



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

CAUSE NO. 47 OF 2018

(Before D. K. N. Marete)

IRENE C. ROTICH.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF BOMET.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 23rd May 2018. It does not offer any issues in dispute on its face.

The respondent in a Statement of Response dated 27th June, 2018 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about 22nd October, 2013. She was employed by the respondent in the water resource department at a gross salary of Kshs.19,323.00.

The claimant's other case is that she served with loyalty and diligence until November, 2017 the respondent wrongfully dismissed her and refused to pay her terminal dues. At this time, she earned Kshs.28,323.00.

Her terminal dues include;

- a) *The Respondent, terminated the Claimant's employment without following the procedure laid down in the Employment Act;*
- b) *The Respondent terminated the Claimant's employment without proving the reason for the termination was valid;*
- c) *The Respondent did not give the Claimant termination notice as provided in the Employment Act;*
- d) *The respondent under paid the claimant for the duties and work she offered under the two contracts that were issued to her and were running concurrently.*
- e) *The Respondent did not pay the Claimant's overtime.*
- f) *The Respondent failed or neglected to give the Claimant a Certificate of Service as required by the Employment Act.*

She prays as follows;

- a) *Reinstatement back to her job at the respondent*
- b) *Kshs.481,491/=*
- c) *Interest at court rates.*
- d) *Certificate of Service*
- e) *Cost of this suit.*

The respondent's case is a denial of the claim and its particulars. It is her case that any appointment of the claimant was unlawful for being a

contravention of the provision of part VII of the County Governments Act, particularly Section 59 on the functions of the County Public Service Board. She puts it thus;

5. The Respondent further states that at no time did it instruct the County Public Service Board pursuant to Section 59 of the County Governments Act to appoint the Claimant and the Claimant needs to be candid to this Honourable Court that purported appointments were illegal and has no basis at law.

6. The Respondent challenges the legality of all the letters of appointment referred to by the Claimant as not conveying the decision of the County Public Service Board as required by law but makes reference to strange bodies such as the Administration, the County Government, and the County Human Resource Management Advisory Committee (CHRMAC). This is a clear manifestation that in the entire process the County Public Service Board was never involved.

7. The Respondent affirm that the Claimant's claim is founded on an illegality since her appointment was null and void and ab initio and therefore not sustainable in law.

14. The Respondent reiterates that the suit is ill grounded, misconceived and arises out of an unlawful contracts and the same should be dismissed with costs to the Respondent.

The matter came to court variously until 18th July, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful. The claimant in her written submissions dated 26th September, 2018 reiterates and submits her case of unlawful termination. On this, she relies on sections 41 (1) and 44 (4) of the Employment Act, 2007 as follows;

...Section 41(1) of the Employment Act 2007 which provides that when an employer intends to dismiss or terminate the employment of an employee for among other reasons misconduct, it must explain to the employee in a language the employee understands the reasons for intended dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. The Claimant contends that the respondent never explained to her the reasons for the intended dismissal.

Further,

Section 44(4) of Employment Act lists matters which amount to gross misconduct and which would entitle an employer to summarily dismiss an employee, however the same provide that an employee should be given an opportunity to dispute the truthfulness of the accusation. The claimant submits that she was summarily dismissed from work with no clear reasons of her dismissal yet her employment contract was still legally enforceable. This led to the unfair termination of the claimant from her employment.

The claimant further sought to rely on the authority of **Teresa Carlo Omondi vs Transparency International Kenya, Cause No. 863 of 2015** where the court observed thus;

“... the respondent had an obligation to respect the claimant's right to serve her full term, in accordance with the terms and conditions agreed between the parties and with due regard to the law governing that contract. There was an obligation to treat the claimant fairly up to the very end. Fair dealing between employers and employees is not to be ignored on the ground that a fixed term contract is anyway coming to an end. The departure of the employee is not to be hastened. The claimant was hastily pushed out and treated like one who had committed an employment offence, but was not told what her offence was. What did the respondent stand to lose by holding out until 30th September 2012. The court agreed with the claimant that her outgoing contract was terminated by the respondent prematurely and unfairly.”

The respondent in her written submissions dated 31st August, 2018 denies the claim. It is her submission that the claimant was not properly and lawfully employed by the County Public Service Board, Bomet County and therefore the futility of this claim. On this, the respondent cites Article 235 (1) of the Constitution of Kenya, 2010 which empowers a County Government in dealings with her work force. This is as follows;

235 (1) “ A county government is responsible, within a frame work of uniform norms and standards prescribed by an Act of parliament, for – (b) appointing persons to hold or act in those offices, and confirming appointments.

She further relies on section 59 (1), (b) of the County Governments Act, 2012 which provides as follows;

59 (1), (b) The functions of the County Public Service Board shall be, on behalf of the county government, to- (b) appoint persons to hold or act in offices of the county public service including in Boards of cities and urban areas within the county and to confirm

appointment.”

Section 59 (1) of the County Governments Act, 2012 delineates the functions of the County Public Service Board as follows;

59 (1) The functions of the County Public Service Board shall be, on behalf of the county government, to –

a) establish and abolish offices in the county public service;

b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

This being the case, the employment of the claimant by any other authority other than the county Public Service Board or her delegated authority is nullity in law. This applies to the claimant’s appointment and employment.

The respondent further submits that the alleged appointment of the claimant is void *ab initio* and tainted with illegality. To amplify this, the respondent relies on the authority of **Halsbury’s Laws of England [4th edition] volume 16 (1A) page 29**, the formation of contracts of Employment paragraph 18 provides that;

“A finding of illegality means, however, not only that no common law claim may be maintained on the contract, but also that the employee subject to the contract, loses any statutory employment rights which rely on his having been an employee under a contract of employment, in particular the right to claim unfair dismissal”

The respondent further and in the penultimate sought to rely on the authority of **Kenya Airways Limited v Satwant Singh Flora [2013] eKLR** as follows;

*..., the respondent urges this ... court to find and hold, rightfully so, as was held in **KENYA AIRWAYS LIMITED V SATWANT SINGH [2013]**, that the instant claim is founded on an illegal contract of employment and the claimant lost any statutory rights under the Employment Act as a result of the irregularity.*

Where does this lead us? It cannot be any other way. This is a case of lawful termination of employment. The letter dated 6th November, 2017 dubbed, **Separation of Employment Contract**, merely communicated the nullity and voidness of the contract of employment. It was therefore terminated with effect from 31st October, 2017. This cannot be faulted. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.

The 2nd issued for determination is whether the claimant is entitled to the relief sought. She is not. Having failed on a case of unlawful termination of employment, she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

Delivered, dated and signed this 9th day of October, 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mugumya instructed by P. Sang & Company Advocates for the claimant.
2. Mr. Cosmas Koech instructed by County Attorney’s Offices for the respondent.