



Odongo v National Police Service Commission & another (Cause E6491 of 2020) [2022] KEELRC 1090 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1090 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6491 OF 2020
NZIOKI WA MAKAU, J
JUNE 16, 2022

BETWEEN

PATRICK ODONGO CLAIMANT

AND

NATIONAL POLICE SERVICE COMMISSION 1ST RESPONDENT

**JOSEPH V. ONYANGO (BEING SUED IN HIS CAPACITY AS THE
CHIEF EXECUTIVE OFFICER OF THE KENYA POLICE SERVICE**

COMMISSION 2ND RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondents by a Memorandum of Claim dated 20th November 2019. He avers that the Ministry of Devolution & Planning deployed him to the 1st Respondent as a Chief Information Officer by a letter of appointment dated 6th December 2013 and that it later extended his and other staff's deployment period to 30th June 2017, vide an internal memo dated 5th December 2016. It is the Claimant's averment that upon the 1st Respondent advertising for the post of Director Communications & Outreach and his application thereof, he was invited for an interview for 9th June 2017. He avers that upon being successful on the interview, he was appointed to the said position for a renewable term of five years vide the 1st Respondent's letter dated 3rd July 2017 and that the terms and conditions of the employment included that his term-renewal would be based on exemplary job performance subject to the retirement age of 60 years. The Claimant avers that the 1st Respondent was also to pay him gross salary of Kshs. 320,000/- with an increment anniversary date of 1st July and consolidated allowances capped at 40% of the gross remuneration. The Claimant avers that his salary subsequently increased over time to Kshs. 506,000/-.
2. The Claimant avers that by a letter dated 26th May 2020 the 1st Respondent through its Chair communicated to him the purported decision to release the Claimant back to the Public Service



Commission (PSC) with further instructions to hand over all assets and documents to his deputy by on or before 29th May 2020. He contends that the said release letter was in breach of his employment terms of 3rd July 2017 and that the illegal redeployment therefore unlawfully terminated his contract without any warning, notice and know reason and/or complaint. The Claimant thus seeks from the Respondent – loss of earnings and immediate payment of dues including gratuity and compensation dues for the balance of the contract period. He prays that this Court also award him general damages for breach of contract and loss of employment, a certificate of service, cost of this suit, and interest on the foregoing.

3. In response, the Respondents filed a Reply to the Memorandum of Claim dated 14th March 2022 averring that the Claimant was deployed from Ministry of Education to the 1st Respondent Commission vide a letter dated 6th December 2013 for a period of eighteen months. The Respondents aver that vide a letter dated 10th January 2014 the Commission requested, and the Claimant thereafter submitted the necessary documents that would help process his appointment. The Claimant was then deployed to the position of Chief Information Officer vide a letter dated 13th January 2014 that also provided for the terms and conditions which the Claimant accepted in a letter dated 16th January 2014. The Respondents aver that later in 2017, the Commission appointed the Claimant to the position of Acting Director Information Education and Communication with effect from 23rd May 2017 until that time the position would substantively be filled.
4. The Respondents admits that the Commission appointed the Claimant to the position of Director Communications & Outreach after he went through the recruitment process and accepted the terms and conditions set out in the five-year contract dated 3rd July 2017. It is the Respondents' averment that in March 2018 the Commission approved his request to attend a Strategic Leadership Development Programme at the Kenya School of Government and also sponsored him for a programme on Leadership and Corporate Governance in Mombasa in February 2019. The Respondents aver that on 29th April 2019, the Commission appointed the Claimant as the Secretary of the Policy, Programmes, Legal Affairs and Appeals Committee and also as a technical member of the Finance, Administration, Planning and General Purpose Committee. The Respondent avers that the Claimant stated vide a letter dated 27th May 2020 that he was willing to back to the PSC and on 20th July 2020 he filled out the National Police Service Commission clearance form and handed over. The Respondents aver that the Claimant then through his advocates wrote to the 1st Respondent in a letter of 28th May 2020 demanding to be permitted to carry out his duties but later wrote to the Chairperson of the Commission withdrawing his demand for the matter can be handled administratively.
5. It is the Respondents' averment that the 1st Respondent approved that the Claimant as per his contract be paid his three months' salary in lieu of notice amounting to Kshs. 1,518,000/- as evidenced by an internal memo dated 16th December 2020. The Respondents aver that the Claimant was paid Kshs. 1,518,000/- vide a payment voucher dated 4th January 2021 and not Kshs. 890,000/- and that the Claimant is therefore not entitled to any damages and costs. They pray that the Claimant's suit be dismissed with costs to them.
6. The Claimant admits in his submissions that since inception of the present suit the Respondents have since paid him a sum of Kshs. 1,038,500/- and that there were also "without prejudice" negotiations which as per his testimony, collapsed without full resolution of the issues in dispute. The Claimant submits that having been paid the said sum, his claim is now only for gratuity and unpaid sums he would have received had his contract proceeded to fruition. The Claimant submits that his quantification for gratuity is founded in Clause (iii) of his Letter of Appointment dated 3rd July 2017 which directs the same to be calculated at the rate of 31% of annual basic pay for every year earned. He



