



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 2 OF 2017

(FORMERLY NYERI ELRC CAUSE NO. 392 OF 2017)

ABRAHAM GITONGA MUTUNGI.....CLAIMANT

VERSUS

THE PERMANENT SECRETARY PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....1ST RESPONDENT

DISTRICT COMMISSIONER MERU CENTRAL DISTRICT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents in the High Court of Kenya at Meru in June 2010. He averred that he was employed as a Chief in June 1999 and posted to Gaitu location of the then Meru Central District. He was confirmed into permanent employment on 19th April 2002 and he took up his administrative duties and served till 12th September 2006 when he was asked to proceed on compulsory leave on the orders of the then District Commissioner (Meru Central District). He was served with a letter dated 25th April 2008 dismissing him from his position as chief without any benefits whatsoever. He contended that his dismissal from employment was unlawful, irregular, malicious and that he suffered both special and general damages. He averred that the dismissal was malicious as he was not granted an opportunity to defend himself and that though investigations exonerated him, the Respondents ignored the recommendation of the District Commissioner Mr. Mabeya Z. Mogaka who found the allegations against him unfounded. He sought payment of the unpaid monthly salary from September 2006 to November 2008 at the rate of 19,982/- = Kshs. 539,514/-, reinstatement, as well as costs of the suit and any other better orders the court may deem fit to grant.

2. The Respondents filed a defence in which it was stated that the Claimants services were terminated as he was not diligent in his service and his performance was found wanting. The Respondents averred that the Claimant was severally warned and that the dismissal was thus lawful. The Respondents denied that the Claimant was entitled to any reinstatement as he was discharging a contractual obligation which permitted the employer to terminate the employment at any time.

3. The matter did not proceed before the High Court and upon transfer to this court in 2017 was given the first number before a transfer to the ELRC Registry at Meru where it was assigned the second number which is the current case number. The Claimant filed a list of documents on 4th May 2018 which comprised of letters relating to the matter including the employment letter, confirmation, show cause, suspension letter, dismissal letter, appeal to the PSC, a memorandum to the District Commissioner and the letter from the General Overseer of Grace Ministries Africa and a leave of absence letter by the Claimant.

4. The Claimant testified on 6th November 2018 and the Respondent availed no witness and did not attend the hearing though duly served. The Claimant reiterated that his service was without any drama until the District Commissioner sent him on compulsory leave on unfounded allegations. He stated that the recommendation that he be retained was ignored. The Claimant's witness Pastor Moses Anampiu stated that he relocated the church and the Claimant did not destroy the church as alleged in the accusations leveled against the Claimant.

5. The Claimant filed submissions on 10th December 2018 and submitted that he was innocent of all the accusations leveled against him. The Claimant submitted that his dismissal was unlawful and he cited the provisions of Section 45 and 41 of the Employment Act to the effect that the Respondents were not to terminate his employment unfairly and he should have been accorded a hearing prior to dismissal. He thus sought damages for the unlawful dismissal being the unpaid dues as well as damages under the Employment Act Section 49(1)(c). He cited

the cases of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** and **Ambassador Samson Kipkoech Chemai v Richard Erskine Leakey & 2 Others [2017] eKLR**.

6. The issues that are for determination are whether the Claimant was dismissed lawfully and secondly, if his dismissal was unlawful, what remedies he is entitled to. From the testimony adduced, it is clear that the Claimant was dismissed on some frivolous grounds which upon investigations by the District Commissioner Mabeya Z. Mogaka were found to be baseless. It appears that the residents in the area are predisposed to criminality and could not stomach the Claimant's service as he was opposed to crime and illicit brews. He thus was fought both by the residents and his supervisor who was predisposed to illegal felling of trees and illegal collection of funds from the citizenry. In his response to the show cause letter, the Claimant clearly gave lucid explanations against the accusations leveled against him thus proving there was no basis to terminate. He was dismissed in 2006 when the Employment Act Cap 226 (now repealed) was in force. He therefore cannot enjoy the benefit of Section 41 or the provisions of Section 49(1)(c). He also cannot be reinstated to his position as the termination was over a decade ago. He was however not paid his salary for the period of suspension, which suspension I find was not merited. In the final analysis he is entitled to recover the unpaid salary as well as costs of the suit plus interest on the sum he was entitled to as salary. I therefore enter judgment for the Claimant against the 3rd Respondent as follows:-

- a. Kshs. 539,514/- being the withheld salary
- b. Interest on the sum above at court rates from the date of filing suit till payment in full
- c. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 28th day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the original

DEPUTY REGISTRAR