



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**CAUSE NO. 548 OF 2014**  
**RACHEL KEMUNTO GESAMI.....CLAIMANT**  
**VERSUS**  
**PUBLIC SERVICE COMMISSION .....1<sup>ST</sup> RESPONDENT**  
**THE ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

Mr Nthiga for Claimant

Mr Ngumi for Respondent

**JUDGEMENT**

**Pleadings**

1. The claimant instituted this claim by way of memorandum of claim dated 3<sup>rd</sup> April 2014. The claimant pleaded to the effect that;

i. She was initially employed by the Public Service Commission for a contract of three years (3) as stipulated in a letter dated 12<sup>th</sup> June 2009 as the Director Vision 2030 coordination in the office of the Prime Minister. The letter was issued by the Office of the President signed by Amb. Francis K. Muthaura who was the Permanent Secretary and Head of the Public Service.

ii. Vide the Local Agreement made on 22<sup>nd</sup> June 2009 she was employed by the 1<sup>st</sup> Respondent as a Coordinator, Vision 2030.

iii. On 5<sup>th</sup> October, 2009 she received a letter from Office of the President signed by Amb. Francis Muthaura the Permanent Secretary, Secretary to the Cabinet and Head of Public Service informing the claimant that her appointment had been varied from Director Vision 2030, Coordinator Job Group "S" to the grade of Director Vision 2030, Coordinator Job Group "T".

iv. Vide Local Agreement dated 19<sup>th</sup> January, 2011 she was employed as Secretary Policy Coordinator Job Group "T".

v. Pursuant to a letter from the defunct Office of Prime Minister dated 31<sup>st</sup> January 2011 she was appointed Secretary, Policy Coordination, Job Group “T” with effect from 19<sup>th</sup> January, 2011.

vi. On 13<sup>th</sup> March 2013 the public service commission issued a letter to the claimant to retain her till the end of the term of her contract pursuant to Local Agreement Terms till the end of her contract. Subsequently and by a letter dated 15<sup>th</sup> April 2013 issued by the Office of the President and signed by the Permanent Secretary, Secretary to the Cabinet and Head of Public Service addressed to the claimant, the claimant was to be absorbed into the mainstream Civil Service.

vii. The claimant received a letter from Office of the President dated 25<sup>th</sup> July 2013 signed by Abdul Mwasserah, and copied to Secretary, Public Service Commission that her contract had been terminated with effect from 1<sup>st</sup> July 2013.

viii. The claimant also received another termination letter dated 31<sup>st</sup> July 2013 signed by Abdul Mwasserah, stating that she will be paid for the month of July.

2. The claimant further pleaded that;

i. The 1<sup>st</sup> respondent terminated her employment arbitrarily and without notice or warning

ii. The 1<sup>st</sup> respondent gave no legitimate reason for the termination

iii. She enjoins the 2<sup>nd</sup> respondent who is Chief Legal Advisor to the government for permitting such an illegality without adherence to the law; and

iv. The 1<sup>st</sup> respondent’s action amounted to blatant and unjustifiable breach of the contract of employment.

3. The claimant avers that the 1<sup>st</sup> respondent’s breach of contract of employment was wrong and illegal on the basis that:-

i. It was made without basis and thus was not justifiable at all to validate the termination and or dismissal of the claimant from employment.

ii. The decision to dismiss and or terminate the claimant’s employment was neither documented and published nor was it communicated to the claimant; and

iii. No procedure as envisaged within the realm of contract of employment, the laws governing labour matters in Kenya and generally contemplated under the rules of natural justice was followed before arriving at the decision to terminate the contract of employment.

4. The claimant avers that the 1<sup>st</sup> and 2<sup>nd</sup> respondent decision and action was against the principle of public policy and public interest and was thus unfair, unjust, irrational and whimsical.

5. The respondent’s decision to dismiss and or terminate the claimant’s employment was for an extraneous purpose and ulterior motive and was not underpinned on any law.

6. The claimant seeks for a declaration that the respondents’ actions amounted to a premeditated, blatant, illegal and unfair breach of the claimant’s contract of employment and seeks for the following remedies;

i. An order for the respondents to pay the claimant 5 months’ salary until expiry of her contract being Kshs 408,370.00 x 5 = Kshs 2,041,850.00

ii. An order for the respondents to pay the claimant outstanding allowances till expiry of her

contract Kshs 1,235,450.00

- iii. Violation of employment Act, Payment of entitled wages per year in breach Kshs 408,370.00 x 12 = Kshs 4,900,440.00.
- iv. An order for the respondents to pay the claimant all retirement benefits under the pensions Act, as at the judgement date.
- v. Interests on (a) and (d) at commercial rates till payment in full.
- vi. Any such further compensations as may, subsequent hereto, come to light.
- vii. This court has jurisdiction to entertain this case.

7. The claimant thus sought the following reliefs against the respondent;

- i. The sum of Kshs 8,177,740.00 being the total sum owed to the claimant as more particularized in paragraph 20 of the Memorandum of Claim;
- ii. Interest on (a) above at current commercial rates;
- iii. Costs of the cause; and
- iv. Any other remedy that this honourable court may deem just and expedient to grant.

