



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.145 OF 2017

[Formerly Cause No.43 of 2016 – Nakuru]

DORCAS JEPKORIR KIPLAGAT.....CLAIMANT

VERSUS

COUNTY SECRETARY – HEAD OF COUNTY

PUBLIC SERVICE OF UASIN GISHU.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

CHIEF OFFICER – PUBLIC SERVICE MANAGEMENT.....3RD RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU.....4TH RESPONDENT

JUDGEMENT

The Cause herein was filed on 18th February, 2016 at Nakuru, ELRC registry and moved to this registry for hearing and disposal. The claimant filed Amended the Memorandum of Claim on 21st April, 2016. The Claim was again amended and filed on 29th July, 2016.

Claim

The issues in dispute are;

1. *Refusal to pay salary and allowances due to the claimant without any justification*
2. *Unfair labour practice*
3. *Lack of clear job designation and/or title*
4. *Demotion*
5. *Unlawful suspension*
6. *Unlawful redundancy*
7. *Leave travelling allowance*
8. *Compensation for breach of employment terms and conditions including rights*
9. *Consequential losses for wrongful withholding of salary and allowances and compensation for consequential losses and damage*

1. The claimant, a female adult was employed by the Public Service Commission in the year 1996 and worked for Local Government at the County Council of Wareng as a Payments Officer. The 1st respondent is the head of the County Public Service of Uasin Gishu and the 2nd respondent is created under the County Government Act, 2012 and does oversee matters of civil service at the county level. The 3rd

respondent is the chief officer of the Public Service Management County Government of the 4th respondent which is a County Government established under the provisions of Article 176 of the constitution, 2010.

2. The claimant was employed by the PSC in the year 1996 working for the Local government of Wareng as Payments Officer. The claimant rose through the ranks to Administrative Officer II at salary scale 10 and which appointment was confirmed by letter dated 2nd February, 2011.

3. The claimant was seconded to the Transition Authority and deployed to the 4th respondent to assist in establishing the requisite administrative structure and human resources management and payroll administration in readiness for the operationalisation of county government following the general elections on 4th March, 2013.

4. The claimant was deployed as Interim Human Resources/Payroll Manager to the 4th respondent vide letter dated 25th February, 2013 and which stipulated the duties and responsibilities thereof. The claimant was deployed on a temporary basis to the 4th respondent and continued drawing her salary and allowances from the 4th respondent. She was paid an allowance of Kshs.30, 000.00 per month for extra responsibilities.

5. By letter dated 20th January, 2014 addressed to all governors, chairpersons of the county Public Service Boards which included the 2nd respondent and done by the chairperson, Transition Authority it accorded 3 options to be exercised by the respondents in respect of persons deployed such as the claimant and these being;

a) The county government which needed the services of the interim team for a specified duration were to meet the costs of their extraneous allowances as approved by the Minister of Public Service;

b) The county governments that needed the services of the interim county transition teams for a longer period were to consider absorbing them at the county;

c) The County Government that no longer required the services of the interim county transition teams were to release them back to the Transitional Authority for subsequent redeployment to their former stations.

6. The letter by the Transitional Authority gave a deadline for feedback on the preferred option as 31st January, 2014. The respondents failed to inform the Transitional Authority on any option. The respondents retained and continued to utilise the services of the claimant as the Human Resources/Payroll Manager.

7. The claimant diligently served the 4th respondent until 25th May, 2015 when she was redeployed to the position of Administrative Officer at the department of Agriculture is reported for duty on 3rd June, 2015.

8. The claim is that the actions taken by the respondents were unfair and unlawful and amounted to unfair labour practices for the reasons that the respondents failed to notify the Transitional Authority by 31st January, 2014 that the services of the claimant were not required and thus established an employment relationship in which the claimant became the Human Resources/Payroll Manager in terms of the Employment Act, 2007 or under the County Government Act, 2012 and which relationship could only be varied or changed in terms of the law. The actions of the respondents were unfair when they removed the claimant from the position of Human Resources/Payroll Manager and re-assigned her administrative duties in the department of agriculture which was inconsistent with her rights as an employee. The claimant was entitled to leave but the respondent rejected her leave request by letter dated 9th July, 2015 unfairly and unlawfully. The 3rd respondent commenced unwarranted and unjustified disciplinary inquiry against the claimant without due process and in breach of the law by issuing the claimant with a notice to show cause on 15th July, 2015 and which alleged acts not disclosed. The claimant was also subjected to unnecessary disciplinary hearing in a bid to harass her on 6th October, 2015 and whereupon it took long to communicate the decision contrary to the principles of expeditious, reasonable fair administrative action as communicated vide letter of 29th April, 2016.

