrained to depart at the end of October, 2-19.

26. The Claimant avers that he construed the Respondent's conduct as a deliberately intended to compel him to leave and therefore maintains that such departure was non voluntary, was coerced, was borne out of the circumstances deliberately set in place by the Respondent and was beyond his control as an employee of the Respondent and puts the Respondent to strict proof of any allegations to the contrary.
27. As such, the Claimant holds the Respondent, its officers and its key organs the County Public Service Board and its Executive Committee included, liable for such unfair, unlawful and unprocedural constructive summary dismissal without pay and pray for awards as against the Respondent on grounds that the Respondent violated his rights and entitlement to a decent work environment, subjected him to harsh and substandard working conditions, deprived and denied him his just remuneration for services rendered to it thereby subjecting him to servitude and slavery, treated him unfairly for failing to observe basic industry employment standards, unprocedurally constructively terminated his employment contract summarily for no cause at all and without pay, contrary to the rule of law and the principles of natural justice and the Claimant shall seek to rely on the Appointment Letter dated 9/5/2019 for its full tenor and effect.

8. He claims thus;

- i. A month's salary in lieu of notice .....Kshs 165,089.00
- ii. Unpaid salary for 5 months from June 2019 to October, 2019 @165,089x5..Kshs 825,445.00
- iii. Service Gratuity equivalent to 31% of the Claimant's annual basic pay for his would-be period of service (2 years 6 months).....Kshs 1,535,328.00
- iv. Damages for unfair, unlawful and unprocedural constructive summary dismissal without pay, the equivalent of the Claimant's lost salary for 24 months from November, 2019 to November 2021 when the current Governor was sworn in to office @165,089x24 .....Kshs 3,962,136.00

Total .....Kshs 6,487,998.00

9. He prays as follows;

- a. A declaration that the Respondent's conduct amounted to unfair, unlawful and unprocedural constructive summary dismissal of the Claimant from service without pay under his Appointment Letter dated 9/5/2019 therefore entitling him to an award in damages equivalent to his projected salary for the lost term of service from the date of such unfair, unlawful and unprocedural constructive summary dismissal until the swearing in of the next Governor (from November 2019 and November 2021);
- b. An order to compel the Respondent to pay the Claimant his just dues and such damages as below;
  - i. A month's salary in lieu of notice .....Kshs 165,089.00
  - ii. Unpaid salary for 5 months from June 2019 to October, 2019 @165,089x5.....Kshs 825,445.00



- iii. Service Gratuity equivalent to 31% of the Claimant's annual basic pay for his would be period of service (2 years 6 months).....Kshs 1,535,328.00
  - iv. Damages for unfair, unlawful and unprocedural constructive summary dismissal without pay, the equivalent of the Claimant's would be salary for 24 months from November 2019 to November 2021 when the current Governor was sworn in to office @165,089x24 .....Kshs 3,962,136.00
- Total .....Kshs 6,487,998.00

- c. Costs of this Cause;
  - d. Interest at court rates on (b) (i-iii) above from the date of the unfair, unlawful and unprocedural constructive summary dismissal of the Claimant from service without pay and on (b) (iv) and (c) above from the date of judgement, all until payment in full;
  - e. A Certificate of Service;
  - f. Any other or further relief that this Honourable Court may deem fit to grant.
10. The Respondent's case is a denial of the claim.
  11. It is his further case that the Respondent states that the Claimant was never recruited as an officer of the Respondent and the alleged recruitment was unprocedural and irregular. It was never deemed to be necessary and was never sanctioned by the appropriate internal organs of the Respondent. Again the alleged recruitment officer had no mandate to offer employment to the Claimant contrary to the position advanced in the Claimant's Memorandum of Claim.
  12. She therefore denied the claims as prayed.
  13. The claimant in a Reply to Response to claim reiterates his case and denials to Respondents defence as mere sham and denial of the claim as raised. This is because it totally fails to address the issues raised in the memorandum of claim.
  14. The issues for determination therefore are;
    1. Whether there was a legitimate employment contract between the Claimant and the Respondent.
    2. Whether the Claimant's employment was terminated by the Respondent.
    3. Whether the termination of the employment of Claimant by the Respondent was wrongful, unfair and unlawful.
    4. Who bears the costs of this cause.
  15. The 1st issue for determination is whether there was a legitimate employment contract between the Claimant and the Respondent. The parties hold diametrically opposed position on this.
  16. By that contract, the Respondent appointed the Claimant to such advisory position with effect from 9/5/2019 while extending him the following contractual benefits:-A monthly basic salary of Kshs 109,089/=, housing allowance of Kshs 40,000/= and a commuter allowance of Kshs 16,000/=, totalling up to a consolidated salary of Kshs 165,089/= payable in arrears at the end of each month over the term of service;At the end of his contract period, to Service Gratuity at the rate of 31% of the Claimant's annual basic pay for every served;Medical insurance within the Respondent's existing Staff Health Insurance Scheme with the Work Injury Benefits Act applying to work related injury;One (1)



month's annual leave upon completing an year of service and each subsequent period thereafter while the Claimant continued employment, the Governor reserving the right to determine when the earned leave could be taken; and Each party reserved the right to terminate the contract by giving the other a month's notice in writing or a month's pay in lieu of notice without necessarily assigning reasons thereof but without prejudice to the Respondent's right to terminate the contract summarily for lawful cause.

