



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATION COURT AT KISUMU

CAUSE NO. E016 OF 2020

KIBISU KABETSICLAIMANT

VERSUS

COUNTY GOVERNMENT OF VIHIGA.....RESPONDENT

JUDGMENT

1. On 6 December 2017, the Governor, County of Vihiga, offered Kibisu Kabetsi (the Claimant) the position of Political Advisor for a term of 3-years, renewable.
2. The offer was followed by a formal contract dated 3 March 2018 from the Governor. The contract was to run for 3-years.
3. On 19 October 2018, the County Public Service Board regularised the contract on the same terms as outlined in the contract from the Governor.
4. However, on 17 September 2020, the Governor wrote to the Claimant to inform him of the termination of the contract on the grounds of gross misconduct and undisclosed conflict of interest.
5. The Claimant was aggrieved, and he caused his legal advisors to make a demand to the County Attorney alleging unlawful termination of employment.
6. There was no response, and on 2 November 2020, the Claimant lodged a Statement of Claim with the Court against the County Government of Vihiga (the Respondent), asserting unlawful termination of employment and breach of contract.
7. The Respondent was served and acknowledged receipt of the Notice of Summons and Statement of Claim on 5 November 2020.
8. Despite accepting service, the Respondent did not enter Appearance or file a Response within the prescribed time, and on 9 March 2021, the Court directed that the Cause proceeds to formal proof on 18 May 2021 (the Respondent filed a Memorandum of Appearance on 16 March 2021).
9. When the Cause came up for hearing on 18 May 2021, the Claimant informed the Court that the Respondent had not served upon him the Memorandum of Appearance and that he was ready for the hearing.
10. Since the Respondent was absent, the Court allowed the hearing to proceed. The Claimant testified.
11. Pursuant to Court orders, the Claimant filed his submissions on 18 June 2021.
12. The Court has considered the pleadings, evidence on record and the submissions.

Unlawful/Unfair termination of employment

13. The Claimant challenged the lawfulness or fairness of the termination of his employment on the ground that 30-days' notice as envisaged under the contract and section 35(1) of the Employment Act, 2007 was not given.
14. The Claimant further challenged the decision on the ground that he was not afforded an opportunity to be heard and that the particulars of gross misconduct and conflict of interest were not disclosed.
15. The Claimant was a public officer and entitled to the protections assured to every public officer within the context of Article 236 of the

Constitution before removal from office.

16. There was no evidence that the Respondent or the Governor complied with the due process protections before taking the decision to terminate the Claimant's appointment.

17. If the Governor acted on the assumption that the Claimant was serving at his (Governor's) pleasure, he was grossly mistaken as to the status of the law on the pleasure doctrine.

18. In this regard, the Court of Appeal has held that *arbitrariness and capriciousness* would not meet the due process yardstick (see the decisions by the Court of Appeal in *County Government of Nyeri & Ar v Cecilia Wangechi Ndungu (2015) eKLR*, *Narok County Government & Ar vs Richard Bwogo Birir & Ar (2015) eKLR* and *County Government of Garissa & Ar v Idriss Aden Mukhtar & 2 Ors (2020) eKLR*).

19. In the same vein, if the Claimant was involved in gross misconduct and or conflict of interest, the Respondent did not disclose the particulars of such indiscretions or prove the same in Court.

20. The Court finds that the termination of the Claimant's appointment was not only unlawful but unfair.

Damages

21. The Claimant sought the equivalent of 2-years' salary in the sum of Kshs 4,320,000/- which he would have earned had he served the full term of the contract.

22. The Claimant was initially on a 3-year contract. The letter regularising the contract indicated that he would now serve within the tenure of the Governor.

23. The Claimant had served about two and a half years of the initial contract leaving a balance of about 7 months. If he were to serve up to the end of the Governor's term, he had a balance of about 2 years.

24. All things being equal, it could not be guaranteed that the Claimant or the Governor would serve their full terms.

25. In consideration of the above, the Court is of the view that the equivalent of 7 months gross salaries would be appropriate (gross monthly salary was Kshs 201,200/- according to the contract).

Breach of contract

Pension dues

26. The Claimant's contract did not provide for pension but gratuity.

27. The Court is, therefore, unable to award pension, which was not part of the terms and conditions of service.

Unpaid leave days

28. The separation letter advised the Claimant that he would be paid terminal dues after clearance. If he is entitled to any unpaid leave days, the Respondent should commute and pay the same.

Certificate of Service

29. A Certificate of Service is a statutory entitlement, and the Respondent should issue one to the Claimant within 30 days.

Conclusion and Orders

30. From the foregoing, the Court finds and declares that the termination of the Claimant's appointment was unlawful and unfair, and the Claimant is awarded:

(i) Damages **Kshs 1,408,400/-**

31. The Respondent to pay any outstanding leave to the Claimant and also issue a Certificate of service.

32. The damages to attract interest at court rates from the date of judgment.

33. Claimant to have costs at half-scale.

34. The Court regrets that it could not deliver the judgment on the scheduled date due to other official engagements.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND DELIVERED IN KISUMU ON THIS 2ND DAY OF DECEMBER 2021

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Dr Alutalala Mukhwana & Co. Advocates

For Respondent Office of the County Attorney

Court Assistant Chrispo Aura