



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.132 OF 2015**

***(Before D. K. N. Marete)***

**PETER KEMELI TOO.....CLAIMANT**

**VERSUS**

**NANDI COUNTY PUBLIC SERVICE BOARD.....RESPONDENT**

**JUDGEMENT**

This matter was originated vide an application by way of Notice of Motion dated 29th April, 2015 which application came to court through a certificate of urgency of even date. The application was also coupled with a Statement of Claim of the same date. The claim does not disclose the issue in dispute on its face.

The respondent's in their Respondents' Reply Memorandum deny the claim and pray that the same be dismissed with costs.

At the onset of the proceedings, the parties agreed on abandoning the application in favour of prosecuting the main suit.

The claimant's case is that vide a letter of appointment dated 7th April, 2014, he was appointed as Chief Officer, Department of Transports and Infrastructure, County Government of Nandi for a term of four (4) years with effect from 9th April, 2014. He avers that he thereon embarked on his duties as spelt out until the 8th September, 2014 when he was suspended from duty for a host of allegations which were strange, baseless and unfounded. The letter of suspension stipulated that while on such suspension, he would be paid house and commuter allowances but no salary. This, he avers, was unlawful.

The claimant's further case is that while on suspension, a select committee was formed by the 1st respondent to investigate the allegations against him and come up with recommendations on the way forward. He indeed appeared before the committee and made his case whereupon the committee recommended his transfer to another department. The claimant's case is that despite a finding of no wrong doing by the committee he was summarily dismissed vide a letter dated 31st March, 2015.

The claimant contends that the summary dismissal as executed by the 1st respondent was a contravention of the law in that his appointment was the province of the County Public Service and this rendered the action void *ab initio*. This is as follows;

*“15. The claimant further avers that the 1<sup>st</sup> Respondent's attempt to invoke the provisions of section 44 (3) of the Employment Act, 2007 with regard to summary dismissal is*

*unfounded as the allegations made and the resultant recommendation by the select committee does not satisfy the threshold of gross misconduct.”*

The respondents avers that the dismissal amounts to unfair termination and prays for reinstatement and alternatively.

*“17. IN THE ALTERNATIVE but without prejudice to the foregoing, the claimant seeks an order for compensation for unfair termination and for payment of all his dues pursuant to the contract of employment.”*

In the penultimate he prays as follows;

- a. A declaration that the purported summary dismissal of the claimant is void ab initio*
- b. A declaration that the claimant's termination of employment amounts to unfair termination.*
- c. The Honourable court do order reinstatement of the claimant.*
- d. IN THE ALTERNATIVE but without prejudice to the foregoing, the Honourable Court do order compensation for unfair termination and for payment of all the claimant's dues.*
- e. Interest.*
- f. Cost of the suit.*
- g. Any other or further relief as the court may deem just and fit to grant.*

The Respondent in defence cites the following as issues for determination;

- i. Summary dismissal of the Claimant for gross misconduct.*
- ii. Reinstatement of the Claimant.*
- iii. Compensation for unfair termination of employment.*
- iv. Claimant claim for payment for unfair termination.*

The respondents admit employment of the claimant as claimed but aver that he was dismissed pursuant to Section 31 (d) County Government Act, 2012 as read with Section 44 (3) Employment Act, 2007.

The issues for determination in the circumstances therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair or unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of the cause?

This matter came for hearing on 28th July, 2015 when the claimant testified and reiterated his evidence as per the claim. This is also reiterated in the claimants written submissions filed on 22nd January, 2015.

In cross-examination, the claimant admitted being the officer responsible for implementing the Public Finance Management Act, No.18 of 2012. He further admitted that all revenue must be receipted yet he had received Kshs. 150,000.00 from Jebess Contractors for Survey and Design but not as revenue. He further testifies that this was as a conduit for the 2nd respondent.

The evidence of the claimant above cited is a display of lack of transparency in dealing with his office. He would not be able to account for this but only states that this was paid to the 2nd respondent directly. The claimant denies the other complaint of a demand for Kshs.120,000.00 from Tega and also delay of Tega's payment. These are not satisfactorily answered or addressed by the claimant.

