



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 422 OF 2017

NYAGA N. KAIRICHI.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF EMBU.....RESPONDENT

JUDGMENT

1. The Claimant filed suit seeking to recover against the Respondent for concerning the wrongful/unfair and illegal dismissal, refusal to pay terminal dues to him, punitive damages and any other relief the court may award under the labour laws. He averred that he was employed as a revenue collector in the revenue department of the County Council of Mbeere the predecessor of the Respondent and that by virtue of the establishment of the Respondent under Article 176(1) of the Constitution of Kenya and the County Government Act No. 17 of 2012 was at all material times to the suit an employee of the Respondent. He averred that on account of the longevity of his service to the Respondent he ought to be treated as a permanent employee by dint of Section 37 of the Employment Act. He asserted that he was not granted any leave days and/or allowance and that at the time of the dismissal had accrued leave days for the 7 years of service. He averred that his dismissal was without any colour of right as the Respondent's revenue officer dismissed him with immediate effect on 9th September 2016 through a text message. He was not given any notice, or accorded a hearing. He averred the Respondent did not consider his appeal against his summary dismissal and that he had not been warned prior to the dismissal for any alleged misdeed. His counsel issued a demand letter on 29th September 2017 and despite efforts seeking to have the Respondent satisfy the claim the Respondent had failed to do so. The Claimant sought payment of one month's salary in lieu of notice Kshs. 14,213/-, annual leave for 7 years at rate of 21 days a year Kshs. 71,045/-, house allowance for 7 years at the rate of 15% of the basic pay Kshs. 179,083/-, service pay for the 7 years for 28 days for each completed year of service per the CBA for Embu County Workers Union Kshs. 92,858/-, damages for wrongful dismissal per Section 49 of the Employment Act being 12 month's salary Kshs. 170,556/-, punitive damages of 200,00/- and any other relief the court may deem fit to grant. He also sought costs of the case.

2. The Respondent filed a defence on 24th November 2017 in which it denied that the County Government of Embu took over the casual employees of the defunct County Council of Mbeere. The Respondent averred that Section 37 of the Employment Act did not apply to casual employees. The Respondent denied that the Claimant was unfairly dismissed or that he was entitled to be provided with accommodation in terms of Section 31 of the Employment Act. The Respondent denied the Claimant was confirmed as an employee and denied the Claimant was entitled to any relief per his claim. The Respondent thus sought the dismissal of the Claimant with costs.

3. The Claimant filed issues which could be collapsed into three broad areas which are, whether the Claimant was a casual worker or a permanent employee of the Respondent; whether his dismissal was unlawful, unprocedural, and unfair; whether the Claimant is entitled to the remedies sought as well as costs of the suit.

4. The Respondent did not appear at the hearing on 7th March 2018. The Claimant testified that he was a former employee of the Respondent. He stated that when the system of county governments came in he was absorbed by the Respondent having been employed by Mbeere County Council in 2009. He stated that he was a casual employee earning a sum of Kshs. 14,000/- a month or thereabout. He stated that his bank statements which he produced indicated that he was paid by the Respondent. He testified that he would collect revenue and surrender to the revenue officer and that POS machines were issued subsequently which permitted the collections to be monitored. He stated that on 7th September 2016 he was summoned by the Revenue officer and when he went he found his supervisor Doris Muthoni there. He was asked to hand in collections that he had not surrendered. He informed the revenue officer that he had surrendered all the money to his supervisor and the revenue officer stated he wanted money and not an explanation. He got a text message on 9th September 2016 asking him not to report to work until he produces Kshs. 25,000/-. He wrote letters seeking to be heard on this issue to no avail and later sought through a demand letter of 29th September 2017 for payment of his dues. He produced the demand letter and the reply from the Respondent dated 13th October 2017. He prayed for the orders in terms of his claim.

