



Mukhwana v Kakamega County Public Service Board & another (Cause 57 of 2018) [2022] KEELRC 1331 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 57 OF 2018**

**JW KELI, J
JULY 14, 2022**

BETWEEN

KAKAYI TOM MUKHWANA CLAIMANT

AND

KAKAMEGA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

COUNTY GOVERNMENT OF KAKAMEGA 2ND RESPONDENT

JUDGMENT

1. The Claimant an ex-employee of the 1st Respondent as a ward administrator filed a Memorandum of Claim dated July 24, 2018 and received in court on the July 25, 2018 against the Respondents seeking the following Orders: -
 - a. A declaration that the 1st Respondent's actions of suspending the Claimant indefinitely without salary and allowances, failing to conclude the disciplinary proceedings against the claimant efficiently and expeditiously as well as freezing the claimant's salary and allowances are unfair, unlawful and constitute an unfair labour practice by the Respondent contrary to Article 41 of *the Constitution*.
 - b. An Order for a permanent injunction against the 1st Respondent prohibiting it from terminating the Claimant's employment based on the show cause notices of September 19, 2016 and June 22, 2017.
 - c. An Order for the 1st Respondent to terminate all disciplinary proceedings against the Claimant and reinstate the Claimant back to employment without loss of salary, allowances, benefits, privileges and rank.
 - d. An Order for the Respondents to pay the Claimant's full salary and allowances from August 2016 when his salary was stopped to the date of lifting the suspension plus interest.



- e. An Order for the Respondents to pay the Claimant's leave allowance for 3 years at Kshs. 8000/- per year totalling Kshs. 24,000/-
 - f. An Order for the Respondents to reimburse the Claimant a sum of Kshs. 34,000/- plus interest.
 - g. An Order for the Respondents to pay the Claimant compensatory damages for unfair labour practice made against him, mental and emotional distress suffered to be assessed during hearing.
 - h. An Order for the Respondents to pay the Claimant a transfer allowance of Kshs. 48,190/-
 - i. Cost of this cause plus interest
 - j. Any other relief as may be deemed necessary by this Honourable Court.
2. The Claimant together with claim filed in the bundle verifying affidavit sworn by the Claimant on the July 25, 2018, Claimant's list of witnesses dated July 24, 2018, witness statement of Kakayi Tom Mukhwana (the Claimant) dated July 25, 2018, Claimant's list of documents dated July 24, 2018 and annexed the bundle of documents.
 3. The Claim is opposed. The Respondents entered appearance through the law firm of Osango & Company Advocates and filed replying affidavit sworn by Dorcas Mbiya on the December 18, 2018 and filed in court on the December 19, 2018, a statement of response to the claim dated June 22, 2020 and received in court on the July 2, 2020 together with Respondent's list of documents dated June 22, 2020 and the bundle of documents.
 4. The Claimant's case was heard on the March 15, 2022 with Claimant being the only witness of fact and was cross examined by counsel for the defence. The defence indicated to the court that it would not call witnesses for oral hearing and will rely on the Replying affidavit of Dorcas Mbiya sworn on the December 18, 2018 and filed in court on the December 19, 2018. The Claimant accepted the position and the defence case was marked as closed.
 5. The parties filed written submissions. The Claimant's written submissions are dated April 6, 2022 and received in court on the April 26, 2022. The Respondents' written submissions are dated April 25, 2022.

The Claimant's case

6. The Claimant adopted his witness statement dated July 25, 2018 as his evidence in chief. He states that he was employed by the 1st Respondent as a ward administrator and deployed to West Kabras Ward and entitled to monthly salary of Kshs. 80,190/- and that he performed his duties professionally.
7. That on October 29, 2015 he was suspended on grounds of absenteeism and refusal to read the County Governor's speech and disappearance with kshs. 12,000/- meant for referees.
8. That upon satisfactory explanation the suspension was lifted and he was transferred to county headquarters in Kakamega town vide letter dated March 31, 2016 and later vide letter dated 7th April 2016 he was posted to social services youth and sports as an administrative officer of which he says he was never paid transfer allowance the equivalent of 1 month's basic salary as per the Human Resources Policies and Procedure for the Public Service.
9. On March 21, 2017 the Claimant states he received a show cause letter dated 19th September 2016 while at home undergoing treatment for an acute brain syndrome. He was called to pick the letter by human resources officer by name Dorcas which show cause letter suspended him indefinitely. That he responded to the show cause letter. Vide letter dated 22nd June 2017 he was invited to attend



disciplinary hearing slated for July 26, 2017 which he attended and presented orally to the committee and was not call back with feedback but his salary was frozen.

10. The Claimant stated that while at West Kabras Ward he incurred expenses that have not been reimbursed amounting to the sum of Kshs. 34,000/-.

The Respondents' Case

11. The Respondent relies on the replying affidavit of Dorcas Mbiya sworn on the December 18, 2018 and filed in court on the December 19, 2019. The terms of employment and places of work are not disputed. The deponent avers that the Claimant was terminated for gross misconduct for absenteeism and or absconding and or desertions of duty without leave and or permission in breach of discipline and negligence of duty. That the claimant during his employment was issued with several warning letters (annexures DM1, a to g) giving him warning and subsequent suspension on account of absenteeism and absconding of duty without notice and or prior leave and or permission. That the Claimant was subjected to disciplinary hearing which he attended and made his presentations dated 26th July, 2017 and the minutes are annexed (DM2). That after the hearing the Board made a resolution to terminate the Claimant's services vide letter dated October 9, 2017 (DM3).

Determination

Issues for determination.

12. Under the statement of claim the Claimant identified the following as the issues for determination
 - a. Unfair/unlawful suspension and unlawful disciplinary proceedings
 - b. Failure /refusal to pay the Claimant's dues.
13. The Respondent did not file any particular issues but in his submissions he addresses unfair termination and the question of the Claimant having been on probation .
14. The court upon consideration of the case by the parties and their written submissions is of the considered opinion that the issues placed before it by the parties for determination in the dispute are as follows:-
 - a. Whether Claimant was on probationary terms of employment
 - b) Whether the termination of the Claimant's employment was lawful and fair.
 - c) Whether the Claimant is entitled to reliefs sought.

a. Whether Claimant was on probationary terms of employment

15. The Respondent submits that the Claimant was not an employee of the Respondents as he was still on probation and that the Respondents have never confirmed him as an employee. That this is evident from his letter dated November 4, 2015 at paragraph 2 which reads:- 'you will service on probationary terms for a period of six months and you confirmation to permanent and pensionable terms will be subject to your performance during this period and submission of a report of satisfactory performance by your immediate supervisor. While in service either party may terminate service by giving one month notice to the other or by giving one month gross salary in lieu of notice''.
16. The Respondents submit that the Claimant signed on the terms of the employment on November 5, 2014 and did not demonstrate to court he was confirmed upon serving 6 months.



17. The Claimant submits that since the Claimant continued in service after the 6 months and was even transferred we can conclude he was an employee of the Respondent.
18. Section 42 of the *Employment Act*, 2007, reads, '(2) a probation period shall not be more than six months but it may be extended for a further period of six months with the agreement of the employee. (3) no employer shall employ an employee under probationary contract for more than aggregate period provided under section (2)' The interpretation of this provision is that after expiry of 12 months the employee is deemed to have been confirmed in employment whether or not the employer has issued letter of confirmation of employment.
19. In the instant claim the Claimant was employed on probationary terms for six months. The Respondent says he was not confirmed hence not their employee. It is not in dispute that the Claimant was in service at least upto year 2017. The court finds and determines that the Claimant's terms of employment had automatically been confirmed upon serving for a period of aggregate 12 months. The court determines he was an employee of the Respondents.