17. Among the Claimant's obligations were those that: The Claimant would be subject to a daily eight (8) hour work schedule spreading over five (5) working days per week, likely to be changed from time to time by the Governor depending on work schedules and office requirements with flexibility expected in such advisory position to be able to execute the responsibilities of that office but with no entitlement to any overtime; The Claimant was required to observe the Governor's office's legitimate need for confidentiality and integrity and was not, without the consent of the Governor, to disclose any confidential matter relating to his employment and/or business of the office to any unauthorized persons; The contract required the Claimant to obtain clearances from various government entities and to submit them to the Governor not later than fourteen (14) days from the date of appointment in default that the appointment would be rendered void;
18. Quite contrary to the indication in the contract that the Respondent wished the Claimant every success in the undertaking and promised its full support towards achieving mutual goals, the Respondent committed material breaches of the terms of that contract of service, breaches that went to the root of that contract in a manner to suggest that the Respondent no longer had any intent to be bound by some very essential terms of that contract entitling the Claimant to treat himself as discharged from any further obligation to perform his part of that contract in a manner to terminate the contract on his part and leave without given any notice at the Respondent's instance by reason of the Respondent's conduct.
19. We submit and will demonstrate shortly that the Respondent's conduct amounted to constructive summary dismissal of the Claimant.
20. We submit:-

That the Respondent's conduct outlined above amounted to repudiatory breach of, departure from, as well as a gross violation of essential terms of its contract of service with the claimant thereby entitling the Claimant to leave, at the Respondent's behest, on grounds of constructive dismissal by the Respondent.

21. The Respondent, Preliminarily, cites the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR wherein the Court of Appeal sitting at Nairobi pronounced itself as follows:

“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay – this is the unreasonable test. The second interpretation is that employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment – this is the contractual test...”



22. And further:

“ 30. Having failed to prove his claim of constructive dismissal, the Appellant could not benefit from the Respondent’s failure to call witnesses.

31. On the issue of costs, I will say this; while ordinarily, costs follow the event, the court is allowed to exercise discretion in making an award one way or the other. The Appellant, having failed in his major claim for damages for constructive dismissal, although succeeding in the other claims, did not attain an automatic entitlement to costs. It was therefore proper for the learned trial magistrate to direct each party to bear their own costs.

32. Ultimately, I find no reason to cause me to overturn the decision by the learned trial magistrate.

33. This appeal therefore fails and is dismissed.

34. Each party will bear their own costs.” [Emphasis added]

23. The Respondent’s submissions is that the Claimant’s recruitment was bereft of the requisite due process. In fact, the Claimant does admit that there may have been procedural defects in his said recruitment. See page 26 of the claimant’s Initial Bundle of Documents. He further implicitly admits that the Mr. Charles Kerich may not had express authority to engage the Claimant on behalf of the Respondent, its Public Service board or the Human Resource Department. See page 8 of the Claimant’s Written Submissions. It should also be noted that the Claimant did not produce any such authority in support of his case. During cross examination, the Claimant did admit that he was not shown any advertisement of the position he was being offered, and that the said Mr. Kerich did not show him any authority that he had to engage him on behalf of the Respondent.

24. The Respondent’s further case is that without a proper basis to engage the Claimant, it does not become apparent how his said employment was regular and therefore he is not entitled to the relief he seeks in these proceedings.

25. She further relies on authority of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR where the Court of Appeal sitting at Nairobi had the following to say on this aspect;

“(25) We now come to the award of Kshs 3,000,000 being general damages in lieu of reinstatement it is trite law that general damages are not awardable for wrongful termination. Previous decisions of this Court have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice. (See *Alfred Githinji v Mumias Sugar Company Ltd* civil Appeal No 194 of 1991).

(26) In the case of *Central Bank of Kenya v Julius Nkonge* [2002] eKLR this court held that the trial Judge had erred by computing damages beyond the notice period. It was the court’s view that on the assumption that the respondent’s dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of notice, namely, three months, and that the trial Judge erred in awarding him more.

(27) Similarly, in *CMC Aviation Limited v Mohammed Noor* [2015] eKLR, this Court held that despite a finding of unfair termination of employment, the



fact that the employment contract was terminable by one month's notice meant an award of one month's salary in lieu of notice was reasonable compensation."

26. I therefore find that the Claimant was not regularly employed by the Respondent. The purported recruiting officers did not have the requisite authority for so doing as provided for by the law. And this answers the 1st issue for determination.
27. With a finding of unprocedural employment of the Claimant by the Respondent, all other issues for determination fall by the way side. They are not worthy of any determination.
28. I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

**DELIVERED, DATED AND SIGNED THIS 3RD DAY OF OCTOBER 2023.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances

Mr. Muyaa instructed by Kinyua Muyaa & Company Advocate for the Claimant.

Mr. Kithinji instructed by Hassan Alawi & Company Advocate for Respondent.

