



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2071 OF 2011

OMAR MOHAMMED IBRAHIM CLAIMANT

VERSUS

THE SECRETARY, PUBLIC SERVICE COMMISSION1ST RESPONDENT

THE PERMANENT SECRETARY, PROVINCIAL ADMINISTRATION

AND INTERNAL SECURITY 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

Mr. Ndolo for claimant

Mr. Siro for respondents

JUDGMENT

1. The claimant commenced this suit vide a plaint dated 18th December 2009 and filed on the same date. The claimant's claim arose from his dismissal by the 1st and 2nd respondents who unlawfully retired him purportedly in public interest.
2. The claimant sought to appeal that decision of the 1st and 2nd respondents to retire him allegedly on public interest but the 1st and 2nd respondents rejected his appeal or review.
3. The claimant maintained that his dismissal was not founded on due process and was indeed actuated by bad faith.
4. The 1st and 2nd respondents were also in breach of the rules of Natural justice as they never afforded the claimant the right to be heard.
5. The claimant prays for judgment against the respondents jointly and severally for:
 - a. General damages for breach of contract;
 - b. Reinstatement;

- c. Costs of the suit;
- d. Interest on (a) and (c) above; and
- e. Any other relief that the court deems fit.

6. The claimant filed his list of documents and list of witnesses dated 21st March 2011, and called three witnesses to testify.

7. The respondents filed their joint written statement of defence on 3rd May 2010 and they neither filed documents in support of the defense nor called any witnesses to testify.

Evidence

8. The claimant, CW1 testified under oath in support of his case. He told the court that he held the position of Assistant Chief Haroresa Tana River District sub-location.

9. The claimant alleges that he was wrongly retired in public interest before his retirement date for no valid reason and the respondents did not follow a fair procedure.

10. The claimant was born on 14th July 1965 and was retired on 1st July 2007 at the age of 41 years. The letter of retirement is dated 17th May 2007 from the office of the president.

11. The District Commissioner Tana River District had written to the claimant on 29th November 2005 stating that the chief of Kalkacha Location had complained about the claimant's conduct in that he had neglected his duties and the claimant was asked to show cause why disciplinary action should not be taken against him.

12. It was alleged that many students in the sub-location fell out of school and that the claimant did not go work. Thirdly, it was alleged the claimant had caused division in the community, leading to two groups fighting.

13. The claimant replied to the allegations. The claimant added that he had a working committee to deal with all community issues and it was therefore not true that he was not working, had caused students to drop out of school, and had caused divisions in the community.

14. The reply was not responded to but on 24th February 2006, the claimant received a letter from the Provincial Administration Coast province alleging that the claimant's work was poor and that the claimant had failed to maintain peace and harmony and to attend to community complainants.

15. The claimant denied those allegations by a letter dated 3rd March 2006. The claimant explained how he did his work through his committee. This letter was not responded to nor was the claimant called to a disciplinary hearing.

16. The claimant received a letter dated 17th May 2007 terminating his employment in public interest with effect from 1st July 2007.

17. The claimant appealed to have the decision to terminate his employment rescinded but the appeal was rejected on 1st September 2008. The claimant made a further Appeal by a letter dated 30th September 2008 to which he received no response.

18. The claimant was paid Kshs.17,527 monthly salary at the time of termination. A letter of demand by the claimant's Advocate dated 12th August 2009 was responded to on 17th August 2009.

19. The people of Haroresa demonstrated at the District commissioner's office to protest the claimant's removal to no avail.

20. The claimant states that he has suffered immensely due to the financial loss occasioned by the termination. That his children have dropped out of school. He seeks reinstatement and in the alternative compensation. The claimant was 50 years at the time of the hearing of the suit. That Assistant chief's retire at the age of 60 years. That Haroresa sub-location has had no sub-chief since then. That the nearest Assistant chief is forty (40) kilometres away and the community continues to suffer.

21. CW2, Hadija Gambo Mbocha, testified under oath in support of the claimant's case. CW2, adopted his witness statement dated 24th June 2011 as his evidence in chief. CW2 told the court that he lives at Haroresa; he is unemployed and was not a relative of the claimant.

22. CW2 told the court that the claimant was their former Assistant Chief. He was very effective in that capacity and assisted the community to get two bore holes. He also helped to build a school. A dispensary was also build during his time.

23. There were tribal clashes in Tana River District, and the claimant requested for eighteen (18) police reservists to guard the community.

24. The claimant assisted girls and adults to go to school. CW1 referred to the claimant as a father they had for fourteen (14) years but now they had become orphans for nine (9) years.

25. The community has lost communication with Government since then.

26. CW1 prayed the court to reinstate the claimant. That the claimant had done no wrong at all to the community during his term as Assistant chief.

27. CW1 survived very close, cross examination by Mr. Sio, counsel for the respondents. He told the court that he was one of the representatives appointed by the people of Haroresa to represent them in court in this case. That he was not a relative of the claimant, but was only interested in the good of the community. CW1 said they had no Assistant chief todate.

