



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

EMPLOYMENT AND LABOUR COURT AT ELDORET

CAUSE NO 2 OF 2018

NOAH KIPKOECH KOSGEL.....CLAIMANT

VERSUS

PRINCIPAL SECRETARY MINISTRY OF INTERIOR

NATIONAL GOVERNMENT AND OTHERS.....RESPONDENT

J U D G E M E N T

1. By a Petition dated 25th March,2015 the petitioner sought from the Court orders in the main that he was lawfully and procedurally appointed as the Chief Chemundu Location with effect from 25th June, 2009.
2. Further that he was a permanent and pensionable employee of the 1st Respondent and that his dismissal from public service through a letter dated 20th September,2010 was unlawful, unreasonable and unfair
3. The petitioner further sought an order that the conduct of proceedings leading to his dismissal were flawed with procedural irregularities as the petitioner was not accorded sufficient opportunity to defend himself on spurious accusations made by the respondents against him.
4. The petitioner further sought a declaration that his dismissal on the strength that he failed to present his academic certificates to prove that he sat for KCE examination or met the requirements for the part of the Chief for Chamundu location was illegal and unfounded in law.
5. The application was supported by the affidavit of the petitioner in which he deponed among others that: _
 - (a) **THAT** I am a graduate with Bachelor of Arts degree Baraton University with a major in History and Minor in religion.
 - (b) **THAT** before I joined Baraton University, I had sat both for Kenya Certificate of Education (KCE) and Kenya advance Certificate of Education (KACE).
 - (c) **THAT** I applied for the post of Chief having read and advertisement made by the 1st Respondent prove of which is supported by an interview for the post of a Chief dated 5th May,2008.
 - (d) **THAT** I was successful at the said interview where I presented my testimonials among them being my original KCE with a score of Division III.
 - (e) **THAT** subsequently, I received an appointment letter dated 27th July 2009 addressed to me by the 1st Respondent stating inter alia thus;
 - (i) That I was appointed on probation as chief II in the Service of Government of Kenya with effect from 25th June, 2009.
 - (ii) That I was entitled to receive Kshs. 16,692/= (Sixteen thousand six hundred and Ninety-Two only) as basic salary.
 - (iii) That salary increment was due on 15th June 2010 onwards.

(iv) That I would be eligible for retirement benefits upon confirmation per terms of service of the 2nd Respondent.

(v) That I would be subjected to all regulations for officers and/or employees of the 2nd Respondent.

(vi) **THAT** as a Chief of Chemundu Location, I conducted a medical examination on my person as required by regulations, signed the appointment letter and was issued a certificate of medical examination confirming that I was left fit for permanent service in the Kenya Government Administration the same was forwarded to the 1st Respondent through 4th Respondent.

(vii) **THAT** I immediately commenced work as Chief II at Chemundu Location after being official installed by the then D.C Nandi Central, Ndambuki F.K. on 7th July 2009.

(viii) **THAT** my work was exemplary and commendable. I was feted for outstanding contribution in eradication of illicit brew (chang'aa) at the Location by the 3rd Respondent herein.

(ix) **THAT** while at the office I was recommended for a security course by the office of the then Nandi Central District Commissioner (4th Respondent) for an induction course that took place at the Administration police training college Nairobi on 7th December 2010.

(x) **THAT** in the meanwhile I received a letter dated 20th April, 2010 asking me to present my academic certificates. The letter in part read.

“this is construed to mean that either you did not sit examination and/or failed to meet academic requirements, or that you are not interested in the offer appointment made to you”

(xi) **THAT** this got me by surprise because I had forwarded my testimonials through the 4th Respondent who informed me that the same had been forwarded to the 3rd Respondent for onward transmission to the 1st Respondent.

(xii) **THAT** my testimonials had been returned back to me without my original KCE after I had forwarded them to the 1st Respondent. Since the 1st Respondent had not returned my KCE certificate, I swore an affidavit stating the loss to facilitate issuance of a duplicate to me.

(xiii) **THAT** I had to seek to know reasons for my being subjected to immense interference, promoting me to seek clarification from 4th Respondent who wrote to the 1st Respondent in a letter addressed to the 1st Respondent on 29th April, 2011.

(xiv) **THAT** unbeknown to me a letter had been written by the 1st Respondent addressed to me through the office of 4th Respondent purporting to cancel the offer of appointment reasoning thereby.

