



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 112 OF 2016

(BEFORE D. K. N. MARETE)

ALOYS MATAYA MOSETI..... CLAIMANT

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....RESPONDENT

JUDGEMENT

This matter was brought to court vide a statement of claim dated 27th June, 2016. It does not disclose on issue in dispute or its face.

The Respondent in a Respondent's Memorandum of Reply dated 13th December, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about the 18th July, 2013, the respondent employed him as County Revenue Supervisor. He thereon assumed his employment and worked in pursuance of his mandate. He earned and was paid Ksh.129,527.00 per month.

The claimants further case is that the respondent authorized and or allowed the claimant to seek and or procure a baking facility of Kshs.2,391,349.00 which she (respondent) guaranteed.

It is the claimant's other case that the respondent herein paid his monthly salary for the months of October, 2013 to March, 2014 and thereafter fell in default, which default in salary payments has persisted to date. This is despite being a lawful bonafide employee of the respondent.

The claimant claims being subjected to unfair labour practices a contravention of Article 41(2) of the Constitution of Kenya, 2010 as follows;

- i. Denying and/or depriving the Claimant of lawful Remunerations.*
- ii. Withholding and/or suspending the Claimant's payment/salary without lawful cause and/or basis.*
- iii. Subjecting the Claimant to unfair and inhuman treatment.*
- iv. Depriving the Claimant of Economic and Social Rights contrary to **Article 43(1) (c) of the Constitution, 2010.***

v. Constructively dismissing the Claimant without regard to the Due process of the Law.

vi. *Subjecting the Claimant to unfair labour practices.*

9. Owing to the failure by the Respondent herein, to pay and/or remit the Claimant's Monthly Salary, w.e.f April 2014, the Claimant has been subjected to loss and extreme prejudice, including inhuman treatment and Deprivation. Consequently, the Claimant seeks for Damages and/or payment of accrued Salary Arrears.

10. In view of the foregoing, the Claimant claims against the Respondent is for payment of Salary Arrears, w.e.f April 2014, at the rate of Kshs.129,527/= only, per Month, for a period of 25 months, making a total of Kshs.3,238,175/= only.

He prays as follows;

a. *Payment of Kshs.3,238,175/= only, being Salary Arrears w.e.f April 2014, to date of filing of the instant proceedings.*

b. *Declaration that the Claimant herein is entitled to payment of Monthly*

c. *Salaries and Allowances, in terms of the Letter of Appointment, until and unless the Employment is lawfully terminated and determined in accordance with the provisions of the **Employment Act, 2007.***

d. In the alternative to prayer (b) hereof, the Honourable Court be pleased to declare that the actions and/or suspension of the Claimant's Salary amounts to Constructive Dismissal of the Claimant and thus constitutes Unfair Labour Practice.

e. *Payment of Damages to and in favour of the Claimant pursuant to and/or under the provisions of **Section 49 of the Employment Act, 2007.***

f. *Interests at Court rates (14%) per Annum w.e.f **April 2014** until payment in full.*

g. *Costs of the suit/Proceedings be borne by the Respondent.*

h. *Any such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.*

The respondent admits employment of the claimant in terms of paragraphs 3, 4, 5, 6, 7, 8 and 9 of the claim. She however avers that this was subsequently discovered to be untenable by virtue of the operators of the Constitution of Kenya, 2010 as it was contrary to the findings of the Transitional Authority and the Salaries and Remuneration Commission.

The respondent's further case is that the claimant was duly notified of the lacuna in his appointment by the respondent's County Public Service Board in February, 2014 and that she is therefore not responsible. The claim is overtaken by events.

The respondent did not pursue his case any further or even file any written submissions as directed by court. The defence was left hanging and on its own.

This matter came to court variously until the 21st March, 2017 when it was heard. CW1 – Alloys Mataya Moseti, the claimant in his testimony reiterated his case as presented in the claim. He sought to rely on the documents annexed in support of the claim and also his witness statement (also dubbed claimant's written statement) dated 27th June, 2016 at page 6 of the claim.

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 his written submissions dated 1st March, 2017 reiterated that he made a demand letter to the respondent dated 11th May, 2016 raising his claim of unfair labour practices but was responded to by a letter dated 24th May, 2016 whereby she denied that the claimant was her employee. He further denies any notification or communication of lacuna by the respondent and submits that this has not been brought to the attention of the court.

The claimant seeks to rely on the authority of **Hema Hospital v. Dr. Wilson Makongo Marwa, Civil Appeal No. 72 of 2014**, where the Court of Appeal at Kisumu, (Maraga, Musinga & Gatembu, JJ.A) observed as follows;

... that under section 41 of the Employment Act, states that “before the employment of any other person is terminated on the grounds of misconduct, poor performance or physical incapacity he should be notified in a language that the employee understands, the reason for which the employer is considering termination”.

The claimant further submits that this inaction by the respondent was irresponsible and unacceptable as follows;

In the current circumstance, the Respondent did not inform the Claimant the reason why they stopped remitting monthly salary to the Claimant’s Account and why they thought it wise to inform the Court through the letter dated 24th day of May 2016, that the Claimant was no longer their employee.

The claimant also submits a case of lack of compliance with the requirements of substantive and procedural justice in that he was not informed of his predicament or even afforded an opportunity to be heard. He presents it thus;

Pursuant to Section 41 (2) of the Employment Act, an Employer shall “before terminating the employment of an employee or summarily dismissing an employee, under section 44 (3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the Employee”

In all, the claimant ably presents a case of constructive termination by the respondent. This is not in any way rebutted by the said respondent. The claimant’s case stands tall through and through. I therefore find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to relief sought. He is. On a finding of unlawful termination of employment, the claimant becomes entitled to the relief sought.

I am therefore inclined to allow the appeal and order relief as follows;

- i. 12 months compensation for unlawful termination of employment Kshs.129,527.00 x 12 months.....Kshs.1,554,324.00
- ii. The costs of this claim shall be borne by the respondent.
- iii. The costs of the claim be and are hereby assessed at Kshs.100,000.00.

Delivered, dated and signed this 17th day of October 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Oncwang'i instructed by Ogutu-Mboya & Company Advocates for the Claimant.
2. Mr. Thomas N. Mawasa instructed Mawasa & Company Advocates for the Respondent.