28. CW1 denied that Haroresa people refused a replacement when one was appointed. CW1 insisted that the claimant served the community very well as their Assistant chief. CW2 said that political conflict that affected Tana River District at the time, caused the claimant to be unfairly dismissed.

29. CW2 also denied that the claimant was a drunkard. CW2 said up to 400 students went to school during the claimant's time. That these numbers have dropped since them. Cw2 said that the claimant mobilised the community to take their children to school.

30. Cw2 added that the community consisted of mainly pastoralists. CW2 said he had three children in class sight (8). CW2 said only one (1) clan lived in Haroresa. The clan is called Wardi. CW2 denied there were inter-clan fights in Haroresa during the time of the claimant. Claimant however stated that the disagreement between the Wardi and Oromos led to the claimant's dismissal. The Oromos instigated the dismissal. That the Oromos now take food rations meant for the Wardi Community.

31. CW2 denied that the claimant opened a shop to sell Government relief food. Cw2 denied that he was involved in such illicit trade.

32. CW2 described the claimant as a peace maker who prevented cattle rustling during his term.

33. CW3 was Nuri Madhobe Galgalo. CW3 adopted his witness statement dated 24th June 2011 as his evidence in chief. CW3 stated that he was a relative of the claimant and had no complaints against the claimant. That the claimant was their Assistant chief and served the community very well during his time. That the community has no Assistant chief since then. CW3 said he was 67 years old and was born

in Tana River.

34. CW3 stated that most of their schools and houses have been destroyed by floods.

35. CW3 gave examples of community initiatives by the claimant during his time including building of four (4) class rooms, acquisition of eighty (80) chairs for the children and also got eighteen (18) reservists to protect the community. That a dispensary was built during his term. That these facilities are there todate. CW3 added that the claimant held barazas regularly and got girls and adults to attend school. CW3 taught the Koran.

36. That the community got birth certificates during the time and the claimant asked the community to protect girls from HIV AIDS. That the community lost cattle to the Oromos and the politics led to the claimant's loss of his job. The claimant did not commit any offence.

37. That the entire sub-location of Haroresa shares the feeling of CW3. That problems were caused by chiefs from other locations, leading to tribal clashes and they instigated the sacking of the claimant. CW3 denied that the claimant encouraged early marriage of the children. CW3 prayed that the claimant be reinstated to his job.

Response

38. The respondent filed a statement of defence at the High Court on 26th April 2010 before the matter was transferred to the Employment and Labour Relations Court.

39. The respondent did not adduce any evidence to rebut the clear and compelling evidence of CW1, CW2 and CW3 to the effect that the claimant was a good Assistant chief, who served the community of Haroresa well and was unfairly dismissed from employment upon unfair instigation of chiefs who had conflicts with the Haroresa community. The averments in the statement of defence remain bare denials.

Determination

40. The issues for determination are;

- i. Whether the employment of the claimant was terminated for a valid reason and in terms of a fair procedure.
- ii. Whether the claimant is entitled to reinstatement or compensation if the answer to (i) above is in the negative.

Issue i

41. CW1, CW2, CW3 adduced compelling evidence which has led the court to reach the following conclusion of facts and law.

- a. That the claimant served Haroresa sub-location as then Assistant Chief for a continuous period of fourteen (14) years.
- b. That the claimant served the community diligently and with dedication until his employment was for no valid reason and without following a fair procedure terminated by the 2nd respondent.
- c. That todate, there has been no replacement of the claimant to fill the Vacant position of Assistant chief Haroresa for a period of nine (9) years as at the time the suit was heard.
- d. That the entire sub-location is in favour of having the claimant reinstated to his position as Assistant chief.

e. That the claimant was at the time of the hearing 50 years old and could serve the community until he attained the retirement age of sixty (60) years.

42. Accordingly, the court answers issue i as follows;

The employment of the claimant as the Assistant chief of Haroresa sub-location in Tana River District, was terminated unlawfully and unfairly in violation of Section 41, 43 and 45 of the Employment Act, 2007.

Issue ii

43. The CW1, CW2 and CW3 adduced uncontroverted evidence that the position of Assistant chief Haroresa sub-location has not been filled todate and the community has suffered lack of services performed by the claimant for the past nine (9) years as at the time of hearing the suit.

44. The evidence by CW1, CW2 and CW3 is also to the effect that the claimant was ready and willing to serve his remaining term of service till he reaches the retirement age of sixty (60) years.

45. The court is satisfied that the claimant is suitable to return to his job and the entire community of Haroresa sub-location supports his reinstatement.

46. There being no evidence to the contrary, the court orders as follows;

a. The claimant be reinstated to the position of Assistant chief, Haroresa, sub-location, Tana River District, without loss of any salary or benefits with effect from the date of termination on 1st July 2007 within thirty (30) days of this judgment.

b. The arrear salary payable to the claimant be paid with interest at court rates from date of filing suit till payment in full.

c. Costs to follow the outcome.

Dated, signed and delivered at Nairobi this 8th day of September 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE