



**Onyango v Judicial Service Commission (Cause 884 of 2014)  
[2019] KEELRC 1740 (KLR) (30 April 2019) (Judgment)**

*Clement Odour Onyango v Judicial Service Commission [2019] eKLR*

Neutral citation: [2019] KEELRC 1740 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 884 OF 2014**

**HS WASILWA, J**

**APRIL 30, 2019**

**BETWEEN**

**CLEMENT ODOUR ONYANGO ..... CLAIMANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant, Clement Oduor Onyango, filed this claim vide a Statement of Claim dated 27/05/2014 for wrongful, unlawful, unfair, malicious and unconstitutional termination of his employment and payment of terminal benefits against the Respondent, The Judicial Service Commission.
2. He avers that there was an established an employer-employee relationship when he was appointed the Chief Facilities Officer by the Respondent vide a letter dated 16/09/2013 after a rigorous competitive selection. That he indicated in his acceptance of offer letter dated 22/09/2013 to the Respondent that he would take up employment from 01/11/2013 and that he thereafter notified his then employer, Messrs Safaricom Limited on 25/09/2013 that he would resign.
3. That he resigned from Safaricom on 30/09/2013 and reported to his new place of work at the Respondent's offices on 01/11/2013 but was advised to go home and wait for a while and would be informed on when to report to begin his duties. That he was shocked at the dramatic turn of events when he was informed by the Respondent through a letter dated 02/12/2013 that it had decided to revoke his appointment as Chief Facilities Officer upon deliberation by one of its Committee.
4. He continues to aver that since he had a valid written contract of service as per Section 10 of the Employment Act, the revocation of his appointment was a breach of contract and was also contrary to Section 18(5) (b), 35(3) and 47(1) of the Employment Act. Further, that the Respondent being a creature of the Constitution of Kenya failed to be guided in its decision by the principles set in Article



172(2) (a) of the Constitution on transparency in the process of appointing judicial officers and other staff of the Judiciary.

5. That the Respondent did not give him any valid/ written reasons for revocation of his appointment as required by Section 43(1) of the Employment Act or give him a chance to be heard before the said revocation and that this therefore amounted to unfair termination within the confines of Section 45 of the Employment Act. That the right to be heard is further reiterated in Articles 47 and 50 of the Constitution and as against the principles of natural justice.
6. That the Respondent failed to act in accordance with justice and equity even with the knowledge that he had resigned from his former employment and had no means of financially supporting himself or his family since he relied totally on his monthly salary.
7. He also avers that despite several demands and notice of intention to sue being given to the Respondent, it has failed/neglected and/or refused to make good of the payment demands and persists in the same. He prays for judgment against the Respondent for:-
  - a) A declaration that the termination of the Claimant's appointment was unfair, illegal, wrongful and unlawful.
  - b) Certificate of Service under Section 51 of the Employment Act.
  - c) Terminal benefits and dues accrued as follows:

Salary (per month) (Kshs. 105,000x12).....	Kshs. 1,260,000
House allowance (per month)(Kshs.35,000x12).....	Kshs.420,000
Transport allowance (per month)(Kshs. 16,000x12).....	Kshs.192,000
Responsibility allowance (per month)(Kshs.10,000x12).....	Kshs.120,000
Extraneous allowance (per month) (Kshs.30,000x12).....	Kshs.360,000
Leave allowance (per annum) (Kshs. 23,000x1).....	Kshs.23,000
Opportunity costs.....	Kshs. 3,000,000
TOTAL.....	Kshs. 5,375,000
  - d) Costs of the claim.
  - e) Interest on (c) and (d) above.
8. The Respondent filed its Statement of Response dated 05/06/2015 denying every allegation in the Statement of Claim averring that the following provisions of the Constitution and the Judicial Service Act govern the employment of all judicial staff and officers:-
  - i) Article 171 of the Constitution establishes the Judicial Service Commission whose functions are outlined in Article 172.
  - ii) Article 171(1) (c) of the Constitution provides the Judicial Service Commission with the mandate to appoint, receive complaints, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and staff of the Judiciary. That the Judicial Service Act, 2011 was enacted to give effect to Article 171.
  - iii) Article 172(2) of the Constitution provides that the Respondent shall be guided by competitive and transparent processes of appointment of judicial officers and other staff of the Judiciary.



