



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 57 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

**EMMANUEL EBENEZER ODUOR..... PETITIONER**

**VERSUS**

**THE COUNTY SECRETARY,**

**COUNTY GOVERNMENT OF HOMABAY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY PUBLIC SERVICE**

**BOARD HOMABAY COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF HOMABAY.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner is an employee of the 2<sup>nd</sup> respondent from 27<sup>th</sup> June 2016 as Public Health Officer. On 20<sup>th</sup> April 2018, the office of the County Secretary Homabay issued the petitioner with a letter of termination on the following grounds:

- (i) The position you are holding was not advertised meaning there was no advert you responded to and;
- (ii) No interview was conducted prior to your appointment. The contract of service was terminated with effect from 1<sup>st</sup> July 2018.

2. The petitioner produced letter of appointment dated 27<sup>th</sup> June 2018 signed by one Steve Biko Odidi, Ag Board Secretary of the Homabay County Public Service Board. The appointment was accepted by the petitioner on 1<sup>st</sup> August 2006 and he appended his signature to the letter. It is not in dispute that the petitioner commenced work and continued to serve until the date of termination.

3. The petitioner was placed in job group 'H' and was on probation for a period of six months. The letter referred to appointment to the above mentioned post following the recent interviews.

4. The petitioner relies on the following violations *inter alia*:

- (i) Disciplining the petitioner on the basis of administrative lapses on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
- (ii) Usurping powers of the 2<sup>nd</sup> respondent.
- (iii) Denying the petitioner right to be heard.
- (iv) Violating the petitioner's right to fair treatment.
- (v) Discriminating upon the petitioner.
- (vi) Subjecting the petitioner to inhuman treatment therein violating Articles 10(2) (c) 41, 47(1) and 236(b) of the Constitution of Kenya 2010.

5. The petitioner deposed to a supporting affidavit in which he states that he read an Advertisement placed in the Bulletin Board of the 3<sup>rd</sup> Respondent on or about April 2016 in which members of public were invited to apply for various jobs in the County Government. The petitioner applied for the advertised position of Public Health Officer III

6. The petitioner and others were called to attend oral interviews to which the petitioner attended. Pursuant to the interview, the petitioner received a letter of appointment to the position from the Secretary/Chief Executive Officer of the board to the position of Public Health Officer Grade III.

7. The petitioner received a posting order executed by the Chief Officer, Department of Health Service Homabay County dated 18<sup>th</sup> June 2010. The petitioner reported to work at Rachuonyo South Sub-County and was assigned to Oyugis Town to conduct community Health Services at Kasimba Community Unit as per letter dated 4<sup>th</sup> August 2010. The petitioner was placed on the payroll and continued working until 1<sup>st</sup> July 2018, a period of about two (2) years. This is the gist of the petition.

8. The petitioner prays for:

(i) Declaration be issued to the effect that the petitioner is entitled to protection under the constitution.

(ii) Declaration that the actions and/or omissions of the Respondents herein, including in particular, the purported notice of termination of employment of the petitioner, constitutes and/or amounts to unfair labour practices, punishment, mistreatment of the petitioner and gross abuse of office.

(iii) Declaration that the notice of termination of service and/or employment, dated 20<sup>th</sup> April 2018, but withheld and only delivered to the petitioner on the 25<sup>th</sup> July 2018, albeit signed on behalf of the 1<sup>st</sup> Respondent, is illegal, void and contrary to the due process of the law.

(iv) An order of Judicial Review in the nature of Certiorari to issue to remove unto the Honourable Court and quash the letter dated 20<sup>th</sup> April 2018, but delivered on the 25<sup>th</sup> July 2018, whose effects was/is to terminate the Petitioner's employment.

(v) Permanent Injunction, restraining the Respondents either by themselves, agents, servants and/or employees from unfairly and/or illegally terminating the petitioner's employment without complying with the due process of the law.

(vi) Costs of the Petition be borne by the Respondents jointly and/or severally.

(viii) The Honourable Court be pleased to issue such orders and/or writs as the Court may deem fit and/or expedient.

#### **Replying Affidavit.**

9. A replying Affidavit deposed to by Mr. George Illah, Principal Legal Officer of the respondents on 24<sup>th</sup> September 2018 in which he states that the petitioner has never been lawfully employed by the 3<sup>rd</sup> respondent, The County Government of Homabay was filed.

10. That the position held by the petitioner was never advertised as alleged by the petitioner or at all.

11. That the petitioner was never interviewed as alleged or at all.

12. That the petitioner has not attached proof of such advertisement yet under *Section 66 of the County Governments Act*, positions of the 3<sup>rd</sup> respondent are to be publicly advertised.

13. That the petitioner knows that he is a victim and part of fraudulent recruitment by unscrupulous people purporting to be officers of the 3<sup>rd</sup> respondent who issued fake appointment letters to the petitioner herein.

14. That the fraudulent appointments were revoked in terms of Section 75 of the County Governments Act. That in any event the petitioner ought to have invoked provisions of *Section 77 of the County Governments Act* by appealing the decision of the County Public Service Board to the Public Service Commission. That the suit is premature and it be dismissed with costs.

#### **Determination**

15. The issues for determination are as follows:

(i) Was the Petitioner a lawful employee of the Respondent? If answer to (i) above is true,

(ii) Was the termination of the petitioner's employment for a valid reason and done following a fair procedure?

(iii) Is the petitioner entitled to the reliefs sought?

#### **Issue (i)**

16. The petitioner produced a letter dated 27<sup>th</sup> June 2016 in terms of which he was appointed to the position of Public Health Officer III in job group H. He was placed on probation for a period of Six months. The letter of appointment is written and signed by one Steve Biko Odidi, Ag Board Secretary. The petitioner was posted by a letter dated 18<sup>th</sup> July 2016, written by one Duncan Odongo Ojiem, Chief Officer Department of Health Service, Homabay County.

17. The petitioner received a further posting order dated 4<sup>th</sup> August 2016, signed by one George O. Wigwa Sub-County Public Health Officer Rachuonyo South Sub-County.

18. The petitioner further produced letter dated 1<sup>st</sup> August 2016, written by one Vitalice O. Obetto for Sub-County Medical Officer of Health, Rachuonyo South, written to the Chief Officer of Health Confirming that the petitioner reported to work in the Sub-County on 27<sup>th</sup> July 2016.

19. It is significant that none of the signatories to the said letters have placed any evidence before this court denouncing the advertisement, interview, appointment, deployment and commencement of work by the petitioner as stated in the respective letters placed before court vide a supporting affidavit by the petitioner.

20. The denial by the respondents that the petitioner was not a lawful employee of the respondents is hollow, unsupported by any tangible evidence and completely insufficient to shake the credible testimony by the petitioner under oath and supported by documents whose authenticity has not been specifically questioned by the respondents.

21. The petitioner has proved on a balance of probabilities that he was lawfully employed by the respondents in the position of Public Health Officer III on 27<sup>th</sup> June 2016 and he served lawfully and continuously until 1<sup>st</sup> July 2018 when the employment was terminated.

22. It is the finding of this court that no valid reason has been placed before court for the said termination of employment. Furthermore, the respondents did not follow a fair procedure in terminating the employment of the petitioner. The petitioner was not given any notice, notice to show cause nor was he afforded opportunity to defend himself. The termination was arbitrary and devoid of any valid reason. The same was unlawful and unfair. The respondents violated *Articles 27(1) 41(1) 8 (2) 50(1) and 236(b) of the Constitution of Kenya 2010*.

23. The termination was in addition a violation of *Sections 36, 41, 43 and 45 of the Employment Act, 2007*.

24. Accordingly, the petitioner is entitled to an order of Judicial Review in the nature of Certiorari to remove unto this court and quash the letter dated 20<sup>th</sup> April 2018, which was delivered to the petitioner on 25<sup>th</sup> July 2018 terminating the petitioner's employment.

25. The petitioner is therefore reinstated to his employment without loss of any salary or benefits with effect from 1<sup>st</sup> July 2018, the termination having been unlawful and of no effect, *abinitio*.

26. In the final analysis, judgment is entered in favour of the petitioner as against the respondents jointly and severally as follows:

(i) The termination of the employment of the petitioner was unlawful and unfair.

(ii) An order of Judicial Review in the nature of certiorari is issued to remove unto the court and quash the letter dated 20<sup>th</sup> April 2018 which terminated employment of the petitioner with effect from 1<sup>st</sup> July 2018.

(iii) The petitioner is reinstated to his former position in the employ of respondents without loss of any salary, benefits or ranking with effect from 1<sup>st</sup> July 2018.

(iv) Costs of the suit to follow the outcome.

**Judgment Dated, Signed and delivered this 4<sup>th</sup> day of December, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Ogutu for the Petitioner.

Mr. Nyauke for Respondent

Chrispo – Court Clerk