



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI

CAUSE NO 1037 OF 2013

JOSEPH WANJOHL.....CLAIMANT

VERSUS

NATIONAL WATER CONSERVATION & PIPELINE

CORPORATION OTHERS.....RESPONDENT

JUDGEMENT

1. The claimant informed the court that he was employed in 1989 by the respondent as a craftsman at a salary of Kshs 4,700/=. He was in charge of mechanical installation and water supplies. He was transferred from Sultan Hamud Region to Nairobi and worked there until 2005 when water sector reforms came. The claimant was consequently transferred to Ol kejuado Water and Sewerage Company. According to him he was to receive an improved salary from Kshs 59,000 to Kshs 80,000/= with a house allowance of Kshs 25,000/= but this did not happen.

2. The claimant further stated that the recommendations of the water sector task force were implemented but he was never absorbed by any Water Service Board and further that his services were never terminated. In cross-examination he stated that he resigned but it was never acknowledged and that the Water Services Boards were supposed to take care of his dues.

3. The respondent's witness Ms Risiki Mukami stated that after 2005 Water Services Boards were formed and the claimant's services with the respondent became superfluous. He was therefore seconded to Athi Water Service Board where he was to be employed after 30th June, 2006 as per the Legal Notice number 101 of 2005.

4. According to her, the Boards were to henceforth take responsibility for paying the claimants salary and allowances. She further stated that by 30th September, 2006 the claimant was no longer an employee of the respondent therefore could not benefit from salary reviews done by the respondent. She also stated that the task force report has not been adopted due to absence of enabling legislation.

5. In cross-examination she stated that she did not have any document's services with the respondent were terminated and one showing claimant's engagement with Athi Water Services Board. Mr Khalwale for the claimant submitted that the claimant's employment was not terminated upon his transfer to Olekejuado Water Service Board or any other Service Board. The transfer letter makes no mention of termination of service. At paragraph 3, the letter states;

“please not that your current terms of service remain and you shall be reporting to Ag Managing Director for further instructions”.

Counsel submitted further that there was no termination notice issued to the claimant yet section 35 of the Employment Act was very clear that for termination of employment a notice must issue.

6. On underpayment, counsel submitted that on or about 27th September, 2006 the managing Director of the respondent published the approved grading structure of salaries and allowances. According to the document the claimant was to earn Kshs 80,000/= instead of Kshs 35,000/= which created an underpayment of Kshs 45,000 per month. House allowance was to be Kshs 25,000 but was paid 10,500 creating a shortfall of kshs 14,500 per month.

7. Mr Khalwale further submitted that Section 5(2) of the Water Act provided that during the transitional period the officers and servants of the Ministry engaged in the provision of Water Services were to be deemed to be on secondment to the Water Services Board for the period of three years after which they would either enter into written contracts with the boards or be redeployed to public service. According to counsel, the claimant was not offered any written contract by the Water Services Boards he served and therefore he remained an employee of the respondent.

8. Further, the guidelines on staff deployment dated 30th June 2005 stated that after the initial deployment to the Board for one year, the officers would enter into written contracts with the Boards if found suitable or be redeployed in public service. The guidelines according to counsel made it clear even where an employee had been found unsuitable to serve, such employee would be deployed to public service as opposed to dismissal.

9. Mr Kamwendwa for the respondent on the other hand submitted that the respondent's witness Riziki Mukmi stated that upon enactment of Water Act in 2002 which brought about water sector reforms there was constituted Water Service Boards. The Ministry therefore gave guidelines to the respondent on staff deployment to WSBS and WSPS. As per the said guidelines, all employees engaged in water conservation and drilling activities were to be redeployed under WSBS in those regions. The claimant was one of the employees in respondent's regional offices and was consequently redeployed to Athi WSB, TanaAthi and Olkejuado Water and Sewerage Company.

10. Counsel further submitted that on 30th June, 2005 the Ministry issued more guidelines on staff deployment to WSB's and stated inter alia that WSB's would take responsibility for paying salaries and other personal allowances to employees of the respondent deployed to the Boards with effect from 1st July, 2005. Further, that after initial deployment to the Board for one year, the officers would enter into a written contract of employment with the WSBs if found suitable or be redeployed in the public service.