- iv) Part III of the Third Schedule of the Judicial Service Act sets out the criteria for selecting candidates for appointment and provides for promotions, transfers, confirmations and terminations of all judicial officers and staff.
  - v) Sections 8 and 9 of the Third Schedule expressly provide that the Chairman of the Commission shall be informed of all vacancies and that all applications for appointment to vacancies shall be invited by public advertisement or where a vacancy need not be advertised, the position shall be filled by the appointment or reappointment of a public officer on temporary terms.
  - vi) Section 14 of the Third Schedule mandates the Respondent to take such action or such directions when it is satisfied that public interest requires that any matter relating to the appointment, promotion, transfer, secondment or confirmation of an officer be dealt with otherwise than in accordance with the procedure laid down in Part III of the Third Schedule of the Judicial Service Act.
  - vii) The Respondent has developed, approved and issued a Scheme of Service to guide in recruitment and selection of staff. The Scheme of Service sets out the grading structure in various cadres, job description and requirements for appointment to the various positions.
  - viii) The Respondent has a human resource policy and procedure to guide human resource practice in the Judiciary.
9. The Respondent denies that there has ever been an employer-employee relationship between it and the Claimant or that it issued the Claimant an offer of appointment for the position of Chief Facilities Officer after a competitive selection or recruitment.
  10. It states that the position of Chief Facilities Officer does not exist in the cadres of service of the Judiciary and the Judicial Service Commission and that it did not declare any vacancy or advertisement for appointment to the said position. That the Claimant could not therefore commence his duties because his Letter of Offer was irregular, null and void and that in its meeting held on 20/11/2013 and 05/12/2013, it revoked the Claimant's purported offer of appointment in accordance with Section 14 of the Third Schedule of the Judicial Service Act.
  11. It denies that it acted unreasonably, unlawfully, unfairly and illegally in revoking the irregular appointment of the Claimant and avers it was guided by the provisions of the Constitution and Section 3(g) of the Judicial Service Act and that the revocation does not therefore amount to an unfair termination of employment. That the Claimant's suit is misconceived as it does not disclose any reasonable cause of action in law and should be dismissed with costs.
  12. The Respondent then filed a Witness Statement dated 17/05/2018 sworn by the Principal Human Resource Officer at the Judiciary, Stephen Mutua, who states that the offer of appointment was irregularly issued to the Claimant by the former Director of HR and Administration, Mr. Dismus Obondo and that the said offer of appointment had not been sanctioned by the Respondent.
  13. That in a meeting held on 20/11/2013, the Respondent's Human Resource Management Committee deliberated on the request for employment of temporary staff to work under the Chief Facilities Manager and that Mr. Dismus Obondo submitted a board paper giving the following background under which the Claimant had been offered a one (1) year temporary appointment:-

“In December 2012, the Judiciary employed a Chief Facilities Manager in the Directorate of HR and Administration who started the reorganization of the function of maintenance of facilities and security of buildings as provided by an outsourced security firm. This was



carried out mainly at the Supreme Court Building but with oversight of all court stations. It then became apparent in due course that a medium level officer was required to coordinate maintenance and security of the Milimani Law Courts. The former Chief Registrar Judiciary then requested the Facilities Manager to identify an officer to be employed on temporary basis to assist at Milimani Law Courts and who in turn identified the Claimant. The Facilities Manager introduced him to the former Chief Registrar Judiciary who interviewed him and recommended his employment for one year on temporary basis under Section B.4 (i) of the Judicial Service Staff Regulations. The former Chief Registrar Judiciary further directed that the recruitment of the officer be formalized by way of the directorate making a request for approval of employment of the Claimant and then preparing a letter of offer. The Claimant was issued with the letter of offer on 16/09/2013 and was to start working on 01/11/2013. He was then informed through the Chief Facilities Manager to wait until his employment case had been presented to the Commission for direction”.

14. That the Human Resource Management Committee then declined to approve the request stating that the engagement was irregular as shown in a copy of the minutes for the said meeting produced as Exhibit 3 in the Respondent’s list of documents. That the Claimant was then informed of the revocation of his appointment and the Respondent in its meeting held on 05/12/2013 then adopted the Human Resource Management Committee’s recommendation.
15. That Mr. Dismus Obondo was dismissed from employment by the Respondent on 17/12/2017 for gross misconduct with one of the grounds being the unprocedural and irregular recruitment and employment of staff without seeking approval of the Commission. That the Respondent has produced its Replying Affidavit marked Exhibit 5 filed in Judicial Review Application No. 30 of 2014 instituted by Mr. Dismus Obondo, an application which has since been withdrawn.
16. He states that the Claimant had not acquired any rights as an employee of the Judiciary and that the Respondent acted within its mandate so as to correct the irregularities committed in the recruitment of the Claimant. That the Respondent commission is accountable to the people of Kenya as per Section 3(c) of the Judicial Service Act and that Section 4(f) and (g) of the Judicial Service Act further provides that the commission shall promote and uphold honesty and integrity in its functions and such other positive values prescribed by regulations. That the Claimant is not entitled to terminal dues and damages for unfair termination of employment or to be issued with a Certificate of Service as he has not worked for the Respondent to be entitled to a certificate of service