5. The Claimant filed submissions on 22nd March 2018. In his submissions he submitted that his employment as casual converted under the provisions of Section 37 of the Employment Act. He submitted that his job as a revenue clerk was not of a casual nature and therefore he was entitled to the benefit of the provisions of Section 37. He submitted that his termination was unfair in terms of Section 45(2) of the Employment Act, 2007. He submitted that the law enjoins the court to consider whether the termination from employment is justifiable and inquire into both the reasons and the procedure of termination. He cited Section 43 of the Employment Act and submitted that the termination was without a valid reason to warrant his dismissal. The Claimant submitted that even if the Respondent had reason to apply the provisions of Section 44(4)(g) of the Employment Act, the standard procedure set out under Section 41 of the Employment Act was not adhered to. He thus urged the court to find the dismissal was unlawful and unfair and award him the sums sought.

6. The Claimant was employed by the defunct Mbeere County Council in 2009. After promulgation of the Constitution of Kenya 2010, the County Governments came into being by operation of law. The system of county governments was anchored on Article 6(1) and the counties specified in First Schedule of the Constitution. The Fourth Schedule distributes duties between the county governments and the national Government which clearly shows the revenue collection function at markets and in public parking were functions for the counties to undertake. The Claimant therefore by dint of the employment in 2009 a year before the promulgation of the Constitution benefited in the transfer of his services within the new structures. The Respondent implicitly recognises this in its reply to the Claimant advocates letter dated 13th October, 2017. The letter reference EC/CS/LEG/VOL.VI/048 under the hand of the acting County Secretary Wilson G. Ireri states in the material parts as follows:

Please be advised that your client has not been terminated from employment as alleged. The County Government has merely suspended him from duty for misappropriating public funds; the facts of which are within your client's knowledge.

As such the issue of unfair, un-procedural and unlawful termination of employment does not arise. Similarly the allegations of lack of a fair hearing lack any factual or legal basis. The suspension of your client from duty is a temporary measure as arrangements are being made to invite him for a hearing to show cause why further action should not be taken against him.we request you to kindly advise him to await an invitation letter to appear before the County Human Resource Management Advisory Committee for disciplinary hearing.

7. The letter clearly sets out the Claimant was an employee of the Respondent. The discussions on his employment are therefore moot. From the evidence before the court, he was an employee whose salary was paid monthly. In spite of the failure to formalise the engagement with the County Government of Embu, he was entitled to the benefit of Section 37 of the Employment Act. He was terminated by text message as no suspension letter was issued. The Respondent took the position that the Claimant had been suspended pending a disciplinary case. If we take the letter to be accurate in as far as the anticipated or proposed disciplinary hearing is concerned, it is impossible to imagine there was contemplation of a disciplinary hearing that would ensue in 2017 or later given the suspension in September 2016. There was no communication to this end and the Claimant is entitled have sought the redress he did. He testified and came across as honest and went into great detail on the handover of cash he was accused of misappropriating. He was not given an opportunity under Section 41 of the Employment Act, 2007 to articulate these issues before the County Human Resource Management Advisory Committee. He was therefore dismissed from employment unlawfully, unprocedurally and without recourse to the safeguards in law. He claimed house allowance and leave for 7 years. He unfortunately can only recover for the three years preceding his dismissal as there is a limitation on the same in terms of Section 90 of the Employment Act. He is not entitled to service for the 7 years as he was a contributor to NSSF according to his evidence. Section 35 bars the payment of service pay to employees who are members of a pension scheme or contributors to the National Social Security Fund. In the final analysis the Claimant is entitled to the following remedies:-

- i. One month salary in lieu of notice Kshs. 16,344.95
- ii. Payment of Kshs. 49,034.85 being leave earned but not taken for 3 years
- iii. Arrears on house allowance for 3 years Kshs. 76,750.20
- iv. Compensation for unfair dismissal for 4 months Kshs. 65,379.80
- v. Costs of the suit
- vi. Interest at court rates on items i), ii), iii) from date of filing suit till payment in full.
- vii. Interest at court rates on iv) above from date of judgment till payment in full
- viii. A certificate of service.

It is so ordered.

Dated and delivered at Meru this 10th day of May 2018

Nzioki wa Makau

JUDGE