



Olute v County Government of Siaya & another (Employment and Labour Relations Cause E059 of 2021) [2022] KEELRC 13206 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13206 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E059 OF 2021
CN BAARI, J
NOVEMBER 17, 2022**

BETWEEN

MARY APIYO OMONDI OLUTE CLAIMANT

AND

COUNTY GOVERNMENT OF SIAYA 1ST RESPONDENT

CORNEL RASANGA AMOTH 2ND RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated August 12, 2021, and filed on August 23, 2021, the Claimant seeks judgment against the Respondents for the following reliefs:
 - a. A declaration that the Respondents' decision to terminate her employment was unfair, unlawful and unprocedural.
 - b. A declaration that the Respondents' action of terminating her employment violated her rights and fundamental freedoms as enshrined under Articles 27, 47 & 50(1) of the Constitution of Kenya and the provisions of the Employment Act.
 - c. Compensation for the rest of her would-be term at Kshs 6,157,250.00 (22 months* Kshs 279,875.00)
 - d. General damages for unfair, unlawful and unprocedural termination at Kshs 3,358,500.00 (12 months * 279, 875.00).
 - e. Unpaid salary for the month of September, 2020 at Kshs 279,875.00
 - f. One month's pay in lieu of notice being Kshs 279,875.00



- g. Unpaid leave allowance of Kshs 639,714.29 (48 working days).
 - h. Gratuity payable for 3 years.
 - i. General damages for reputation and emotional batter at Kshs 5,000,00.00.
 - j. Any other relief or order the Honourable Court may deem fit to grant.
2. The Respondent filed a Statement of defence to the Claimant's claim dated October 26, 2021 and filed on similar date.
 3. During the hearing, the Claimant testified in support of her case. She adopted her witness statement and produced a bundle of documents filed in the matter in support of her case.
 4. The Respondent presented one Mr Joseph Onyango Ogutu, to testify on their behalf. Mr Ogutu adopted his witness statement dated October 26, 2021, and produced documents filed in support of the Respondents' case.
 5. Submissions were filed for both parties.

The Claimant's Case

6. The Claimant's case is that she was appointed by the 2nd Respondent to the position of County Executive Committee Member of Education, Gender, Youth and Social Services, vide a letter dated January 31, 2018. It is her case that the appointment was subsequent to the approval by the County Assembly of Siaya.
7. It is the Claimant's case that her starting consolidated salary for the position was Kshs 259,875.00 per month, as had been determined by the Salaries and Remuneration Commission. The Claimant further states that as at the time of dismissal, her consolidated monthly gross salary stood at Kshs 279,875.009.
8. It is the Claimant's further case that subsequent to her appointment, the 2nd Respondent transferred her to the docket of Health and Sanitation in the same capacity, vide a letter dated March 9, 2018, and thereafter, she was transferred back to the docket of Education, Youth Affairs, Gender and Social Services in a letter dated July 30, 2018.
9. The Claimant states that she retained this position until her summary dismissal on September 28, 2020.
10. The Claimant states that on January 30, 2020, she received a show cause letter from the 2nd Respondent premised on allegations of abuse of office and dereliction of duty as CEC member of Education, Youth Affairs, Gender and Social Services.
11. It is her case that on February 5, 2020, she substantively responded to the show cause letter, and that the issue never resurfaced again and neither of the Respondents sought any clarification nor was there any subsequent communication in that regard.
12. The Claimant states that about 6 months later, on the morning of August 4, 2020, she was informed by the Chief Officer, Health; a Dr Omondi Owino, that she had tested positive for Covid-19, and was instructed to prepare to be collected for isolation immediately.
13. The Claimant states that she was taken to Bondo Hospital the same day where she fell terribly ill. The Claimant further states that this information was promptly relayed to the 2nd Respondent vide a text message, being the only communication medium available to the Claimant, and the message was duly acknowledged.



