



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 282 OF 2018**

**LUCY ATIENO MATENGO.....CLAIMANT**

**v**

**COUNTY PUBLIC SERVICE BOARD,**

**KISUMU.....1<sup>st</sup> RESPONDENT**

**H.E. PROF PETER ANYANG NYONGO.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Lucy Atieno Matengo (the Claimant) was appointed as Chief Officer, Gender, Culture and Sports for a term of 5-years through a letter dated 19 September 2014 by the County Government of Kisumu. The Claimant was confirmed on 26 January 2017.
2. On 24 August 2017, the Governor sent the Claimant on compulsory leave to enable him to evaluate her performance and reorganise the county government.
3. The compulsory leave was followed by a letter dated 26 September 2017 informing the Claimant of her contract's termination. The reason given was the re-organisation of the county government.
4. The Claimant accepted the termination of her contract through a letter dated 18 December 2017, and at the same time, she asked for the computation and payment of her benefits.
5. The County Secretary acknowledged receipt of the letter on 15 January 2018 and advised the Claimant that her final dues would be processed and further that she had been released for re-absorption by her former employer.
6. On 15 August 2018, the Claimant sued the County Public Service Board (the Board) and the Governor alleging unfair employment termination and breach of contract.
7. Upon service, the Respondents filed a Response to the Statement of Claim and Motion seeking that the Cause be struck out for want of jurisdiction. The objection was anchored on section 77 of the County Governments Act.
8. In a Ruling delivered on 2 May 2019, the Court dismissed the Motion, and this paved the way for the hearing of the Cause.
9. The Claimant testified on 2 November 2020, while the Chief Executive Officer of the County Public Service Board testified on 15 December 2020.
10. The Claimant filed his submissions on 8 February 2021 (should have been filed and served by 30 January 2021) while the Respondents submissions were not on record.
11. The Claimant identified the Issues for adjudication as:
  - (i) Whether or not the Claimant was unfairly terminated?
  - (ii) Whether or not the Claimant is entitled to terminal dues of Kshs 5,523,293/-?
  - (iii) Who should bear costs?

12. The Court has considered the pleadings, evidence and submissions.

### **Unfair termination of employment**

13. The Claimant challenged the fairness of the termination of her contract on the grounds that she was not subjected to due process contrary to the protections set out in sections 41, 43 and 45 of the Employment Act. She also asserted that no valid reasons were not given.

14. In defending the fairness of the separation, the Respondents contended that Claimant's contract lapsed upon her requesting to be released through the letter dated 18 December 2017.

15. The Respondents' contention cannot be correct because the County Secretary had on 26 September 2017 expressly informed the Claimant of the termination of her contract.

16. The Claimant was a public officer and was thus assured of the protections granted all public officers by Article 236 of the Constitution as well as by section 41 of the Employment Act, 2007.

17. The Respondents did not afford the Claimant an opportunity to make representations before making the decision to bring the contract to an end, and the Court finds that the decision was unfair.

18. Further, the Respondents did not lead any evidence as to why the re-organisation of the county government led to the termination of the Claimant's contract. If any performance evaluation was conducted, the results were not produced in Court.

19. An advocate represented the Claimant. She did not pray for any remedy in respect of the unfair termination of employment and, therefore, the Court will not award any.

### **Breach of contract/statute**

#### **Salary for November and December 2017**

20. The Claimant's employment was terminated with effect from 26 October 2017, and in the circumstances, she cannot validly claim salaries for November and December 2017.

#### **The difference in salary from January 2018 to September 2019**

21. The Claimant sought Kshs 2,474,829/- which she labelled difference in salary from September 2018 to September 2019.

22. The Court understands this head of the claim to be the salary the Claimant would have earned had she served her contract to expiry.

23. The termination of the Claimant's contract was devoid of any due process. She had a legitimate expectation of serving the contract to expiry.

24. The Claimant admitted that she went back to her former employer on 22 January 2018.

25. In the circumstances, the Court is of the view that an award equivalent to the salary the Claimant would have earned from October 2017 to January 2018 when she re-joined her erstwhile employer would be appropriate. The Court has also taken into consideration that it has not awarded any compensation.

26. The Claimant was earning Kshs 226,380/- and the Court awards Kshs 905,520/-.

### **Gratuity**

27. The Claimant's contract provided for gratuity at the rate of 31% of the basic salary. The Claimant did not serve the full tenure of the contract but would be entitled to *pro-rata* gratuity for the period 19 September 2014 to 26 October 2017, a period of 3 years.

28. The Claimant's monthly basic salary was Kshs 146,380/- making a yearly basic salary of Kshs 1,756,560/-. For the 3-years, the Claimant earned a basic salary of Kshs 5,269,680/-. 31% of the cumulative basic salary is Kshs 1,633,600/-.

29. The Court awards the Claimant Kshs 1,633,600/- as gratuity.

### **Conclusion and Orders**

30. The Court finds and declares that the termination of the Claimant's contract was unfair but declines to award compensation as it was not pleaded.

31. The Claimant is however entitled to and is awarded:

(i) Lost salary Kshs 905,520/-

(ii) Gratuity Kshs 1,633,600/-

**TOTAL Kshs 2,539,120/-**

32. The Claimant did not tender any explanation for the late filing of submissions. She is denied costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 7<sup>TH</sup> DAY OF APRIL 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Claimant Mr Achura instructed by A.E. Kiprono & Associates

For Respondent Mr Amondi instructed by Amondi & Co. Advocates

Court Assistant Chrispo Aura