



**Shidemi v County Government of Migori & another (Appeal E038 of 2021)  
[2022] KEELRC 13061 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13061 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E038 OF 2021  
CN BAARI, J  
NOVEMBER 3, 2022**

**BETWEEN**

**DENNISH MAGOMERE SHIDEMI ..... APPELLANT**

**AND**

**COUNTY GOVERNMENT OF MIGORI ..... 1<sup>ST</sup> RESPONDENT**

**MIGORI COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. Peter Areri  
(SPM) delivered on 16th September, 2021 in Migori Chief Magistrate  
Employment and Labour Relations Court Cause No. 3 of 2018)*

**JUDGMENT**

1. The appeal herein arises from the Judgment rendered on September 16, 2021 by Hon Peter Areri (SPM), where he found that at the time the Appellant was suspended, his contract had lapsed, and thus, without an existing contract between the parties herein, a breach of contract could not arise and the Appellant's claim dismissed with costs.
2. The Appellant being dissatisfied with the decision of the Trial Court, lodged this appeal on October 15, 2021.
3. The appeal is premised on the grounds that:
  - i. The Learned Trial Magistrate erred in law and fact in that he misapprehended the Appellant's claim in the original suit and proceeded to apply wrong principles of law in the determination of that matter as instead of righting the wrong and punishing the Respondents herein for unlawful non-payment of salary for the period of January, 2018, to September, 2018, and general damages for unlawful termination of service and breach of employment contract, he rewarded the same by unfairly dismissing the Appellant's case.



- ii. The Learned Trial Magistrate erred in law and fact in that he wrongly overlooked the Respondent's admission that the Appellant was paid his salary from September, 2018, to December, 2018, and proceeded to suspend him as their employee by judging that there was no existing contract between the Appellant and the Respondents herein being that there was no renewal in writing of the same.
  - iii. The Learned Trial Magistrate erred in law and facts by failing to consider that the Respondents herein admitted not having served the Appellant with any dismissal and/or termination letter before they advertised and declared his position vacant, and up to the time when this matter was on trial, no termination letter had been issued.
  - iv. The Learned Trial Magistrate further erred in law and facts by not considering the relevant labour laws, International Labour Organization (ILO) Conventions and policies of fair hearing and disciplinary process that was supposed to be accorded the Appellant and was never accorded to him.
  - v. The Learned Trial Magistrate erred in law and fact by not considering constitutional rights of the Appellant whereby an employee has a right to be notified in writing of the administrative actions that affect his rights, as the case was, right to fair hearing and information of the decision of the hearing before his position was declared vacant.
  - vi. The Learned Trial Magistrate erred in law and facts in that he misapprehended the Appellant's claim in the original suit and proceeded to apply wrong principles of law by claiming that salaries paid to the Appellant herein from September, 2018, to December, 2018, were paid out of error and/or an act of benevolence.
  - vii. The Learned Trial Magistrate erred in law and facts by failing to have regard to the Appellant's evidence, written submissions and judicial authorities.
4. The Appellant prays that the appeal be allowed and the judgment of the Hon Peter Areri (SPM), delivered on September 16, 2021, be set aside, and this Court be pleased to arrive at its own judgment allowing the Appellant's memorandum of appeal.
  5. Parties canvassed the appeal through written submissions. Both parties filed their submissions.

### **The Appellant's Submissions**

6. It is submitted for the Appellant that the Respondent's action of giving the Appellant duties to perform, paying him salary and issuing him with a suspension letter, confirms that the Appellant and the Respondents had an employer-employee relationship even if the said contract had not been renewed in writing. It is submitted that by their conduct, both parties acknowledged and presumed that the terms and conditions of the previous contract were still applying.
7. The Appellant further submits that this Court finds that by conduct, the Appellant and the Respondents had renewed the employment contract and by the time the Appellant was being suspended, both the Appellant and Respondents believed to be in a contractual relationship.
8. It is the Appellant's submission that disciplinary control in the County Government for staff employed by the Public Service Board, is a mandate of the Public Service Board directly through the Secretary who is the CEO or through the member of the Board on the delegation in writing.



9. The Appellant submits that there was procedural fault in the way the disciplinary action was carried out against him being that from the beginning; the author of the suspension letter did so without express authority from the Secretary, Migori County Public Service Board or the Public Service Commission.
10. The Appellant submits that there was malice in the disciplinary process taken against the Appellant, as the suspension letter was supposed to be issued after the Appellant had been interdicted. It is further submitted that the matter had been reported and needed investigation, and no conviction or culpability on the part of the Claimant had been registered.
11. The Appellant submits that he was absorbed by Migori County from Ministry of Health which had employed him, and thus Section 138 of the County Government Act is relevant in this matter and thus he was subject to the provisions of the Public Service Code of Regulations Revised in 2006.
12. It is the Appellant's submission that the Respondents through their agents, breached the employment contract they had with the Appellant by suspending him through an unauthorized officer, refusing to pay him his allowances during suspension, refusing to report to the supervisor during his suspension and advertising his position before hearing of his case.

