



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO.78 OF 2018

(Before D.K.N.Marete)

LEONARD MAJAU MIRITI F M'MIRITI

Alias LEONARD MIRITI.....CLAIMANT

VERSUS

THARAKA NITHI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

COUNTY GOVERNMENT OF THARAKA NITHI.....2ND RESPONDENT

JUDGMENT

This matter come to court through a Statement of Claim dated 4th October, 2018. It does not disclose an issue in dispute on its face.

The Respondent in an Answer to Claim dated 3rd May, 2019 denies the claim and prays that it be dismissed with costs.

The Claimant's case is that he was first employed on a permanent and pensionable basis on or about 13th September, 1985 and worked with the Ministry of Education in Nairobi.

He was posted to Meru District Hospital on 2nd May, 2002 where worked for about three years before another posting to Isiolo District hospital vide a letter dated 30th June,2005.

The Claimant's further case is that on or about 19th March, 2014, he requested for a transfer from Isiolo District Hospital to Tharaka Nithi County due to his health condition and nearness to his home. The request was approved and he was released to report to the County in a letter from the County Director of Health dated 7th May, 2014.

His further case is that at his new place of work and vide a posting letter dated 8th June, 2014, he was officially assigned to work as Health Administrative Officer at Chuka Level 4 Hospital where he served dedicatedly.

The Claimant's other case is that due to his exceptional hard work, he was made part of County Health Management as County Health Administrative Officer in charge of Rural Health facilities. Here, he excelled in his performance of duty and was promoted to Senior Health Administrative Officer and deployed to the Office of the County Governor by the County Secretary to perform the duties of a transport officer in which he also excelled.

The Claimant's further case is that vide a letter dated 5th September, 2017, he requested for a transfer from Tharaka Nithi County to Meru County which was near his family to enable him get good care due to his poor health. Lucy Karimi on 7th September, 2017 did a letter of no objection to his transfer dated 7th September, 2017. This was followed by a letter dated 8th September, 2017 from the County Secretary to his Meru County counterpart assuring him that he was willing to release the Claimant if there was a vacancy over there.

The Claimant's other case is that, shockingly, while still in office, he received a letter dated 8th September, 2017 informing him of his termination from employment with effect from 8th August, 2017. He was later forced to leave office even without carrying his personal effects in the office or handing over.

The Claimant further avers that the Respondent refused to pay him for the months of August and September, 2017 despite having worked yet he was servicing a loan of Ksh.666,352.28 and a family to take care of.

He submits and avers that this was an unfair labour practice and a contravention of Section 43 and 45 of the Employment Act, 2007 besides being a violation of his constitutional rights and fundamental freedoms under Article 41(1) and (2)(a) and 47 (1) and (2) of the Constitution of Kenya 2012.

In conclusion, the Claimant avers despite numerous visits to the Respondent's offices for hearing and resolution of his grievances, the Respondent have ignored his overtures.

He prays as follows;

a) A declaration that the 1st Respondent's letter dated 8th September, 2017, terminating the Claimant's employment contravenes the Claimant's rights and fundamental freedoms guaranteed under Articles 41(1) and (2) (a) and 47(1) and (2) of the Constitution of Kenya and the statutory rights to fair labour practices secured under Section 43 and 45 of the Employment Act, Cap 226, Laws of Kenya and is therefore, unconstitutional, unlawful, contrary to the rules of natural justice, unprocedural, null and void ab initio and of no legal effect.

b) An order compelling the Respondents to forthwith reinstate the Claimant to his position of a Senior Health Administrative Officer – Job Group L as per his letter of deployment and let him continue servicing in that capacity without any form of harassment, intimidation or discrimination.

c) An order compelling the Respondents to pay the Claimant all his unpaid and with-held dues, with effect from August, 2017.

d) Costs of the claim and interest at court's rate.

The Respondent's case is that the termination of the employment of the Claimant by the 1st Respondent was procedural and fair and in line with the provisions of the Employment Act, 2007.

Their further case is that the reasons for termination of employment was that all staff serving in the Office of the Governor have their services ending with the term of the sitting Governor in accordance with the pleasure doctrine. The Claimant fell in this category and therefore his services were deemed to have ended when the term of the then Governor ended.

The Respondents other case is that if the Claimant was aggrieved by the decision of the 2nd Respondent, he was and is still at liberty to appeal to the Public Service Commission in line with Section 77 of the County Government Act, 2012.

In conclusion the Respondents aver that the allegation of termination without notice is a misconception of the facts contemplated under Section 43 and 45 of the Employment Act, Chapter 226. This is because the reasons for termination were well articulated in the letter dated 8th August, 2017 and in tandem with Section 35(1)(c) of the Employment Act cited.

