



Murende v Meru County Investment & Development Corporation (Cause 31 of 2019) [2022] KEELRC 13115 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13115 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE 31 OF 2019
DKN MARETE, J
OCTOBER 31, 2022

BETWEEN

SOLOMON KIRAGU MURENDE CLAIMANT

AND

MERU COUNTY INVESTMENT & DEVELOPMENT CORPORATION RESPONDENT

JUDGMENT

1. This matter was originated by way of memorandum of claim dated September 23, 2021. It does not disclose an issue in dispute on its face.
2. The respondent in a response to memorandum of claim dated December 18, 2019 denies the claim and prays that the same be dismissed with costs.
3. The claimant further files a reply to the respondent response to the memorandum of claim dated January 28, 2021.
4. The claimant's case is that he is an Engineer by profession and registered as such under serial No. B5101.
5. It is the claimant's further case that he was initially an employee by Meru Central County Council and in such course received a letter of transfer to the respondent. This letter is dated May 12, 2015. The respondent therein appointed him as Head of Technical Services.
6. The claimant's other case is that his transfer was not allocated any job description despite having received a letter of transfer indicating that he was to take up the position of Head of Technical Services. His enquiry on this state of affairs bore no fruit.
7. The claimant's further case is that he remained for almost one year without any job description or job title and later came to learn that the position he had been transferred from Meru County Government to take up in the Respondent's office had been filled by another person, one Acquillino Thilange



who was also the Respondent's Managing Director's business partner. Interestingly, Mr.Thilange's professional qualification was Chemical Engineer which was off as he was the Head of Technical services a position that required an individual skilled in technical services more specifically. A construction engineer.

8. The claimant's further avers that around the month of October and November, 2015, the Respondent initiated the construction of a Petrol Station along Mwendantu Road, Meru County whereupon Mr. Thilange requested the claimant to prepare designs and bill of quantities for the Petrol station which he did satisfactorily. Upon approval of designs, an advert for construction ensued through Mr.Thilange in December 2015. Tender process completed and award made to Bonale General Construction and Suppliers Limited. Mr.Thilange and the Respondents MD acted as Respondents as Respondent's representative in the project. The claimant had no role in the project or even Respondent's office. He was only permitted to participate.

Further,

12. Around the months of April- May 2016, Mr.Acquillino Thilange was transferred from the Respondent's organisation to Meru County Revenue Board. The position of Head of Technical Services was rendered vacant and nobody was appointed to as his replacement. There was also no official office handover to another officer. On 8th June 2016, the claimant received a letter appointing him Director, Technical services in an acting capacity. He was to report to the Managing Director. Two months down the line, he received a memo attaching his employment contract from the Respondents Human Resource Manager. Two months down the line, he received a memo attaching his employment contract and requesting that he signs this by 24th August, 2016. Contract on transfer from his former position at the County Government as Chief officer where he was on permanent terms. His terms of engagement were as follows;

-Kshs.132,249.00 – Monthly pay

-Kshs.60,000.00-House allowance

-Kshs.20,000.00-other allowances

-30 days annual leave

-31% annual pay as gratuity

-Group Accident cover

-Telephone services

-Job Group B2

On 2nd September 2016, a memo on reporting to the Managing Director for appraisal, performance evaluation and other operational matters. It did not make reference to the claimants employment status. Responsibilities included;

- i. Undertaking all preliminary and detailed designs for various technical works of the corporation,
- ii. Defining technical specifications and parameters for works,
- iii. Preparing bills of quantities and provide technical estimates costs for various projects,
- iv. Participating and supporting other relevant departments with technical,
- v. Costing and other information for purposes of undertaking technical,



