



Kithuka v Machakos County Assembly & another (Employment and Labour Relations Cause E861 of 2017) [2023] KEELRC 2988 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2988 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E861 OF 2017
AN MWAURE, J
NOVEMBER 15, 2023**

BETWEEN

JOHNSON MUIA KITHUKA CLAIMANT

AND

MACHAKOS COUNTY ASSEMBLY 1ST RESPONDENT

MACHAKOS COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The claimant filed an amended memorandum of claim dated 19th May 2019.

Claimant's case

2. He avers he was employed as a personal assistant from 1st October 2013 at a salary of kshs 25,000/-. He says his contract was to terminate with the expiry of the term of the assembly on 31st July 2017.
3. He says thereafter he executed his duty diligently but in September 2015 his salary was withheld.
4. He avers he reached to the respondent severally to inquire about his withheld salary and when he went to the respondent's county clerk to inquire he was told orally that his services were no longer required and his contract was terminated.
5. He says his termination was unconstitutional and was in violation of fair labour practices.
6. He prays for compensation contained in paragraph 14 of his amended claim amounting to kshs 1,100,000/-.

Respondent's claim

7. The respondent filed a response to the claim dated 29th September 2017.



8. He avers the claimant was not their employee and the respondent's structure did not have a position of a personal assistant.
9. He says on 5th November 2013 they wrote a letter to terminate any possible fraudulent letters and he further says even if claimant had a contract which is denied it was terminated on 31st August 2013 by Hon. Willy Kasimu.

Claimant's evidence

10. The claimant gave his evidence on 27th April 2023. As in his claim he testified how he was employed by the respondent as a personal assistant. He says in September 2015 he did not get his salary. He says he thought it was a normal delay but on inquiry he learnt the other employees were getting their salary.
11. He says he tried to get an audience with Deputy County Clerk Mr Mutisya but he told him to resolve the matter with his MCA. He says he got his letter of appointment from the county government and not from MCA.
12. He says there is a letter from MCA to Machakos County Government saying that he ceased to be a personal assistant of the MCA. He says he was not an employee of the MCA but of Machakos County Government.

Respondent's evidence

13. The respondent witness one Joseph Mutisya said he was a clerk to Machakos County Council. He says MCA used to employ staff and that is how claimant was employed by an MCA but later the said MCA revoked the claimant's employment. He says claimant was under supervision of the MCA though he admits he signed claimant's letter of appointment and gave claimant certificate of service.

Submissions

14. The court has considered the claimant's submissions dated 15th May 2023 and at the same time the court considered respondent's submissions dated 22nd June 2023.

Analysis and determination.

15. The main issue to determine is whether the claimant was employed by the respondent.
16. Documents tend to give clear picture unless are forged or are fraudulent. There is an appointment letter on the letterhead of Machakos County Government addressed to the claimant and dated September 2013 whereby he was offered a job as a personal assistant. The letter was signed by Mr Mutisya the clerk. The same was to be valid to the end of the assembly which was 31st July 2017.
17. Clearly the claimant was an employee of the respondent whatever the respondent says. There is no reference in the letter of appointment that the claimant was employed by an MCA. In that regard there is clear authentic evidence that claimant was employed by the respondent.
18. There is a revocation letter dated 5th November 2015 addressed to Personal Assistants, Secretaries and Messengers revoking all contracts given to them. They were assured there were arrangement to give contracts between them and MCAs.
19. There were a lot of untidy ongoing from the respondent's office as far as the claimant's employment was concerned. There is no letter provided to the honourable court showing claimant was employed by the MCA. As earlier observed the claimant was employed by the County Government of Machakos.



Yet on 3rd August 2013 a letter was written to clerk of Machakos County Government by one Willy Kasimu alleging that claimant had ceased to be his employee. Yet there was no evidence claimant was employed by the MCA Kasimu.

20. There is a clear contravention of the employment laws and article 41 of *the constitution*. The law and especially sections 43 and section 45 of *Employment Act* are mandatory on how to fairly and legally terminate an employee. Section 43(1) of the *Employment Act* provides:

In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

Section 45(1) of same act provides:

No employer shall terminate the employment of an employee unfairly.

21. And section 41 of the *Employment Act* provides as hereunder.

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.

22. The way the claimant lost his employment was in clear departure of the statute law, Constitution of Kenya and myriads of case laws.

23. The respondent neither informed the claimant that he was to be terminated and as well did not tell him the reason for termination. All they did was to stop paying his salary sometime in August 2015. This is inhuman treatment as per the case no 376 of 2015 of Jackson Gona Konde vs Ayub Amor Mohamed & Company where the court held :

“salaries and wages are protected under part IV of the *Employment Act* and must be paid promptly when due. Employers who delay payment engage in wages offences and are liable for criminal prosecution and sanctions.”

24. It is only when claimant followed the respondent to inquire why his salary was stopped that he was told to resolve the matter with his MCA. He was never to date informed why his employment was terminated.

25. In this case the claimant was neither informed the reason for termination of his employment nor was he even given a letter of termination. He was not taken through disciplinary procedure mandated in section 41 of the *Employment Act*. In the case No 009 of 2021 Titus Muriuki vs Beverly School of Kenya Limited the court held:

“section 43 of *Employment Act* place a burden on the respondent to demonstrate and prove the reason of termination based on the facts, matters and circumstances that existed at the time of termination.



26. Also in the case of No 591 of 2020 Amalgamated Union of Kenya Metal Workers vs Power Protection Limited the court noted:

“ it is evident from the letter that the grievant was not given an opportunity to defend himself. The termination was therefore contrary to section 41 of the Employment Act. Further without a hearing there is no proof of grounds for termination.

27. This case the court finds that clearly the claimant was employed by the respondent and his termination was cruel, un procedural and wrongful. The court therefore enters judgment in his favour and orders the respondent to compensate him as follows:

Reliefs

- a. Salary arrears from 2015 to date is unsupported by law and is declined as salary is paid as per services rendered.
- b. 1-month salary in lieu of notice as that is what is in the Employment Act unless otherwise agreed between the parties kshs 25,000.
- c. Leave allowance is awarded. Respondent did not prove they gave him leave so kshs 25,000/-.
- d. Severance pay is unsupported as claimant was not terminated through redundancy.
- e. The claim for damages is consolidated with prayers e and 1 and is awarded salary equivalent to 6 months considering that he worked for about 2 years but also considering how he was crudely terminated kshs 150,000/-.
- f. Prayer for reinstatement of NHIF, NSSF and reinstatement are overtaken by events and are not granted.
- g. The total awarded to the claimant is kshs 200,000 plus interest at court rates from date of judgment till full payment.
- h. Costs are also awarded to the claimant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of



the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

