



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 97 OF 2017

DAVID EMAPUS EKASIBA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF BUNGOMA.....RESPONDENT

JUDGMENT

The Claimant initially sued the Municipal council of Bungoma by a Plaint dated 18th July, 2011 seeking reinstatement to his work, payment of salary arrears, compensation and general damages. The defendant filed a defence denying liability to the Claimant.

The local governments became defunct in 2013 and were taken over by County Governments. In 2016 the Claimant amended its plaint and introduced the County Government of Bungoma as the defendant from whom he now seeks the various reliefs.

The Claimant testified under oath to the effect that he was employed on a temporary basis by the Municipal Council of Bungoma as a cleaner.

That he was not employed on permanent and pensionable basis. The Claimant produced a letter dated 13.10.2003 as exhibit '1'. The Claimant was given a staff No. ST/337/2.

That he worked until 11.4.2007 when he was dismissed by a letter of the same date produced as Exhibit 2.

The letter simply read “ Termination of Temporary Appointment on 16.4.2007”

The letter was by the town clerk Mr. Aineah Indakwa. The Claimant earned Kshs 3,000 per month. The Claimant testified that he was not given notice and sought payment in lieu of notice. That he did not go on leave and sought payment in lieu of leave days not taken. The Claimant also sought payment of house allowance.

The claimant stated that he was not given any reason for the termination and did not do any wrong and he was not given opportunity to be heard. The Claimant seeks payment of arrear salary not paid from December 2004 to April 2007 of Kshs 8000 per month.

The Claimant further claims for compensation for the unfair and unlawful termination of employment and he be granted certificate of service.

The Respondent did not file an amended defence to the amended statement of claim. The Respondent did not also call any witness in defence of the Claimant's case.

The Respondent had however filed statement of defence to the initial plaint on 30.8.2011 in which the defendant denied the claim stating that the Plaintiff was never in permanent employment of the Municipal Council of Bungoma and therefore the suit is misplaced and without merit.

The Claimant filed written submissions on 27.5.2019 and the Respondent filed submissions on 29.5.2019.

Determination

The issues for determination are:

- a) Whether the employment of the Claimant was lawfully and unfairly terminated by the Municipal Council of Bungoma

b) Whether the Claimant has proved the reliefs sought in the amended statement of claim.

The Claimant has tendered evidence under oath which has not been controverted by the Respondent that he worked for the Municipal Council of Bungoma as a washroom cleaner from 13.10.2003 up to 11.4.2007. That he received a monthly salary of Kshs 3000.

That because he was treated as a temporary employee he did not go on leave for the period he served the respondent. That his employment was without notice, notice to show cause or hearing terminated by a letter 11.4.2007. The employment was to end on 16.4.2007.

From the letter of appointment produced by the Claimant he was offered temporary employment. It is however clear that the Claimant worked continuously for a period of over four years.

At the time of termination of the employment of the Claimant, the erstwhile Employment Act, Cap 236 of the Laws of Kenya was applicable.

In terms of the said Act, the Employment of the Claimant had ceased to be one of temporary nature by virtue of its continuity and the length of time the Claimant had served the Respondent.

Accordingly, the Claimant was entitled to the minimum rights provided under the erstwhile statute including being given at least 21 days annual leave and being given at least one month notice of termination.

The Claimant has proved on a balance of probabilities that he is owed by the respondent:-

- a) Kshs 15,000 in lieu of 30 leave days not taken in the sum of Kshs 15,000
- b) Under payments for the period December 2004 to April 2007 at the rate of Kshs 800 per month totaling Kshs 248,000
- c) One month salary in lieu of notice in the sum of Kshs 10,000
- d) And a certificate of service which he was not given.

Reinstatement and compensation

The Claimant's Employment was terminated when the Employment Act, Cap 236 Laws of Kenya did not provide for the remedy of compensation or reinstatement. The remedy available for an employee whose employment was unlawfully terminated then was commutation of the termination to a normal termination and payment of all terminal benefits due to the employees.

The Claimant was unfortunately not pensionable and is therefore not entitled to any pension. Under the common law of employer and servant the Claimant is entitled to general damages for wrongful termination equivalent to the notice period he was entitled to under contract of service. The court has already granted the Claimant one month salary in lieu of notice and this remedy suffices to mitigate the unlawful termination in terms of the law applicable at the time of termination.

The court finds that the County Government of Bungoma is liable to pay terminal benefits in respect of employees who served under the erstwhile municipal Council of Bungoma.

Accordingly judgment is entered in favour of the Claimant against the County Government of Bungoma, the respondent herein as follows:-

- a) One month salary in lieu of notice Kshs 8,000
- b) Kshs 15,000 in lieu of 30 days leave.
- c) Kshs 248,000 being underpayment (arrear salary from December 2004 to April 2007).

Total award Kshs 271,000

- d) Interest at court rates form date of filing suit till payment in full.
- e) Respondent to grant the Claimant certificate of service within 30 days of this judgment.
- f) Costs of the suit.

DATED, SIGNED and DELIVERED at BUNGOMA this 26Th day of SEPTEMBER, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearance:

Obwoga Onsongo & Co. Advocates for the Claimant

M/s J.O Makali & Co. Advocates for the Respondent

Joy: Court Assistant.