



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 4 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

DR. EUNICE JEPKOECH SIRIA.....CLAIMANT

-Versus-

THE COUNTY SECRETARY,UASIN

GISHU COUNTY.....RESPONDENT

J U D G E M E N T

The Claimant herein is a doctor by profession. She was appointed as a County Executive Committee (CEC) Member for Health at the County of Uasin Gishu by the Governor on 8th November 2013. The genesis of this suit are events which occurred on 13th and 14th June, 2015.

The Governor for Uasin Gishu had received complaints of laxity and mistreatment of patients in health facilities within Uasin Gishu and in particular Ziwa Sub-County Hospital. The Governor decided to make an impromptu fact-finding visit to the hospital on 13th June, 2015 to check on the veracity of the complaints and the general state of the facility. The Governor tried reaching the Claimant with a view of having her accompany him to the facility being the head of the department but the Claimant did not pick his calls. He decided to proceed to the facility with other senior officers led by the Chief Officer for Health in the absence of the Claimant.

On arriving at the facility the Governor witnessed the neglect and mistreatment of patients at the facility. He directed the Chief Officer for Health and the other Senior officers accompanying him to take appropriate disciplinary measures against concerned employees at the facility.

The Claimant upon discovering what had transpired at the hospital on 13th June, 2015 decided to make a visit to the hospital the next day on 14th June, 2015. The concerned employees informed her of the directive by the Governor. She apologized on behalf of the Governor for the directive and assured the concerned employees that no adverse action would be taken against them. This was contrary to the directive by the Governor.

The Claimant met the Governor on her way from the hospital and they had a discussion on what had transpired during the Governor's visit and the Governor directed the Claimant to take disciplinary action against the concerned employees.

The Claimant however failed to act on the Governor's instructions to take disciplinary action against the concerned employees forcing him to assign the Chief Officer for Health to take charge of the matter. The

Governor considered the Claimant's failure to act on his instructions as gross misconduct and commenced disciplinary proceedings against the Claimant.

The Claimant was suspended to pave way for further investigations vide a Letter of Suspension dated 10th August, 2015. A disciplinary Committee was thereafter empaneled to inquire into the allegations against the Claimant. The Claimant was then invited to submit a written Defence to the Charges against her which she did. The Claimant was subsequently invited for a Disciplinary Hearing on 22nd September, 2015 which she attended.

The Disciplinary Committee heard the Claimant and other witnesses and returned a verdict that she was guilty of insubordination. The Committee recommended that severe disciplinary action be taken against her. It is upon the backdrop of the Recommendations by the Disciplinary Committee that the Governor dismissed the Claimant from service on 25th November, 2015. The Claimant was aggrieved by the dismissal and filed this suit to challenge the dismissal.

In the Memorandum of Claim filed by the Claimant on 13th January 2016, she avers that her suspension and eventual dismissal was without justification, was high handed and contravened the Constitution, the County Government Act and the Employment Act. She avers that she complied with all lawful orders issued to her by her superiors during the period of her employment but was treated unfairly when she was required to sack staff before granting them their right to be heard. She avers that she was targeted by the Respondent for sins she did not commit.

The Claimant avers that owing to the unfair and high handed manner in which she was suspended and dismissed, she has lost and claims Ksh.19,600,000/- being her terminal dues made up as follows:-

- a) Unpaid salaries for August, September, October and November 2015 Kshs.918,750/-
- b) Unpaid leave for 2015 Kshs.306,250/-
- c) Service pay for period 2013 upto 2018 Ksh.14,700,000/-
- d) Compensation for unfair termination – Gross salary x 12 Ksh.3,675,000/-
- e) The certificate of service contemplated in Section 51 Employment Act.

The Claimant prays for the following remedies-

- a) Declaration that the Claimants services were unfairly, unprocedurally and unlawfully terminated.
- b) The Claimant be reinstated forthwith in her previous position or in the alternative she be compensated fully in the sum of Kshs.19,600,000/-
- c) Orders be made compelling the Respondent to issue a certificate of service to the claimant.
- d) Any other relief this Honourable Court may deem necessary to grant in the circumstances.
- e) Costs of this claim.

The Respondent filed a Memorandum of Defence on 4th May 2016 in which it denies the averments in the Memorandum of Claim and states that there was reasonable, justifiable and compelling cause to dismiss the Claimant for gross misconduct following the manner in which she had engaged herself in acts of insubordination. The Respondent further pleads that the process that led to the dismissal of the Claimant was fair and lawful, that she was suspended from duty to pave way for investigations, a disciplinary committee was then empanelled by the Governor to look into the Claimant's case and accord her a fair hearing. It is pleaded further that the Claimant responded to the charges against her and further

appeared before the disciplinary committee which heard evidence from witnesses including the claimant before returning a verdict that the Claimant was culpable and her acts amounted to insubordination and the disciplinary Committee recommended that severe disciplinary action be taken against her.

The Respondent further avers that CEC members are appointees of the Governor and are accountable either individually or collectively to the Governor who is also vested with the power to dismiss them under section 31 and 40 of the County Government Act. The Respondent avers that CEC members are state officers under Article 260 of the Constitution and are not subject to the Employment Act, that the suit filed by the Claimant is an abuse of court process as it seeks to gag or curtail the constitutional powers of the governor against the spirit of the constitution and the County Government Act. The Respondent prays that the suit be dismissed with costs.

When the case came up for hearing the parties sought and were granted leave to argue the case by way of written submissions. The parties subsequently filed and exchanged written submissions. In the submissions both parties reiterate the facts as narrated hereinabove and frame issues for determination which in my opinion may be summarised as follows-

- a) Whether there was an Employment Relationship between the Claimant and the Respondent;
- b) Whether this Honourable Court has the Requisite Jurisdiction to hear and determine the Claim;
- c) Whether there was a valid reason for the Dismissal;
- d) Whether due process was followed in dismissing the Claimant; and
- e) Whether the Reliefs sought are tenable.

Determination

I have carefully considered the pleadings and written submissions together with authorities cited. I will proceed to determine the issues as summarised above.

Whether there was an employment relationship and whether this court has jurisdiction to hear this matter

It is the Respondent's contention that there was no employment relationship between the Claimant and the Respondent, that the Claimant being a member of the county executive committee which is independent of the County Public Service, was an appointee of the governor and the powers to discipline her were exclusively vested in the governor. It is further the contention of the Respondent that as county secretary he is the head of the county public service but his powers do not extend to the executive committee members. It is contended that the employment relationship is between the governor and the Claimant.

The Claimant did not have an opportunity to address the court on this issue as it was raised in the Respondent's submissions after the Claimant's submissions had been filed.

The Employment Act defines an employee as ***a person employed for wages or a salary and includes an apprentice and indentured learner***, and an employer as ***any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company***;

In paragraph 2 of the Claim the Respondent is defined as "the County Secretary being sued *on behalf of Uasin Gishu County*. In paragraph 3 the Claimant states she was at all material times relevant an employee of the County Government of Uasin Gishu. My understanding is that the Claimant has sued the County Government of Uasin Gishu through the County Secretary so that the substantive Respondent is not the County Secretary, but rather, the County Government.

Jurisdiction of this Court

The jurisdiction of this court is derived from Article 162(2) and section 12 of the Employment and Labour Relations Court Act which provide as follows:-

Article 162.

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations; and

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

12. Jurisdiction of the Court

(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade union's organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

It is the Respondent's position that there is no employment relationship between the petitioner and the Respondents. The Respondent relied on the case of **Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016]eKLR** where the court stated that the jurisdiction of this court is limited by the existence of an employment relationship and the case of **Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited[1989]KLR 1** where the court stated that jurisdiction is everything and without it a court has no power to make one more step.

A similar objection was raised by the Respondent in the case of **Nick Githinji Ndichu v Clerk, Kiambu County Assembly & Another [2014]eKLR** in which Nduma J. citing the decision of Majanja J in **United States International University (USIU) v Attorney General (2013) eKLR** and **Civil Appeal No.6 of 2012 Professor Daniel N. Mugendi Vs. Kenyatta University and 3 others,**

stated as follows-

13. It is clear from the foregoing that the law is not concerned with the method of acquiring an employee. The law does not concern itself with whether the person was appointed or elected. Rather, the person must:

(i) be having an oral or written contract of service;

(ii) be provided a service to a real or legal person;

(iii) be receiving a wage/salary for the services rendered.

If such a person has a dispute with the person with whom he/she has a contract of service and to whom he/she provides services for a wage or salary, the court has jurisdiction over such dispute and has available remedies for that purpose.

14. It is the Court's finding that the Petitioner has a relationship with all the above attributes with the 2nd Respondent.

This court has therefore got jurisdiction over this matter."

I agree with and adopt the decision of Nduma J. The case of **County Government of Nyeri & Another v Cecilia Wangechi Ndungu [2015]eKLR** which was also decided by the Employment & Labour Relations Court in the first instance, the Court of Appeal confirmed that a state officer is an employee whose terms and conditions of service are regulated by the constitution or the relevant statute, principles of fair administrative action and rules of natural justice, but is not subject to the Employment Act.