14. The Claimant states that she was admitted at Bondo isolation unit on the August 4, 2020, and subsequently transferred to Avenue Hospital in Nairobi where she was admitted from August 5, 2020, to August 14, 2020, in the high dependency unit. The Claimant states that she was later referred to home-based care from August 14, 2020, to September 2, 2020.
15. It is the Claimant's case that on September 2, 2020, she went for review and was given two days off duty after which she asked for 10 more days leave to fully recuperate. It is her case that she was legally entitled to the leave, and further that she reported back to work on September 22, 2020.
16. The Claimant states that in spite of being aware of her medical situation, the 2nd Respondent maliciously purported to draw a show cause letter dated August 4, 2020, against her, which letter required the Claimant to respond to the allegations thereto within Seven (7) days from the date of the letter. The Claimant contends that she was never served with the show cause letter, and even if she was, she would not have had the capacity to respond to it.
17. It is the Claimant's further case that in a letter dated September 28, 2020, the 2nd Respondent purported to dismiss her from office as the County Executive Committee Member for Education Youth Affairs, Gender and Social Services pursuant to Section 31 (a) of the County Government Act, on account of not responding to the show cause letter dated August 4, 2020.
18. The Claimant finally states that it is upon the aforestated facts that she instituted this Claim.

The Respondents' Case

19. The Respondents' case is that the Claimant was issued two show cause letters and that she responded to one letter, but that her response had gaps. It is the Respondents' further case that the Claimant was again issued another show cause dated August 4, 2020, which letter, she did not respond to leading to her summary dismissal.
20. It is the Respondents' case that they were aware that the Claimant had contracted Covid 19, but her show cause letter had already been signed as at the date when her covid test results returned positive.
21. The Respondents state that the Claimant was given sufficient time to recover, including additional leave days, which were approved by the Respondents.
22. The Respondents state that show cause letters were issued to various officers whose departments had underperformed in relation to the targets they set with the 2nd Respondent. It is the Respondents' case that each employee was required to respond to the show cause letter by themselves, but that the Claimant did not respond to hers.
23. It is the Respondents' case that the issues subject of the Claimant's show cause letter included wrangles in a technical institution that fell under the Claimant's docket, mismanagement, failure to respond to audit queries and failure to give a full account of the 1st Respondent's assets under the Claimant's docket.
24. The Respondents state that County Executive Committee Members have their own disciplinary mechanism for which the County Assembly cannot interfere with.
25. The Respondents state that the Claimant's show cause letter was dispatched to her department on August 4, 2020. It is the Respondents' case that the Claimant's disciplinary process was delayed until she resumed duty on September 22, 2020.



26. The Respondents state that the Claimant's termination was not arbitrary or capriciously done, but it was instead, informed by the 2nd Respondent's disappointment by her poor performance. The Respondents state that the Claimant abdicated her leadership role and was not running the department she was entrusted with to the required standard. It is the Respondents' assertion that the Claimant's inability to perform was established through transparent, fair and proper disciplinary procedure.
27. The Respondents state that they did not subject the Claimant to any form of discrimination, and that indeed none had been proved. It is the Respondents' further case that they became aware of the Claimant's covid-19 positive results after the show cause letter dated August 4, 2020, was issued.
28. It is the Respondents' case that the Claimant's claim that the show cause letter was based on her health status, hence discriminatory is not true for reason that show letter was not issued to her alone, but to all the County Executive Committee Members who had underperformed in their respective spheres, and they were all issued with show-cause letters. It is their case that the Claimant was not singled out.
29. It is the Respondents' case that other officers of the Respondents including the Claimant's fellow County Executive Committee members, contracted covid-19, but were not dismissed, and hence the show cause letters had nothing to do with the covid situation.
30. The Respondents further state that it is not sufficient for the Claimant to merely allege that she was discriminated against by her employer on account of her health status, she instead, must demonstrate to the court that indeed her dismissal was on account of her health status yet she has not tabled any evidence to that effect.
31. The Respondents' witness (RW1) told the court on cross examination, that the Claimant was not paid salaries for the last two months' worked for reason that she did not clear with the Respondent.
32. The Respondents pray that the suit be dismissed with costs.

The Claimant's Submissions

33. It is submitted for the Claimant that Section 31 of the County Government Act, does not confer the Governor with unfettered powers to dismiss County Executive Committee Members at whim, otherwise called the pleasure doctrine, instead, such powers are confined by the principles of accountability enshrined in the Constitution of Kenya and as such, must be exercised reasonably and judiciously. She called to her aid the holding in County Government of Narok & Another v Richard Bwogo Birir and another, Nakuru Civil Appeal No 74 of 2014 eKLR to support this position.
34. The Claimant further submits that this Honourable Court is clothed with the jurisdiction to determine issues of Constitutional violations alongside Employment and Labour Relation matters. She sought to rely in the holding in Abdikadir Sulciman v County Government of Isiolo & Another, Nyeri ELRC No 76 of 2015 eKLR for this proposition.
35. It is the Claimant's submission that her summary dismissal from employment without due process contravened the provisions of Article 27, 47 and 50 of the Constitution of Kenya, 2010.

The Respondents' Submissions.

36. The Respondents submit that Section 31 of the County Government Act states that the Governor may dismiss a County Executive Committee Member, and that the use of the word 'may' in this section denotes discretion given to the Governor to dismiss a County Executive Committee member. The Respondents further submit that this discretion applies even though it is fettered. They sought to rely in the holding in County Government of Nyeri & Another versus Cecilia Wangechi Ndungu [2015]



eKLR, cited in *County Government of Garissa & Another versus Idris Aden Mukhtar & 2 Others [2020] eKLR*, where the court stated that the pleasure doctrine applied to the extent that it was exercised reasonably and not arbitrarily and capriciously.

37. It is submitted for the Respondents that the county executive committee members are accountable to the Governor, in whom the buck stops on all issues of overall accountability of the county government.

Analysis and Determination

38. I have considered the pleadings, the witnesses' oral testimonies and the submissions by both parties. The issues that fall for determination are:
- i. Whether the Claimant was unfairly dismissed.
 - ii. Whether the Claimant is entitled to the remedies sought.
39. The question of whether or not a dismissal/termination is fair has largely been settled to depend on the employer's adherence or lack thereof to the tenets of fair procedure and the substantive justification for the dismissal.
40. The Claimant was issued two show cause letters. One that she responded to substantively like she says, and another that she denied ever receiving. The first show cause letter was not pursued, and she told the court that she assumed the Respondents were satisfied by her response to the charges against her.
41. The Respondents on their part through their witness (RW1), told the court that the Claimant's response to their first show cause letter had gaps, but did not proceed to require that she further explains her response, or that she be heard in relation to the charges. The issues subject of the letter were in my opinion left to rest, and I have no reason to awaken them.
42. Concerning the show cause letter of August 4, 2020, the Claimant told the court that she tested positive for Covid 19 on the same day, and that she was put in isolation at Bondo Hospital and later referred to Avenue Hospital in Nairobi where she was admitted from August 5, 2020, to August 14, 2020.
43. The Respondents confirmed that indeed they were aware that the Claimant had tested positive for Covid 19 on August 4, 2020, but that the show cause letter had already been signed and hand delivered to her department on the same day. The Respondent further confirmed that due to the Claimant's health situation at the time, she was medically incapacitated and could understandably, not have responded to the show cause letter.
44. The Claimant resumed duty from her sick leave on September 22, 2020, and was summarily dismissed on September 28, 2020. As correctly admitted by the Respondent, six days was a short period to have expected a response to the show cause letter. The Claimant was summarily dismissed nonetheless.
45. Fair hearing is not only a statutory, but also, a Constitutional requirement demanded of an employer in a termination/dismissal process. This requirement is anchored on Section 41 of the *Employment Act*, which states: -

' 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.'



46. The Respondents have made an attempt at relying on the provisions of Section 31 of the County Government Act, to justify the Claimant's summary dismissal. The Section states as follows:

' The governor—

- (a) May, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so.'

47. I do not wish to belabour the place of the pleasure doctrine in post 2010 Kenya. Article 236 of the Constitution put the last nail on the coffin of the pleasure doctrine in Kenya's public service; the doctrine is long dead. The only pleasure that the Executive wields, is in regard to nomination and appointment upon vetting. The Employment Act and the Constitution, demand that removal from public or state office is constitutionally chained with the rules of natural justice.

48. In *County Government of Narok & Another v Richard Bwogo Birir and another*, Nakuru Civil Appeal No 74 of 2014 eKLR, the Court of Appeal had this to say on the pleasure doctrine: -

' All persons holding public or state office in Kenya in the executive, the legislature, the judiciary or any other public body and in national or county government are servants of the people of Kenya. The court holds that despite the level of rank of state or public office as may be held, no public or state officer is a servant of the other but all are servants of the people. Thus, the court holds that the idea of servants of the crown is substituted with the doctrine of servants of the people under the new Republic as nurtured in the Constitution of Kenya, 2010.

The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya's public or state service.'

49. The Respondents no doubt violated the statutory and constitutional tenets of fair process in their summary dismissal of the Claimant. The Claimant was not accorded an opportunity to defend herself or respond to the charges levelled against her. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR*, the Court observed as follows:

' The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.'



