



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 234 OF 2018

(FORMERLY NAIROBI ELRC CAUSE NO. 946 OF 2018)

KENNEDY MURIUKI GICHANGI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for alleged wrongful termination of employment. He averred that he was employed as a personal assistant to the Deputy Governor on 8th September 2017 with duties of maintaining the Deputy Governor's diary, handling correspondences and enquiries, managing appointments for the Deputy Governor, setting up meetings and managing the affairs of the Deputy Governor's office *inter alia*. The Claimant averred that he earned Kshs. 66,090/- made up of basic, house allowance and commuter allowance. He averred that he was suspended on 6th April 2018 for 2 weeks pending investigations over issues the Respondent termed as 'areas of concern' and the letter did not disclose any act or omissions on the part of the Claimant. He averred that on 17th May 2018 he was issued with a letter of termination of employment by the Public Service Board office stating that he was dismissed effective 13th March 2018 a period prior to the suspension letter. He averred that the suspension and subsequent dismissal were unlawful and unreasonable. The Claimant averred that he was not given the reason for the termination of employment and neither was he summoned before any disciplinary committee to answer any allegations. He thus sought a declaration that the suspension letter dated 6th April 2018 was unlawful and unprocedural; a declaration that the termination of employment vide the letter dated 17th May 2018 was unprocedural and unlawful; an order for reinstatement of the Claimant to employment and payment of the unpaid salary and allowances from the date of suspension to the date of reinstatement; any further and better relief that the honourable court may deem fit and just to grant; and costs of the suit.

2. The Respondent filed a defence in which it averred that the suspension meted out on 6th April 2018 was not a terminal punishment but an interim measure undertaken by the Respondent for reasons of good administration to ensure the investigations were carried out without a hindrance or interference. The Respondent averred that the suspension did not amount to summary action as it did not amount to dismissal. The Respondent averred that the Claimant failed to perform his duties to the expectation of the Respondent prompting the issuance of the suspension letter and subsequently the letter of termination from employment. The Respondent averred that the suspension was to set in motion the wheels of its own investigation and thereby determine the suitability of the Claimant to hold office. Consequently, the Respondent averred that it was not under any obligation to hold a hearing separate from the contemplated investigation itself. The Respondent averred that it carried out the investigation and found that the Claimant had not performed his mandate to the expectation of the Respondent and thus terminated the employment of the Claimant. The Respondent averred that the working relationship between the Claimant and the Respondent was untenable and therefore the remedy of reinstatement of the Claimant to the former position is not possible to implement as the position has already been filled up by the Respondent. The Respondent averred that the Claimant had not demonstrated any exceptional or special circumstance to warrant the remedy of reinstatement. The Respondent averred that granting the reliefs sought would occasion grave injustice on the Respondent. It urged that the suit be dismissed with costs.

3. The Claimant testified as did the Respondent's witness Tom Nyambisa Nyatika the head of human resource management in the Respondent. The Claimant testified that he was not called for a hearing by the Board and neither did they inform him what they were investigating. He stated that he had no relationship with the procuring entity and the Respondent should have taken the matter to court. He said he had no allegations of bribery. The Claimant testified that he was not called after the suspension. In cross-examination he stated that he never offered to help people get jobs, tenders or contracts as that was not part of his duties. He testified that he did not get into contact with suppliers or contractors. He agreed that his position was one of trust and he was not to conduct himself in any manner that would bring the office into disrepute. He was referred to the suspension letter and he stated there was no major reason given only areas of concern. He testified that the Respondent did not state what precisely the areas of concern were. He said that he had not breached any trust and that the suspension was without reason. He stated the purpose was to conduct investigations and he thought he had a right to be heard. He testified that the termination letter showed that the Respondent made a decision to terminate his services long before they were to conduct investigations. He stated that termination was the final act and he was dismissed without a hearing. He stated that he was not aware that he was first to appeal to the County Public Service Board. He was referred to his payslips and stated that they were system generated and were

not certified by the Respondent. He stated that there was no requirement to certify them. He said the issue of authenticity was not an issue as the documents were genuine. In re-exam he stated the letter of termination did not give reasons and that the payslips were from the GHIRS system where employees using their personal number obtain payslips or any other document of importance. He stated that he was not aware of any proceedings undertaken for him to appeal.

