



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 215 OF 2018

(Before Hon. Justice Mathews N. Nduma)

DAVID OUMA GOR.....CLAIMANT

VERSUS

CLERK-HOMA BAY COUNTY ASSEMBLY.....1ST RESPONDENT

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD...2ND RESPONDENT

JUDGMENT

1. The claimant is the former Deputy Clerk of the 1st respondent from 1st July 2014 up to 12th February 2018 when he was dismissed by the 2nd respondent.
2. The claimant was firstly suspended on 7th August 2017 on grounds couched as follows
‘Insubordination and disrespect of authority. You wrongly failed and refused to obey lawful and proper command which was within your scope of duty to obey’.
3. The particulars of the offence are that on 4th August 2017, the claimant appeared before the board and was asked to appear again and he failed to appear as agreed.
4. That on several occasions the claimant behaved inappropriately and when written a show cause letter to explain his actions, he failed to do so. That the Board split the office of the Deputy clerk and Human Resource into two and advertised positions of Principal Internal Auditor, Principal Counsel, Public Relations and Communications Officer in the newspapers. The claimant defied the resolutions of the Board and removed the information on the notice Board terming it as null and void.
5. That the claimant failed to attend a staff meeting and called media to announce that staff were forced to leave office which information was false, despite that claimant was not the spokesperson of the Assembly.
6. That the claimant persistently sought fault on the management and the board and neglected to perform his lawful duties.
7. That the claimant was persistently absent from office and when appointed chairman of a disciplinary committee, he failed to perform that duty.
8. That the claimant had received verbal warnings, plus first and second written warnings but had failed to reform.
9. That the claimant used abusive language to the clerk who was placed in authority over the claimant.
10. That the claimant fostered divisions among the staff and that the claimant intercepted letters addressed to the clerk and opened them before they reached the clerk’s office.
11. The claimant was to appear before the Board on 7th November 2017. On 10th November 2017, the suspension was extended to 4th December 2017.
12. By a letter dated 19th January 2018, the claimant was invited to appear before the Board on 23rd January 2018.

13. The claimant received a letter of dismissal for insubordination and gross misconduct dated 12th February 2018. He was found guilty of all the aforesaid offences contained in the notice to show cause.

14. The claimant produced a letter dated 7th August 2017, in which he objected to the suspension and explained the charges made against him in the show cause letter.

15. On 23rd January 2018, the claimant made an oral presentation to the Board regarding the charges made against him. The minutes of the proceedings were produced by the claimant. The claimant made very lengthy presentation on his case and concluded by stating that he was very remorseful if he had gone overboard in demanding changes in the manner the affairs of the Homa Bay County Assembly were being conducted.

16. The claimant denied that he was insubordinate to the clerk.; was abusive to the clerk; exceeded his mandate as deputy clerk including intercepting letters meant for the clerk and that he had lawful cause to be away from office when he attended his wife's funeral and attended meetings as a member of the Homa Bay County Public Assembly and liabilities committee as per the appointment letter dated 12th May 2017 written to him by the County Secretary.

17. The claimant produced several letters which he wrote seeking various interventions on behalf of staff of the Assembly.

18. The claimant opines that he was being victimized for his genuine quest to improve service delivery at the Homa Bay County Assembly.

19. The suit is not defended. Counsel Lina Akoth, as she then was filed a memorandum of Appearance for the 1st and 2nd respondents on 18th July 2018 but no statement of defence was filed.

Determination

20. The issues for determination are:

(a) Whether the dismissal of the claimant was for a valid reason and done in terms of a fair procedure.

(b) Whether the claimant is entitled to the reliefs sought.

Issue I

21. The onus of proving the case on a balance of probabilities falls on the claimant 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.*

22. The claimant must prove to the satisfaction of the court that his dismissal from the office of the deputy clerk was not for a valid reason and that the respondent did not follow a fair procedure in dismissing him from the office. This onus remains notwithstanding that the suit is not defended.

23. A careful analysis of the documentary evidence presented by the claimant himself points to a very tense relationship between himself and his immediate supervisor the clerk.

24. The correspondence written by the claimant to the clerk, who was his supervisor, especially the memo by the claimant to the clerk dated 17th July 2017, depicted extreme disrespect of the office of the Assembly Clerk by the claimant who was the Deputy Clerk. The language used against the clerk by the claimant without getting into the details contained in the letter is derogatory, insubordinate and outright derogation of civility on the part of the claimant.

25. The claimant was charged with the various offences contained in the notice of suspension. The claimant explained himself to the 2nd respondent in writing. The claimant had a lengthy opportunity to explain his case before the Board.

26. The Board has the constitutional and statutory mandate to remove the claimant from office.

27. The Board was not satisfied with the explanation given by the claimant, and in the court's view rightly so.

28. It is the court's finding that the dismissal of the claimant from the office of Deputy Clerk was for a valid reason and the 2nd respondent followed a fair procedure in removing the claimant from office. The claimant is not entitled to any of the reliefs sought in the claim. The suit is dismissed. The parties to bear their own costs of the suit.

Judgment Dated, Signed and delivered this 15th day of May, 2019

Mathews N. Nduma

Judge

Appearances

Claimant in person

Chrispo – Court Clerk