- vi. Economic and financial feasibility analysis for prospective investments projects by the corporation.
 - vii. Providing support in the procurement of technical services by the Corporation,
 - viii. Liaising with supplies of technical services and supervise all technical works,
 - ix. Providing technical support to business service directorate in undertaking feasibility studies and financial /economic analysis,
 - x. Preparing and presenting briefs and report to the corporation Management and the board,
 - xi. Providing leadership to the members of staff in the directorate and undertake any other responsibility assigned by the Managing Director.Placement of an advert for Technical Director – two days after the claimants signing of his employment contract. This was his position.Technical committee for takeover of the completed Petrol station formed.Function of inspection committee
 - i. Ensuring the correct quantity of the goods is received
 - ii. Ensuring that the goods, works and services me the technical standards defined as in the contract.
 - iii. Ensuring that the goods, works, services have been delivered or completed on time, or that any delay occasioned had been noted.
 - iv. Ensuring that all required manuals or documentation had been received.
 - v. Issuing interim or completion certificate or goods received notes as appropriate and in accordance with the contract.Construction okayed and handed over.Procession on annual leave by claimantMemo of 13th October 2016 from the Respondent complaining of
 - i. Omission of what was claimed to be critical components that were missing from the petrol station tender.
 - ii. Items from the bill of quantities that had been omitted
 - iii. The claimant was to inform whether any contract variations with respect to the petrol station contract had been effected and if at all necessary authorization, including the tender committee were granted before execution.
9. The claimant further avers that he replied to the internal memo on the same day. In his response the claimant wrote a memo addressing the following issues. That the bill of quantities was prepared after receiving instruction from Engineer Acquillino Thilange who was the Respondent’s Technical Director at the time without certain components since he informed the Claimant that the Respondent had a limited budget for the construction of the petrol station and therefore could not construct a fully-fledged petrol station. The claimant also explained that the variations the Respondent was accusing him of issuing unprocedurally were normal site instructions, issued in reference to the Agreement and conditions of Contract for Building Works published by the joint building council of Kenya April 1999 edition sub-sections 30.1, 30.2, 30.3 and 30.4.
10. The Claimant’s other case is summed up as follows;Claimant’s instructions to the Respondents ICT Officer to request a connection by the contractor.On 16 .11.2016, a memo on account of poor workmanship.On 17.11.2016 he responded to this.These repairs were done by contractorOn



22.12.2016, received a show cause letter citing professional negligence, violation of procurement law on the job accusations. This is as follows;

- i. Violation of procurement law on account of the claimant's actions thus exposing the corporation to sanctions by other regulatory authorities for non-compliance with the procurement laws.
- ii. Unprocedural issuance of contract variations to Messrs. Banale Limited without prior written approval from the tender committee thus exposing the Corporation to illegal contingent liabilities.
- iii. Negligence of professional duty or incompetence in rendering technical supervisory works leading to failing to execute an urgent remedial measure to ensure the major defects are technical defects are rectified in a manner that ensures prudence in the application and use of public resources. Continued threats of termination from the Managing Director due to his criticism of the manner he handled procurement and tendering process. On 3.01.2017, claimant writes to Ethics and ACC and Ombudsman, CAJ requesting for protection for managing director and threats of termination. On 09.01.2017, letter of disciplinary hearing later rescheduled to 17th January, 2017 and later 15th February, 2017. The claimant attended the disciplinary committee meeting on 15th February 2017. The disciplinary panel was comprised of Lilian Maina (Human Resource Manager), Sharon Kospkei (Legal Officer) and Jephitha Karuti (Corporation Accountant). The claimant presented his written submission to the committee but the panellist refused to accept the written submission. It is important to note that two members of the panel being the legal officer and the Human Resource Manager were also members of the Inspection and Acceptance Committee of petrol station project which had supervised and approved the work that the contractor had done on the Petrol Station. On 20.12.2017, he received a letter inviting him to the Board's determination on the disciplinary case scheduled for 27.02.2007. Attended, made out submissions but was forced to write an apology on remarks he had made on the managing director in his reply. Letter of 14.03.2017 terminating his employment. Variance between show cause letter and grounds for termination. Particulars of Irregularities in the claimant's disciplinary process
 - i. Failing to give the claimant an opportunity to appeal the decision of the Respondent's disciplinary committee contrary to the Meru Investment and Development Corporation disciplinary guidelines clause 5.2.2
 - ii. Failing to issue the claimant with relevant documents relating to the matter such as and the minutes of the disciplinary hearing and the disciplinary panel's recommendations which were necessary for the claimant's preparation for both the hearing and appeal.
 - iii. Subjecting the claimant to an impartial disciplinary hearing as the same members who formed the inspection and Acceptance Committee of the Petrol station project including Sharon Koskei (legal officer) and Lilian Maina (Human Resource Manager) made a composition of the disciplinary committee that heard the claimant's case contrary to the rules of natural justice.
 - iv. Irregularly introducing new issues during the disciplinary process that the claimant had no opportunity to respond to as they were not contained in the Respondent's show cause as sent by the Respondent's Human Resource contrary to Clause 5.1.3 of the guidelines of the Meru County Investment & Development guidelines on disciplinary procedure. Particulars of malice
 - a. Accusing the claimant of negligence of duty despite his actions being in line with his assigned duties as set out in his Role profile.



- b. Victimizing the claimant and tricking him into retracting statements continued in his response to your show cause letter and using the same retracted statements as grounds for his termination as seen in his termination.
 - c. Subjecting the claimant to an impartial cosmetic disciplinary process while all along the Respondent was targeting to terminate the claimant's services evidenced by the Respondent's action of advertising the claimant's position as vacant shortly after the claimant signed his employment contract. Particulars of loss
 - i. Loss of future earnings considering the claimant was 39 years of age at the time of his termination.
 - ii. Loss of reputation among his peers.
 - iii. Loss of career.
 - iv. Loss of future employment.
 - v. Mental health has deteriorated.
11. It is the claimant's penultimate case that by reason of the foregoing the claimant has suffered loss of dignity, mental health and financial strain at the Respondent's will despite offering his loyalty, time and productive years in diligent service to the Respondent. The period and circumstances leading to his termination have greatly injured his professional credit despite many acknowledged years of exemplary performance. The claimant's mental health has also deteriorated due to the pressure after losing his employment leading him to develop mental illness called depression.

He claims thus;

- a. 12 months' pay for unfair termination (Kshs.212,249x12) Kshs.2,546,988.00
- b. Service payment (2 months/year worked) Kshs.(212.249x2) 10) Kshs.4,244,980.00
- c. 2 months' notice pay (212,249x2) Kshs.424,498.00
- d. Leave pay for 50 unpaid leave days (6,298x 50) Kshs.314,900.00
- e. Pay for days from 1st to 14th March 2017 Kshs.106,125.00

Total Kshs.7,637,491.00

He prays thus;

- i. A declaration that the act of the Respondent withholding the evidence forming the basis of termination of the claimant is unfair, unlawful and against the rules of natural justice.
- ii. A declaration that the act of discrimination in the place of work on basis on the claimant's age is unconstitutional, unlawful and illegal and amounts to breach of contract of employment and deprivation of property.
- iii. 12 months' pay for unfair dismissal at Kshs.2,546,988.00
- iv. 2 months' notice pay at Kshs.424,498.00
- v. 2 month for every year worked for 10 year at Kshs.4,244,980.00
- vi. Leave pay for 50 unpaid leave days Kshs.314,900.00



- vii. Pay for days worked from 1st March 2017 to 14th March 2017 Kshs.106,125.00
 - viii. General, aggravated and exemplary damages for deceit, victimization, fraudulent misrepresentation.
 - ix. General, aggravated and exemplary damages and loss of career.
12. The Respondents case is a denial of the claim.
 13. It is her case that the claimant has grossly exaggerated and concealed the facts of this matter so as to appear a victim.
 14. Her further case is that the claimant was engaged as a chief officer in charge of roads and infrastructure in the County Government of Meru on a five (5) year contract lapsing of the exit of the 1st Governor appointing authority.
 15. The Respondent's other case is that the claimant transferred to the Respondents employ on 9th September, 2016 and was engaged on contract terms as Director, Technical services which he took up and performed.
 16. The Respondent further avers that claimant wilfully, carelessly and improperly his work that required the exercise of due diligence and that he took responsibility for the mistakes and errors that had occurred. Out of these deliberate omissions by the claimant including procurement irregularities, the petrol station project which was under the supervision of the claimant became the subject of investigations by the Ethics and Anti-Corruption Commission (EACC) thus exposing the Respondent to sanctions by EACC for non-compliance with procurement laws.
 17. The Respondent again answers paragraph 27 of the Memorandum of Claim by admitting that he issued a show cause letter to the claimant considering that he had offered unsatisfactory response to earlier letters. On inspection of the petrol station by the inspection committee, the project was found to be wanting and therefore the justification for a show cause letter to the claimant.
 18. The Respondent's other case is that due process at disciplinary process was pursued on the matter ending in termination of the claimant's employment. The termination is therefore sustainable and in terms of the Respondents Human Resource policy, November, 2016 Disciplinary Guidelines. This is expressed as follows;
 18. In response to paragraph 18, the claimant reiterates the contents of paragraph 43 and 44 of the memorandum of claim and avers that he was subjected to unjustifiable accusations by the Respondent. The claimant states that the process of his termination was not in accordance with due process. The claimant avers that the disciplinary manual used against the respondent was illegal as it had not been published in the Kenya Gazette and subjected to public participation as required by the Meru County Investment and Development Act 2014.
 19. The issues for determination therefore are;
 1. Whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful.
 2. Whether the claimant is entitled to the relief sought.
 3. Who bears the cost of this cause.
 20. The 1st issue for determination is whether the termination of the employment of the claimant by the Respondent was wrongful, unfair and unlawful. The claimant in his written submission dated 4th