9. The actions by the respondents were actuated by malice and meant to create an impression that the claimant was on suspension which was not the case. These acts amounted to unfair labour practices. The respondents breached the law by reducing the claimant in rank without following the stipulated procedures and by indicating that she was a Clerical officer in the notice to show cause dated 15th July, 2015. The respondents have wilfully failed to pay the claimant her salary since November, 2015 to April, 2016 and subjected her to servitude. The responsibility allowance has not been paid since June, 2015 to date. The claimant was denied her annual leave contrary to the law or being paid the requisite leave travelling allowance.

10. The respondents unlawfully carried out unlawful redundancy by abolishing the claimant's position from that of Resources/Payroll Manager to restructuring it to create the position of County Human Resource Manager. The claimant was not given notice prior to the redundancy and the creation of the new position. The rules of redundancy were never followed and the claimant was not given the first priority having been the substantive holder of the original position. By abolishing the position of Resources/Payroll Manager the respondents failed to comply with section 60 of the County Government Act, 2012. The respondents failed to consider the fact that the claimant was available to discharge her duties and the new position was not competitively filled and by appointing a new officer, effectively there are two existing positions on the same function and placed the claimant at a gross disadvantage as the claimant was already in the service.

11. In further breach of the claimant's rights in employment, the claimant was unable to service her bank loan with Co-operative Bank currently at Kshs.949, 803.70 and CFC Life Insurance Kshs.37, 566.00 which was serviced by way of check off. The bank issued a notice on 13th April, 2016 seeking to enter the claimant with the Credit Reference Bureau (CRB). The interruption of the claimant's employment was contrary to the Transitional Authority advisory on staffing of county governments.

12. The claimant is seeking for a declaration that employment exists between her and the 4th respondent as the Resources/Payroll Manager a declaration that by abolishing the position held by the claimant of Resources/Payroll Manager this was an unlawful redundancy and in breach of section 60 of the County Government Act, 2012; an order that the respondents do reconstitute the position of V for occupation by the claimant and in the alternative the position of Resources/Payroll Manager be declared not filled and be competitively filled.

13. The claimant is also seeking for orders that the claimant was subjected to servitude and unfair labour practice contrary to articles 30 and 41 of the constitution and payment of damages are due for the breaches. That there was unlawful suspension of the claimant in in breach of contract and the law and damages due. A declaration that the respondents have no right to reduce the claimant's rank and any such efforts are a nullity. Payment of leave at kshs.77, 700.00 with leave travel allowances at Kshs.32, 400.00 with damages for breach of the right to take leave. Payments of salaries due from November, 2015 to date together with increments. Payment of responsibility allowances from June, 2015 to date together with increases at kshs.37, 000.00.

14. The claimant is also seeking damages for the consequential losses associated with the breach by the respondent by being unable to service her bank loan and being listed with CRB. Claims for costs and interests due.

15. The claimant testified in support of her claims. Upon employment, the claimant was deployed to the 4th respondent in 2013 as the Resources/Payroll Manager with an allowance of Kshs.30, 000.00 and remained in this position until May when she was moved to the department of Agriculture and has since been redeployed twice. During the redeployment, the claimant did her handing over note on 3rd June, 2015. The handing over instructions was made through a text message to which the claimant complied.

16. The claimant also testified that at the time of her deployment she had a loan with the bank paid through check off at Kshs.28, 000.00 per month but was unable to pay the same due to the unlawful actions by the respondents in the redeployments and failure to pay the due instalments. Due to inability to pay the claimant was listed with the CRB. In September, 2015 the respondents stopped the claimant's salary. The bank payments dues also stopped. Payments to Liberty Insurance also stopped.

17. On 15th July, 2015 the claimant got a hearing notice stating that she had absconded duty and should show cause why she should not be dismissed. This was not true as the claimant had remained on duty and in her reply dated 24th July, 2015 this was explained.

18. From June, 2015 the respondents failed to pay the claimant the due responsibility allowances. In the letter deployment to the department of agriculture, the terms of service had not been changed yet the salary was changed down. There was no due process. Responsibility allowance was stopped.

19. The claimant also testified that she was invited to a disciplinary hearing on allegations that she had absconded duty. This was not true as the claimant had been on duty and these allegations were malicious. There was no desertion. The stoppage of salary was unfair labour practice and in breach of the claimants rights in employment.

21. The claimant also testified that she was issued with a letter of reinstatement after the alleged suspension which is not correct as there was no suspension in the first instance. This letter was issued on 29th April, 2016 on the reasons that there had been a suspension. The claimant had not left the duty station. The defence that the claims made are premature is not correct as the claimant filed the suit herein following the stoppage of salary and demand for arrears and the non-payment of the bank loan through check off. For five months the claimant was not paid her salary.

Defence

22. In response, the respondent's case is that upon the employment of the claimant she was seconded to the 4th respondent and deployed as the interim Payroll Manager by the Transitional Authority and was for the transition period before the County Government of Uasin Gishu was inaugurated. The deployment was interim pending appointment of a substantive office holder by the County Government. The 4th respondent has since appointed a substantive officer for the position of Payroll Administrator and thus an end to the interim deployment of the claimant and on such appointment the claimant assumed her position as Administrative Officer at the Payroll Section.

23. The defence is also that the claimant was not taken back to the Transitional Authority as the County Government of Uasin Gishu was the parent employer.

24. In May, 2015 the claimant's services were found relevant in the department of agriculture and was transferred accordingly. The claimant did not object to the transfer and was moved accordingly. The claimant failed to turn up at her new station which led to disciplinary proceedings against her.

25. It is also the defence that the respondents do interdepartmental transfers a common practice in public service and this was done with the claimant. There was no report by the claimant of any challenges she may have faced while at work. The claimant was not denied taking of her annual leave as alleged and she chose to abscond duty from May, 2015 when a notice to show cause was served on her.

26. The claimant was suspended from duty and later taken through the disciplinary process. There was a reasonable cause following her absenting self from duty. The claimant was given the opportunity to defend herself on 6th October, 2015 following notice of 15th September, 2015. The disciplinary committee was about to conclude the matter when the claimant filed suit. She had not exhausted the disciplinary mechanisms at work.

27. The claim that the respondents have created a position of Payroll Manager for the claimant is ill-conceived and untenable in view of the provisions of the County Government act which vests the power to create and abolish offices in the county public service exercised by the

2nd respondent. The claims made are meant to affect the efficient running of the county government of Uasin Gishu. The suit filed is incompetent, the mandate of the Transitional Authority has since lapsed and the suit should be dismissed with costs.

28. In evidence, the respondents relied on the witness statement of Joseph Tanui and on the grounds that he is the Chairperson of the 2nd respondent and conversant with the claim. The claimant was deployed as the Payroll Manager to the 4th respondent by the Transitional Authority for the transition period and before the County Government was inaugurated. The appointment was interim and pending appointment of a substantive office holder and which the 4th respondent has done and ended the interim appointment of the claimant. The claimant then assumed the role of Payroll Manager, her previous position as held before the transitional measures.

29. It is also the statement of Mr Tanui that the claimant was not taken back to the Transitional Authority upon end of transition as the parent employer was Wareng County Council, now defunct and assumed by the 4th respondent and her services were needed in the agriculture department where she was transferred to. The claimant moved to the new department and never made complaint with regard to any challenge she may have faced and as alleged in the memorandum of claim.

30. The claimant has never been denied her annual leave but chose to abscond duty from May, 2015 and only resumed duty in October, 2015 when she was served with a notice to show cause. The claimant was suspended and taken through disciplinary hearing on 6th October, 2015.

31. The suit filed is premature since internal mechanisms procedures are not exhausted. The respondent has the right to discipline its employees and should not be curtailed. The claimant was given a hearing and a recommendation taken to reinstate her back into service. The demands made that the claimant be declared the Payroll Manager is untenable in view of the provisions of the County Government Act which mandate the 2nd respondent to create and abolish an office. The claims made should be dismissed with costs.

32. At the close of the hearing, both parties filed written submissions.

Determination

In analysing the matters herein the court has put into account the pleadings by both parties for the claimant and the respondents, the oral evidence and written statements, the submissions and the applicable law and the issues which emerge are;

The employment status of the claimant with the respondents Whether there is redundancy and if not whether the claimant was unfairly treated and if yes, whether it was lawful;

Whether the claimant should be placed in the position of Human Resource Manager and pay Roll Manager or these positions be declared vacant and competitively filled;

Whether the claimant has been subjected to servitude;

Whether the remedies sought are due.