4. The Respondent's witness stated that the Claimant's name was forwarded by the office of Deputy Governor and that he was not aware of any application or advertisement for the position. He testified that the Claimant was discharging the duties of personal assistant to the Deputy Governor and in the course of his employ there were reports of unethical conduct. He stated that it was reported the Claimant was soliciting for money from contractors purportedly to assist them get tenders in the County Government. He said the Respondent undertook internal investigations to confirm the truthfulness of these reports and once it was confirmed it was forwarded to the County Public Service Board. He was referred to a document dated 9th April 2018 which recommended termination of service and stated that basically the Respondent was able to confirm that the Claimant was soliciting for favours from persons seeking to do business with the County. He testified that the Respondent had no option but to recommend the summary dismissal. That, he said did not require the Respondent to give the Claimant a hearing. In cross-examination he stated that the Claimant was an employee of the County Government and earned a salary. He testified that the money was wired to the employees account and once an employee had credentials the employee could generate a payslip. He confirmed the payslip in evidence was generated from the internet. He testified that the suspension was to give room for internal investigations which were conducted. He stated there were no minutes before the court to show the investigations were conducted. He testified that the termination was given more than 2 weeks after the 2 week suspension. He was referred to the letter of dismissal and confirmed that it was effective 13th March 2018. He stated that it was not correct to state that suspension was given after dismissal. He stated that the suspension was on 6th April 2018 and termination on 17th May 2018 with an effective date of 13th March 2018. He testified that the Claimant did not receive salary in the month of April or May. He stated that the Claimant as personal assistant to the Deputy Governor was not subject to competitive process and he did not see where the issue of advert came from. He said that he had stated the Claimant had tried to get influence over tenders and the tender process. He testified that the complaint was lodged in the office and resulted in the summary dismissal. He said they had the records but they did not deem it necessary to file the reports. He stated that the position the Claimant held was a position of trust and the moment the trust disappeared the contract was frustrated and there was nothing they could do. He was referred to the letter of 9th April 2018 and he admitted that he was the author of the letter to the Public Service Board. He stated that the letter was done 2 days after the suspension and that the meeting was held on 9th April and in that letter the minutes were forwarded to the Board. He was re-examined and he stated that payslips are only accessed when one has credentials. He stated that it was prudent to have them certified. He testified that the suspension was to give the Respondent a chance to conduct investigations on the complaints received though these were not on record. He stated that the position of personal assistant to the Deputy Governor was not advertised and there was no advertisement or interviews.

5. The parties filed submissions and the Claimant submitted that the Respondent did not adhere to the provisions of Section 41 of the Employment Act. He submitted that the dismissal was therefore unfair and unlawful within the meaning of Section 43 and 45 of the Employment Act. He cited the case of **Nochulus Muasya Kyula v Farmchem Limited [2012] eKLR** where the learned judge held that

It is not sufficient for the employer to make allegations of misconduct against the employee. The employer is required to have internal systems and processes of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at.

The Claimant urged the court to be guided by the above quoted decision in reaching a finding that the termination of the Claimant's employment was unfair and wrongful and that he is entitled to the prayers sought in the claim.

6. The Respondent submitted that the issues for determination were whether the suit offended the provisions of Article 234(2)(i) of the Constitution as read with Section 77 of the County Governments Act as well as whether the termination of the Claimant's services was illegal, unlawful, illegitimate and unconstitutional. The final issue for determination was whether the Claimant was entitled to the remedies he had sought in his claim. The Respondent submitted that the Claimant ought to have appealed in terms of Section 77 of the County Governments Act and that the Claimant had to follow the dispute resolution mechanism under Article 234(2)(i) of the Constitution as read with Section 77 of the County Governments Act. The case of **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR** was cited for the proposition that where a dispute resolution mechanism outside courts is provided, the same must be exhausted before the jurisdiction of the courts is invoked. The Respondent submitted that the procedure for redress of particular grievance prescribed by the Constitution or an Act of Parliament should be followed. In support of the submission, the Respondent cited the cases of **Speaker of the National Assembly v Njenga Karume [2008] 1 KLR 425** and **Jude Riziki Kariuki v Tharaka Nithi County Government & Another [2019] eKLR**. The Respondent also relied on the cases of **Charles Gitong Kibaara v Tharaka Nithi County Government & Another [2019] eKLR** and **Republic v Secretary, County Public Service Board & Another Ex parte Hulba Gedi Abdile [2017] eKLR**. The Respondent submitted that the provisions of Section 65 of the County Governments Act gives the County Public Service Board the mandate to recruit and the recruitments should be after competitive advertisement and public participation as envisioned in Article 10 of the Constitution. The Respondent submitted that the Claimant's recruitment was not on merit or with fair competition. The case of **John Mining Temoi & Another v Governor of Bungoma County & 17 Others [2014] eKLR** for the proposition. The Respondent cited the cases of **Stephen Munene Njagi & Another v Tharaka Nithi County Government [2017] eKLR**, **Samuel Angasa Onukoh v Speaker, Kisii County Assembly & 118 Others [2017] eKLR** and **Jackson Cheruiyot Rono v County Secretary Bomet & Another [2017] eKLR** on the issue of the recruitment process. The Respondent in summary urged the dismissal of the Claimant's case.