“It has been noted that you presented a falsified copy of KCE Certificate to the District Commissioner showing that you attained Division II and the same was forwarded to this office to enable us process your appointment. Upon request by this office to avail the original academic certificate vide letter no ESTAR 12/3/VOLXV/44 dated 20th April,2010 you presented a KCE Certificate indicating that you attained Division III. This portrays dishonesty and lack of integrity.

(xv) **THAT** I immediately wrote to the 1st Respondent lamenting on the content of the letter and service of the letter purporting to cancel the offer of appointment to the office of Chief Chemundu Location.

(xvi) **THAT** instead of responding to my grievances the 1st Respondent through the office of the Deputy County Commissioner (4th Respondent), advertised my position in a letter dated 6th March,2015, the same was copied to the other Respondents herein. Accordingly, application for my position ought to reach the said office on/or before 10th April,2015.

6. The 1st,2nd ,3rd and 4th respondent filed a replying affidavit through one Dr. (ENG) Karanja Kibicho who deponed on the main that:-

(i) **THAT** I am the Principal Secretary /Interior, in the Ministry of Interior and Co-ordination of National Government and I am duly authorized and competent to swear this affidavit on behalf of all the Respondents herein.

(ii) **THAT** the Respondent admit paragraph 3.4 and 5 of the petitions but aver that the petitioner's appointment as the chief was irregular, improper and unmerited due to the misrepresentation by the Petitioner which was not detected early enough.

(iii) **THAT** the Respondents aver that the Respondents did carry out a due diligence exercise to verify the qualifications of the petitioner.

(iv) **THAT** the Respondents aver that the petitioner availed a document on 23rd November,2009 which indicated that the petitioner attained a Division ii in his KCE document was noted not to bear certain features in genuine academic certificates which prompted

the ministry to ask the petitioner to submit his original academic certificates.

(v) **THAT** after the said request the petitioner presented another KCE certificate on 28th September,2010 which indicated that he had obtained a Division III grade hence conflicting with the earlier certificate.

(vi) **THAT** subsequently the petitioner's appointment as chief Chemundu location was cancelled on the grounds of dishonesty and lack of integrity for presenting a falsified academic certificate and the said decision was relayed to him through his supervisor in accordance with the chain of command through a letter dated 28/9/2010.

(vii) **THAT** the Respondents aver that the petitioner was verbally and by written letters informed to present his academic certificates and hence he was given a fair hearing.

(viii) **THAT** the petitioner claims for unpaid salary from 20th June 2011 to 17th December,2014 is baseless as he was unqualified and having obtained the appointment through fraud, he cannot expect to benefit from this fraud.

7. In the submission in support of the petition, Mr. Bitok for the Petitioner submitted in the main that by standards and objectives enshrined under the Public Service Commission 2012, the respondent failed to protect the rights of the petitioner. The act of summarily dismissing the Petitioner without giving him an opportunity to be heard amounted to unfair termination as defined by section 45 of the Employment Act and violation of his rights to face administrative action. Counsel further submitted that the respondent failed to demonstrate to the Court that the petitioner's employment was terminated procedurally.

8. According to Mr. Bitok, the termination was penalty with service consequences which had to be done with care, regard and notice to the affected employer who should have been granted a reasonable opportunity to give a defence. The petitioner did no wrong. He submitted his credentials as required at the time of employment and the respondent did not disclose where they obtained the alleged division II certificates.

9. Mr. Bitok further submitted the summary dismissal was unfair as it did not follow the provisions of section 44(3) of the Employment Act. Further there was no evidence that the petitioner had been relieved of his duties because he still maintained his government stores, beret, hat, swagger stick and uniform. The Claimant had no signed to indicate he had surrendered the government stores because there was nothing to guide or request him to surrender.

10. Ms Langa for the respondent on her part submitted that the respondent conducted due diligence after interviewing the petitioner to verify his qualifications whereby he presented two academic certificates which conflicted with each other thus making the respondent cancel his appointment on grounds of dishonesty and lack of integrity based on article 10 and article 232 of the constitution.

11. According Counsel, since the petitioner presented a falsified academic certificate at the time of his appointment, he cannot be heard to allege that he was lawfully and procedurally appointed as chief of Chamundu with effect from 25th June, 2009.

12. Concerning whether the Petitioner was a permanent and pensionable employee, counsel submitted that he was never admitted into permanent and pensionable establishment which was done on completion of probation and since the verification of the Claimants documents found him unfit for appointment in public service his prayer of being a permanent and pensionable employee fails.

