



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 83 OF 2016

(Before D. K. N. Marete)

ERIC KIPRONO KOECH.....CLAIMANT

VERSUS

HON ATTORNEY GENERAL.....1ST RESPONDENT

MINISTRY OF HEALTH.....2ND RESPONDENT

JUDGEMENT

This matter was originated under a Memorandum of Claim dated 18th April, 2016. It does not disclose on issue in dispute on its face.

This was followed by an Amended Statement of Claim amended on 15th July, 2016.

The respondent in a Respondent's Reply to Memorandum of Claim dated 17th January, 2017 denies the claim and claims an amount of Kshs.89,954.10 as counter-claim.

The Claimants case is that;

4. In the year 1997 the claimant applied for a Higher Diploma in Public Health Education and Promotion course and was admitted to Kenya Medical Training College for a post basic in service course after meeting all requirements for training in public service and proceeded to undertake the said course and successfully completed in 1998 and return to his former station and started working in his new profession see appendix 20 a, 20 b.

The claimant's case is that in 2009, he applied for a Masters Degree as a self sponsored student and was granted authority to pursue this upon which he proceeded to pursue his studies at Great Lakes University of Kisumu – Kisumu campus.

The claimant's further case is that while pursuing his further studies, he was surprised that his salary of Kshs.37,266.00 was stopped and on enquiry with the ministry, he was informed that this was due to his abscondment of duty. At the time of termination, he earned the salary above cited.

The claimant's other case is that by a letter dated 10th March, 2010 his services were terminated on the basis of absconding duty which he denies. He deems this termination as unlawful for there not having been issued with a written warning or being afforded a hearing. He had extended a sixteen year stint of

service, blemish free.

He prays as follows;

- a) A declaration that the termination of the claimant's employment vides the Respondent's letter of 13th March 2011 was unjustified, unfair and unlawful.*
- b) A declaration that the act of the Respondent is in violation of the rights of the claimant under Article 21, 27, 28, 41 and 236 of the Kenya constitution.*
- c) An order that the claimant be reinstated in the position he was with effect from March 2016 with all salary.*
- d) A minimum pay of Kshs.2,683,152.00 as per the salary he earned of Kshs.37,266.00/= plus other increments that the Respondent has effected since then (s.4(1)(c) Employment Act 2007)*
- e) General rights for the violation and/or breach of the claimant's constitutional rights in prayer (b) above.*
- f) Cost of this suit and interest on the sum awarded at court rates.*
- g) Any other or further relief as this Hon. Court may deem fit to grant.*

The respondent's case is a denial of the claim and an averment that the claimant was dismissed from service for gross misconduct. He is the author of his fate and cannot be heard to blame her for this.

The respondent rests his case on the fact that the claimant on completion of his annual leave on 21st October, 2009 absconded duty and proceeded for a masters degree training without authority and approval from the Hospital Training Committee and or Ministerial Committee.

It is the respondent's case that despite desertion of duty, he continued to earn salary and allowance with effect 2nd October, 2009 to 31st December, 2009 all amounting to Kshs.89,954.10 which amount he has refused to refund even on demand.

The issues for determination are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfairly and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of the claim?
4. Whether the respondent is entitled to the counter-claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfairly and unlawful? The claimant reinforces his case by relying Article 50 (2) (f) and (j) of the Constitution as follows;

50(2) Every accused person has the right to a fir trial, which includes the right-

f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.

j) (To be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

He further relies on Article 236 of the Constitution of Kenya, 2010 which provides thus;

236. A public officer shall not be –

a) Victimised or discriminated against for having performed the functions of office in accordance, with the constitutions or any other law; or.

b) Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

The claimant again vests his case on Article 47 (1) and (3) of the Constitution as follows;

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2).....

(3) parliament shall enact legislation to give effect to the rights in clause

(1) and that legislation shall:-

a) Provide for review of administrative action by a court or if appropriate an independent and impartial tribunal and

b) Promote efficient administration

It is his submission that a close scrutiny of the interplay of the actions of the respondent in his termination of employment are a display of recklessness and illegality and therefore a case for a finding on his behalf.

The respondent also rests a case of lawful termination of employment. It is her submission that the claimant's dismissal was occasioned by desertion of duty which amounts to gross misconduct. The claimant was issued with a show cause letter to which he replied, justifying his abscondment of duty on grounds that the District Training Committee had recommended his training and amounted to approval.

The claimant was subjected to disciplinary proceedings leading to dismissal. He preferred an appeal vide a letter dated 20th March, 2012 which appeal was also dismissed by the Public Service Commission.

The respondent in the penultimate submits that the claimant has not proved his case on a balance of probability and prays that the same should fail and be dismissed with costs.

I agree with the case and submissions of the respondents. The claimant has *in toto* failed to prove his case on a balance of probability and preponderance of evidence. The respondent ably displays a case of lawful termination of employment and supports this on her witness statements and list of documents. I therefore find a case of lawful termination of employment and hold as such.

On a finding of a case of lawful termination, the claimant is not entitled to the relief sought.

The other issue for consideration is whether the respondent is entitled to the counter-claim? I appreciate that the counter-claim as presented ends as such - a pleading which is not demonstrated or at all. The respondent has not tendered any evidence in support of her claim. It therefore fails for want of proof.

I am therefore inclined to dismiss the claim and counter-claim with orders that each party bears their own costs of the respective cases.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Ngetich instructed by Weldon Ngetich & Company Advocates for the Claimant.
2. Miss Langat instructed by State Law Office for the Respondent.