May, 2021 submits in reiteration of his case as pleaded and presented. The claimant's submissions highlight the following defects of the disciplinary proceedings; That a board meeting was scheduled on 20th February, 2017 and attended by the chairman, Joel Kinua and members, Henry and Kinoti. The quorum of five members as per the regulations for such meeting was not met. During the meeting, the board members directed the claimant to write an apology to the Managing Director and retracting what they alleged were non-factual statements in the claimant's response to the notice to show cause dated December 30, 2016. The directions for an apology was with a promise to retain the claimant's employment with the Respondent. He complied with the directions on doing an apology. But this was due to coercion, duress and or undue influence or fear of losing his job. He later received a letter dated March 14, 2017 terminating his employment on 7 disciplinary offences whereas the notice to show cause had only 3. The claimant has upon termination of employment attempted to secure employment elsewhere but the circumstances of his dismissal have conspired and frustrated such efforts.

21. The claimant's submits that his termination of employment was procedurally and substantive unfair and lacked compliance with section 45 (2) of the *Employment Act*, 2007 which provides as follows;
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason-
 - i. Related to the employees conduct, capacity or compatibility
 - ii. based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”
22. The claimant further seeks to buttress his case by relying on the authority of *Walter Ogal Anuro vs Teachers Service Commission* (2013) eKLR where the court observed as follows;

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
23. It is his further case and submission that the Respondent failed to afford him a fair hearing during the disciplinary proceedings as this appeared premeditated and concluded from the onset. Again, the employment of coercion and trickery on the part of the Managing Director's request for an apology amounted to an unfair labour practice and contravened section 41 of the *Employment Act*, 2007 which comes out thus;
 1. 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.
 2. Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1).”
Emphasis added.



24. The Respondent submits a case of lawful termination of employment and denies non-compliance with the law as alleged and submitted by the claimant. In this she demonstrates the sequence and procedure pursued in the disciplinary proceedings and therefore compliance with sections 41 and 45 (2) of the Employment Act, 2007.
25. This matter tilts in favour of the claimant. Through and through, he has established and demonstrated a case of unlawful termination of employment whereby the Respondent failed to articulately pursue the law and procedure on termination of employment. The Respondent has not ably controverted this and has failed to adduce evidence to the contrary.
26. The conduct of the disciplinary proceedings was callous to the extreme. That the Respondent would request a desperate employee to re-track his answer to a show cause letter in return for retention of his employment and later use this to terminate the same employment is diabolic. I therefore find a case of unlawful termination of employment and hold as such.
27. The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having succeeded on a case of unlawful termination of employment he becomes entitled to the relief sought.
28. I am therefore inclined to allow the claim and order relief as follows;
 - i. One (1) months' salary in lieu of notice Kshs.212,249.00
 - ii. Ten (10) months' pay for unfair termination of employment at Kshs.212,249.00 x 10=.....Kshs.2,122,490.00
 - iii. Leave pay for 50 unpaid leave daysKshs.314,900.00
 - iv. Pay for days worked from 1st March 2017 to
14th March 2017Kshs.106,125.00
Total of claim.....Kshs.2,755,764.00
 - v. The cost of this cause shall be borne by the Respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Mr. Kanjama instructed by Muma & Kanjama Advocates for the Claimant.

Mr. Mogire holding brief for Kibanga instructed by Munga Kibanga & Co. Advocates for the Respondent.

