



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 36 OF 2017**

**BONIFACE M. KARANJA.....CLAIMANT**

**VERSUS**

**THE CHAIRMAN, BOMET COUNTY PUBLIC SERVICE BOARD...1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, BOMET COUNTY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondents seeking recompense. He averred that he was employed by the Ministry of Co-Operative Development on 6<sup>th</sup> April 1994 and was deployed to Bomet as an audit staff. He was served with a letter of desertion on 6<sup>th</sup> December 2013 and he was required to show cause why disciplinary action should not be taken against him. He presented himself to the Ministerial Human Resources Management Advisory Committee on 29<sup>th</sup> January 2015 to defend himself and the disciplinary case was terminated on 1<sup>st</sup> April 2015. The Claimant averred that the functions of the Ministry of Co-operatives was devolved and the ministry renamed as Ministry of Industrialization and Enterprise Development and in June he sought transfer to Kiambu County. The letter dated 9<sup>th</sup> June 2015 sought a transfer from Bomet County to Kiambu County and the Head of the County Public Service Board wrote to the Secretary/CEO Transition Authority confirming that they did not have an objection with the transfer. On 19<sup>th</sup> August 2015 the Secretary/CEO Transition Authority wrote to the 1<sup>st</sup> Respondent requesting them to release him to report to Kiambu County and prepare his last pay certificate and other transfer documents accordingly. He was served with a release letter on 26<sup>th</sup> August 2015 which indicated that he was not active on their payroll due to a disciplinary case. He averred that on 23<sup>rd</sup> October 2015 the Chief Officer Trade, Industry, Tourism and Co-operative Development Kiambu County wrote a release letter stating that despite his release by Bomet County his salary was stopped from 30<sup>th</sup> April 2014 and Kiambu County could not pay his salary arrears. He averred that on 24<sup>th</sup> February 2016 the Secretary/CEO Transition Authority wrote to the 2<sup>nd</sup> Respondent complaining about the preparation and release of last pay certificate. He averred that on 10<sup>th</sup> March 2016 the Secretary to the Public Service Board wrote to the County Secretary to reinstate his salary on payroll and the salary that was withheld be paid from the date when it was held per Regulation G32(4) of the code of regulations. He averred that the Respondent refused or ignored to act upon this request. He thus sought the withheld salary from 30<sup>th</sup> April 2014 to date of the suit being Kshs. 2,326,960/-, interest at court rates, damages, transfer of IPPD to Kiambu County, annual leave for 3 years amounting to 90 days and costs of the suit.

2. The Respondents filed a memorandum of defence in which the claim was denied being liable. The Respondent denied that there was hearing of the disciplinary case against the Claimant or any decision rendered. It averred that if there was any request to transfer the same was approved by the Head of the Public Service and that the Respondents were being unnecessarily dragged into the instant proceedings and that the relevant parties had not been sued as respondents. The Respondent averred that it was not in a position to verify correspondences not copied to them. It was averred that the letter of release was contradictory as it could not assert the staff has absconded or deserted and at the same time purport to release him.

