



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 227 OF 2014**

**(ORIGINALLY NAIROBI CAUSE NO. 1218 OF 2011)**

**SAMSON TAPOYO.....CLAIMANT**

**V**

**COUNTY COUNCIL OF POKOT.....RESPONDENT**

**JUDGMENT**

1. Samson Tapoyo (Claimant) sued the County Council of Pokot (Respondent) on 20 July 2011 and in a casually drafted Memorandum of Claim, he stated the issue in dispute as *unlawful dismissal and refusal to pay terminal benefits to Mr. Samson Tapoyo*.
2. The Respondent filed a Response on 28 September 2012.
3. On 29 October 2012, Nzioki wa Makau J directed that the Cause be transferred to Nakuru for hearing and determination.
4. The Cause was later fixed for hearing on 21 May 2015, when the Claimant's case was taken. The Respondent's case was taken on 29 July 2015.
5. The Court has considered the pleadings and evidence on record and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies/orders*.
6. Nevertheless, before examining the issues, some background.
7. A Memorandum of Appearance was filed by the firm of Barongo Ombasa & Co. Advocates on behalf of the Respondent on 29 May 2012.
8. On 13 September 2012, the firm of Katina & Co. Advocates filed what it called an Entry of Appearance on behalf of the Respondent, and a Response on 28 September 2012.
9. However, on 7 October 2014, the firm of Barongo Ombasa & Co. Advocates filed a Notice of Change of Advocates.
10. The Claimant was employed by the Respondent on 10 November 1997 on a casual basis and in 1998, he was absorbed into the permanent establishment as a clerical officer.
11. He was suspended from duty through a letter dated 19 July 2007, after several warning letters, pending action by the appropriate committee of the Respondent.
12. Thereafter, the Claimant made enquiries of the Respondent concerning his employment status and the Respondent, through a letter dated 23 June 2010 advised the Claimant that he had been dismissed and this prompted the present legal action.

**Whether dismissal was unfair**

13. There are 2 dismissal letters on record and produced by the parties. The first letter is dated 30 July 2007 and the second one is dated 23 June 2010.
14. The question of the effective/actual date of dismissal therefore becomes a pertinent issue for

- resolution. The resolution of the question will have a direct bearing on the unfairness of dismissal.
15. The Claimant denied receiving the first dismissal letter. He confirmed that he received the second dismissal letter from the Respondent's Clerk, Mr. Tanui. He also stated that he was not invited to appear for a disciplinary hearing before the Respondent or any of its Committees before the dismissal as communicated through the letter of 30 July 2007.
  16. On 19 April 2008, the Claimant's legal advisers wrote to the Respondent seeking to know his fate or employment status. The Claimant himself wrote to the Respondent on 9 June 2008 asking whether he was still on suspension and stating that he had not received the warning letters referred to in the suspension letter.
  17. There was no response to these 2 letters.
  18. In 2010, the Respondent issued the Claimant with a dismissal letter dated 23 June 2010 after he had made persistent requests to know his fate.
  19. The Respondent called its former Clerk. According to him, the Claimant was dismissed on 30 July 2007 after long chronic absenteeism.
  20. The witness stated that he summoned the Claimant to appear before the Respondent's Finance Committee in 2007 but he did not appear and therefore a resolution was made to dismiss him.
  21. The dismissal letter dated 30 July 2007, according to the witness was delivered to the Claimant through a delivery book, though a copy was not produced in Court.
  22. The witness made no reference at all to the second dismissal letter dated 23 June 2010 and signed by him and which was annexed to the Response.
  23. The first dismissal letter was also signed by the Respondent's witness.
  24. It is not clear to the Court why the Claimant had to be dismissed twice, in 2007 and in 2010.
  25. If indeed he had been dismissed in 2007, there was no need for the Clerk (and he testified in Court) to have issued another letter in 2010. He did not disown any of the dismissal letters though he tactfully failed to produce the letter dated 23 June 2010.
  26. The Respondent also did not respond to the 2 letters seeking clarification on the Claimant's employment status in 2008. If the Claimant had been dismissed as posited by the Respondent in 2007, nothing would have been easier than to respond to the letters and advise the Claimant of the dismissal.
  27. The Court can therefore conclude that the Claimant was dismissed in 2010, the Respondent having failed to communicate to the Claimant the fact that he had been dismissed in 2007 or respond timeously to enquiries by the Claimant.
  28. In this respect, the Court takes comfort from the legal principle in *Hindle Gears Ltd v McGinty & Ors* (1984) IRLR 477 by the Employment Appeal Tribunal in England that an uncommunicated decision to dismiss an employee is not sufficient to effect a dismissal. Communication of the decision to dismiss in terms which either bring it expressly to the attention of the employee or at least give him a reasonable opportunity of learning of it is essential.
  29. I would adopt the legal principle as sound even in our jurisdiction.
  30. Moreover, if I were wrong on the above conclusion regarding the 2007 dismissal, I would still find that dismissal in 2010 was not preceded by a hearing as envisaged by section 41 of the Employment Act, 2007 and therefore procedurally unfair.
  31. If the employment of the Claimant was subject to other terms and conditions which would lead to a different conclusion, the same were not brought to the notice of the Court.
  32. On substantive fairness and with the state of disclosure made by the Respondent, and the failure by the Respondent to discharge the burden placed on employers to prove the reasons for dismissal (section 43 of the Employment Act, 2007) and that the reasons were valid and fair (section 45 of the Act), the Court can only conclude that the dismissal of the Claimant in 2010 was equally, substantively unfair.

#### **Appropriate remedies/orders 7 days pay in lieu of notice**

33. The Claimant sought Kshs 4,810/- on account of pay in lieu of notice. There was no suggestion that he was issued with written notice and the Court would find in his favour.

#### **19 days worked in July 2007**

34.The Claimant sought Kshs 13,056/- under this head. Legally, he is entitled to earned wages.

***Salary arrears***

35.Under this head, the Claimant sought Kshs 968,905/- being wages he would have earned upto 23 June 2010 when he was issued with the dismissal letter.

36.The Court would find that the actual and effective date of dismissal was 23 June 2010 and therefore the Claimant is entitled to wages up to that date.

***Leave allowance***

37.This was not proved nor evidentiary foundation placed before Court. The head of relief is declined.

***Gratuity***

38.The Claimant sought gratuity of Kshs 1,069,231/-. Gratuity has either a contractual or statutory basis. No contractual or statutory basis for gratuity was demonstrated.

39.Before concluding, the Court wishes to observe that apart from the clumsy pleadings, the parties did not give due attention to the prosecution of their respective cases.

**Conclusion and Orders**

40.The Court finds and holds that the Claimant was dismissed unfairly, and awards him and orders the Respondent to pay him

- |                                 |                |
|---------------------------------|----------------|
| a. 7 days pay in lieu of notice | Kshs 4,810/-   |
| b. 19 days wages                | Kshs 13,056/-  |
| c. Salary arrears               | Kshs 968,905/- |

TOTAL **Kshs 986,771/-**

41.Gratuity and leave are declined.

42.Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 29<sup>th</sup> day of January 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Kahunga instructed by B. N. Munialo & Co. Advocates

For Respondent Mr. Barongo instructed by Barongo Ombasa & Co. Advocates

Court Assistant Nixon