



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 207 OF 2018

STANLEY MURIMI KINYUA.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF KIRINYAGA.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent seeking recompense for the alleged illegal termination of employment and non-payment of dues owed to the employee. He averred that he was employed by the Respondent as a clinical officer on 12th February 2015 and at the time of termination of employment was working at Kimbimbi S. C. Hospital. The Claimant averred that the termination on 23rd May 2015 was unlawful and without reason. He averred that the Respondent had not paid salary for 4 months – Kshs. 197,292/-, unpaid leave for 4 months – Kshs. 16,441/-, unremitted pensions – Kshs. 12,000/-, 12 month's in lieu of notice of termination – Kshs. 591,876/-, damages for the illegal termination of employment and interest in the sums at court rates compounded from 23rd May 2015 till payment in full, costs of the suit.

2. The Respondent's defence was that the recruitment of the Claimant was not transparent, based on fair competition and merit as required under Section 65 and 66 of the County Governments Act as read with Article 232(1)(g) of the Constitution as the position was never advertised. The Respondent averred that the appointment to the position was not only highly irregular but also unlawful, illegal and illegitimate. The Respondent averred that it did not terminate the employment of the Claimant but rather the County Service Public Board of the Respondent revoked and/or withdrew his appointment pursuant to Section 75(a) of the County Governments Act after it discovered that the process through which the Claimant was appointed was marred with irregularities and illegitimate. In response to the reliefs sought by the Claimant the Respondent averred that the same are unfounded and granting them would occasion grave injustice on the Respondent as there is no cause of action between the Claimant and the Respondent. The Respondent thus urged the dismissal of the suit with costs.

3. The Claimant and Geoffrey Githinji Kamau, the Respondent's witness testified. The Claimant stated that he was employed as a clinical staff and that he previously worked in Mandera and Eldoret. He adopted his statement and produced the documents attached to his memorandum of claim. His statement was to the effect that he was employed on 12th February 2015 as a clinical officer III Job Group H earning a monthly salary of Kshs. 49,323/-. He stated that having worked for the Respondent for over 4 months he was without being afforded a hearing terminated from service. He stated that for the 4 months worked he was never paid his salary and despite seeking payment of the accrued dues the Respondent continued to detain his dues. He stated that the termination was unfair, illegal and unconstitutional and the continued withholding of his terminal dues crippled his source of livelihood. He stated that the Respondent had opted to exhibit discriminatory, unfair treatment and slavery tendencies and disrespect for labour laws. He thus urged the grant of the reliefs in his suit. He attached the letter of appointment by the Kirinyaga County Government County Public Service Board dated 12th February 2015 signed by G. G. Kamau the Secretary County Public Service Board, the internal posting letter dated 19th February 2015 signed by Dr. Esbon Gakuo the County Director of Health, the arrival letter of the Medical Officer in charge Kimbimbi Sub County Hospital dated 24th February 2015 indicating the Claimant had reported on 24th February 2015 as well as the letter dated 23rd February 2015 signed by Dennis Ireri Senior Health Administration Officer Kerugoya County Hospital indicating the Claimant had reported on 23rd February 2015 for duties at the station and seeking the facilitation of processing of the Claimant's appointment. He also attached the demand letter from his advocates dated 3rd September 2017 in which he sought unpaid salary for 3 months, 12 months salary for unlawful termination of employment, severance pay for the time worked, certificate of service and other legal benefits as the law may grant. He was cross-examined and he testified that the process of engagement at the County Public Service is that there is advertisement then interview, shortlisting and then appointment. He stated that there was an advertisement for his position but he did not have the advertisement. He stated that he had applied for the job but he did not have the letter of application. He testified that he had an appointment letter and that the letter was regular. He stated the advertisement was verbal and made in church and whoever was qualified would apply. He stated that he was not aware that it had to be advertised in the dailies. He was referred to the Respondent's bundle and stated that the letter was a withdrawal of 28 health workers and he was number 25 on the list. He said that as per the documents he worked for less than a month and that he could not claim salary he did not work for nor claim leave for months not worked for. He was re-examined and he stated that there were advertisement and that these were informal. He testified that he applied and was invited for interview. He stated that he worked and reported on 3rd March 2015 and was employed till 25th May 2015. He stated he was posted to Kirinyaga Sub County Hospital and was not paid his salary.