b. Whether the termination of his employment was lawful and fair

20. It is considered position of the court that for termination of employment to be said to be lawful and fair it must comply with the requirements of Section 43 and 41 of the *Employment Act*. Section 43 of the Act requires proof of reason for termination. Section 43(2) guides the court on the prove of reasons by providing as follows, '43(2) the reasons or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee'. The termination is unfair if the reasons did not exist. Section 45 further expounds on the reasons by providing as follows: -(2)A termination of employment by an employer is unfair if the employer fails to prove:-
 - a) That the reason for the termination is valid
 - b) That the reason for the termination is a fair reason - (i) related to the employee's conduct, capacity and capability or (ii) based on the operational requirements of the employer
 - c) That the employment termination is in accordance with fair procedure".
21. The criteria of fair procedure is provided for under Section 41 of the *Employment Act* and the court finds that three ingredients are to be met namely:-
 - a. "The employer, before the termination explains to the employee in a language they understand , the reason the employer is considering termination.
 - b. Secondly the employee is entitled to have another employee or a shop floor union representative of his choice during this explanation.
 - c. Thirdly the employee and his representative must be afforded opportunity to be heard and the employer must consider their representation."
22. The Claimant admits that all the processes under section 41 of the *Employment Act* were followed upto to the stage of disciplinary hearing. That he was invited for disciplinary hearing on July 26, 2017 where he attended and made representations. The committee indicated they would get back but the Claimant remained in limbo until he filed this claim. The Claimant submits that the failure to conclude his case expeditiously within a reasonable time and in any event not exceeding 6 months as prescribed by the public service guidelines and refusal to pay his salary and allowances and yet he is still contracted to the Respondent constitutes unfair labour practices.



23. The Claimant further submits that in submissions dated July 26, 2017 he did explain to the committee that he sought permission while away either on medical grounds or studying. That the Respondent's disciplinary committee failed to acknowledge that the Claimant's absence was involuntary and it was unfair to terminate the Claimant's employment without considering the medical evidence attached. Further the Respondents never communicated the termination.
24. During cross-examination by Counsel for the Respondents the Claimant admitted he was given opportunity to be heard by the Board on the July 26, 2017. The Minutes were produced as exhibit DM2 under the Replying affidavit of Dorcas Mbiya. The Claimant on being asked whether he was dismissed for gross misconduct and absconding duty said he was not aware and never saw the resolution of the Board. On being asked why he lied to court he was on suspension having been dismissed from service vide termination letter dated October 9, 2017, the Claimant told the court he did not have a copy of the letter and was shown the document by his counsel and learnt of the termination in court.
25. The Claimant on being asked whether he had informed the Board he was unwell the Claimant told the court he explained in letter dated March 3, 2017 and in response to the Board on July 26, 2017. In his response the Claimant had told the Board the reasons for his absence was attributed to the show cause letter of September 19, 2016 which had suspended him until finalisation of his case(exhibit DM11F under Respondent's replying affidavit)
26. The court is satisfied that from the correspondence and from the recorded minutes (DM2) all annexed to the Replying Affidavit by Dorcas Mbiyu and adopted as the evidence of the Respondents, that the Claimant absconded duty and thus a valid reason existed to dismiss him from service. The Claimant disputed receipt of the letter of termination hence his case that he was sent on indefinite suspension. There is no evidence on the face of the said letter (DM3) that it was ever communicated to the Claimant. That would be in breach of section 41 that requires the employer to communicate to the employee the reason they are considering termination of service. The process is mandatory and the court upholds the authority cited by the Claimant in Court of Appeal in Pius Machafu Isindu v Lavington Security Guards Limited where the court took the position that the elaborate process requiring notification and hearing under section 41 is mandatory.
27. For that finding that the termination of employment was not communicated to the Claimant the court finds there was no procedural fairness in termination of the employment of the Claimant.

Whether the Claimant is entitled to reliefs sought

28. The Claimant submits that the Respondents never defended the claim nor authenticated the annexed documents nor did the disciplinary officer of the Respondent testify hence the claim should be allowed.
29. The Respondents submits that the replying affidavit of Dorcas Mbiya sworn on the December 18, 2018 was on the March 15, 2022 adopted as their response in opposition to the Claim.
30. The court finds that evidence by was affidavit is valid. The Claimant did not seek to cross-examine the deponent despite having the opportunity to do so. The Claimant cannot then submit to question admission of the evidence under the affidavit at submissions.
31. The court found there was procedural unfairness. Section 49 of the *Employment Act* then applies. The Respondent relies on the decision *Richard Nyaundi Marasi v Board of Management Geturi Mixed Secondary School* (2017) eKLR which they say the circumstances are similar to instant case. In that case the court found there was no constructive dismissal. In that case just like the instant case there was no termination of employment as the Claimant was sent on indefinite suspension on half salary as his presence in the school was found undesirable and the executive BOM had no power to carry out