3. The Claimant testified and stated that he was a public officer and was initially suspended. He stated that in December 2013 he was accused by the Permanent Secretary of being absent without permission and directed that the Claimant's salary be stopped. He stated that he presented himself before the Ministerial Disciplinary Committee which heard him in April 2015 which issued an order that the disciplinary case be terminated. He said that he was still in Bomet working. He stated that he applied to be transferred to Kiambu County and both counties agreed as Kiambu County gave a no objection and the communication to Bomet County was issued. He stated that the Transition Authority had to approve the transfer and on 19<sup>th</sup> August 2015 approved the transfer. He testified that Bomet County was to prepare his last pay certificate and other required documents as the last pay certificate is necessary for the transfer. He stated that the last pay certificate shows his integrated personal pay data and the details per the certificate would allow transfer. He stated that Bomet County released him on 25<sup>th</sup> August 2015. He testified that he was not on payroll when he was last paid in April 2014. He stated that the Transition Authority wrote seeking his release and the Bomet County failed to issue the necessary release papers which led to his not being deployed to Kiambu County as expected. He thus sought the payment of salary arrears, reinstatement to payroll and release of last pay certificate, leave allowance for 5 years and costs of the suit. In cross-examination he admitted that he was neither in Bomet County nor Kiambu County. He confirmed that from 20<sup>th</sup> August 2015 he did not work anywhere. He stated that in 2015 when he was reinstated he was reporting to the county co-operative officer then. He stated that he continued with his duties at Bomet central. He confirmed that he did not have the request for the transfer to Kiambu County. He stated that for May to August 2015 he was not paid until later. He testified that he was suspended on 6<sup>th</sup> December 2013 by the Ministry of Trade Industry and Enterprise Development. He conceded that the disciplinary case was not by County Government of Bomet. He stated that his payroll was transferred upon devolution and he was seconded to the County. He testified that his salary was stopped by the national government. He stated that he did not complete 2015 at Bomet County. He confirmed receipt of payment made covering May 2014 to August 2015. He conceded that he was clear and update his records at Bomet and confirmed that he did not go back to Bomet County for assignment of duties and that he opted to chase his documents through the Transition Authority. He stated that he appealed to the Public Service Commission but conceded that he had not provided the letter as evidence. He stated that his employer was the Public Service Commission and after devolution the Bomet County became his employer. In re-examination he testified that he initiated the transfer to Kiambu County from Bomet County. He stated that it was for Bomet County to prove otherwise as he was working until release from the

county. He stated that he was paid dues for May 2014 to August 2015 and sought payment till March 2019. He testified that he appealed at the Public Service Commission. He stated that the Transition Authority approved his transfer and that the Transition Authority had authority to instruct the County Government.

4. The Respondent called Wesley Sigei the HR director Bomet County. He testified that the Claimant was a devolved staff working as a senior co-operatives auditor at the time in Konoin, Bomet County. He stated that they only got to know of the discipline case after devolution and that they received a notification from Ministry of Co-operatives that the Claimant had absconded duties. He testified that there was no record of the Claimant rendering service to Bomet County and there are no records to show he was an employee of Bomet County. He stated that the Claimant failed to report for deployment in Bomet County and therefore was not on its payroll. He stated he was aware the Claimant sought transfer to Kiambu County and that there was concurrence by the Transition Authority. He testified that Bomet County released him and presumed he had begun working in Kiambu County. He noted there was a letter from the County Secretary Kiambu County rejecting the Claimant's transfer. He testified that the Claimant ought to have appealed to the Public Service Commission which is the body mandated to handle disciplinary issues for devolved staff. He stated that after rejection he was not required to return to Bomet as he had been released and was employee of Kiambu County. He stated that despite not working for the County of Bomet the Claimant was paid salary from May to August 2015. He testified that the Claimant's payroll was at Ministry of Co-operatives and that the Claimant was not an employee of Bomet County. After release Bomet County would not have any other data and that the last pay certificate issued was the payslip for 2014 and this was done to allow release of salary. He stated that there was communication to IPPD National Treasury to show he had been released to Kiambu County. In cross-examination he testified that the Claimant had never been an employee of Bomet County from the records. He stated that devolution found the Claimant in Bomet County as he had been transferred from Ministry of Co-operatives to the then Konoin District. He stated that the Claimant was deployed by Ministry of Co-operatives and his salary was from central government. He testified that the Claimant never drew salary from Bomet County. He stated that the Claimant was not devolved to Bomet County. He testified that after the disciplinary case was terminated the Claimant was required to report to County Secretary for reinstatement to duty then to payroll. He stated that the Claimant did not report and so he was not reinstated as he had absconded duty. He stated that if the Claimant had reported he would have been reinstated. He testified that the Claimant was under Mr. Kerich the co-operatives officer and there was no notification that the Claimant reported. He stated that the Claimant was released in August 2015 with last payslip of April 2014. He stated that Bomet County had already issued a last pay certificate and payslip for April 2014. He testified that the payment made covered the arrears from May 2014 till August 2015. He stated that the Claimant was a devolved staff and had he reported to Kiambu County he would have been okay. He testified that the IPPD headquarters has to communicate with county payroll managers and give data on the staff who are input on the county payrolls system. He stated that the County of Bomet did its best by release of 2014 payslip and last pay certificate. He testified that they never received any report the Claimant was on duty.