4. The Respondent's witness testified that he was the Secretary of the Kirinyaga County Public Service Board and he adopted his statement dated 22nd January 2018. His statement was to the effect that the functions of the Board were *inter alia* appointment of persons to hold or act in offices of the County Public Service. He stated that in making any appointment the County Public Service Board is mandated by law to ensure that the process is open, transparent, based on fair competition and merit. He stated that the Board must therefore advertise vacant positions available in the County Public Service, consider the applications from interested persons, shortlist and conduct interviews and finally make appointments. He stated that he was aware the appointment of the Claimant was not open, transparent and based on fair competition and based on merit as it was never advertised and the Claimant neither applied nor interviewed for the position and that consequently the appointment was not only irregular but also unlawful, illegal and illegitimate. He stated that the Board discovered the irregularities and illegalities that marred the appointment of the Claimant and revoked the appointment by virtue of the powers vested upon it by the County Governments Act. He stated the termination was not illegally terminated as alleged but revoked pursuant to the County Governments Act. He stated that the Claimant is not entitled to the damages or terminal dues as his appointment was irregular, unlawful, illegal and illegitimate therefore null and void. He was cross-examined and stated that there was a general notice on 3rd March 2015 and that this was addressed to the Chief Officers and not the Claimant. He testified that he was not aware if the Claimant was heard before the dismissal. He stated that the appointment letter says that he was appointed clinical officer. He stated that he did not know the internal operations and did not know where the Claimant was posted. He stated that he did not know when he dispatched the letters and when the Claimant reported. He was referred to the letter dated 24th February 2015 and stated that was a letter to the Director of Health and was signed by the station officer. He stated that by the nature of the case there was an irregularity and therefore the County Public Service Board withdrew. He stated that the County Public Service Board was the one mandated to employ the Claimant and that the Claimant was not interviewed by the Board. In re-examination he stated that there was no advertisement placed in the print or other media. He testified that there was no application in the Respondent's records and he could not remember interviewing the Claimant. He stated that in 2 weeks the Board realized it was irregular and wrote revoking the appointment on 3rd March 2015. He stated that he was aware Section 75 granted the Board power to revoke or suspend the appointment and that the appointment was revoked as it was non-existent. He stated that he did not know but assumed that the day the officer received the letter should have been the date of termination which was a few days after.

5. The parties filed submissions and the Claimant in his submissions stated that the issues for determination were

- a) Whether there was a contract of service
- b) Whether the Claimant's termination was unlawful
- c) Whether the Claimant is entitled to the remedies sought

The Claimant submitted that the court had jurisdiction. The Claimant submitted that the law applicable was Article 162(2)(a) of the Constitution and the Industrial Court Act or any other law which extends jurisdiction to the court relating to labour and employment relations including disputes arising out of employment. The Claimant submitted that relying on the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2015] eKLR** there was no justifiable cause for the termination of employment. The Claimant urged the grant of the reliefs sought in the claim and any other orders the court deems just and fair.

6. The Respondent submitted that the issues for determination were

- a. Whether the Claimant's employment was illegal, unlawful, illegitimate and unconstitutional
- b. Whether the revocation of the Claimant's employment was justified
- c. Whether the suit offends Section 77 of the County Governments Act
- d. Whether the Claimant is entitled to the reliefs sought in his claim

The Respondent submitted that the Claimant's employment was unlawful as it contravened the Constitution and Section 57 and 65 of the County Governments Act. It submitted that the provision of Article 10 of the Constitution required that there be public participation, inclusivity and integrity, transparency, accountability, equity and equality in making appointments to the public service. The Respondent cited the case of **Republic v Secretary, County Public Service Board & Another Ex parte Hulbal Gedi Abdile [2017] eKLR** on the issue. The case of **John Mining Temoi & Another v Governor of Bungoma County & 17 Others [2014] eKLR** was cited for the proposition that merit and fair competition requires the interview and selection for the advertised positions. The cases of **Stephen Munene Njagi & Another v Tharaka Nithi County Government [2017] eKLR** and **Samuel Angasa Onukoh v Speaker, Kisii County Assembly & 118 Others [2017] eKLR** were cited for the process of recruitment under 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 this 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 submitted that the Claimant's employment was unprocedural and as such there was no employee employer relationship. The case of **Jackson Cheruiyot Rono v County Secretary Bomet & Another [2017] eKLR** was cited on this point as well as the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR**. The case of **Mcfoy v United Africa Company Limited [1963] 3 All ER 1179** was cited as well. The Respondent submitted that the Claimant was underserving of the remedies sought as no court will enforce an illegal contract. The Respondent thus urged the dismissal of the Claimant's claim.