50. Further, in *Onyango Oloo v Attorney General (1986-1989) EA 456*, the Court had this to say:

' A decision in breach of the Rules of Natural Justice is not cured by holding that the decision would otherwise have been right since if the principles of Natural Justice is violated, it matters not that the same decision would have been arrived at denial of a right to be heard renders any decision made null and void ab initio.'

51. The letter dismissing the Claimant from the service of the Respondents, refers to the show cause letter of January 5, 2020, which RW1 told the court did not inform the dismissal. The Respondents were in my view, out to dismiss the Claimant for whatever reason, and at whatever cost and without regard to the law on due process.

52. I find the Claimant's dismissal unlawful, unprocedural, and hence unfair.

Whether the Claimant is entitled to the reliefs sought

53. The Claimant's claim is for a declaration that the Respondents' decision to terminate her employment was unfair, unlawful and unprocedural, a declaration that the Respondents' action of terminating her employment violated her rights and fundamental freedoms as enshrined under Articles 27, 47 & 50(1) of the *Constitution* of Kenya and the provisions of the *Employment Act*, Compensation for the rest of the would-be term, General damages for unfair, unlawful and unprocedural termination, Unpaid salary for the month of September, 2020, One month's pay in lieu of Notice, Unpaid leave allowance of, Gratuity payable for 3 years, General damages for reputation and emotional batter, and any other relief or order the Honourable Court may deem fit to grant.

54. The court has found the Claimant's dismissal unlawful, unprocedural and hence unfair for violating the rules of natural justice.

55. This finding, entitles the Claimant to compensation in accordance with the provisions of Sections 49 and 50 of the *Employment Act*. (see *Benjamin Langwen v National Environment Management Authority (2016) eKLR.*)

56. The Supreme Court observed in the case of *Kenfreight (EA) Limited v Benson K Nguti [2016] eKLR* that the *Employment Act* provides for a number of remedies for unlawful or wrongful termination under Section 49, and it is up to the judge to exercise his or her discretion to determine whether to allow any or all of the remedies provided.

57. The Claimant has sought payment of 22 months' salary for the unexpired term of her contract. Section 49 of the *Employment Act*, 2007, caps compensation for unfair termination/dismissal at a maximum of 12 months. The Act does not provide for payment for the unexpired term of contract. This claim is dismissed for lack of legal basis.

58. The Claimant has further sought an award of 12 months' salary for unfair, unlawful and unprocedural termination. In *Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR* the court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.

59. The Claimant was in the service of the Respondents for two (2) and a half years. Her appointment letter did not expressly provide the term of her contracts. The letter instead, stated:

' You will serve at the pleasure of and the tour of duty of HE the Governor.'



60. The Governor's tour of duty, was to end in August, 2022, the 2nd Respondent having been on his second term at the time of the Claimant's dismissal. This thus means that had the Claimant not been unfairly dismissed, she would have ended her term in August, 2022. This is my view, justifies maximum compensation.
61. The Claimant is awarded 12 months' salary for unfair dismissal.
62. In regard to the claim for unpaid salary, RW1, confirmed to the court that the Claimant was not paid salary in the last two months that she was in the service of the Respondents. The Claimant has however only sought salary for the Month of September, 2020.
63. Being that parties are bound by their pleadings, the Claimant is awarded salary for the Month of September, 2020.
64. On the claim for payment of one-month salary in lieu of termination notice, the Claimant was evidently not issued with termination notice nor paid in lieu thereof.
65. I find the claim merited and the Claimant is awarded the statutory one-month salary in lieu of termination notice.
66. The Claimant further sought payment of unpaid leave allowance. This claim was not proved to be owing and the same is dismissed.
67. The Claimant also sought to be awarded service gratuity. She did not however serve the entire term and the amount awardable is only for the 32 months served, and which is hereby awarded.
68. Finally, the Claimant seeks Kshs 5,000,000.00 as general damages for reputation, physical and emotional batter. No evidence was led in support of this claim. The claim is devoid of legal basis and is hereby dismissed.
69. In sum, Judgment is entered for the Claimant and against the Respondents as follow: -
 - i. Payment of 12 months' salary as compensation for unfair dismissal at Kshs 3,358,500/-
 - ii. Unpaid Salary for the Month of September, 2020, at Kshs 279,875.00/-
 - iii. One (1) month's salary in lieu of notice at Kshs 279,875.00/-
 - iv. Gratuity at Kshs 419,812.50/-
 - v. Costs of the suit and interest at court rates.
70. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF NOVEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Umazi h/b for Mr. Walukwe for the Claimant

Ms. Ndeda present for the Respondents

Christine Omollo- C/A



