



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 261 OF 2018

COLLINS OMONDI OJONYO.....CLAIMANT

VERSUS

HON DR GIDEON OCHANDA.....1st RESPONDENT

DENNIS OCHIENG.....2nd RESPONDENT

PARLIAMENTARY SERVICE COMMISSION.....3rd RESPONDENT

JUDGMENT

1. On 18 June 2018, Dennis Ochieng, as the Bondo Constituency Manager (the 2nd Respondent), wrote to Collins Omondi Ojonyo (the Claimant), notifying him that he had been suspended until the conclusion of investigations by the Police on allegations of fraud.
2. The Claimant was aggrieved. He instituted these legal proceedings against Hon Gideon Ochanda (1st Respondent), the 2nd Respondent and the Parliamentary Service Commission (the 3rd Respondent), alleging that the suspension was unlawful and a breach of contract.
3. The Claimant also filed a Motion under a certificate of urgency.
4. On 8 August 2018, the 3rd Respondent filed a Response to the Claim and Motion seeking that it be struck from the Cause.
5. On 16 August 2018, the Claimant filed an Amended Memorandum of Claim. On 12 September 2018, the 2nd Respondent informed the Constituency Liaison Officer that he had terminated the Claimant's employment with effect from July 2018.
6. The Claimant sought the following reliefs in the Amended Memorandum of Claim:
 - (i) A mandatory order to compel the 1st, 2nd and 3rd Respondents, their agents, servants, employees, assigns, personal representatives and/or successors to pay all outstanding salaries and/or emoluments payable to the Claimant with effect from April 2018.
 - (ii) A mandatory order to compel the 1st, 2nd and 3rd Respondents, their agents, servants, employees, assigns, personal representatives and/or successors to reinstate the Claimant to the position of Divisional Coordinator – Bondo Constituency.
 - (iii) A permanent injunction to restrain the 1st, 2nd and 3rd Respondents, their agents, servants, employees, assigns, personal representatives and/or successors from suspending, demoting, interdicting, dismissing, withholding salaries and emoluments and/or any other unlawful manner interfering with the Claimant's employment.
 - (iv) The costs of this Cause to be borne by the 1st, 2nd and 3rd Respondents jointly and severally.
7. When the parties appeared in Court on 3 October 2018, the Court directed that in order to avoid delays, the Cause proceeds to hearing on the merits.
8. As a result, the 1st and 2nd Respondents filed a Joint Statement of Response on 29 October 2018.
9. On 28 May 2019, the 3rd Respondent filed what it referred to as Affidavit in Response to the Claim.

10. The Cause was heard on 2 December 2020 when the Claimant and the 2nd Respondent testified and closed their cases.
11. An application by the 3rd Respondent for adjournment was declined, and its case was closed.
12. Pursuant to Court directives, the Claimant filed his submissions on 2 March 2021 (should have been filed and served by 10 January 2021), the 1st and 2nd Respondents on 2 March 2021 (should have been filed and served by 10 February 2021). The 3rd Respondent had filed its submissions on 17 February 2021.
13. The Claimant raised 3 Issues for determination in his submissions:
 - (i) Whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondents?
 - (ii) Whether the Claimant is entitled to compensation for unlawful, unprocedural and unfair termination from employment as prayed for in the Amended Memorandum of Claim?
 - (iii) Who should pay the costs and interest of the suit?
14. The 1st and 2nd Respondents, on their part, identified the Issues for determination as:
 - (i) Whether the Claimant improperly suspended?
 - (ii) Whether the Claimant is entitled to reinstatement?
 - (iii) Whether the Claimant is entitled to costs?
15. The 3rd Respondent identified 3 Issues in its submissions:
 - (i) Whether there exists a nexus or contractual relationship between the Claimant and the 3rd Respondent that would give rise to a claim against the 3rd Respondent based on unfair dismissal and/or termination of employment under the operations of Kenya's labour laws and relevant contractual and other regulations of a contract executed between the Claimant and the 1st Respondent?
 - (ii) Whether the Claimant's termination of employment by the 1st Respondent was lawful?
 - (iii) Who is liable to pay costs?
16. The Court has condensed the Issues as examined hereunder.