The matter came to court variously until the 16th of December, 2020 when the parties agreed on a determination and disposal by way of written submission.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful?
2. Whether the Claimant is entitled to the reliefs sought?
3. Who bears the cost of the cause?

The 1st issue for determination is whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawful. The Claimant in his written submissions dated 23rd December, 2020 reiterates his case of unlawful termination of employment. He particularly relies on Section 43(1) and (2), Section 45(1) and (2)(a),(d) and (c) and Section 45(5) of the Employment Act, 2007 to elaborate his case.

The Claimant also rubbishes the defence of the pleasure doctrine by relying of the authority **Cecilia Wangeci Ndungú** which dismissed this practice in the new constitutional dispensation and practice.

The Respondents in their written submissions dated 25th February, 2021 submit that the Claimant has not attached any contract of service between him and the respondent.

Further, Section 63 of the County Government Act provides that the County Public Service Board is the only authority for employment and promotion in respect of offices at the County Public Service. No appointment or assignment is valid unless this is in writing.

It is the Respondent's further submission that the Claimant has never been employed by the County Public Service Board. His list of documents dated 4th October, 2018 clearly indicate that he worked in the Office of the County Governor and his term would end with term of the then Governor.

The Respondents further submit and emphasise the pleasure doctrine and justify it on the foregoing reasons and data.

The Claimant narrates and demonstrates that he was in public service from 1985 to the date of his termination of his employment. He variously transferred office from the Ministry of Education to the Meru and Isiolo district hospitals before being posted to Tharaka Nithi County on his request.

At Tharaka Nithi County, he served in various capacities at the Chuka Level 4 Hospital from where he was transferred to the Office of the County Governor as transport officer. All this time, the Claimant remained a public officer and was on secondment to the county public service. This is where he met his demise of office by the termination of employment letter dated 8th September, 2017.

The next issue becomes whether the termination of employment of the Claimant was valid and lawful. The letter of termination dated 8th September, 2017 merely conveys a decision of termination by the County Public Service Board with effect from 8th August, 2017. This was on grounds of effluxion of time which is variously expressed and explained in the Respondent's defence and submissions.

I must admit that this extremely callous. The Respondents truly did not comply with Section 41, 43, 45 and 47 of the Employment Act, 2007. Principally, this contradicts Section 45(1), 45(2) (a), (b) and (c) and 45(5) of the Employment Act.

The termination of employment is terminal and self defeating for violating the requirement for substantive and procedural fairness as stipulated by Section 41(1) and (2) of the said Employment Act. The Claimant was not taken through any form of disciplinary proceedings, or at all and was booted out office on the whims of 1st Respondent. This was also for reasons which are not known to the law. I therefore find a case of wrongful, unfair and unlawful termination of employment and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the Claimant is entitled to the reliefs sought. He is. Having won on case of unlawful termination of employment, he becomes entitled to the reliefs sought.

This matter brings out an issue of the conspiracy and contradictions between law and justice. It is a prudent jurisprudential starting point that courts law should be bent on during justice as they also apply the law. In this case a court is tired up in a situation of a compromise between clear provisions of the Employment Act and allotting justice to the claimant in the circumstances. This court chooses to do the latter.

In making relief to the Claimant, the provisions of Section 49 (3) (a) – reinstatement come into play. The employment of the Claimant was on 8th August, 2017 and this was communicated a month later.

The Claimant filed this cause 5th October, 2018. Would this and today's determination debar him from enjoying the fruits of reinstatement?

This matter has been around the court corridors for almost three years since inception. The Claimant is not to blame for the delay in a determination of the matter. It is also notable that courts and other social activities were destabilized and paralysed by the onset of novel corona pandemic in March, 2020. Nobody should unduly pay the price for this.

Secondly, the Claimant is or at the verge of retirement on age grounds. If he is not reinstated, he would become a victim of no retirement benefits on the grounds of a flimsy termination of employment. This would be inequitable. It would be injustice on his part.

This is a court of justice. Every employee would wish to reap from his investment of thirty years plus. So be it.

I am therefore inclined to allow the claim and order relief as follows;

- i) That the claimant be and is hereby reinstated to employment without loss of benefits, promotions and office.
- ii) That the Claimant is ordered to report to work on 27th July, 2021 at 800 hours.
- iii) That in the event the claimant is or has been material for retirement on age ground, he shall be eligible and accessible to all his retirement benefits as per his contract of service.
- iv) Eight (8) months compensation for unlawful termination of employmentKsh.62,660 x 8=501,280.00
- v) The costs of this cause shall be borne by the Respondent.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Ogera instructed by Babu M'Inoti & Company Advocates for the Claimants.

2. Mr.Mugambi Gitari instructed by Mugambi Gitari & Company Advocates for the Respondents.