13. The respondent asked the petitioner to avail his academic certificates through letters annexed as exhibits KK 2(a) 2(b) and 2(c) hence the dismissal was procedural not caprizivus as alleged. The dismissal was supported by the evidence of falsified academic certificate.

14. Regarding salary, counsel submitted that the Claimant was not entitled to a salary since he could not benefit from his fraud, dishonesty and lack of integrity which led to his irregular appointment.

15. By a letter dated 27th July 2009 the Claimant was informed that he was appointed as Chief II on probation basis. The letter enclosed a formal letter of appointment from Public service Commission dated 27th July,2009.

16. The appointment letter was accepted by the Petitioner on 7th August,2008.

17. Earlier, there was a letter dated 17th June,2009 which informed the Petitioner that he had been successful during the interview held on 15th May,2008 and cleared for appointment as Chief II for Chemundu Location. The letter further informed the petitioner that he was required to see the District Human Resource Management Officer for the appointment formalities. It was asked to carry his originals Academic (professional and other testimonials for verification). It is presumable that after the verification was when the Claimant was issued with the formal letter of appointment dated 27th July, 2009.

18. From the evidence on record, the Claimant was formally installed as the Chief of Chamundu on 7th July, 2009 and embarked on his duties including attending induction training organized by Ministry of Internal security.

19. However, by a letter dated 20th April, 2010 the Claimant was informed that he was yet to present his academic certificates to Provincial administration offices for verification. The letter proceeded to inform the petitioner that failure on his part could be constrained either that he never sat for the examination or failed to meet the requirements or further that he was not interested in the offer made to him.

20. According to the Petitioner he handed his original certificate on 6th September, 2010 to one Mr. Keter of Personnel at Nandi District Headquarters for onward transmission to the Officer of the President for verification but to date had not been found. The Petitioner further

reported the loss of the certificate and obtained a police abstract.

21. By a letter dated 28th September, 2010 the respondent informed the Petitioner that it was noted that he presented a falsified copy of KCE certificate to the DC showing that he attained Division II and the same was forwarded for processing of the petitioners appointment and that upon request to avail the original academic certificate he presented a KCE certificate indicating he attained Division III. This according to the respondent portrayed the petitioner’s dishonesty and lack of integrity. The respondent therefore went ahead and cancelled the petitioner’s offer of appointment.

22. The petitioners have complained that in cancelling his appointment, the respondent violated his rights under article 10,20.21.22.35 and 50(1) of the Constitution and further his right under section 47(1) (2) of the Fair Administrative Actions Act.

23. It would be useful to point out at this stage that whereas this petition was presented as a constitutional petition, counsel for the Petitioner has extensively relied on the provisions of the Employment Act and decisions by the Court on claims founded on the Employment Act. This court and the court of Appeal has decided in several cases that where there is statute that adequately addresses a dispute or complaint it is not necessary to invoke the constitution unless it can be demonstrated that the issues in the dispute would not be fully addressed unless resort is made to the Constitution.

24. That having been said the petitioner herein had already been issued with a letter of appointment he was therefore for all intents and purposes the respondent’s employee. The termination of his service therefore ought to have adhered to the provisions of the Employment Act.

25. It may well be true that the petitioner was guilty of the allegations against him however the respondent ought to have called upon him to Show Cause why his contract should not be terminated over those allegations. He ought to have been taken through a disciplinary hearing before the cancellation of his contract. This did not happen in respect of the Petitioner.

26. The court therefore declares that the petitioners was lawfully and procedurally appointed as the Chief of Chemundu Location and that his dismissal from public service was unlawful and unfair.

27. However, considering the lapse of time since the unprocedural termination, the Court will not order reinstatement. However, considering the circumstances under when the petitioner was terminated and the reasons, the Court is of the view that this is a proper case for awarding maximum 12 months wages for unfair termination of service. The Claimant’s monthly salary on appointment was **Kshs. 16,692/=** . The Court therefore awards him **Kshs. 200,304/=** being twelve months salary.

28. The petitioner shall further have costs of the petition.

29. It is so ordered.

Dated at Eldoret this 14th day of November 2019

Abuodha Jorum Nelson

Judge

Delivered this 14th day of November 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....**for the Claimant and**

.....**for the Respondent.**

Abuodha J. N.

Judge