Privity of contract between the Claimant and the 3rd Respondent

17. The Claimant entered into a contract with the 2nd Respondent on 2 October 2017. The contract provided that the 2nd Respondent was the employer.
18. While joining the 3rd Respondent as a party, the Claimant contended that the 3rd Respondent had been joined as the *financier, facilitator and coordinating national government entity that finances the 1st Respondent to employ and pay salaries and emolument to members of staff of the constituency office.*
19. The Parliamentary Service Commission's role in contracts between members of the National Assembly and constituency staff at the material time was governed by the Parliamentary Service (Constituency Office) Regulations, 2005.
20. Regulation 22 defines an employer. With that definition, there is no doubt in the mind of the Court that the employer of the constituency staff is the local member of the National Assembly and not the Commission.
21. The employment status of these staff has also been the subject of litigation up to the Court of Appeal.
22. The Court of Appeal in *Parliamentary Service Commission v George Okoth Owuor & Ors* (2015) eKLR opined that there was no privity of contract between the Commission and constituency staff employed by a member of the National Assembly.
23. The 3rd Respondent merely facilitated the 1st Respondent to pay the Claimant his remuneration (evidence of payment vouchers to Bondo Constituency office were filed). The Court is, therefore, unable to agree that it would be liable to the Claimant for the alleged breaches of contract.
24. The 3rd Respondent was wrongly joined to the proceedings.

Unlawful suspension

25. The Claimant was suspended without pay through a letter dated 18 June 2018.
26. Under the common law, for the suspension of an employee without pay to be lawful, it must be anchored on a contractual clause or be underpinned by a specific statute (see *McKenzie v Smith* (1976) IRLR 345 and *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR).
27. The Respondents did not disclose to the Court the source of the power which was used to suspend the Claimant without pay and without a set duration.
28. The contract provided for interdiction on half-pay and not a suspension without pay.
29. The Court finds that the suspension without pay was unlawful.

Unfair termination of employment

30. The gravamen of the Claimant's plea in the initial Memorandum of Claim was not unfair termination of employment but unlawful suspension.
31. In the Amended Memorandum of Claim, there was equally no precise plea of unfair termination of employment if, by the suspension, the Claimant believed there was a repudiation of contract amounting to unfair termination of employment.
32. During oral testimony, the Claimant did not seek to amend the Memorandum of Claim to include a cause of action for unfair termination of employment.
33. By this time, there was already on record a letter by the 1st Respondent dated 12 September 2018 attesting to the termination of the Claimant's employment.
34. The Court, therefore, declines to entertain the action for unfair termination of employment as urged in the submissions.

Appropriate relief

35. The Claimant's contract was frustrated, and it would be impractical on the obtaining state of the record to grant an order of reinstatement or a mandatory injunction. The relationship between the Claimant and the member of the National Assembly was more personal than would obtain within large organisations.
36. The most efficacious relief, in the view of the Court, is to award the salaries the Claimant would have earned from 18 June 2018 (date of suspension) to 28 May 2019 (date when the letter of termination was filed in Court).
37. The Claimant's monthly remuneration was Kshs 20,200/-).

Salary from April 2018 to (date of suspension)

38. The Claimant stated in his written statement, which was adopted as part of the evidence, that he was not paid salaries from April 2018. The Respondents did not rebut the testimony by the production of pay records, and the Court finds that the Claimant was entitled to salary for April and May 2018 at a monthly rate of Kshs 20,200/-.

Conclusion and Orders

39. The Court finds and declares that the suspension of the Claimant was unlawful, and he is awarded:

- (i) Suspension salary Kshs 111,100/-.
- (ii) April and May 2018 Salary Kshs 40,400/-

TOTAL **Kshs 151,500/-**

40. The Claimant did not file submissions within agreed timelines. He is denied costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 17th day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mr Lawi instructed by Achola Jaoko & Co. Advocates

For 1st and 2nd Respondents Mr Mutemi instructed by Mutemi Sumbi Advocates

For 3rd Respondent Mr Angaya instructed by Wangechi Thanji Advocate

Court Assistant Chrispo Aura