## **Evidence**

17. CW1 testified in court that he relies in his documents marked COO1 to COO6 together with his written statement dated 16/03/2017 as part of his evidence. He stated that he was interviewed in 2013 by the former CRJ, Gladys Shollei in the presence of a lady Facilities Manager for a role in facilities management and that he passed the interview and was offered the job.
18. That he studied Electrical Engineering for 5 years at the UON, has a Diploma in Electronic & Computer Systems and explained to the court the various skills and training he has attained in the course of his career. That he lost the job at Safaricom after resigning following his job offer from the Judiciary and that he has suffered great loss considering he had just married and had their first baby on 17/09/2013.
19. Further, that he had loans he was servicing and was therefore put on CRB and has also lost the value of what he would have received as salary with the offer from the Respondent. He asked the court to consider the loss he suffered in income and compensate him accordingly as per his Claim.



20. In cross-examination, CW1 confirmed that he was interviewed by Facilities Manager, Lily Odundo and does not know whether he was the only candidate as he was interviewed alone. That he learnt of the position by telephone from an administrator who introduced herself as Susan who asked him if he would be interested in a position for facilities management and that he did not see any advert on the same post.
21. He confirmed from the Respondent's list of approved establishment that the position of Facilities Management does not exist and neither does the position PL12 and that he has also not filed any certification to prove his qualifications. That he did not know Dismus Obondo before the offer of appointment and that the said letter does not mention the JSC in any part but bears the Court of Arms logo of the Judiciary.
22. In re-examination, he testified that Dismus Obondo signed his letter of offer as Director HR & Administration, a position that exists in the list of cadres in Judiciary that was shown to him in Court. He insisted that his letter of offer was not a fake document and that he does not know Peter Bunde.
23. RW1, Peter Bunde testified that he was adopting his filed witness statement as his evidence and in cross-examination he stated that the preliminaries to be sanctioned by the JSC were not followed in the Claimant's case. That there is evidence the Claimant was interviewed but it was not by the JSC and that the Claimant would have been entitled to salaries if appointed. In re-examination, he testified that the CRJ cannot conduct interview of staff on her own as it has to be a panel constituted by the JSC.

#### **Claimant's Submissions**

24. The Claimant submits that there was an employer-employee relationship created through the offer letter he received from the Respondent and his acceptance through signing thereof as required by Section 9(2) and (3) of the Employment Act. That it is trite law that employer-employee relationship is created once an employee signs their acceptance to the letter of offer and that an offer for employment ceases to be an offer and becomes a binding employment contract under law as per Justice James Rika in *Fidelix Mwendwa Muli v Bamburi Cement Limited* [2018] eKLR.
25. That there was no other contract intended to be executed by the parties from the one concluded on 20/09/2013 and that the offer of appointment and acceptance thereof thus constituted a binding contract between him and the Respondent. He states that the Respondent is therefore estopped from withdrawing from the employment contract without considering the terms of that contract and the law governing the said contract.
26. Further, that Sections 9(1), (2) and 14 of the Third Schedule to the Judicial Service Act clearly provide for situations where appointment for employment is made without advertising or following the strict procedures envisioned therein and that in such cases, the appointee holds office on temporary terms. That in his case, his appointment was necessitated by requirements of public interest because the Milimani Law Courts badly needed his skills and proficiency and that the Respondent is distancing itself from his appointment by blaming Mr. Dismus Obondo for issuing the letter of appointment without its authority when in fact he was an authorized agent/employee of the Respondent.
27. Further, under the principle of vicarious liability and the law of agency, the actions of an agent are attributable to the principal and that Mr. Dismus Obondo and the Respondent cannot be separated to favour the Respondent's case while prejudicing the Claimant. That it is also banal law that an error does not vitiate a contract since it can be rectified and that he did not appoint himself as was held in *Simon Mukulo v County Government of Kakamega* [2016] eKLR.



