



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT BUNGOMA**

**ELRC CAUSE NO. 92 CONSOLIDATED WITH 91 OF 2017**

**JOSEPHAT KIMUTAI KEMEI.....1ST CLAIMANT**

**SIMON WAFULA.....2ND CLAIMANT**

**VERSUS**

**WEST POKOT COUNTY SERVICE BOARD.....RESPONDENT**

**J U D G M E N T**

The consolidated suit by the 1<sup>st</sup> and 2<sup>nd</sup> Claimants seek the following reliefs:-

- a) Declaration that the termination of employment of the Claimants was unlawful and compensation be awarded in respect thereof.
- b) Salary in lieu of notice
- c) payment of arrears wage
- d) provision of Certificate of service

in addition and in respect to the 2<sup>nd</sup> Claimant,

- e) payment of pension contribution as per the rules of the scheme.
- f) Under payments as per letters dated November, 2012 and 2016.

**FACTS OF THE CASE OF 1<sup>ST</sup> CLAIMANTS**

**(CW1- JOSEPHAT KIMUTAI KEMEI)**

This is the Claimant in Cause No. 92 of 2017. He was employed by the Ministry of Local Government on 24.8.2007 as a County Development Officer. He was transferred to Human Resource Management where he became Chief Administrative Officer.

He was deployed to West Pokot County Government as the Interim Human Resource /Payroll Manager on 25.2.2011.

He was then deployed as Interim Head of Human Resource Management. On 29.1.2014, Claimant was appointed Head of County Human Resource Management. He ceased to be Interim Payroll Manager. Preparation of payroll was no longer part of his duties. The payroll manager position was left vacant.

On 18.11.2015, the Respondent suspended the Claimant on allegations of gross misconduct in that he;

- i. Fraudulently paid himself Ksh 66,496.55 in October, 2014.
- ii. He referred himself as Dr. Kemei Josephat Kimutai which was not the case.

iii. Careless performance of work resulting in one Simon Wafula re-designing himself.

The Claimant responded to the allegations. He appeared before a disciplinary committee. His employment was terminated.

## **CW2. FACTS OF THE CASE OF THE 2ND CLAIMANT**

The Claimant was employed by the Ministry of Local Government, Town Council of Chepareria on 7.11.2012 as a Computer Programmer II. The County Government of West-Pokot employed the Claimant as a Clerical Officer II on 29.9.2014 in the Human Resource Department.

On 4.11.2015, the Claimant was involved in a road accident and underwent a surgery on 6.11.2015.

The Claimant was on sick leave when the County Public Service Board sent a County Government Officer escorted by a contingent of Public Officers to serve the Claimant a letter of suspension at home with a notice to show cause. The Claimant responded to the letter and was invited to a disciplinary meeting on 8.2.2016 by a letter dated 4.2.2016.

On 29.3.2016 the Claimant was served another notice to show cause with different reasons for the suspension and new charges. The Claimant responded to the new charges on 11.5.2016.

The allegations included:

i. Fraudulently awarding himself a basic salary of Kshs 44, 550 in January 2015 contrary to the letter of appointment that placed the Claimant as Kshs 12,510.

ii. Forgery of appointment letter to Chief Clerical Officer Job Group 'J'

iii. Unlawful designating himself as Computer Programmer II contrary to the appointment letter.

The Claimant defended the charge stating that he had no ability to award himself salary since procedure of approval of payment involved different officers with checks and balances and no one officer could pay himself what they liked.

That the letter of appointment dated 7.11.2012 clearly designated his level of entry to the County Government which was at salary scale 10 Job Group 'J' under pay group 'AC' (former Local Government Officers) whose entry point was Kshs 42,850 with 1<sup>st</sup> increment of Kshs 43,700, 2<sup>nd</sup> increment of Kshs 44,550 and the 3<sup>rd</sup> increment fell due in January 2015 as indicated in the letter of suspension.

The Claimant did nothing wrong but was paid as per his current job entry point and annual increments.

The Claimant denies ever forging letter for Chief Clerical Officer Job Group 'F'. This charge was dropped in the end.

Furthermore, the Claimant denies designating himself as a Computer Programmer II. That the allegation has no basis since his position was as per the letter of appointment dated 7.11.2012.

The Claimant states that the procedure followed to terminate his employment was unfair in that letter of suspension and notice to show cause were delivered to him at home while he was sick, having undergone a surgery. The Claimant was suspended before being given a chance to show cause. The Claimant was given one day notice to appear before the disciplinary committee.

The Claimant was not given opportunity to be represented at the hearing by an employee of choice.

The Claimant prays that the suit be allowed as prayed.

## **RESPONSE TO 2ND CLAIMANT'S CASE.**

Respondent filed a statement of response on the 31.10.2017 in which respondent states that the 2<sup>nd</sup> Claimant was employed as Clerical Officer 111 Job Group F with effect from 1.1.2014 at a starting salary of Kshs 12,510 per month.

That the Claimant while working in the Human Resource Department - IPPD Section colluded with the Head of Human Resource Management (1<sup>st</sup> Claimant) at the County and promoted himself to Chief Clerical Officer Job Group H pursuant to a forged letter dated 7.11.2012 from Town Council of Cheparerie.

The Claimant fraudulently paid himself salary and allowances from June to September 2014 and arrears paid in month of October, 2014 in the sum of Kshs 305,674.

The Claimant paid himself fraudulently salary Kshs 128, 182 for Job group 'J' in the month of November and December, 2014 yet he was entitled to kshs 42,020 at Job Group 'F'. The County Government lost Kshs 86,162 in total.

The Claimant then paid himself fraudulently a basic salary of Kshs 44,550 and other allowances contrary to the letter of appointment that placed him at a basic salary of Kshs 12,510 in the month of January to October, 2015. The County Government lost Kshs 48,100 in that

respect.

Further more, the Claimant fraudulently paid five (5) workers a sum of Kshs 566,291 by effecting fake appointment letters and back dated salaries irregularly.

The Claimant in addition introduced Eight (8) ghost workers into the County Payroll resulting in loss of funds in the sum of Kshs 2,578,930 to the County Government.

At the material time the Claimant worked on the temporal placement at the Human Resource Department masquarading as the Interim County Payroll Manager and made several recommendations and representations to third parties contrary to his terms of employment.

The Respondent states that the Claimant was lawfully suspended, disciplined and dismissed following fair procedure. He responded to show cause letter. Attended disciplinary hearing and thus dismissal was for a valid reason.

### **RESPONSE TO 1<sup>ST</sup> CLAIMANTS CLAIM.**

The Respondent states that the 1<sup>st</sup> Claimant was dismissed for misconduct in that he fraudulently and irregularly paid himself Kshs 462,715 in September and October, 2015 through different bank accounts belonging to the Claimant.

The Claimant fraudulently and irregularly paid salary to health staff on Economic Stimulus Programme (ESP) from March to December 2014 in violation to a directive that they be absorbed from 2015. The County lost Kshs 6,118,099.

Claimant paid a ghost worker Debra Chepkorir between November, 2014 and October 2014 Kshs 915,483 with Kshs 172,400 transfered to the Claimant's account.

The Claimant paid his wife Roseline Chebet a ghost worker between November, 2014 and October 2015 Kshs 823,841.

Claimant fraudulently promoted 2<sup>nd</sup> Claimant Simon Wafula to Chief Clerical Officer Job Group 'H' by a forged letter from the Town Council of Cheparerie dated 7.11.2012.

Claimant re-designated Simon Wafula, 2<sup>nd</sup> Claimant as a Computer Programmer II in Job Group 'J' and misrepresented Wafula to 3<sup>rd</sup> parties as Computer Programmer II.

The County Government lost Kshs 12 million. The termination of the 1<sup>st</sup> Claimant was therefore lawful and the respondent followed fair procedure by suspending the Claimant on 15.11.2015 and giving him a show cause letter. The Claimant responded to show cause letter on 3.12.2015. Claimant appeared before a disciplinary committee on 12.4.2016. Claimant was dismissed from service with effect from May 2016.

Claimant Appealed to Public Service Commission on 20.6.2016. The Appeal was dismissed on 26.4.2017. The Respondent prays that the Claimant cause be dismissed with costs.

### **DETERMINATION**

The issues for determination are as follows:

- i. Did the 1<sup>st</sup> and 2<sup>nd</sup> Claimants conspire to grant the 1<sup>st</sup> Claimant undeserved position and fraudulently pay the 2<sup>nd</sup> Claimant more salary than he was entitled?
- ii. Did the 1<sup>st</sup> Claimant fraudulently receive salary he did not deserve?
- iii. Was the dismissal from employment of the 1<sup>st</sup> and 2<sup>nd</sup> Claimants for a valid reason and in terms of a fair procedure?
- iv. Are the 1<sup>st</sup> and 2<sup>nd</sup> Claimants entitled to the reliefs sought?

### **ISSUES (i), (ii) & (iii)**

The court shall deal with the three issues collectively as follows:-

It is the respondent's case that the 1<sup>st</sup> Claimant being Head of County Human Resource Management fraudulently and irregularly paid himself a total of Kshs 462,715 in September and October, 2014 through bank account belonging to the Claimant.

That the Claimant fraudulently and irregularly paid salaries to health staff on Economic Stimulus Programme contract from march to December, 2014 in blatant disregard of the Respondent's directive that the said staff be absorbed in January, 2015. That the County Government lost Kshs 6,118,099 as a result. That the 1<sup>st</sup> Claimant paid a ghost worker Debra Chepkorir between November, 2014 and October, 2015 Kshs 915, 483 and he transferred Kshs 172, 400 to his own account. The 1<sup>st</sup> Claimant paid his wife Roseline Chebet a ghost

worker between November 2014 and October, 2015 Kshs 823, 841. Finally the 1<sup>st</sup> Claimant irregularly promoted Simon Wafula 2<sup>nd</sup> Claimant to Chief Clerical Officer Job Group 'H' pursuant to a forged letter from the Town Council of Chepareria dated 7.11.2012.

The Claimant further re-designated Simon Wafula as a Computer Programmer II in Job Group 'J' in blatant disregard of the letter of appointment by the Respondent and misrepresented Simon Wafula as a Computer Programmer II to third parties.

The 2<sup>nd</sup> Claimant was thus irregularly paid a basic salary of Kshs 44,550 instead of Kshs 12,510 as per the Letter of Appointment in the months of January to October, 2015 in the sum of Kshs 485,100.

That due to the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Claimants, the County Government lost over Kshs 12 million.

The Respondent states that it has proved in terms of Section 43 (1) and 47 (5) of the Employment Act, that the termination of the employment of the 1<sup>st</sup> and 2<sup>nd</sup> Claimants was for a valid reason.

That both 1<sup>st</sup> and 2<sup>nd</sup> Claimant's were given show cause letters which they responded to and they both attended disciplinary hearings where their explanations were heard and rejected.

That the two were lawfully and fairly dismissed from employment. That the two filed Appeals to the Public Service Commission and the Appeals were rejected.

That the two claims have no merit and they be dismissed with costs.

The court is aware that in terms of Section 107 and 108 of the Evidence Act Cap 80 Laws of Kenya as read with Section 47 (5) of the Employment Act, 2007 the Claimants have the primary burden of showing that their termination was wrongful and upon discharging that onus, the burden of rebuttal shifts to the Respondent to demonstrate that there were valid reasons to terminate the employment of the Claimants and that a fair procedure was followed in dismissing Claimants from employment.

The court has analysed the oral and documentary testimony by the 1<sup>st</sup> and 2<sup>nd</sup> Claimants as set out in the Judgment and the court is satisfied that the evidence by the Respondents has rebutted the claims by the two Claimants that the dismissal from their employment was not merited.

The 1<sup>st</sup> and 2<sup>nd</sup> Claimants engaged in irregular and fraudulent conduct as demonstrated by the evidence presented by the Respondents. The County Government of Pokot lost in excess of Kshs 12 million as a result of the unlawful conduct by the two Claimants.

Even though the 1<sup>st</sup> Claimant was the supervisor of the 2<sup>nd</sup> Claimant and sanctioned the fraudulent transactions, the two were acutely aware that the initial letter from Town Council of Cheparerie dated 7.11.2012 was not genuine. Therefore the promotion of the 2<sup>nd</sup> Claimant was founded on quick sand and condonation by the supervisor does not cleanse its illegality and culpability by the 2<sup>nd</sup> Claimant. Both the 1<sup>st</sup> and 2<sup>nd</sup> Claimant were guilty of gross misconduct and they were validly dismissed from employment. They both were accorded a fair hearing and opportunity to appeal the adverse decisions and the two causes also fail on that score.

The two causes for unlawful dismissal lack merit and are dismissed.

#### **ISSUE IV**

With regard to whether the 1<sup>st</sup> and 2<sup>nd</sup> Claimants are entitled to the reliefs sought, the court has found that the two officer were dismissed from service for gross mis conduct.

The two had caused the Respondent immense financial loss. The summary dismissals were justified and the 1<sup>st</sup> and 2<sup>nd</sup> Claimants are not entitled to any payment in lieu of notice.

The claims are thus dismissed. The claim by the 2<sup>nd</sup> Claimant for underpayment of wages and arrears salary are also unmerited given that the Claimant had been placed irregularly one high grade and salary than he had been lawfully appointed. The claims are unmerited and are equally dismissed.

The 1<sup>st</sup> Claimant has equally failed to prove that he was under paid in terms of regulation of wages (General amendment) Order. The claim for overtime worked during normal working days and public holidays was equally not proved. The Claim is also dismissed.

Both Claimants are entitled to Certificates of Service for the correct positions and period they held with the Respondents.

Accordingly, the suit by the 1<sup>st</sup> and 2<sup>nd</sup> Claimants are dismissed in entirety except with respect to grant of Certificates of Service within 30 days.

**DATED, SIGNED and DELIVERED at BUNGOMA this 1<sup>st</sup> day of FEBRUARY, 2019.**

**HON. M. N. NDUMA, JUDGE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA**

**Appearances:-**

Mr. Rugut for Claimant

Mr. Nyonge, Wanyama for Respondent

Chrispo: Court Assistant.