11. According to Mr Kamwendwa it was apparent from the guidelines from the Ministry that the claimant was to be retained on secondment to WSB he had been transferred or seconded to for the period up to 30th June, 2006. Thereafter the claimant was to be engaged by the institution he had been seconded or transferred to. Counsel therefore submitted that after 30th June, 2006 the claimant ceased to be an employee of the respondent. It was thus not necessary to give him any termination notice since his employment with the respondent was deemed to have been frustrated or terminated by operation of law. In this regard counsel relied on the case of **Reilly Vs R(1934) AC 176**.

12. Concerning underpayment, counsel submitted that save for bald allegations devoid of any proof, the claimant failed to show how much he earns, house allowance he was entitled to and commuter allowance to enable the court ascertain that indeed he was underpaid. Further, the claimant failed to show how the claim for Kshs 3,402,000/= was constituted and that it was a fallacy to imagine the claimant worked from 2006 to 2011 a period of five years without being paid.

13. Counsel further submitted that under The Water (Plan of Transfer of Water Services) Rules, 2005 it was explicit that the WSBs were to take responsibility of paying salaries and other personal emoluments to the respondent's staff deployed to the Boards with effect from 1st July, 2005. Further that the claimant's salary and allowance having been paid to him by the WSB namely Athi, Tana-Athi and Olkejuado he could not make any further salary and allowances claim from the respondent.

14. Counsel further submitted that the claimant was deliberately distorting the legal Notice No 101 of 2005 and further that it was not the duty of the respondent to compel the WSB to employ the claimant. If no contract was offered to the claimant by the WSBs he was seconded to, he should have brought that to the attention of the respondent or the Ministry immediately after the lapse of three year period but not after his purported dismissal. Counsel further submitted that the deployment was to public service and not necessarily to the respondent. Further that the claimant failed to demonstrate that the employees who were deployed to the respondent had similar circumstances as him.

15. The water sector reforms saw the mobilization of staff from the respondent to the various WSBs created as a result of the reforms. The guidelines on staff deployment to Water Services Boards issued on 30th June, 2005 required all officers deployed in the regional offices to report to the respondents headquarters for re-deployment. It was pursuant to this that the claimant reported to the Headquarters from Sultan Hamud and was transferred to Olkejuado WSB then to Athi WSB and later to Tana Athi Board.

16. By a letter dated 1st July, 2005 (Appendix B of respondent's documents) the PS Ministry of Water and Irrigation stated further that for continuity of services in the regions currently under the respondent all the staff in the Regional Offices would report to the CEO's of further that for continuity of services in the regions currently under the respondent all the staff in the Regional Offices would report to the CEO's of the relevant Boards for appropriate deployment.

17. The terms and conditions of service for the deployed employees provided that staff would be deployed to the Boards for a transitional period of one year during which period, such staff would be deemed to be on secondment and that the Ministry would take the responsibility for paying their salaries and personal allowances. After the initial period of one year the officers were to enter into written contracts of employment with the Boards if found suitable or be redeployed in the public service.

18. The claimant was neither absorbed by the Olkejuado WSB nor re-deployed in public service. According to Water (plan of Transfer of Water Services) Rules 2005 (L.N. 101 of 2005) after expiry of one year, that is to say by 30th June, 2006 the Boards were free to engage personnel in accordance with their own requirements. What the above implies in the context of the claimant is that omission by the Olkejuado WSB to absorb him as a member of staff and failure by the respondent and indeed government to deploy him in public service constituted unprocedural declaration of redundancy hence unfair termination of service.

19. Concerning the applicable salary and emoluments, the task force report dated 27th June, 2007 observed that since the employees were deployed to WSBs on same terms and conditions they had at the respondent, there was no justification to sideline them when implementing the new terms and conditions of service as they were still employees of the respondent until delinked from it. The claimant is therefore justified to claim to benefit from the revised salary however only to the extent of computation of compensation of this terminal dues and compensation for unfair termination of service.

20. The court in the circumstances hereby awards the claimant as follows:

a. One month's salary in lieu of notice

59,205

b. 10 months salary as compensation

for unfair termination of service 592,050

C. Severance pay at 15 days pay for

each completed year of service (1989 -2005) 473,640

1,124,895

d. Costs of the suit.

21. Items (a), (b) and (c) shall be subject to taxes and statutory deductions.

22. It is so ordered.

Dated at Nairobi this 28th day of September, 2018

Abuodha Jorum Nelson

Judge

Delivered this 28th day of September, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.