



Langat v County Public Service Board Kericho County & 2 others (Employment and Labour Relations Cause E016 of 2021) [2022] KEELRC 164 (KLR) (22 April 2022) (Judgment)

Willie Kipkoech Langat v County Public Service Board & 2 others [2022] eKLR

Neutral citation: [2022] KEELRC 164 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E016 OF 2021
ON MAKAU, J
APRIL 22, 2022**

BETWEEN

WILLIE KIPKOECH LANGAT CLAIMANT

AND

**THE COUNTY PUBLIC SERVICE BOARD KERICHO
COUNTY 1ST RESPONDENT
COUNTY GOVERNMENT OF KERICHO 2ND RESPONDENT
THE GOVERNOR KERICHO COUNTY 3RD RESPONDENT**

JUDGMENT

1. The claimant brought this suit on 19.11.2021 seeking the following reliefs:-
 - a) A declaration that the termination of his employment by the Respondents was unlawful thus null and void and has no legal effect,
 - b) Damages for unlawful dismissal in the following terms
 - (i) Salary from the date of the unlawful termination at Kshs 199,110/- per month to end of the term of his contract on 13th September 2022 and,
 - (ii) One month's salary in lieu of notice being Kshs 199,110/-
 - (iii) Interest on prayer 2(a) and (b) above from date of filing of suit
 - c) Damages for unlawful termination
 - d) A Certificate of Service as per section 77 of the Employment Act no. 11 of 2007



- e) Costs of the claim
2. The respondent entered appearance on 6.12.2021 but failed to file defence to controvert the claimant's allegations. The matter was heard on 27/1/2022 when the claimant gave evidence in court but the respondent and their counsel did not attend. However, they filed written submissions after the close of hearing.

Evidence

3. The claimant testified as CW 1 and basically, adopted the facts in the Memorandum of claim and his written statement dated 11/11/2021 as his evidence in chief. He further relied on the bundle of documents in a list dated 11/11/2021 as his exhibit.
4. In brief, the claimant testified that he was appointed Chief Officer Water and National Resources by the respondents via contract dated 3/11/2017 for a period of 5 years ending on 13.9.2022. His starting salary was Kshs 127000 but it was later increased to Kshs 179,000 per month.
5. On 5/10/2018 he received a show cause letter from the Respondent accusing him of wilful neglecting of duty. He responded by his letter dated 18.10.2018 requesting for further and better particulars on the allegations to enable him make a substantial response. However, the employer made no response and no reason was given for the failure to grant his request.
6. However, no response was made by the employer and no reason was given for the failure to grant his request. Instead, the employer served him with a letter dated 14/3/2019 inviting him to attend a disciplinary hearing before a committee to defend himself on 26/3/2019. He attended the hearing without the documents and particulars requested before the committee comprising the Deputy Governor Ms Kikwai, County Secretary Mr. Joel Bett, Chief of Staff Mr. Charles Kirui, Governor's Advisor Mr. Philip Bauma and Governor's Legal Advisor Mr. Kibyegon Kirui. In his view, the Board that heard his case was not properly constituted.
7. The claimant further stated that he was never served with a copy of the minutes of the meeting and he was shocked to receive a dismissal letter on 9.5.2019. In his view the dismissal was unfair and unlawful.
8. He further testified that after the dismissal he was employed by the Government of Nandi County in the same year but to date he has not received any pay because the respondent failed to provide his payroll details and certificate of service, which is a requirement in government-to-government relocation. Therefore he prayed for the reliefs set out in his suit.

Submissions

9. In his written submissions, he reiterated that he was not accorded a fair hearing before the termination because his request for particulars of the allegation again plus supporting documents to enable him prepare his defence was ignored by the employer. He maintained that he was not provided with sufficient particulars of the allegations plus supporting evidence before attending the hearing on 26.3.2019. Therefore, he contended that the said flawed procedure culminated in an action that is a nullity in law because it was based on breach of the law.
10. For emphasis, he relied on *Nicholas Muasya Kyule V Farnham Limited* [2012] e KLR and *Kennedy Muriuki Gichangi - V - County Government of Kirinyaga* [2019] e KLR where the court held that dismissal for misconduct must be done through a fair procedure which is set out under section 41 of the *employment Act*.



11. Finally, he submitted that in view of the said procedural breaches, his dismissal was unfair and he is entitled to the damages sought in the statement of claim. He urged the court to award the maximum compensation of 12 months' salary, as was done in the case of *Joshua Otiego Apiyo v Modern Costs express td* [2019] e KLR. He also prayed for his costs of the suit.
12. The respondents, on the other hand submitted that there was no valid employment relationship between the claimant and them because his appointment was not done in accordance with section 45 of the *county Governments Act* (CGA).
13. They argued that the claimant was not recruited through open and competitive process as required by the said Section. They maintained that the Claimant was appointed by the Governor without any advertisement, interview by the Public Service Board and vetting by the County Assembly. Therefore, they submitted that the claimant was a beneficiary of an illegal contract and as such he cannot enforce it or seek court protection.
14. The respondent further submitted that the issue of unfair or unlawful termination does not arise because an illegal contract has no protection in the law. They urged that as a general rule, courts do not enforce contracts, which are in contravention of statutes.
15. For emphasis, they relied on *D. Njogu & Company Advocate v National Bank of Kenya Ltd* [2016] e KLR where the court of Appeal held that any contract that contravenes a statute is illegal and the same is void *ab initio* and is therefore enforceable.
16. Further, the respondents submitted that the letter dated 9/5/2019 was not a dismissal letter but rather a notification of letter informing the claimant of the decision of the 1st respondent. Therefore, the respondents maintains that the claimant has not proved that he was dismissed.
17. As regards, the reliefs sought, the respondents submitted that no relief are merited because the employment of the claimant was illegal and in breach of the public policy. For emphasis, he relied on *Mistry Amaa Singh v Servave Wafunira* [1963] E. A 409 and *Lakhan v Vailtia* [1955] E.A 454 where the court upheld the principle that it would be contrary to public policy for courts to enforce contracts that are breach of statute. Therefore, the respondents prayed for the suit to be dismissed with costs.

