



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 363 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**EVANS MUTUNGI MUSYOKA.....CLAIMANT**

*VERSUS*

**COUNTY GOVERNMENT OF MAKUENI.....RESPONDENT**

**JUDGMENT**

On 19<sup>th</sup> March 2013, the Claimant filed his Memorandum of Claim, dated 18<sup>th</sup> March 2013 which was amended by the Amended Memorandum of Claim dated 1<sup>st</sup> December 2014 and filed on 5<sup>th</sup> October 2014. He seeks the following prayers:

- a. Payment of salary for the period the claim (sic) was on an illegal suspension between 8<sup>th</sup> May 2001 to 9<sup>th</sup> May 2010 a total of 104 months and 21 days at the rate of 29,565.00 per month.
- b. Damages for unlawful suspension.
- c. Costs and interest of this suit.
- d. Any other relief this Court may deem fit and proper to grant.

On 8<sup>th</sup> March 2013, the Respondents filed its response dated 28<sup>th</sup> March 2013 denying the averments in the memorandum of claim.

**Claimant's Case**

It is the Claimant's case that on 5<sup>th</sup> March 1997, he was employed by the Respondent as a Council Askari earning a gross monthly salary of Kshs.29,565. It is also his case that he worked diligently and effortlessly throughout his employment until 18<sup>th</sup> May 2001 when his services were suspended unlawfully and without a justifiable cause and lasted for a period of 104 months and 21 days.

During trial, the Claimant who is employed in the capacity of a lorry driver in the County Government of Makueni, adopted the documents filed by him as part of his evidence.

It is the Claimant's case that he was suspended without the issuance of a formal warning or reason. The Claimant avers that the suspension was unlawful as it went beyond 3 months contrary to what is stipulated by law and the terms and conditions of service for officers of local authorities 2012.

It is also the Claimant's case that during the suspension, he was not paid half (½) of his salary as is required.

**Respondent's Case**

It is the Respondent's case that the Claimant showed unprofessionalism and lack of commitment during the term of his service. The Respondent avers that it gave the Claimant an explanation and the grounds for suspension.

It is the Respondent's case that the suspension was based on reasonable

grounds which were founded in good faith and in the general interest of the respondent's welfare which were to be considered by the Full Council. The eventual deployment was a decision taken after much deliberations and consultations. Further, there was no intention of malice against the Claimant.

The Respondent avers that the delay to communicate the Claimant's reinstatement was an oversight by a member of the council and the consequences of such an action should not be visited upon the council.

### **Submissions**

The Claimant in his written submissions dated 29<sup>th</sup> October 2018 and filed on 2<sup>nd</sup> November 2018, submits that suspension occurs only when there is need for investigations to determine whether or not the employee's employment should be terminated. It is his submissions that the decision of whether to pay or not lies with the employer but ought to be based on outcome of the investigations conducted. Further, the period of suspension ought to be definite but should not exceed 6 months. The Claimant relied on the case of *Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR*, *Donald C. Avude vs. Kenya Forest Service [2015] eKLR* and *Paul Ng'eno vs. Pyrethrum Board of Kenya Ltd [2013] eKLR* to submit that his suspension was unlawful, unfair and unprocedural.

It is the Claimant's submissions that he is entitled to the 104 months and 21 days salary compensation. It is also his submissions that **section 49 of the Employment Act** and **section 51 of the Labour Institutions Act** accords this Court the powers to grant such orders.

It is also the Claimant's submissions that the court ought to grant the Claimant general damages for unfair and unlawful suspension.

The Respondent did not proceed with its case or file submissions, because the cause was deemed undefended as the counsel for the Respondent was not properly on record.

### **Determination**

After considering the facts of this cause and evidence adduced by the Claimant, the following are the issues for determination:

1. Whether the Claimant's suspension was unlawful.
2. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant's suspension was unlawful:**

The Claimant submits that his suspension was unlawful, unfair and unprocedural. It is his case that his suspension letter did not indicate the reasons for his suspension.

It was his case that his contract was subject to the terms and conditions of service for officers of Local Authorities 2012. However, no copy was attached.

The Claimant was suspended in 2001. The Employment Act 2007 was not in force at the time and the relevant law to be applied is **the Employment Act, Cap 226 of the Laws of Kenya**. The law was silent on the issue of suspension and employers could suspend and terminate their employee's services at will. The Court of Appeal in the case of *Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR* held that:

*"Prior to 2007, employers had no obligation in observing principles of natural justice in termination of employment of contracts. Employers could terminate contracts of employment at will, for good cause, bad cause or no cause."*

### **Whether the Claimant is entitled to the reliefs sought**

The claimant did not submit the terms and conditions under which he was employed. The letter dated 9<sup>th</sup> March 2010 does not state that he is reinstated. It merely refers to deployment. There is no evidence of any connection between the claimant's employment prior to the suspension and the deployment letter dated 9<sup>th</sup> March 2010. The previous employment was in the position of Askari while the deployment was in the position of Office Messenger.

Even if the claimant's redeployment was a reinstatement, the claim for salary is statute barred having accrued on 18<sup>th</sup> May 2001 when he was suspended, while the suit was filed on 19<sup>th</sup> March 2013, about 12 years later.

For these reasons the claim is dismissed with no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**