28. Further, that the Respondent should have rectified any procedural error during its deliberation meeting and that at the time he received the appointment letter, all procedures and requirements as stipulated under Part V Section 32 of the Judicial Service Act had been complied with by the Respondent. He prays that this Court finds that there existed an employer-employee relationship between him and the Respondent.
29. It is submitted by the Claimant that Section 41(2) of the Employment Act provides that an employer shall before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4), hear and consider any representations the employee may want to make. That the Respondent violated Section 43(1) of the Act as the reasons it gives are not valid to warrant revocation of the letter of appointment and that this results to unfair termination.
30. Further, that the Respondent failed to prove any reasons in relation to his conduct, capacity or compatibility or operational requirements prior to revoking his letter of appointment. He prays that this Honourable Court finds his revocation of employment as being unfair and/or unjust because there was no substantive justification or procedural fairness in his termination.
31. He submits that the Employment Act provides that an employee whose employment contract has been unfairly terminated is entitled to notice, wages due and compensation and that he has made prayers which he has substantiated in his Claim and submissions. That an award of damages for breach of contract for the unlawful, unprocedural and unfair termination would restore him as far as possible to the place where he would have been if it were not for the injury and that the Court in the Simon Mukulo case awarded the Claimant damages of Kshs. 517,140/= equivalent to 6 months gross salary for breach of contract by the Respondent for revoking the letter of appointment therein.
32. Further, that in industrial relations jurisprudence, the law takes the view that unlawful termination of a service contract amounts to denial of the right to work and the affected employee is entitled to reinstatement or damages. That this was similarly held by Hon. Justice Maraga as he then was in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Other [2014] eKLR.
33. The Claimant prays that the Court considers that he never contributed to his predicament as he desired to continue in employment and serve his country and that he has a clean record of service that earned him promotions and pay rises. That he was terminated abruptly at a time when he was relying on his salary and that he has also lost a promising professional career in the facilities management field. The Claimant finally prays that interest be allowed at the rate of 14% per annum from the date of termination of his employment to the date of satisfaction of all payments allowable.

### **Respondent's Submissions**

34. The Respondent submits that from the onset, the Claimant's appointment to the judiciary was irregular and tainted with illegality as he was not competitively recruited as required under Article 172(2) of the Constitution. That this was the position in the case of Agnes Wanjiku & 10 Others v Chief Registrar of the Judiciary & another [2017] eKLR while in the case of Trusted Society of Human Rights Alliance v Nakuru Water & Sanitation Services Company & Another [2013] eKLR Byram Ongaya J held that recruitment undertaken outside policy guidelines and regulations were unlawful.
35. It submits that the Claimant did not produce any application letter before the court and that his mysterious employment disregarded the provisions of the Judicial Service Act, the Judicial Service Staff Regulations and the established Human Resource procedures at the Judiciary. Further, that an objective review of the process shows there was never any valid appointment and that the letter of offer never conferred legitimacy to an unlawful process.



36. That this Court should establish that no valid employer-employee relationship existed per definition in Section 2 of the Employment Act and that this suit is premised on an unlawful and irregular letter of appointment. It cites the case of Maurice Oduor Oketch v Chequered Flag Limited [2013] eKLR, the Court held as follows:-

“In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer-employee relationship as defined by in the Employment Act, 2007 actually exists.”

37. It is submitted by the Respondent that the claim for unlawful or unfair termination by the Claimant does not therefore arise at all since it must stem from a valid contract of employment. That it had a legal duty to revoke the irregular appointment of the Claimant as was held by Lady Justice Ndolo in Nicholas Okwema & 8 other v Judicial Service Commission [2016] eKLR at paragraph 66 and further under the Judicial Service Act and the Constitution as it has averred in its pleadings.

38. The Respondent further submits that it has proved the reason for the termination of the irregular appointment and that it is the employee who has a burden of proving unfair and unlawful termination as per Section 47(5) of the Employment Act. It prays that this Honourable Court should therefore hold and find that there was neither an unlawful nor unfair termination as alleged by the Claimant.

39. The Respondent submits that since the Claimant’s prayers for declaratory relief and compensation for unlawful termination do not obtain in the circumstances of this case, he is not entitled to any relief that would subvert the Constitution.

40. That Section 49 (4) of the Employment Act provides the factors the Court should consider when granting an order of reinstatement as prayed for by the Claimant and that the said order would be impossible to enforce in any event since the position of Facilities Manager does not exist in its approved cadres of employment. That the Court in D.K. Njagi Marete v Teachers Service Commission [2013] eKLR held that employment remedies must be proportionate to the economic injuries suffered by the employees and that they are not aimed at facilitating the unjust enrichment of aggrieved employees. The Respondent finally prays that the claim should be dismissed with costs.