Issues for Determination

18. There is no dispute that the claimant worked for the respondents from November 2017 to 9.5.2019 when his engagement was terminated. The issues for determination are:-
 - a) Whether the appointment of the claimant by the 2nd respondent was illegal, null and void.
 - b) Whether the termination of the appointment on 9.5.2019 was unfair and unlawful.
 - c) Whether the reliefs sought by the claimant are merited.

Whether the appointment was illegal

19. The respondent submitted that the appointment of the claimant as Chief Officer was illegal because it was not done in compliance with section 45 and 46 of the *county government Act*. The claimant produced a letter of appointment dated 3.11.2017 and signed by the Governor. The letter states that the appointment was done in exercise of the power conferred on the Governor by section 45 (1) of the *Act*.
20. The respondents did not file any pleadings or affidavit upon which he said submissions stands. It follows that the said submissions is just allegation from the bar by the defence Counsel. It would have



made sense if the said Governor filed defence and adduced evidence confessing that he violated the law by appointing the claimant to office in breach of section 45 of the Act and contrary to the principles of good governance as set out in chapter six of the Constitution.

21. On the other hand, the County Public service Board did not deny that it participated in recruitment of the claimant as a Chief Officer which could have pointed an accusing figure to the Governor of violating the law. Without such evidence from the Governor and the County Service board, I find and hold that there is evidence that the claimant was lawfully appointed by the Governor Kericho County in accordance with section 45 of the Act.

Whether Termination was Unfair

22. Under section 45 of the employment Act, termination of employees contract of employment is unfair if the employer fails to prove: -
- a) That it was grounded on a valid and fair reasons,
 - b) A fair procedure was followed,

Reasons

23. The termination letter dated 9/5/2019 did not state the reason for the dismissal. However, claimant produced a letter dated 14/3./2019 which invited him to a disciplinary hearing and which sets out four charges namely: -
- a. Non-adherence to the procurement procedures in awarding of tenders,
 - b. Payment of contractors for incomplete or non-existent projects,
 - c. Poor workmanship ,
 - d. Failure to undertake due diligence on projects,
 - e. Non-availability of requisite documentation on projects undertaken.
24. The letter also accused the claimant of failure to respond to the show cause letter dated 5.10.2018 which pointed to the admission of the allegation made against him concerning his work as a Chief Officer.
25. The unrebutted evidence by the claimant is that he responded to the shows cause letter by his letter dated 18/10/2018 requesting for particulars of the allegations made against him and the documentary evidence in support of the charges, but respondents ignored the request. The claimant further testified that he attended the hearing without being served with the said documents and the employer failed to avail the requested documents and particulars of the charges during the disciplinary hearing.
26. The above evidence has not been rebutted by the respondents, since no evidence was adduced by any committee member or at all. Section 43 of the employment Act provides that:
- “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.”
27. In this case, the respondent has not discharged the burden of proving that they dismissed the claimant for a valid and fair reason. Consequently, on that ground alone, the dismissal was unfair within the provision of section 45 of the Act.



Procedure Followed

28. Section 41 of the Act provided that:-

“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.”

29. The claimant stated that he was denied particulars of the charges made against him and the supporting documents. He contended that, the charges against him were generalised and without particulars and therefore, he did not understand the same.
30. He further contended that the charges were not explained to him as required by the law and he was denied relevant documents/ information to enable him defend himself effectively. Consequently, he maintained that the dismissal was not in accordance with a fair procedure.
31. The law is clear that the employer has an obligation to explain the reason upon which termination of employment an employee is being contemplated. In this case, the claimant was served with a show cause letter citing generalised allegations and the claimant requested for proper particulars and supporting documentary evidence.
32. The foregoing clearly indicates that the claimant needed the said particulars and documentary evidence to enable him prepare a written defence in response to the show cause letter. However, the same was ignored, and the employer constituted a disciplinary committee, which did not listen to the cry for particulars and documents by the claimant. Therefore, I agree with the claimant that his dismissal was not in accordance with fair procedure.

Reliefs

33. In view of the finding above that, the dismissal of the claimant was for not valid reason and that fair procedure was not followed. I make declaration that the dismissal was unfair and therefore unlawful.
34. The claimant told the court that the Nandi County government employed him in 2019 after his dismissal by the 3rd respondent. He had served for only two years and still had three years left before the lapsing of his contract term. Therefore, I will not award him the maximum compensation but only 4 months' salary for unfair termination. I further award him one-month salary on lieu of notice. His minimum gross pay according to his appointment letter was Kshs 199,110.
35. The claim for salary for the remainder of the contract period fails because the claimant mitigated the loss by seeking an alternative employment. Besides, there is no legal or contractual basis for granting the said relief.
36. In conclusion, I enter judgment for the claimant in the following terms.
- Notice Kshs Kshs. 199,110
- Compensation Kshs. 796,440
- Total Kshs. 995,550
37. The claimant will have Certificate of Service, costs and interest at court rates from the date hereof. The accused will be subject to statutory deductions.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF APRIL, 2022.

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