This court's jurisdiction is thus not confined to employment relationships created under the Employment Act only as suggested by the Respondent. The court has mandate to determine issues relating to all employment irrespective of whether or not such employment relationship arises out of the Employment Act. Article 162(2)(a) does not make any reference to the Employment Act but rather, to "*employment and labour relations*" as parliament may by legislation confer.

For these reasons I find no merit in the Respondent's objections to this court's jurisdiction, being that the Claimant was employed by a written contract of service to perform duties for the County Government of Uasin Gishu for which she was paid wages or salary and was therefore an employee.

Whether there was valid reason and procedural fairness

It was submitted for the Claimant that she was not given a hearing as envisioned in section 41 of the Employment Act and Article 50(1) of the Constitution. It was further submitted for the Claimant that her right to fair labour practices under Article 41 of the Constitution was violated. The Claimant relied on the case of **Collins Osoro Lukhale v AAA Growers Limited [2014]eKLR** where the court stated that "*for a termination to pass the fairness test it must be shown that there was not only substantive justification for the termination but also procedural fairness*".

It was submitted that although the Claimant was informed of reasons for termination she was not granted an opportunity to be heard. It was submitted that under section 31(b) of the County Government Act the governor has power to dismiss an MCA upon a resolution of the County Assembly while section 40 provides for grounds of removal none of which the Claimant committed. It was submitted that the dismissal was unfair in terms of section 45 of the Employment Act.

For the Respondent it is submitted the Claimant was an appointee of the governor under Article 179(2)(d) of the Constitution and section 30(2)(d) of the County Government Act and the Governor has power under section 31(a) to dismiss an MCA if he considers it appropriate or necessary. It is submitted that the law introduces the pleasure doctrine as was stated in the case of **Tom Luusa Munyasa & Another v Governor of Makueni County & Another** cited in **The County Government of Nyeri v Cecilia Wangechi Ndungu**. It is submitted that the Act does not require the governor to give reasons for

dismissal and the Claimant has no grounds to challenge the decision of the governor.

It is further submitted that section 40(1) of the County Government Act provides for the reasons for removal of an MCA being incompetence, abuse of office, gross misconduct and failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee, physical or mental incapacity, or gross violation of the constitution.

It is submitted that the Claimant was removed for insubordination under section 44(4) (c), (d) and (e) of the Employment Act. It is submitted that there was valid reason for the dismissal. It is submitted that the Claimant did not give any evidence in her favour to rebut the evidence presented against her, only alleging that the directive by the governor was illegal, yet the governor did not prescribe the action to be taken as he only directed disciplinary action to be taken against the employees concerned. On the process it was submitted for the Respondent that due process was followed before a decision was reached to dismiss the Claimant.

The powers of the governor to dismiss a CEC member is provided for under section 31(a) and (b) and section 40 of the County Government Act as follows-

31. The governor—

(a) may, despite section 40, dismiss a county executive committee member at any time, if the governor considers that it is appropriate or necessary to do so;

(b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;

40.(1) *Subject to subsection (2), the Governor may remove a member of the county executive committee from office on any of the following grounds—*

(a) incompetence;

(b) abuse of office;

(c) gross misconduct;

(d) failure, without reasonable excuse, or written authority of the governor, to attend three consecutive meetings of the county executive committee;

(e) physical or mental incapacity rendering the executive committee member incapable of performing the duties of that office; or

(f) gross violation of the Constitution or any other law.

(2) *A member of the county assembly, supported by at least one-third of all the members of the county assembly, may propose a motion requiring the governor to dismiss a county executive committee member on any of the grounds set out in subsection (1).*

(3) *If a motion under subsection (2) is supported by at least one-third of the members of the county assembly—*

(a) the county assembly shall appoint a select committee comprising five of its members to investigate the matter; and

(b) the select committee shall report, within ten days, to the county assembly whether it finds the allegations against the county executive committee member to be substantiated.

(4) *The county executive committee member has the right to appear and be represented before the select committee during its investigations.*

(5) *If the select committee reports that it finds the allegations—*

(a) unsubstantiated, no further proceedings shall be taken; or

(b) substantiated, the county assembly shall vote whether to approve the resolution requiring the county executive committee member to be dismissed.

(6) *If a resolution under subsection (5) (b) is supported by a majority of the members of the county assembly—*

(a) the speaker of the county assembly shall promptly deliver the resolution to the governor; and

(b) the governor shall dismiss the county executive committee member.

From the letter of dismissal it is apparent that the Claimant was dismissed under section 31(a) of the County Government Act. Paragraph 3 and 4 of the letter of dismissal reads-

The Constitution of Kenya 2010, Chapter Eleven Article 179(6) provides that Members of a County Executive Committee are accountable to the County Governor for the performance of their functions and exercise of their powers. Further, The County Government Act 2013 Section 31(a) provides that the Governor may dismiss a county executive committee member at any time, if the Governor considers that it is appropriate or necessary to do so.