5. The Claimant filed submissions as did the 2<sup>nd</sup> Respondent. The Claimant's submissions were lodged out of time and were to the effect that the Claimant was released to Kiambu County upon application. He submitted that when he reported to Kiambu County he was not taken in as he had an issue with the last pay certificate from Bomet County as he was not on payroll. He submitted that Bomet County failed to heed the directive. He submitted that he had established he was an employee of Bomet County and was entitled to his employment and salary arrears. He relied on the case of **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR** and **Joseph Kiprono Koech v County Government of Turkana & Another [2014] eKLR** where Ongaya J. held that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer if the employee is exculpated. The Claimant submitted that as a public officer he was entitled to the safeguard under Article 236 and he ought not be victimized or discriminated against for performing the functions of his office or removed from office without due process of law. He also cited Article 41 of the Constitution on the right to fair labour practices. He urged the grant of the prayers on his memorandum of claim with a saving that the sum should be less the sum paid in December 2017.

6. The 2<sup>nd</sup> Respondent submitted that the Claimant's employ was not terminated but the Claimant initiated his transfer to Kiambu County and consequently upon this request being acceded to he was released from the County Government of Bomet and upon his rejection by Kiambu County never came back to County Government of Bomet. The 2<sup>nd</sup> Respondent submitted that under Section 77 of the County Governments Act, the Claimant ought to have appealed to the Public Service Commission. The 2<sup>nd</sup> Respondent cited the case of **Abdikadir Suleiman v County Government of Isiolo & Another [2015] eKLR** where the court held that there was a remedy under Section 77 available to the claimant and that the Claimant in this case did not exhaust all the available remedies in law before filing this suit. The 2<sup>nd</sup> Respondent submitted that the failure to join the County Government of Bomet was fatal to the Claimant's claim since the claim is between an employer and employee. It as submitted that there is no employer-employee relationship between the Claimant and the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent relied on Section 44 of the County Governments Act and Article 176 of the Constitution of Kenya and submitted that the County Government of Bomet had capacity to sue and be sued and should have been enjoined in these proceedings. The 2<sup>nd</sup> Respondent submitted that the Claimant was paid all his salary arrears and could not expect to be paid for a period he did not work for the County of Bomet. The 2<sup>nd</sup> Respondent submitted that the Claimant is not entitled to any of the reliefs sought and that the suit ought to be dismissed with costs.

7. The Claimant was employed by the National Government prior to the advent of devolution. He was in Konoin, Bomet County when the devolution was implemented. He was a devolved staff from the Ministry of Co-operatives and the successor in title. He sought a transfer to Kiambu County and was released to Kiambu County by Bomet County. The transfer was not actualized as he had been facing disciplinary proceedings which had stopped his salary. He sought the last pay certificate and because he was not on payroll with the County of Bomet the certificate that was issued did not cover a period he was off the payroll. It would seem that rather than seek reinstatement to payroll the Claimant embarked on an exercise to actualize the transfer which was unsuccessful. He never reported back to Bomet County for deployment after the efforts bore no fruit. He failed to resume employment and was the author of his own misfortune. He was not an employee of any of the 2 Respondents before court and therefore his suit is misplaced as against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent. The remedies he may have been entitled to could have been best articulated between the County Government of Bomet and the Public Service Commission who are the employers. In the premises the suit is dismissed but each party will bear their own costs.

It is so ordered.

**Dated and delivered at Nyeri this 26<sup>th</sup> day of September 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**