41. I have examined all the averments of the Parties before me. The issues for determination are as follows:-

1. Whether there was an employment contract between the Claimant and the Respondent.
2. Whether the Respondent breached the employment contract with the Claimant.
3. Whether the Claimant is entitled to the remedies sought.

42. On the first issue, the Claimant chose to rely on an offer of appointment letter dated 16/9/2013 addressed to him by the Respondent’s Director, Human Resource and Administration.

43. The letter stated as follows:-

“Re: Offer of Appointment

I am pleased to inform you that you have been offered an appointment as a Chief Facilities Officer on temporary terms of service for a period of twelve (12) months with effect from the date you report to the Principal Facilities Manager for deployment.

The scale attached to this post is PLS 12. You will enter the scale at Kshs.105,000 per month.



You will be entitled to the allowances shown below:-

- (i) House allowance - Kshs.35,000 per month
- (ii) Transport allowance - Kshs.16,000 per month
- (iii) Responsibility allowance - Kshs.10,000 per month
- (iv) Extraneous allowance - Kshs.30,000 per month
- (v) Leave allowance - Kshs.23,000 per month

In addition to the above, you will also be entitled to:-

- i. A Medical Insurance Cover for self, spouse and four (4) biological children below the age of 25 years at designated hospitals.
- ii. Group Personal Accident Cover/Group Life Insurance for self.
- iii. Thirty (30) days annual leave.

Please signify in writing your acceptance or otherwise of this offer by signing below and returning a copy to the Chief Registrar of the Judiciary otherwise the offer will lapse thirty (30) days from the date of this letter.

I take this opportunity to congratulate you on this appointment.

Signed

Dismus O. Obondo

Director, Human Resource And Administration

Copy: The Chief Registrar of the Judiciary,

Supreme Court of Kenya,

Box 30041,

Nairobi"

- 44. The author of the above letter did not intimate that this letter was written following any competitive recruitment process nor did it indicate that the same was on behalf of the Respondent who has the sole responsibility and power under the Constitution to hire and fire staff employed to serve in the Judiciary.
- 45. That notwithstanding, the letter of offer was written by an authorised officer who was employed by the Respondent as its Director of Human Resources.
- 46. The Claimant as an outsider would not have had any information that the Human Resource Director did not have any authority to write such a letter of offer. Indeed the Human Resource Director can be assumed to have had the authority and power to undertake activities which are reasonable in the performance and discharge of his functions.
- 47. Relying on this letter of offer, the Claimant responded vide a letter dated 22<sup>nd</sup> September 2013 accepting the job offer and accepting to report to work on 1/11/2013 and went ahead to resign from his job at Safaricom vide a letter dated 25/9/2013.



48. Under the law of agency, I would say that Mr. Opondo who penned off the appointment letter was an agent of the Judicial Service Commission having been employed by the Judicial Service Commission as the Director, Human Resource and Administration.
49. In the circumstances, as an agent, his actions bind his principle (JSC) in a contractual relationship with a third party (the Claimant). This is referred to as “apparent authority” as third parties like the Claimant herein cannot be required to verify each employee’s authority before entering a contract. Infact Mr Obonyo wrote the letter of offer on the letter head of the Judiciary and signed it off as Director, Human resource and Administration and even copied the same to the Chief Registrar of the Judiciary as a sign that he had all the authority to write the letter as he did.
50. As proof that the appointment was revoked Mr. Obonyo still wrote to the Claimant and informed him of the said revocation having been sanctioned by the Respondent.
51. From the above analysis, it is my finding that there had been established an employment contract between the Claimant and the Respondent.
52. On the second issue, given that there was already an employment contract between the Respondent and the Claimant, the Respondent could only terminate it after following due process as envisaged under the law- Section 41 of Employment Act which states as follows:-
- “(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.
53. There was apparently no notice to terminate the contract.
54. The Claimant was also not given any opportunity to explain his case. He was condemned unheard. I therefore find his termination was unfair and unjustified.
55. In terms of remedies, I award the Claimant an equivalent of 12 months’ salary as compensation for the unlawful termination =  $12 \times 196,000 = 2,352,000/=$ .
56. He is also awarded 1 month salary in lieu of notice = 219,000/=.
57. And leave allowance for 1 year = 23,000/=.
- TOTAL = 2,594,000/= Less statutory deductions
58. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

**Dated and delivered in open Court this 30<sup>th</sup> day of April, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**



**In the presence of**  
**Miss Limpop holding brief Issa for Respondent – Present**  
**Claimant in person – Absent**