Before delving the issues set out above, it is important to revisit the constitution and the law with regards to matters addressed.

33. Under Article 41 of the Constitution, 2010 it provides under clauses (1) and (2) (a) and (b) that;

41. (1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

34. The essence of the provisions above is to ensure that every employee is accorded fair labour practices at the workplace at all material times. In addressing the question of *fair labour relations* the Court of Appeal in the case of **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR** held that where the court in addressing the question of unfair labour practices regard must also be given to the operative law and section 43 of the Employment Act, 2007 read together with section 45 of the Employment Act, 2007. The Court made reference to the case of **Elizabeth Washeke & 62 Others versus Airtel Networks (K) Limited & Another [2013] eKLR** and the findings that;

By having Article 41 of the Constitution, 2010 protecting labour relations/practices, it was a constitutional declaration with the purpose of ensuring that the legislative framework governing labour relations in Kenya was in accordance with the Bill of Rights. This sets the right to fair labour

practices in the equity jurisdiction of the Industrial Court, in a changed constitutional dispensation.

...

To determine the ambit of this open-ended right, regard must be had, first, to what is meant by a labour practice, and, thereafter, to what is meant by a fair labour practice. In both issues, reference must be made to the unfair labour practice jurisprudence by the Industrial Court. The Employment Act, 2007 once enacted allowed the court to declare their view on labour relations policy. Section 43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 This power to give meaning to the concept of fair and unfair labour practices results in the court being used by employers and employees as an arena of struggle. The fruit of this struggle is a body of jurisprudence regulating both individual employment relations and collective labour relations.

35. The reference to Article 41 of the Constitution, 2010 must therefore be given context and meaning within the applicable provisions of the law. The right or rights therein must be actualised within the law.

36. In this regard, section 10 of the Employment Act, 2007 requires an employer to issue an employee with a written contract of employment. Where the written contract of service is reviewed, changed, varied, section 10(5) of the Act provides that;

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

37. The above provisions are not negated by the County Government Act, 2012 in the court reading of section 60 and 55 where the respondents as a collective are required to provide for the organization, staffing and functioning of the county public service in ways that ensure efficient, quality and productive services for the people of the county and in this regard, the 2nd respondent is required to establish or abolish offices that serve the persons within the County. Such powers and functions are to be exercised for the public interest and pursuant to the provisions of section 62 of the County Government Act, 2012.

38. It is common cause herein that the claimant is still in the employment of the 4th respondent. the current position is that of Administrative Officer at the department of Agriculture. The claimant was employed by the Public Service Commission (PSC) and deployed with the County Council of Wareng as the Payments Officer and rose to the position of Administrative Officer II and with devolution, such entity became part of the 4th respondent.

39. The claimant was then seconded to the Transitional Authority and deployed to the 4th respondent to support human resource management and payroll administration as part of transition process and to operationalize the 4th respondent and vide letter dated 25th February, 2013. In this letter, the claimant was directed as follows;

DEPLOYMENT AS INTERIM HUMAN RESOURCE/PAYROLL MANAGER

This is to convey the decision of the Public Service of Kenya (PSC) vide letter ref. ... dated 25th February, 2013 that you be deployed to the Transitional Authority with effect from 12th February, 2013 as an interim Human Resource/Payroll Manager. You are therefore deployed to UASIN GISHU COUNTY and you should report to the County Commissioner with immediate effect.

...

Your terms and conditions of service will be as per your current appointment in the Public Service. you will be deployed on temporary bass to the county and will continue drawing your salaries and all other allowances from your current parent ministry/Department. However you will be paid an Allowance of Kshs.30, 000.00 (thirty thousand) per month for extra responsibilities given to you.

40. In terms of section 10 of the Employment Act, 2007 the claimant was assigned duties under the transitional provisions of the constitution, the Transitional Authority communication to the claimant is specific and precise to the extent that the claimant was to serve as Human Resource/Payroll Manager for the 4th respondent as *an interim Human Resource/Payroll Manager*.

41. The claimant was also directed to signify her acceptance by signing to the new duties as indication of consent and which she did on 12th March, 2013. For the allocated duties, the claimant was to be paid Kshs.30, 000.00 per month. This is not challenged.

42. The claimant has relied on letter and communication by Transitional Authority dated 20th January, 2014 and sent to all Governors, the County Public Service Boards and to all County Assembly Service Boards and respective chairpersons. This communication is not to the claimant. The referenced agenda was to parties as noted in the subject letter.

43. Reading the Transitional Authority letter dated 25th February, 2013 to the claimant, and the letter dated 20th January, 2014 to the subject recipients, I find no relationship. First, the letter to the claimant was specific to her employment. The other was a communication to third parties without reference to the claimant as the letter of 25th February, 2013 had well noted that the claimant was principally the employee of the *parent Ministry/Department* and which was to continue paying her due wages, salaries and or allowances. For the role allocated by the Transitional Authority for the transitional measures, the claimant was only to receive the allowance of Kshs.30, 000.00 per month.

44. The rationale is that the claimant had only been *deployed* by the Transitional Authority. The purpose and reason(s) for the deployment were spelt out.

45. The only relationship with the two letters set out above is the acknowledgement that the Transitional Authority deployments were

interim measures to allow for the operationalisation of County Governments following the General Elections on 4th March, 2013. The Transitional Authority noted in the letter dated 20th January, 2014 that;

... the National Treasury allocated the Authority funds to support payment of the allowances for the months of March to September 2013. The payment of the allowances from the months of October 2013 to date has not been effected as the Transitional Authority does not have budgetary allocations for the period and beyond.

46. In this regard, section 64(4) of the County Government Act, 2012 is relevant in that it provides that;

(4) Any delegation or deployment under subsection (3) shall—

(a) be made by an officer who is qualified and competent to perform the duty;

and

(b) not undermine the expeditious appointment or deployment of a competent person to the public office concerned.

47. The deployment of officers within the public service was allowed. The deployment by Transitional Authority was lawful to the extent that such related to delegated authority and where an officer was qualified to effect the same, such was lawful and justified. The claimant in this regard was *deployed* within the 4th respondent her parent Ministry/department.

48. in **David Barasa versus British Peace Support Team & Another** the court held that;

A Secondment in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so placed.
[Emphasis added]

49. The above findings is reiterated in the case of **Public Service Commission versus County Government of Bomet & Others, Petition No.27 of 2016** that as a general rule in employment and labour relations, an employee must heed lawful directions and instructions given by the employer, whether on secondment, deployment, redeployment or transfer by the principal. Work allocation is the responsibility of the employer. Upon reasonable notice, an employee should abide the directions of the employer as held in **Severine Luyali versus the Minister Foreign Affairs & International Trade & 3 others [2014] eKLR**.

50. With the Transitional Authority mandate ended and interim provisions lapsed, the claimant was not terminated in her employment. The claimant remained the employee of the 4th respondent.

51. By letter dated 25th May, 2015 the respondents deployed the claimant to the Public Service Department, Payroll section to the department of agriculture for Administrative duties. The claimant reverted back to her role and the respondents deployed and communicated in this regard.

52. The claim for responsibility allowances from June, 2015 to date set out under claim (i) is thus without justification. It is dismissed.

53. With findings above, the issues set out with regard to the employment status of the claimant is dealt. The claimant was affirmed by the 4th respondent as their employee and in the Transitional Authority deployment letter; this fact was asserted therein that the parent Ministry/department was the principal employer. In **Nahashon Cheruiyot Ngeno versus Strengthening of Mathematics & Science Education Project & Another [2015] eKLR**, the court held that a deployed employee remained the employee of the primary employer and their benefits and salaries remained the obligation of the employer and pursuant to section 73(2) of the County Government Act, 2012.

54. Noting the above the question as to whether there was a redundancy is addressed. The case for the claimant was *deployment* such ceased and a transfer to the agriculture department communicated. Such followed the appointment of a substantive office holder to the office, the claimant's role and employment did not cease as she reverted back to her duties and such employment is on-going. Redundancy as addressed under section 40 of the Employment Act, 2007 is not demonstrated in this case.

55. The remedies sought with regard to alleged redundancy and that there was unfair labour practices does not arise in this case. The court reading of section 64 of the County Government Act, 2012 is that the respondents are empowered to create or abolish an office and to appoint a qualified person to act or be deployed in such office where need arises. In this regard the claimant was appointed on an interim measure by the Transitional Authority to facilitate the operationalisation of the 4th respondent and such has since ceased.

56. On the question of the claimant being placed in the position of human resource and payroll manager, such position was allocated to the claimant in the interim, it was not an appointment as a substantive office holder and the 2nd respondent in law retains the power to appoint or abolish offices within the respondents. To seek a declaration from the court that the claimant be appointed in such capacity would be interference with such mandate without good basis.

57. Claims that the claimant was subjected to servitude is a serious claim and where such is found to exist is grave. Article 30 of the Constitution, 2010 read together with section 4 of the Employment Act, 2007 prohibits slavery, servitude and forced labour in any form. The

claimant's case in this regard is that she was made to undertake duties since November, 2015 to April, 2016 and the responsibility allowances were not paid since June, 2015 to date. The claimant also asserted that she was denied her annual leave contrary to the law or being paid the requisite leave travelling allowance.

58. Work by the claimant for the period running from June, 2015 to April, 2016 is addressed above with the finding that the deployment under the Transitional Authority and transitional measures was addressed with her deployment to a new department and the claimant reverted back to her administrative duties. For the period the claimant has not taken annual leave, section 28 of the Employment Act, 2007 gives every employee the right to take annual leave or payment in lieu thereof and this right should be secured by the employer by ensuring rules and regulations on how each employee is to enjoy such a right. As the claimant is still in employment with the 4th respondent, such is a matter to be addressed through internal procedures. The right is affirmed and should be processed internally.

59. In the respondents letter to the claimant dated 9th July, 2015 on her leave request it notes that;

LEAVE REQUEST

I am in receipt of your request for leave. I, however cannot process your leave request because I need a release letter showing that you have handed over all documents in your former department (refer to your deployment letter).

Please do so immediately to enable me accord you the necessary support.

60. The taking of annual leave as set out above is a right in law. Such should not be compromised without justification. In the statement filed by the respondent's witness, I find no material as to how the matter of the claimant's leave application was addressed after the referenced letter above. It is not clarified as to whether the claimant complied with the letter of 9th July, 2015 and if not, what action was taken.

61. Without any cause being shown by the respondents, the claimant is entitled to her annual leave and should be administratively addressed and allocated as due or a payment be paid in lieu thereof in fourteen (14) days. Where the respondents fails to comply, such leave as due should be computed and paid for in thirty (30) days.

62. The claimant in submissions has relied on the case of **Kenya County**

Government Workers Union versus Kisumu County Government & 95 others [2015] eKLR and the findings that section 10(5) of the Employment Act, 2007 an employee should be consulted in the alteration of the contract of service. in the claimant's case herein, her deployments was communicated and her approval and consent was sought and which she gave. Such deployment was on an interim basis and she reverted back to her substantive office and was transferred by the principal employer. To rely on the above case would be to remove the background facts from each case and change the context. Such cannot achieve the intended purpose. The different facts are relevant to revisit in each case. Remedies

63. The claim for damages for the alleged unfair labour practices, alleged unlawful acts and servitude do not arise based on the findings above. The claimant was not demoted in her duties as the role allocated by the Transitional Authority is established as being interim and such ceased and the claimant reverted back to her duties.

64. The court does not find a violation of constitutional provisions as alleged that article 30 and 41 of the constitution, 2010 were violated. No damages are due in this regard.

65. The claim that the claimant was unlawfully suspended and there was no disciplinary inquiry and that this was in breach of the claimant's rights is on the basis that the claimant was issued with a letter dated 29th April, 2016 on the reasons she had been on been on suspension. The claimant asserted that she had not left her duty station. That for five (5) months the claimant was not paid her salaries and this had the effect of being unable to service her bank loan and thus got listed with the CRB.

66. The defence is that the claimant deserted her duties and or absconded from May, 2015. There is a reply by the claimant on the alleged absconding duty vide letter dated 24th July, 2015.

67. Desertion of duty is a matter addressed under section 44(4) of the Employment Act, 2007 as a gross misconduct. Such warrants summary dismissal. However the employer must comply with section 41(2) of the Act.

68. Where the claimant is alleged to have absconded duty from May, 2015 such provisions under section 44 of the Employment Act, 2007 should have applied. The stoppage of salary is not a remedy to address such alleged gross misconduct and then issue the claimant with a notice to show cause. Such is taking summary action against the claimant without due process. The sanction of stoppage of salary is grave and an unfair labour practice as where employment is on-going, where an employee is alleged to have committed acts of misconduct, such should be addressed within reasonable time period but stoppage of salary and due allowances is injurious to the employee and subjection to inhuman and degrading treatment. Without good basis and giving the claimant the right to a hearing secured under Article 41 of the Constitution, 2010 read together with section 41 of the Employment Act, 2007 stoppage of salary goes contrary to all good principles of fair labour relations.

69. The letter dated 29th April, 2016 by the respondents to the claimants and referenced that;

REINSTATEMENT UPON SUSPENSION

...

This is to inform you that the County Public Service Board accorded due consideration to your case, however, the explanations you submitted did not exonerate you. The board has decided to reinstate you on condition that the suspension imposed on you is lifted with effect from the date you report for duty. ...

70. In the defence filed, there is show cause notice dated 15th July, 2015; the invitation to disciplinary hearing dated 15th September, 2016; and letter of reinstatement dated 29th April, 2016. There is no record that the claimant was placed on suspension.

71. Where such letter of suspension was issued to the claimant, the respondent as the employer ought to have kept the work records and submit the same upon being served with the claims herein. Without such a record, the court must believe the claimant as the employee.

72. The respondent opted to rely on its written statement for the witness Mr Tanui. This denied the court the chance to interrogate the witness on the submitted evidence. I take it that the claimant's case that she was not issued with a letter of suspension and the alleged absconding duty is not supported in any material way. There is no record at all that the allegation that from May, 2015 the claimants failed to attend duty was procedurally addressed for the respondent to make a summary finding and stop the claimant's salary. Such action, looked at rationally had no basis and amounted to unfair labour practice. Such unfair labour practices had repercussions to the claimant as based on the reemployment she had secured a loan with the bank and an insurance cover which were compromised by the unprocedural conduct of the respondent in taking action against her without due process.

73. The respondent has also failed to account for measures taken in terms of section 12 of the Employment Act, 2007. There is no statement of the disciplinary rules applied and in place to which the respondent relied upon in disciplining the claimant over any alleged misconduct. Where the claimant is alleged to have absconded duty, such rules if available ought to have been used to objectively address such misconduct.

74. Without any rules and regulations as to for the purpose of seeking redress of any grievance relating to her employment and the manner in which an application shall be made, to stop the salary due and then carry out disciplinary proceedings against the claimant lacked basis, it was contrary to the principles of natural justice and amounted to unfair labour practice.

75. For the respondent to direct the claimant that she had been *reinstated* or will be *reinstated on condition that the suspension imposed on you is lifted with effect from the date you report for duty* is to impose an unfair term and condition in employment. The question of *reinstatement* can only arise in a case where there is termination of employment. Reinstatement can also only arise where an employee has been dismissed unfairly. This is not such a case. The claimant's employment with the respondents has not ceased at any given moment and even where there was perceived suspension, which is not the case here, such did not stop employment.

76. All due salaries for the entire duration of employment and without stoppage should be paid. Such is due and owing where not paid in full.

77. In this regard therefore, the claim for salaries due for the period of May, 2015 are payable in full until their full reinstatement and in accordance with the claimant's Administrative duties with the 4th respondent. For the unfair labour practice and addressing the consequences of the stoppage of such salaries, having directed the restoration of the due salaries, the withholding of the same not justified, such should be paid with interest at going commercial rates.

78. The defence that the claims made are premature is not correct as the claimant filed the suit herein following the stoppage of salary and demand for arrears and the non-payment of the bank loan through check off. For five months the claimant was not paid her salary. Such is remedied with the order for the respondent to pay all the wages due without stoppage with interest at commercial rates.

79. Costs are also due to the claimant. Had the respondent addressed itself to the concerns and replies made by the claimant in her letter of 24th July, 2015 this would have shown the claimant was at work and the stoppage of salary redressed immediately. This suit would have been unnecessary.

80. For the reasons set out above, costs should be awarded to the claimant.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

(a) The due annual leave should be addressed as set out in the judgement in in thirty (30) days;

(b) The claimant shall be paid her full salaries as due and arising from May, 2015 to date noting any increments in rank and years applicable for the position held; such salaries are due and payable immediately and not later than thirty (30) days;

(c) The due salaries retained by the respondent from May, 2015 to date shall be paid with interest at commercial rates on-going and applicable as of this date;

(d) As employment of the claimant is on-going, compensation shall not be awarded. the respondents are referred to the provisions of section 46(h) of the Employment Act, 2007; and

(e) Mention in 45 days to confirm compliance as above set out.

(f) The claimant is awarded costs of the suit.

Delivered in open court at Eldoret this 12th day of July, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistants: Nancy & Robert

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