7. The case by the Claimant was pursuant to an appointment under the hand of the Respondent's witness Geoffrey Githinji Kamau. The issues distilled for determination are the following:-

- a. Whether there was a contract of service
- b. Whether the Claimant's employment was illegal, unlawful, illegitimate and unconstitutional
- c. Whether the revocation of the Claimant's employment was unlawful or justified
- d. Whether the suit offends Section 77 of the County Governments Act
- e. Whether the Claimant is entitled to the reliefs sought in his claim

8. The first issue is whether there was a contract of service. Strictly speaking there was no contract of service. The Claimant received a letter referenced 'appointment – clinical officer III'. It conveyed the pleasure of the author the Secretary to the County Public Service Board in appointing the Claimant in the permanent and pensionable terms on the stated salary scale. The Claimant was required to report to the Chief Officer of Health for posting. The duties and responsibilities would later be communicated to the Claimant by the office of the Chief Officer of Health. The Claimant asserts pursuant to this letter he was posted to Kimbimbi Sub County Hospital. He however had 2 letters indicating he reported to for duty on 23rd February 2015 and 24th February 2015. It is not clear which of the two was the effective date of reporting. The Respondent asserts the letter of 12th February 2015 was countermanded by a letter issued on 3rd March 2015. The Respondent's exhibit in this regard was unclear and of no probative value as it was illegible. If the evidence of the Respondent's witness is to be believed he issued the letter countermanding the appointment letter. The curious thing is that the communication was to chief officers and not the Claimant or the affected staff. The Respondent's position was that the letter of posting was the list of officers affected by the letter of 3rd March. However, the letter of posting is dated 19th February 2015 in which it was stated that following the appointment of the officers in the list, the posting had been approved and took effect immediately to ensure smooth service delivery. Each officer had a designation, appointment reference number and station of posting. The Respondent was therefore not candid in asserting that the appointments were illegal, unlawful, illegitimate and unconstitutional when it took such elaborate steps to issue authentic letters of appointment and posting as well as confirmation of the arrival of the employees. On the question as to whether there was a contract of service I would answer that there was a contract encapsulated in the letter of appointment. As to whether the Claimant's employment was illegal, unlawful, illegitimate and unconstitutional, I would return the appointment was neither illegal, unlawful, illegitimate or unconstitutional. One wonders when the Respondent's witness became aware that the appointment he had made was illegal, unlawful, illegitimate and unconstitutional. On the issue as to whether the revocation of the Claimant's employment was unlawful or justified, it was within the purview of the Respondent or the County Public Service Board to recall, cancel or vacate the appointment. However, the revocation or cancellation should be for good cause. The law provides for this under the County Governments Act under Section 75. However, no evidence of the inquiry contemplated under Section 75 was displayed. I would therefore find that there was no justification displayed for the Claimant's contract being terminated. As to whether the suit offends Section 77 of the County Governments Act, the Claimant was appointed under the County Governments Act and was therefore bound to follow the dictates of the law in the recourse he could articulate as a consequence of being aggrieved by any decision on the matter. In this case, Section 77 makes provision for an appeal to the Public Service Commission. Although the Claimant was dismissed in 2015, he did not appeal and waited for the day before the expiry of the cause of action to file this suit. In my view, the Claimant had the option to pursue the claim before the organs under statute and he declined to do so. No reason was offered and no explanation is given as to why he came to court without adhering to the law. In view of this lapse on his part he would be unable to recover any relief for the illegal and unlawful manner of termination of his contract. Suit is dismissed but each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 4th day of November 2019

Nzioki wa Makau

JUDGE