



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 12 OF 2017

(BEFORE D. K. N. MARETE)

STEPHEN KIPROTICH KOECH.....CLAIMANT

VERSUS

HON. EDWIN K. BARCHILEI.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a statement of claim dated 17th February, 2017. The issues for dispute are therein cited as;

- 1. Unfair and unlawful termination.*
- 2. Unlawful withholding of salary.*
- 3. Unfair labour practices.*
- 4. Failure to provide copy of signed contract.*
- 5. Employment rights.*
- 6. Reinstatement to employment*
- 7. Compensation/Damages for breach of rights.*

This matter is not defended or at all. There is a total absence of the respondent in these proceedings. This is despite service.

The claimant's case is that the respondent, who is a member of parliament engaged him as an Office Assistant in March, 2013 at monthly salary of Kshs.65,000.00 exclusive of allowances.

The claimant's further case is that despite presenting a partially executed written contract to the respondent for his execution, this was never returned and therefore his quest to rely on the draft sample contract in evidence.

The claimant's other case is that on 10th February, 2017, he was issued with dismissal letter by one, Denis Mursoi, the Constituency Manager in the presence of his Deputy Constituency Manager, one Paul

Langat. This letter had been endorsed by a Mary Ng'ang'a by placing her name and signature thereon.

The claimant contends that this letter was libelous and lowered his estimation amongst right thinking people and further that its publication and open circulation amounted to a breach of his human dignity and privacy in contravention of Articles 28 and 31 of the Constitution for reasons that;

- a. The claimant is an irresponsible person who is unable to discharge the duties of a Personal Assistant of a Member of Parliament.*
- b. The claimant is in breach of his employment contract and fails to give particulars.*
- c. The claimant is not entitled to service gratuity owing to breaching his contract of employment.*
- d. The claimant is a dishonest and untrustworthy person and cannot truthfully discharge the duties of a public office.*
- e. The claimant is a negligent worker and liable for gross misconduct.*
- f. The letter which contained false information was given to unauthorized persons.*
- g. The false information by the open circulation breached the entitlement privacy of the claimant more so, when the allegations in it were unsubstantiated by due disciplinary process by the employer.*
- h. The claimant's dignity was breached by the malicious circulation of information false information over his integrity and competence to discharge duties of a public office.*

The claimant further contends that the termination of his employment was unfair and unlawful for the following reasons;

- a. The claimant was not given advance notice of allegations of misconduct that the respondent was contemplating to summarily terminate the employment as required by section 41 of the Employment Act, 2007.*
- b. The respondent did not invite the claimant to reply to specific allegations of misconduct as required by law.*
- c. The claimant was not accorded an opportunity to be heard in the presence of a fellow employer of his choice.*
- d. The dismissal letter fails to give specific details of misconduct and the particulars.*
- e. The dismissal letter is not a communication to the claimant over the termination of the employment as required.*
- f. The dismissal letter does not quote or invoke any legal provisions of the Employment Act, 2007 that have been breached by the claimant or any terms of the contract between the parties that were breached.*
- g. The dismissal letters does not contain date(s) of the alleged misconduct found to have been established.*
- h. The termination fails to comply with section 78 of the Employment Act, 2007.*
- i. The respondent failed to comply with the Employment Act, 2007 despite the contract of employment having incorporated its application as a term.*

j. The respondent failed to make an enquiry as provided for in the employment contract.

k. The respondent seeks to breach the agreement by taking away a right to gratuity contained in the agreement.

l. The respondent failed to adhere to the disciplinary policy and practice.

m. The claimant was not given any certificate of service as required by section 51 of the Employment Act, 2007.

He claims as follows;

- a. Overtime since 1st March, 2013 – February, 2017 for
4 hours daily for a total of 5640 hours x Sh.490.95 being hourly rate plus ½
of the hourly rate to constitute overtime pay -Sh.2,768,958
- b. Rest day since 1st March, 2013 – February, 2017 for 204 days x daily pay
computed by dividing monthly pay by 25 working days thus shs.2,618.40 -Sh.534,153.60
- c. Public holidays since 1st March, 2013 to February, 2017 being 11 holidays
annually @ Sh.2,618.40
-sh.28,802.40
- d. 4 years accrued leave pay @ sh. 65,460 -
sh.261,840

Sh.3,593,755

In the penultimate he prays as follows;

a. A declaration that his termination from employment was unfair, unlawful and a nullity coupled with reinstatement to employment without loss of salary, benefits or seniority.

b. Overtime pay, rest day pay, public holiday pay, and leave pay as follows;

i. Overtime since 1st March, 2013 – February, 2017 for 4 hours

daily for a total of 5640 hours x Sh.490.95 being hourly rate plus ½

of the hourly rate to constitute overtime pay -

Sh.2,768,958

ii. Rest day since 1st March, 2013 – February, 2017

for 204 days x daily pay computed by dividing monthly pay

by 25 working days thus @ shs.2,618.40 -

Sh.534,153.60

iii. Public holidays since 1st March, 2013 to February,

2017 being 11 holidays annually @ Sh.2,618.40
sh.28,802.40

-

iv. 4 years accrued leave pay @ sh. 65,460

- sh.261,840

Sh.3,593,755

- c. Payment of the salary for February, 2017 at Kshs.65,460 monthly until the date of reinstatement.
- d. *Payment of damages for the breach of the constitutional right to fair labour practices under article 41 of the Constitution of Kenya, 2010 by the unfair and unlawful dismissal.*
- e. *In the alternative but without prejudice to reinstatement to employment the payment of 12 months salary as damages @ kshs.65,460 thus Kshs.785,520.*
- f. *Payment of service gratuity at rate 31% of the total salary paid to him under the employment contract being sh.3,076,620 for 47 months so far thus sh.953,752.20.*
- g. *3 months salary in lieu of notice at Kshs.65,460 @ thus Kshs.196,380.*
- h. *General and aggravated damages for libel and malicious falsehood by the publication of the letter dated 8th February, 2017 and/or for the breach of the rights to human dignity and privacy under articles 28 and 31*
- i. *respectively of the Constitution of Kenya, 2010.*

Costs and interests.

This matter came to court variously until the 21st of September, 2017 when it was heard with a presentation of the evidence of the claimant.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was 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 was wrongful, unfair and unlawful. The claimant in his testimony at the hearing reiterates his case as presented in his pleadings and supporting documents. This is not defended or denied by the respondent who throughout these proceedings opted for silence. There was no defence.

In the absence of a defence and on the basis of the case, evidence and supporting documents presented in support of the case, I find a case of wrongful, unfair and unlawful termination of employment of the claimant by the respondent. And this closes the 1st issue for determination.

The 2nd issue for determination is whether the claimant entitled to the relief sought. He is. Having won a case for unlawful termination of employment, the claimant is entitled to the relief sought.

I am therefore inclined to allow the claim and award relief as follows;

- i. That a declaration be and is hereby issued that the termination of employment of the claimant by the respondent was wrongful, unfair and unlawful.

ii. That the termination of the employment of the claimant by the respondent be and is hereby annulled.

iii. That the claimant be and is hereby reinstated to employment and ordered to resume duty at 800 hours on 16th November, 2017.

iv. Six months salary as compensation for unlawful termination of employment. =Kshs.65,460.00 x 6 months Kshs.392,760.00

v. The cost of the claim shall be borne by the respondent.

Delivered, dated and signed this 15th day of November 2017.

D. K. Njagi Marete

JUDGE

Appearances

1. Mr. Mogambi instructed by Wambua Kigamwa & Company Advocates for the claimant.

2. No appearance for the respondent.