- disciplinary powers against the claimant. That case deviates from the instant case as the Respondents here had the power to carry out disciplinary proceedings against the Claimant and indeed proceeded to do so and removed the Claimant from payroll. The authority is distinguished from the instant case. The finding of unfair termination for failure to comply with the procedure stands.
32. The Claimant submitted that the suspension and the proceedings exceeded 6 months contrary to public service regulations. The court finds that the Public Service Human Resources Manual and Procedures of 2016 applicable Clause K.3(4) which reads, ‘Disciplinary cases should be dealt with promptly and finalized within a period of six (6) months. Where it is found impracticable to do so the Authorized 151 Officer shall report individual cases to the Public Service Commission explaining the reason for the delay.’”
 33. The letter of suspension/show cause is dated September 19, 2016 and suspends the Claimant without salary except full house allowance and medical allowance/ medical insurance. The Claimant says all these were frozen including his medical insurance despite the letter indicating they would be paid. Clause K. 7 of the PSC manual(supra) provides for payment during suspension as follows;- ‘(2) Where an officer is suspended from the exercise of the functions of his public office, he shall be entitled to full house allowance, medical benefits and no basic salary’. The court finds that Respondent violated the applicable policies by exceeding the suspension beyond 6 months and further by failing to provide medical and housing allowance.”
 34. The court grants prayer (a) being a declaration that the 1st Respondent’s actions of suspending the Claimant indefinitely without salary, of failing to conclude the disciplinary proceedings against the Claimant efficiently and expeditiously within 6 months of suspension as well of failing to pay housing allowance and provide medical are unfair, unlawful and constitute an unfair labour practice by the Respondents contrary to Article 41 of *the Constitution*.
 35. The court finds that the Claimant’s employment having already been terminated and the court having found there existed valid reasons for the termination then prayer (b) is overtaken by events, prayer (c) is untenable as the court finds that the Claimant’s conduct of absconding duty is not compatible with the requirements of the employer.
 36. The Claimant in prayer (D) is for the Respondents to pay the Claimant housing allowance and medical allowance from September 2016, the salary having been last paid in August 2016) for 6 months. The court finds that after lapse of the 6 months of suspension the court finds that constructive dismissal took effect. The Claimant cited the decision Cause No. 611 (N) of 2009 between *Maria Kagani Ligaga v Cocacola East and Central Africa Limited(unreported)* where the court held that constructive dismissal occurs where the employee is forced to leave his job against his will because of his employers conduct although there is n actual termination, the treatment is is sufficiently that the employee considers himself as having been unfairly dismissed. In authority cited by the Respondents in *Rachard Nyaundi Marasi v Board of Management , Geturi Mixed Secondary School (2017)eKLR* , the court cited with approval decision of Justice D.K.N Marete in *Joseph Aleper & Another v Lodwar Water and Sanitation accompanly Limited (2015) eKLR* where the Judge held that constructive dismissal doctrine has its roots in the law of contract under the doctrine of ‘discharge by breach’. That under the doctrine an employee is entitle to treat himself as discharged from further performance of his obligations where the employer’s conduct was a significant breach going to the root of the contract as was stated in cited English decision by Lord Denning in *Western Excavating (ECC) ltd v Sharp (1978)ICR 221* where the court noted that assessment of what was a constructive dismissal applied ordinary contract test so that a dismissal must first be established as follows:- ‘if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract , then the employee



is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's contact.

Justice Marete cited the decision with approval and so did Justice Maureen Onyango in upholding the decision.

37. The human resources and procedure manual for public service of 2016 (supra) provides for the suspension of public officers to last for a maximum period of 6 months. There is no indication that there was report of the delay as envisaged under the manual. Since the termination of the employment was not communicated to the Claimant the court takes it that there was no termination of employment of the Claimant. The Claimant is deemed to have been constructively dismissed from employment after lapse of 6 months of suspension.
38. Consequently the employment of the Claimant is presumed to have ended on or about the March 19, 2017. The Claimant said his last salary was Kshs. 80,190/- per month. The court finds that the employer did not provide details on payment as per its obligation under section 74 of the *Employment Act*. The court noted the last remittance to NSSF was in August 2016 (document 15 of the Claimant's bundle), That means the Claimant was paid salary upto August 2016. The court then awards housing allowance at Ksh. 24,000 as per the employment letter for the lawful suspension period of six months. The medical provision was insurance cover. The Claimant did not present receipts of any medical expenditure. Thus award for housing allowance for 6 months of Kshs. $24000 \times 6(\text{months}) = 144,000/-$
39. Prayer (e) is for an Order for the Respondents to pay the Claimant's leave allowance for 3 years at Kshs. 8,000/- per year totalling Kshs. 24,000/-. There was no evidence of the claim and in any event the court finds that leave allowance would not apply as the officer was on suspension.
40. Prayer f is for an Order for the Respondents to reimburse the Claimant a sum of Kshs. 34,000/- plus interest. During cross examination when asked where he got the figure of Kshs. 34,000/- from, the Claimant told the court the amount was allowances due to him which were never paid. That he wrote to the employer. The Claimant admitted the claim was not approved and he was told it was not paid because he was on suspension. Consequently, the claim is not valid and is disallowed.
41. Prayer g is for an Order for the Respondents to pay the Claimant compensatory damages for unfair labour practice made against him, mental and emotional distress suffered to be assessed during hearing. The court found that the termination was procedurally unfair and it is apparent the Claimant was on unpaid suspension for inordinate long time beyond the public service policy of 6 months which is tantamount to unfair labour practice. The court finds compensation of the equivalent of 12 months salary justified compensation under section 49 of the *Employment Act* considering the unfair labour practice especially the indefinite suspension leading to lost opportunity of future employment, loss of income for months and unprocedural termination. The Claimant is awarded compensation for unfair labour practice and unfair termination equivalent of 12 months salary thus $12 \times \text{Kshs } 80,190$ total sum awarded Kshs. 962,280/-
42. Prayer (h) is for Order for the Respondents to pay the Claimant a transfer allowance of Kshs. 48,190/- The Claimant stated in his witness statement adopted as his evidence in chief in paragraph 6 that he was not paid his transfer allowance. The Respondent did not rebut the claim for transfer allowance in the replying affidavit. The Claimant is granted unpaid transfer allowance at Kshs. 48,190/-

Conclusion and Disposition

43. The court found that the Claimant was exposed to unfair labour practice and his termination from employment was procedurally unfair and on expiry six months of suspension the Claimant was



constructively dismissed from employment of the Respondents. The Court enters judgment for the Claimant against the Respondents jointly and severally as follows: -

- i. A declaration that the 1st Respondent's actions of suspending the Claimant indefinitely without any payment and the failure to conclude the disciplinary proceedings against the Claimant efficiently and expeditiously within 6 months as required under the Public Service Commission Human Resources and Procedures Manual of 2016 was unfair, unlawful and constituted an unfair labour practice by the Respondents contrary to Article 41 of the Constitution.
- ii. The Respondents to pay the Claimant housing allowance for 6 months of Kshs. 24,000x6(months)= 144,000/-
- iii. The Claimant is awarded compensation for unfair labour practice and unfair termination equivalent of 12 months salary thus 12 x Kshs. 80,190/- total sum awarded Kshs. 962,280/-
- iv. The Claimant is granted unpaid transfer allowance at Kshs. 48,190/-
(All the above award amounts are subject to statutory deductions)
- v. Interest is awarded at court rates from date of judgment until payment in full.
- vi. The Respondents to pay to the Claimant costs of the claim.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 14TH DAY OF JULY 2022.

J.W. KELI,

JUDGE.

In the presence of:-

Court Assistant– Brenda Wesonga

For Claimant–In Person

For Respondents– Absent