In this regard, and in reference to the findings of the select committee, I hereby dismiss you from the position of County Executive Committee Member-Health Services with effect from 25th November 2015.

Under section 31(a) there is no express requirement for a hearing before the dismissal of a member of CEC by the governor. However the Governor must exercise his powers to dismiss a member of the CEC within the confines of the Constitution as provided under Article 2 and 236 thereof. Article 236 provides that-

236. *A public officer shall not be—*

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. [Emphasis added]

This means that although section 31(a) appears to suggest that the members of CEC hold office at the pleasure of the governor, that pleasure rule is only applicable as limited by the Constitution. The fact that the section uses the words *appropriate or necessary* means that the governor in the spirit of transparency and accountability, must be able to justify the grounds for removal. In the case of **The County Government of Nyeri v Cecilia Wangechi Ndungu**, the Court of Appeal expressed itself on the issue thus-

We find that the reasons for exercising the said power ought to be valid and compelling and will depend on the circumstances of each case. Consequently the power to dismiss a member of the County Executive is qualified to the extent that the same ought to be for the benefit of the County and in accordance to the principles of devolution...

In the same case the court acknowledged that reasons exist why this legislation is so when it stated:

There are certain circumstances a Governor may lose confidence in a member of a County Executive Committee and due to the sensitivity and/or urgency of the matter at hand the Governor may dismiss the member without giving notice of his intention to do so. Further, section 31(a) of the County Governments Act does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal, he can only dismiss if he considers it appropriate or necessary.... Appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power...is reasonable or not.

In this case the governor did not dismiss the Claimant without a hearing. He constituted a select committee of 5 which heard evidence from both the Claimant and all the staff of Ziwa Sub-County Hospital who after hearing all the evidence made recommendations against all the persons found culpable, one of them being the Claimant. Their recommendations were as follows-

1) The apology of the CECM Health Services to the concerned staff was in bad faith as it negated the directive of H.E. The Governor. That is tantamount to insubordination and attracts severe disciplinary action. Reference: The Employment Act Section 44, Sub-Section 4 (c), (d) and (e) - Extract Attached.

2) The Chief Officer Health Services be given a warning for failure to take up instructions issued by H.E. The Governor in a prompt and effective manner.

3) The Medical Superintendent Ziwa Sub-County Hospital be given a warning for laxity and poor supervision of staff and be redeployed to another facility as a Clinical Officer with no administrative responsibilities. He should also be placed under close supervision.

4) The Hospital Administrator be given a warning for negligence and failure to exercise due diligence. He should be redeployed to another facility as a Health Records Officer with no administrative responsibilities.

5) Management of Administrative functions at Ziwa Sub-County Hospital be reviewed and the casual contract of Josephine Jepchumba should be terminated with immediate effect as her presence at the facility is causing conflict among staff.

Regarding the submissions of the Claimant that the Respondent failed to comply with section 41 of the Employment Act, it is clear from the provisions of both section 31 and 40 of the County Governments Act that the process of dismissal of members of CEC is comprehensively provided for and the Employment Act is therefore not applicable. This is confirmed by the decision of the Court of Appeal in **The County Government of Nyeri v Cecilia Wangechi Ndungu** wherein the Court stated that a state officer is an employee whose terms and conditions of service are regulated by the Constitution or the relevant statute, principles of fair administrative action and rules of natural justice, but is not subject to the Employment Act.

From the foregoing, I find that the governor had power to dismiss the Claimant and that the power was exercised in accordance with the Constitution, the County Government Act and principles of natural justice. The Claimant has therefore failed to prove want of procedural or substantive fairness.

Remedies

The Claimant prayed for salary for August, September, October and November 2015. She further prayed for annual leave for 2015. I find that the Claimant did not demonstrate that her terms of service entitled her to these benefits. Her letter of suspension stated that she will only be entitled to house allowance and medical benefits during the period of suspension. She provided no proof that she would be entitled to the withheld salary upon termination of her employment following the disciplinary process. The claims must

therefore fail and I accordingly dismiss the same.

The Claimant further prayed for service pay, compensation for unfair termination and certificate of service. These prayers are anchored on the Employment Act which as I have pointed out above, are not applicable. Further, even if the Act was applicable she would not be entitled to compensation for unfair termination as her employment was found to have been terminated fairly.

Conclusion

Having found that the Claimant has not proved that her dismissal was unfair or unlawful and having failed to prove any of the remedies sought, the entire claim is hereby dismissed. Each party shall bear its costs.

Dated, Signed and Delivered this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE