



**Nyamaika v Nyamira County Assembly & another (Cause 52 of 2020)
[2022] KEELRC 12735 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12735 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 52 OF 2020
S RADIDO, J
OCTOBER 5, 2022**

BETWEEN

GEOFFREY KEBASO NYAMAIIKA CLAIMANT

AND

NYAMIRA COUNTY ASSEMBLY 1ST RESPONDENT

NYAMIRA COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. Geoffrey Kebaso Nyamaika (the Claimant) was a prison officer until he was offered the position of Sergeant-at-Arms through a letter dated 20 November 2015 by the County Assembly Service Board of Nyamira (the Board).
2. The offer letter indicated that the appointment was on permanent terms.
3. On 2 December 2015, the claimant requested the Commissioner General of Prisons for a departmental transfer (Prisons Service to the County Assembly of Nyamira). The Prisons placed the request before the Public Service Commission.
4. However, no documentary evidence was placed before the Court that the Public Service Commission approved the request.
5. Nevertheless, the Board confirmed the Claimant's appointment on or around 29 June 2016.
6. On 19 December 2019, the Clerk of the County Assembly wrote to the Commissioner General of Prisons requesting him to transfer the Claimant's retirement benefits to the County Assembly because he (the Claimant) had been confirmed into the employment of the County Assembly Service Board on permanent and pensionable terms.



7. The next day, 20 December 2019, the Claimant wrote to the Public Service Commission seeking the transfer of service from Kenya Prisons to the County Assembly of Nyamira. In the said letter, the Claimant indicated that he had been serving under secondment with the County Assembly from December 2015 to December 2018.
8. On 27 December 2019, things took a turn, the Officer in Charge, Kisii Main Prison, wrote to the Claimant instructing him to report back to the Prison Service within 14 days because his 3 years secondment had expired on 7 December 2019 (the letter referred to an earlier letter dated 13 December 2019 recalling the Claimant to the Prisons Service).
9. On 24 February 2020, the County Assembly wrote to the Officer-in-Charge, Kisii Main prison, notifying him that the Claimant had been released with effect from 20 February 2020.
10. Despite the recall, the Commissioner General of Prisons wrote to the Public Service Commission on 19 August 2020, requesting that the Claimant's application for transfer of service from Prisons to the County Assembly be effected.
11. On 14 July 2020, the Claimant lodged a Memorandum of Claim with the Court, and he stated the Issues in Dispute as:

Unlawful summary dismissal, unfair termination and wrongful dismissal and withholding of the Claimant's dues.
12. The Respondents filed a Response on 13 August 2020, prompting the Claimant to file a Rejoinder on 18 September 2020. On 8 February 2022, the Court adopted the Issues in dispute as proposed by the Claimant.
13. The Cause was heard on 21 March 2022 and 26 May 2022. The Claimant and the Clerk of the County Assembly testified.
14. The Claimant filed his submissions on 15 July 2022 and the Respondents on 31 August 2022.
15. The Claimant identified the Issues for determination in the submissions as:
 - (i) Whether the position was advertised, and the interview was done before the Claimant was absorbed?
 - (ii) Whether the Claimant was on secondment?
 - (iii) Whether the claimant's departmental transfer from the prison services to the Nyamira County Assembly was effected?
 - (iv) Whether the claimant was unfairly terminated?
 - (v) Whether the claimant is entitled to the reliefs sought?
 - (vi) Who should pay the costs of the suit?
16. The respondents, on the other hand, identified the Issues as:
 - (i) Whether there was a contractual employment relationship between the claimant and the respondents?
 - (ii) Whether the claimant was unlawfully terminated by the Respondents from employment?
 - (iii) Whether the claimant is entitled to the prayers and reliefs sought in the Plaintiff?



- (iv) Who should bear the costs of this Claim?
17. The court has considered the pleadings, evidence, and submissions and isolated the real Issues for adjudication as examined hereunder.
- Was the claimant a permanent employee of the Nyamira County Assembly by the time of filing suit?
18. The claimant pleaded and admitted in his documents that he was on secondment from the Prisons Service to the County Assembly for 3 years, from 7 December 2015 to 7 December 2018. The Respondents admitted as much.
19. The contention, therefore, appears to be, what was the nature and tenure of the relationship between the parties after 7 December 2018.
20. The claimant, relying on a confirmation letter dated 29 June 2016, and another letter dated 19 December 2019 from the Clerk of the County Assembly, contended that his relationship with the Respondents was that of an employee on permanent and pensionable terms.
21. The court does not find the confirmation letter dated 29 June 2019 reliable to sustain the contention by the claimant.
22. The claimant's first contract was a 3-year contract on secondment. The mere fact that it was subject to confirmation after 6 months of probation did not ipso facto convert it from fixed-term of 3-years to one on permanent and pensionable terms.
23. In the court's view, the use of the words:
- you are hereby confirmed on permanent and pensionable terms as per your appointment letter dated 20th November 2015...
- were not sufficient to convert the nature of the relationship.
24. The claimant's 3-year secondment ended on 7 December 2018.
25. Neither of the parties produced a primary document, either in the form of a letter directed to the claimant or minutes of the County Assembly Service Board, to demonstrate that the claimant was absorbed into the establishment on permanent and pensionable terms.
26. Where primary contractual records are not available, it is open to the Court to consider secondary contractual documents.
27. The claimant also relied on the letter dated 19 December 2019. The court notes that it was addressed to the Commissioner General of Prisons and not the claimant. The next day after the letter, the Claimant wrote to the Public Service Commission requesting for transfer of service. By this date, the Claimant knew his transfer request had not been approved.
28. The claimant, logically, could not have been absorbed into permanent and pensionable terms by the Board before a decision or approval by the Public Service Commission of the request for transfer.
29. The aforesaid letter by the claimant seeking transfer of service had been preceded by a letter dated 13 December 2019 from the Officer-in-Charge, Kisii Main Prison, addressed to the claimant and instructing him to report back to the prison upon completion of the 3 years secondment. The letter must have been prompted by the spectre of the recall.



30. The parties did not bother to produce a copy of the letter of recall. The claimant did not deny receiving a copy of the recall letter (the parties made reference to other records which were not placed before the court).
31. The court further notes that the respondents had released the claimant back to the prison service on or around 20 February 2020.
32. On the state of the record, by the time the claimant filed the Cause, the Public Service Commission had not determined his request for transfer of service.
33. The claimant has now placed before the Court record(s) (letter dated 23 March 2021 from the Officer-in-charge Kisii Main prison to the Commissioner General suggesting that the Public Service Commission made a decision on the request for transfer of service through a letter dated 26 August 2020).
34. The court would, therefore, be acting in vain in making a decision already made by the Public Service Commission, which appears not to have been challenged.

Unfair/unlawful termination of employment

35. The claimant urged the court to find that his employment was unlawfully terminated on or around 24 February 2020 through a letter under the hand of the acting Clerk of the County Assembly.
36. The court has looked at the letter. It was written in response to a letter from the Prisons department addressed to the claimant instructing him to report to the prisons department and noting that he had not reported back to the department.
37. The letter informed the prison department that the claimant had been released to report on 20 February 2020.
38. The court is of the view and finds that the letter of 24 February 2020 by the acting Clerk was not a letter terminating the Claimant's appointment.
39. The claimant, in other words, did not prove that an unfair or unlawful termination of employment had occurred.
40. Salary in lieu of notice and compensation are, therefore, not remedies available to the claimant.
41. Before concluding, the court observes that it appeared to it like the parties kept certain information from it or documents close to their chests and which documents could have significantly assisted the court.

Conclusion and Orders

42. Arising from the above, the court doesn't need to examine the other issues raised by the claimant.
43. The court declines to grant any of the remedies prayed by the claimant. The Cause is dismissed. Each party to bear its own costs.
44. The claimant may wish to pursue the status of his employment with the Public Service Commission and the Prisons department.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 5TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIARB



JUDGE

Appearances

For Claimant Mwamu & Co. Advocates

For Respondents C.O. Ochoki & Co. Advocates

Court Assistant Chrispo Aura