submits that the basic pay can be calculated from the gross pay which he pointed out in his testimony is to be found in Clause (i) of the Letter of Appointment as well as the deductible allowances in Clause (ii) thereof. The Claimant asserts that he concluded his testimony by stating that his claim is for the sum of Kshs 7,636,034/- made up of the gratuity claimed of Kshs 217,409/- and Kshs 7,418,625/- for the unpaid period duration of the contract.

7. The Claimant submits that his redeployment was wrongful and illegal. He submits that according to Section 15 of the National Police Service Commission Act, No. 30 of 2011, the 2nd Respondent had the sole responsibility of supervising the day to day activities of the 1st Respondent. That however, the 2nd Respondent is yet to inform him the reasons for the termination of his contract and subsequent redeployment and whether the redeployment letter by the Chairperson of the 1st Respondent was issued with his (the 2nd Respondent's) concurrence and consent. It is the Claimant's submission that his redeployment letter as issued by the 1st Respondent's Chairperson is illegal for want of sufficient authority or at all and was in breach of the Claimant's Letter of Appointment dated 3rd July 2017. Furthermore, termination of his employment fell short of procedural fairness under Section 41 of the Employment Act and for want of clear reasons for the redeployment contrary to the express provisions of Section 43 of the Employment Act. The Claimant submits that no notice was ever issued as provided for in Section 41(2) of the Employment Act.
8. The Claimant further submits that he is entitled to costs of the sum of Kshs. 1,038,500/- as the said admitted sum was paid to him after institution of this suit. The Claimant submits that the Respondents having also failed to properly present documents as provided for under Section 74 of the Employment Act, it clearly vindicates him and shows there were serious breaches in law. It is the Claimant's submission that as admitted hereinbefore, he waives the claim for three months' notice pay as the Respondents remitted the same to him. He submits that the claim for compensation due for the unpaid remuneration for the balance of the contract period is payable to him on account of the evident breach of contract by the Respondents and which payments should be honoured as they are provided for by contract. He submits that the Court of Appeal has in previous instances held that an award of such damages is applicable in cases where the arbitrary, unconstitutional and malicious actions by servants of Government are proved, and even though they may exceed the compensation payable to the plaintiff. He cited the cases of *Obongo v Municipal Council of Kisumu* [1971] E.A at page 91 and *Nation Media Group Limited v George Nthenge* [2017] eKLR.
9. The Respondents did not file Submissions. The issue that falls for determination as the major part of the suit was resolved prior to the Claimant giving testimony is that of gratuity. The Claimant sought to return to the Public Service Commission vide his letter of 27th May 2020. As such there was no termination and the Claimant having not worked for the 1st Respondent to the end of his 5 year contract cannot recover for the unserved period nor can he obtain gratuity for the period that he has not worked for the 1st Respondent. The gratuity due on the contract is Kshs 217,409/- and that is the only sum he is entitled to. As such there is hereby entered a judgment for the Claimant against the Respondent for Kshs 217,409/- being unpaid gratuity. The Claimant will have half the costs of the suit.

i. Kshs 217,409/- being unpaid gratuity

ii. ½ costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