7. Cases relating to illegality of contract were cited though that was not an issue for determination and can therefore be safely ignored. The Claimant's dismissal was for misconduct. Prior to dismissal for any acts of misconduct, the provisions of Section 41 of the Employment Act come into play and hearing in terms of the Act mandatory irrespective of the circumstances of the particular case. The Respondent asserts that the Claimant's case has been brought to this court prematurely since Section 77 of the County Governments Act provides that any person aggrieved by the decision of the County Public Service, may appeal to the Public Service Commission. The Respondents assert that the Claimant in this suit failed to appeal to the Public Service Commission as provided for in law. Section 77 of the County Government Act provides thus:-

77. (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this

Part referred to as the “Commission”) against the decision

This section is not couched in mandatory terms and as can be discerned from a clear reading of the Section that the person **may** appeal to the PSC. The Constitution of Kenya under Article 234(2)(i) provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments’ public service. Section 77 of the County Governments Act, 2012 does not oust the court’s jurisdiction to hear and determine this suit as the jurisdiction of any Court is donated either by the Constitution or a statute. This court is a specialised court under Article 162(2)(a) of the Constitution as read with Section 12 of the Employment and Labour Relations Court Act. The jurisdiction of the court is spelt out clearly under Section 12 of the Employment and Labour Relations Court Act which provides as follows:-

12. (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –

(a) disputes relating to or arising out of employment and an employee.

....

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:

(iv) A declaratory order;

(v) An award of damages in any circumstances contemplated under this Act or any written law;

(vi) An order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose

(vii) Any other relief as the Court may deem fit to grant.

The question that naturally arises therefore is whether the suit by the Claimant falls within the range of disputes for determination by this court. In this case the Claimant argues that his employment was wrongfully, unlawfully and unfairly terminated by the Respondent. The dispute in my considered view is well within the jurisdiction of this court. The intertwined issues of Constitutional infringements asserted take this case out of the reach of the cases of **Jude Riziki Kariuki v Tharaka Nithi County Government & Another** (*supra*) *et al* as this present case is distinguishable from the cited decisions. In the case of **Abdikadir Suleiman v County Government of Isiolo & Another** [2015] eKLR the court held that:

“In the instant case, looking at the alleged claims of illegality, unconstitutionality, breach of constitutional rights and the remedies as prayed for, it is difficult to find that the cited alternative procedure and remedy under section 77 of the Act was available to the claimant. Even if it is said that it was a case of mixed jurisdiction of the Commission and the court, it is the court’s opinion that the legitimate path was to invoke the court’s jurisdiction to hear and determine the intertwined issues, that being the most efficient and effective manner of disposing the dispute.

In the circumstances of this case, the court returns that the provisions of section 77 of the County Government Act, 2012 did not oust or restrict the jurisdiction of the court for want of exhaustion of the procedure and remedies envisaged under the section”.

8. The Claimant was dismissed without adherence to the law and therefore is entitled at the very least to a declaration that the termination was illegal and unfair. To boot, the dismissal letter was effective 13th March 2018 which was way before the suspension to pave way for investigations. This is untenable. Despite finding in his favour, the Claimant cannot however be reinstated to his position as personal assistant to the Deputy Governor as the position is now unavailable. In addition the position is of an extremely sensitive nature in which the mutual trust of parties is vital. The Claimant would therefore only be entitled to compensation for the unlawful dismissal in terms of Section 49(1). He is entitled to recover 3 months salary as compensation for the unlawful dismissal, costs of the suit as well. In the final analysis I enter judgment for the Claimant against the Respondent for:-

1. Kshs. 198,270/- as compensation for the unlawful dismissal

2. Costs of the suit limited to Kshs. 45,000/-

It is so ordered.

Dated and delivered at Nyeri this 28th day of October 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar