



REPUBLIC OF KENYA



**Ekirapa v Kaunya & another (Cause 34 of 2021)
[2022] KEELRC 12843 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12843 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 34 OF 2021
JW KELI, J
OCTOBER 13, 2022
[FORMERLY KISUMU ELR CAUSE NO. 84 OF 2019]**

BETWEEN

MATHEW EKISA EKIRAPA CLAIMANT

AND

OKU KAUNYA 1ST RESPONDENT

PARLIAMENTARY SERVICE COMMISSION TESO NORTH

CONSTITUENCY 2ND RESPONDENT

JUDGMENT

1. The claimant a former Teso North constituency officer manager upon termination of his employment by the 1st respondent *vide* memorandum of claim dated September 23, 2019 and lodged in court on September 23, 2019 sought the following awards:-
 - (a) Kshs 3739,651.50
 - (b) Costs of this suit and interest
 - (c) Certificate of service
 - (d) Interest on (a) and (b) above.
2. The claimant together with the memorandum of claim filed verifying affidavit sworn on September 23, 2019, claimant's list of witnesses, his witness statement and bundle of documents at page 10 – 46 of his bundle.
3. The claim was opposed by the 2nd respondent who filed memorandum of appearance dated February 27, 2020 appointing Arnold Angaya advocate.



4. The 1st respondent also entered appearance appointing Kimanga and Company Advocates to act for him and filed response dated December 18, 2020 in opposition to the claim.
5. The 2nd respondent filed chamber summons application dated February 27, 2020 seeking for the suit to be struck out as against it which application was ordered to be determined together with the suit.
6. The claimant filed issues for determination dated January 29, 2021 which the court adopted as the issues for determination in the suit *vide* court order of Justice Radido on the March 16, 2021.
7. The claimant filed further supplementary list of documents dated June 3, 2021 being copy of the bank statement.
8. The 2nd respondent filed further affidavit sworn by Michael Sialai CBS on the January 18, 2022.
9. The 1st respondent filed notice of motion application dated November 8, 2021 seeking stay of the proceedings pending hearing by arbitral tribunal. The court considered the application which was canvassed by way of written submissions and delivered its ruling dismissing the said application on the March 24, 2022.

The Claimant's Case

10. The claimant case was heard orally on the December 1, 2021 with the claimant testifying on oath as witness of fact. The claimant adopted his witness statement filed in court on September 23, 2019 as his evidence in chief, produced documents filed with the claim and marked them as exhibits 1 to 9 and the supplementary documents under list of June 3, 2021 as exhibit No 10. The claimant was cross-examined by counsel for the respondents. On re-examination the claimant closed his case same day.
11. After closure of claimant's case, counsel for the 2nd respondent indicated they had not been served with the supplementary document produced by the claimant and applied to be served and for the claimant's case to be re-opened for cross-examination purpose.
12. The court allowed the application.
13. Before the next hearing date, the 1st respondent filed an application for stay to proceed to arbitration which application was heard and determined *vide* ruling dated March 24, 2022.
14. The court resumed with hearing of the claimant's case on the May 25, 2022 when the claimant was cross-examined by counsel for 2nd respondent and the claimant closed his case.

1st Respondent Case.

15. The 1st respondent's counsel Ms Miranda indicated the 1st respondent was missing. The court marked as closed the 1st respondent case for being absent at the hearing on a date taken in court in the presence of the 1st respondent's counsel. The court found no credibility on allegation of a missing 1st respondent without any police report or any other evidence. The court took judicial notice that the 1st respondent was a sitting Member of Parliament and hence a public figure protected by government and cannot just go missing without official report.

2nd Respondent Case.

16. Counsel for the 2nd respondent informed the court that the 2nd respondent would rely on the replying affidavit dated February 27, 2020 in support of the chamber summons application of which they sought leave to be used as their evidence. The claimant's counsel objected stating they would be



prejudiced as no right of cross- examination. The court overruled the objection as affidavits are admitted as evidence and no basis was laid for the cross-examination.

17. The court admitted the filed replying affidavits by the 2nd respondents as their evidence in the suit.
18. The 2nd respondent proceeded to close its case.
19. The court gave directions for filing of written submissions.
20. The claimant's written submissions drawn by Omondi Abande & Company Advocates are dated June 6, 2022 and filed in court on the June 23, 2022.
21. The 1st respondent did not file written submissions.
22. The 2nd respondent's written submissions dated July 20, 2022 were drawn by Arnold Angaya advocate and filed in court on July 21, 2022.

Determination

23. The issues for determination are as per list of issues by the claimant dated January 29, 2021 and adopted by court on the March 16, 2021 to wit:-
 - a. Whether the respondents complied with the laid down procedures in dismissing the claimant.
 - b. Whether the reason for terminating the claimant was valid.
 - c. Whether the act of the 1st respondent of deducting the claimant's salary paid by the 2nd respondent was fair , just and conform with the rules of natural justice.
24. The 2nd respondent had filed a chamber summons application seeking for its name to be struck out for lack of privity of contract which issue will be determined in this judgment.

Whether there was privity of contract between the Claimant and 2nd Respondent.

25. The 2nd respondent submits that its is a constitutional office under article 127 of the *Constitution* of Kenya. That it is charged with the responsibility to facilitate functioning of parliament with respect to constituency offices. Public Service Commission allocates money for each member of parliament to hire staff and operate constituency office in their respective constituencies.
26. The 2nd respondent submits that the *Parliamentary Service (Constituency Offices) Regulations 2005* were enacted to guide members of parliament on running of the constituency offices. That the members of parliament employ own staff independent of parliamentary service commission.
27. That regulation 22 (supra) provides for recruitment of staff by members of parliament who determine their terms of employment and salary scales. That each member has voted monthly allocation for purposes of hiring staff under regulation 13(supra).
28. That the 2nd respondent has no role whatsoever on the recruitment and dismissal of staff under constituency offices who have their own funds and vote ends.
29. That the fact it paid the gratuity to the claimant ought not be construed it was acting as the employer. That during cross-examination the claimant stated that the basis of his claim was the contract of employment which he told the court indicated the member of parliament as the employer. That the said contract indicated that the employer shall be responsible for paying the salary of the person engaged as well as complying with the provision of the *Employment Act* and any other relevant laws.



30. The 2nd respondent in the circumstances submits no privity of contract. To buttress its submissions the 2nd respondent relies on the decision of the Court of Appeal at Mombasa civil appeal No 59 of 2014 *Parliamentary Service Commission v George Okoth Owour & 2 others* where the court held that:-

“The main aspect of doctrine of privity is that a person is not bound by a contract to which he is not a party. That in light of the provision in the contract of employment which identify expressly the 3rd respondent as the employer of the respondent, there was no need for the court to infer agency relationship between the appellant and the respondent. In so holding therefore the ELRC greatly misdirected itself”.

The above decision was applied with approval in Kisumu ELRC No 320 of 2014 -*Andrew Tubei Mulati v Hon Enock Kibungunchy and the Parliamentary Service Commission*.

31. In *Collins Omondi Gongo v Gideon Ochanda and 2 others* (2021) eKLR Justice Radido upheld the judgment of the Court of Appeal sitting at Mombasa in civil appeal No 59 of 2014 *Parliamentary Service Commission v George Okoth Owour & 2 others*) and held that the Parliamentary Service Commission role in the contracts between members of parliament and constituency staff at material time was governed by the *Parliamentary Service (Constituency Office) Regulations 2005*.
32. The 2nd respondent submits that the 3rd respondent merely facilitated the 1st respondent to pay the claimant his remuneration and therefore the court was unable to agree the 3rd respondent was liable for alleged breaches of contract. The court held that the 3rd respondent was wrongly enjoined in the process.
33. The 2nd respondent submits that the court ought to establish intention of the parties under the contract which was that the claimant was never its employee. That the claimant cannot rewrite contract.
34. The claimant submits that the question for the court to answer is on what basis the 2nd respondent through its clerk paid the claimant’s gratuity if there existed no employment relationship between the claimant and the 2nd respondent.
35. The court is bound by the decision of the Court of Appeal in relation to the instant claim the 2nd respondent relied on the decision of Court of Appeal in Mombasa civil appeal No 59 of 2014 *Parliamentary Service Commission v George Okoth Owour & 2 others* where the court held the contract of employment having expressly identified the 3rd respondent as employer there was no need for the court to infer agency relationship with appellant. That answers the question posed by the claimant in paragraph 35 above.
36. The court in the circumstances and with respect to the chamber summons application dated February 27, 2020 finds and determines that the 2nd respondent was improperly enjoined in the instant suit. No order as to costs. The conduct and relationship of the 2nd respondent and the 1st respondent is likely to mislead persons like the claimant that indeed they are their employers the contract terms notwithstanding like the fact of payment by the 2nd respondent of gratuity directly into the account of the claimant as was the case in the instant suit. For that reasons the court declines to award costs in the application to the 2nd respondent. Each party to bear own costs in the application. It is so ordered.

Whether the 1st Respondent complied with the laid down procedures in dismissing the Claimant.

37. Having found the 2nd respondent was erroneously joined in the suit the case stands now against the 1st respondent, the employer of the claimant under the contract of employment (exhibit 1).



38. The claimant's case was that he was *vide* letter dated April 23, 2019 served with verbal compulsory leave for 30 days and before the expiry of the 30 days issued with letter of termination of contract by the 1st respondent dated May 8, 2019 (exhibits 3 and 4 respectively). The claimant submit that the respondents did not produce evidence to challenge the averments by the claimant. That the evidence of the claimant conforms to the provisions of section 107 and 108 of the [Evidence Act](#) to wit:-

section 107

- (i) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (ii) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

section 108 states " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side".

39. The claimant submits that the termination did not comply with the provision of section 41 of the [Employment Act](#). To buttress its submission of unprocedural fairness the claimant relies on the decision in [Daniel Kiplgat Kipleibut and SMEP Deposit Taking Micro Finance Limited](#) (2016) e KLR where the court summarized the provision of section 41 of the [Employment Act](#) and in the case of [Mary Chemweno Kiptanui v Kenya Pipeline Company Limited](#) (2014)eKLR by Justice Monica Mbaru who having found the claimant was not given notice or awarded the right to be heard held that the process was unfair labour practice and in violation of section 41 of the [Employment Act](#).

40. The 2nd respondent submitted that notice was issued under the contract of employment. The submissions notwithstanding its application for misjoinder. The court finds and determines that in all cases of termination of contract the employee must be accorded right to hearing as provided for under section 41 of the [Employment Act](#). The 1st respondent is not exempt from compliance with the law by relying on the terms of contract between the parties. The contract cannot oust provisions of the statute.

41. The court finds and determines that the termination of contract letter dated April 23, 2019 did not follow procedural fairness. The claimant was entitled to notice of hearing of charges against him, hearing in the presence of fellow employee or union representative and their representation to be considered before the employer terminated the employment. These are mandatory steps under the law which every employer contemplating termination of employment must comply with. The court finds and determines there was unprocedural fairness in the termination of the employment of the claimant by the 1st respondent.

Whether the reason for terminating the Claimant's employment was valid.

42. For involuntary termination of employment of contract to be found to be fair it must, in addition to the procedural fairness, also comply with substantive fairness which is the reasons for the termination have to be valid as provided for under section 43. The letter of termination of contract of the claimant by the 1st respondent dated April 23, 2019 stated that the termination is in accordance with termination of engagement clause c (5) (1) of the contract. The said clause provides for notice in lieu for one month. The court finds and determines that is not the reason contemplated under section 43 of the [Employment Act](#).

43. Section 45 (2) (b) provides that the reason for the termination is a fair reason if related to employees conduct, capacity or compatibility or based on operation requirements of the employer. The claimant



testimony that he was terminated unfairly was not controverted by the employer who had the burden to justify the reasons for termination under section 47 (5) of the Employment Act. The court finds and determines no valid reason for the termination of employment of the claimant.

Whether the Claimant is entitled to reliefs sought.

Compensation

44. The court having found unfair and unlawful termination awards the claimant compensation under section 49 (i) (3) of the Employment Act. The court considered the determined period of employment being the term of service of the 1st respondent of 5 years and remaining period of service, the uncouth manner of ejecting the claimant from office, the unjustified compulsory leave, the lack of fault of the claimant and considered that maximum compensation was justified. The court awards maximum compensation equivalent of 12 months gross salary of 141,350 per month. Total award Ksh 1,696,200/-. The claimant is awarded compensation at total sum of Kshs 1,696,200/-.

Claim for gratuity

45. On claim for gratuity the same was paid and evidence produced in court. The claimant submits that this was less the amount of the gratuity he expected to be paid. The claimant has not demonstrated the error in the computation of his gratuity by the 2nd respondent. The gratuity was subject to statutory deduction which are not captured in the claim. That may explain the variance. The court finds no evidence before it to question the gratuity as paid by the Parliamentary Service Commission. The claimant is free to pursue the claim with the 2nd respondent who has already been struck off the case. The court disallows the claim.

Payment in lieu of notice

46. The same is due the court having found unfair termination as per contract of 1 month salary and is awarded for sum of Kshs 141,350/-.

Claim for misappropriated salary

47. On the claim for salary alleged to have been misappropriated by the 1st respondent, the claimant relied on appendix 9 which is salary payment list of total amount of Kshs 94,500/-. There is no proof that the said persons received the said monies or the said monies were personal monies of the claimant. The payment vouchers produced at page 45 and 36 belong to the constitutional office. There is no collaborating evidence to support the claim. The claim is in the nature of special damages and requires strict proof.

48. The claimant claims for Kshs 826,400/- yet the payment vouchers produced from the constituency office add upto Kshs 15,000/-. The court finds that the claim does not meet the burden of prove under section 107 of the Evidence Act and that the burden of proof under this item did not shift to the 1st respondent. The court finds and determined the claim is not proved.

Conclusion and Disposition.

49. The court enters judgment for claimant against the 1st respondent as follows:-

- i. Award of compensation for unfair and unlawful termination equivalent of 12 months total sum awarded for Kshs 1,696,200/-.
- ii. Notice pay of 1 month gross salary of Kshs 141,350/-.



- iii. Certificate of service to issue by 1st respondent pursuant to provision of section 51 of the *Employment Act*.
- iv. Interest at court rates from judgement date.
- v. Costs to the claimant to be paid by 1st respondent.

50. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 13TH DAY OF OCTOBER, 2022.

J. W KELI,

JUDGE.

In the Presence of :-

Court Assistant : Brenda Wesonga

Claimant : In Person Present

Respondent : Obware Holding Brief For Omnandi Advocate

1st Respondent Absent