It would appear that the appointment of the Task Force to investigate the conduct of the claimant on suspension was coldly received by the complaining public. This is because despite open advertisement in the major local dailies on 25th October, 2014 no complaints were received on due date. The major complaints by Sammy Kipchirchir Biwott, the Managing Director, Jebess Contractors and Lazarus Kipkemboi Tega were at this stage downplayed or even disowned *in toto*. This also happened with the complaints from the junior office staff who had earlier made complaints of being strangled out of office by the claimant, it is in this kind of set up that the Task Force found a case of no fault and recommended a case of transfer of the claimant to another department. This was rejected by the respondent and hence this case.

From the onset, the Task Force investigating the complaints against the claimant started on the right footing. However, it would appear from its record of proceedings and eventual finding and outcome that this exercise became partial and appears intimidated by factors that are largely undisclosed. Why would the Task Force be seen to downplay the salient features of complaints launched by Jebess and Tega besides the other members of staff of the county? This is curious and no wonder its findings and report were rejected by the respondents. This appears a case of ardent custom where public servants *et al* abuse their responsibility to cover their own. It is all wrong and unforgivable.

The Respondents in their written submissions make a case of various complaints made against the claimant in the performance of his duties. These were allegations of corruption – he solicited for money from Jebess contractors which monies were not receipted or unaccounted for. He also failed to release bills of quantities (BQ's) to the contractors therefore frustrating work and performance. This is admitted by the claimant and also noted in the Task Force report as follows;

*8. Further the report found and the Claimant committed that:-*

*(a) That the Claimant indeed received a sum of Kshs. 150,000/=.*

*(b) The Claimant never receipted the money received.*

*(c) The money received was not receipted by the County.*

*(d) The money was not accounted for.*

*(e) The Claimant only served for 5 months. He had hardly been in office before serious allegations were leveled. He was summarily dismissed by the County Government of Nandi.*

*(f) He did not have a letter instructing him to receive money on behalf of the County.*

It is the respondents further case and observation that the claimant was no longer useful or relevant in service provision for the following reasons;

*9. The County Government of Nandi after reviewing the report came to the conclusion that:-*

*(a) The primary objective of recruiting the claimant was to head the Nandi Transport Department.*

*(b) The Claimant was incapable of heading the department.*

*(c) The claims against the Claimant were true.*

The testimony of the defence witnesses, Esther Keter, Francis Ominde and Abraham Rono, DW1, DW2 and DW3 respectively comes out clearly to support the defence case and bring out a case of a disabled public officer. I therefore agree with the submissions of the respondents that the termination of the employment of the claimant was fair in that it was procedural and in all complied with the provisions of Section 45 as read with Section 44 (3) of the Employment Act, 2007. This is as follows;

**Whether the summary dismissal of the claimant amounted to unfair termination:-**

*24. Unfair termination under Section 45 of the Employment Act relates to valid reasons and fair procedure of termination. As outlined earlier, we submit that there were valid reasons for termination. In relation to the procedure, the Claimant was given a fair hearing as he was allowed to defend himself before the committee. He was not discriminated against in any way.*

**Termination**

*25. The termination was fair in that:-*

- (a) A reason for termination were valid.*
- (b) The same reason related to the employee's conduct, capacity, compatibility.*
- (c) The employment was terminated in accordance with fair procedure.*

This therefore concludes a case of fair and lawful termination of the employment of the claimant. The recommendation by the Task Force, though duly appointed by the organs of the county government falls short of Public policy expectations and are largely unsustainable. This is for the reason that these were not in tandem with the evidence adduced at their sittings and therefore unacceptable. This seems to adopt a conciliatory spirit and approach which was outside its mandate. A case of lawful termination therefore ensues and I find as such.

The second issue for determination is whether the claimant is entitled to the relief sought. On a finding of lawful termination of employment of the claimant, he loses all in terms of relief sought. I therefore find that the claimant is not entitled to the relief sought.

I am therefore inclined to dismiss the claim with an order that each party bears their own cost of the claim. And this clears all the issues in dispute.

Delivered, dated and signed this 10th day of March 2016.

**D.K.Njagi Marete**

**JUDGE**

**Appearances**

1. Mr. D.K.Korir instructed by D.K.Korir & Associates Advocates for the Claimant.
2. Mr. D.K. Magare & Miss Munywa instructed by M/s Magare & Company Advocates for the respondents.