### **The Respondents' Submissions**

13. It is submitted for the Respondents that the Appellant was employed on a fixed term contract of one year renewable at the instance of the Respondents. It is further submitted that at the end of the Appellant's contract in September, 2017, neither the Respondents nor the Appellant invited the other party to execute a new employment contract for the period beginning September, 2017, and ending in September, 2018.
14. The Respondents submit that the Appellant's fixed term contract was automatically extinguished at the end of September, 2017, and the same had not been officially renewed by the Respondents. It is further submitted that at the end of all contractual employments, a contract terminates automatically, in the face of such termination; an advertisement must be put up in the spirit of the rule of law and participation of the people.
15. The Respondents submit that when an employer institutes disciplinary proceeding through a suspension, an employee in public service is only entitled to a full house allowance and medical benefits but no basic salary. It is further submitted that this only applies where there is in place a valid employer-employee relationship.
16. The Respondents submit that the Appellant did not follow due process before filing the suit subject of this appeal, for reason that Section 77 of the County Government Act, gives every employee within the County Government the right to appeal to the Public Service Commission.
17. It is further submitted for the Respondents that the Appellant came to court prematurely being that he filed a suit without any final communication from his employer. It is submitted that an advertisement cannot take the place of a dismissal and/or termination of employment letter.
18. It is the Respondents' submission that the remedies sought in this Appeal are not due to the Appellant and the appeal should be dismissed.

### **Analysis and Determination**

19. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal, are summarized into the following three grounds:



- i. The Learned Trial Magistrate erred in law and facts in judging that there was no existing contract between the Appellant and the Respondents for reason that there was no renewal in writing of the Appellant's contract
  - ii. The Learned Trial Magistrate erred in law and facts by failing to consider that the Respondents admitted not having served the Appellant with any dismissal and/or termination letter before they had advertised and declared his position vacant and up to the time when this matter was on trial, no termination letter had been issued.
  - iii. The Learned Trial Magistrate erred in law and facts by not considering the relevant labour laws, International Labour Organization (ILO) Conventions and policies of fair hearing and disciplinary process that was supposed to be accorded the Appellant.
20. On the question of whether there existed an employment relationship/contract between the Appellant and the Respondents, the Trial Court concluded that the Appellant's contract having been for one year, lapsed on September 30, 2017, and therefore concluding that the parties herein did not have an employment relationship.
  21. The letter suspending the Appellant is dated January 23, 2018. This in my view confirms that the Appellant was still in the service of the Respondents four months after the lapse of his contract.
  22. Also produced in evidence is a letter dated August 4, 2014, renewing the Appellant's contract for a further one year. This is an indication that the Appellant's contracts of service were not fixed term as was found by the Trial court, but were instead, renewable, and were renewed from time to time. It is no wonder the Appellant continued working up to January, 2018, when the last contract he had lapsed in September, 2017.
  23. The Respondent did not terminate or communicate their intention not to renew the Appellant's contract when it lapsed, which created legitimate expectation that the contract was, or would be renewed. In my view, the Appellant's contract was constructively renewed.  
  
Further, if indeed there was no contractual relationship between the parties herein, why would the Respondents take disciplinary action against the Appellant if they thought him a non-employee?
  24. It is my view that owing to the frequent renewal of the Appellant's contracts, there was a presumption that the Appellant's contract would be renewed for him to have continued working and receiving salary after the lapse of his last contract. Section 2 of the *Employment Act*, defines a contract of service as; -  
  
“... an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;”
  25. There are various tests that are applied to determine the existence or lack thereof of an employment relationship (See *Christine Adot Lopeyio v Wycliffe Mwathi Pere [2013] eKLR*). One of them is the control test, where a servant is considered to be a person subject to the command of the master as to the manner in which he or she does the work assigned to them. Without a doubt, for his entire period in the service of the Respondents, the Appellant was under the command of the Respondents in the way he conducted his work.
  26. For the reasons foregone, I find and hold that contrary to the finding of the Trial Court, there was an employment relationship between the Appellant and the Respondents.



27. On the grounds of dismissal/termination and the Appellant's right to a fair hearing in accordance with the law, the suspension of the Appellant set in motion a disciplinary process which the Respondent was under duty to carry to its logical conclusion.
28. The Respondents constituted an ad hoc committee to investigate the Appellant's misconduct, but decided along the way to assume the contract expired without concluding the disciplinary process. This is improper handling of an administrative processes as the employee deserves closure and the employer must finish what she/he started.
29. The suspension letter cited issues of misconduct and for which the Appellant rendered a response, and which in turn, should have culminated in a hearing of the Appellant and a subsequent termination if found culpable.
30. It is my view that the Respondents violated Section 41 of the *Employment Act*, 2007, for their failure to take the Appellant through the disciplinary process as required by law. In *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR*, the Court observed:

“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.”

31. The Respondents' assertion that the Appellant filed suit prematurely premised on the fact that they had not communicated their decision following the appellant's suspension, confirms that they were unsure of the Appellant's employment status, having told the court that the Appellant's contract had lapsed.
32. In conclusion, the appeal herein is allowed and the Judgment of the Trial Court, delivered on September 16, 2021, is set aside, and substituted therewith the following orders:
  - a. A declaration that there was an employment relationship between the Appellant and the Respondents.
  - b. An order for payment of six (6) months salary as damages for the unfair termination
  - c. The Respondents will bear the costs of the appeal
33. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**CHRISTINE N BAARI**

**JUDGE**



Appearance:

Mr. Mboya present for the Appellant

N/A for the Respondents

MS. Christine Omollo - Court Assistant.