### **Oral Testimony**

8. This matter proceeded for hearing on 26<sup>th</sup> October 2015 and 9<sup>th</sup> February 2016. The claimant's evidence largely followed the pleadings in her memorandum of claim. She testified that;

- i. She was employed by the Public Service Commission for a contract of three years (3) as stipulated in a letter dated 12<sup>th</sup> June 2009 (page 27 of the claimant's bundle of documents) as the Director Vision 2030 Coordination in the Office of the Prime Minister issued by the Office of the President signed by Amb. Francis Muthaura who was the Permanent Secretary and Head of Public Service.
- ii. Vide the Local Agreement made on 22<sup>nd</sup> June 2009 (page 21 of the claimant's bundle of documents) she was employed by the 1<sup>st</sup> Respondent as a Coordinator, vision 2030;
- iii. On 5<sup>th</sup> October 2009 she received a letter from Office of the President signed by Amb. Francis Muthaura who was the Permanent Secretary and Head of Public Service (page 19 of the claimant's bundle of documents) that her appointment had been varied from Director Vision 2030, Coordinator Job Group 'S' to the grade of Director, Vision 2030 Coordinator Job Group "T";
- iv. Vide Local Agreement dated 19<sup>th</sup> January, 2011 (page 29 of the claimant's bundle of documents) she was employed as Secretary, Policy Coordinator, Job Group "T" as stipulated in the letter to wit;
  - i. From 19<sup>th</sup> January 2011 upto 18<sup>th</sup> January 2012 Earning salary Kshs 127,980/= p.m;
  - ii. From 19<sup>th</sup> January 2012, upto 18<sup>th</sup> January 2013 Earning salary Kshs 143,080.00/= p.m. and
  - iii. From 19<sup>th</sup> January 2013, upto 18<sup>th</sup> January 2014 Earning Salary Kshs 161,280.00/= p.m.

e. Pursuant to a letter from the defunct Office of the Prime Minister dated 31<sup>st</sup> January 2011 (page 17 of the claimant's bundle of documents) she was appointed Secretary, Policy Coordination, Job Group "T" with effect from 19<sup>th</sup> January 2011. The salary scale attaching to this grade was Kshs 127,980/= Kshs 200,500/= per month. She was also entitled to the following allowances;

- i. House Allowance - Kshs 80,000/= per month
- ii. Medical allowance - Kshs 2,490/- per month
- iii. Leave allowance - Kshs 10,000/= per month
- iv. Entertainment - Kshs 65,000/= per month
- v. Domestic Servants Allowance – Kshs 15,600/= per month
- vi. Extraneous Allowance - Kshs 60,000/= per month
- vii. Transport Allowance - Kshs 24,000/= per month

f. On 13<sup>th</sup> March 2013 the Public Service Commission issued a letter to the claimant (page 12 of the claimant's bundle of documents) to retain her till the end of the term of her contract pursuant to Local Agreement Terms till the end of her contract.

g. Pursuant to a letter dated 15<sup>th</sup> April, 2013 (page 16 of the claimant's bundle of documents) issued by the Office of the President and signed by the Permanent Secretary, Secretary to the Cabinet and Head of Public Service addressed to the claimant, the claimant was to be absorbed into the mainstream Civil Service.

h. She was shocked to receive a letter from Office of the President dated 25<sup>th</sup> July 2013 (page 11 of the claimant's bundle of documents) signed by Abdul Mwasserah (an officer on the same level as her) and copied to Secretary, Public Service Commission that her contract had been terminated with effect from 1<sup>st</sup> July 2013. She had apparently been working while already terminated.

i. The claimant thereafter received another termination letter dated 31<sup>st</sup> July 2013 (page 10 of the claimant's bundle of documents) signed by the same Abdul Mwasserah stating that she would be paid for the month of July.

## **Respondent's Case**

9. The respondents called one witness RW1 Remmy Mulati who testified to the effect that He is the Director, Personnel management Services of the 1<sup>st</sup> respondent. That within the executive arm of government, need arises from time to time for certain specialized officers who are contractual in nature and that the holders time in office is tied to the tenure of that office. The claimant was engaged that way.

10. Soon after 2013 elections, there was correspondence from the Prime Minister's office seeking to know what would become of staff on contract terms. There were two categories of staff;

- i. Contract; and
- ii. Temporary terms of service

11. The Prime Minister's office engaged the Public Service Commission in light of the end of the Prime Minister's tenure hence the letters of 15<sup>th</sup> April 2013 and 5<sup>th</sup> June 2013. The change of job came with a new line-up of staff to do the same jobs. The claimant was paid gratuity and one month's pay in lieu of

notice and was given a certificate of service.

12. On cross examination, this witness confirmed that;

- a) The claimant's first contract and appointment was ratified by the Public Service Commission (PSC) while the second appointment letter was by the PSC;
- b) The PSC had made a decision to retain the claimant till the end of her contract as per the letter of 13<sup>th</sup> March 2013;
- c) The letter of 15<sup>th</sup> April 2013 provided clearly that "government has decided ...." It thus overruled the PSC
- d) There was no document showing why or giving reasons for the change of decision by the PSC in the second letter of 5<sup>th</sup> June 2013;
- e) The specialized offices did not cease to exist with the change of government in 2013, only advisors did. Indeed, Sylvester Okumu one of the staff who was to be terminated with the claimant continued working and still is todate.
- f) PSC did not communicate directly with the claimant in the decisions it made over her; and
- g) The witness conceded that the claimant was not treated in a good way

13. On being asked by the court why government contracts provide for termination 'upon giving of 3 months' notice or one month's pay in lieu of notice, the witness stated that this is how it has always been as advised by the Attorney General's office. The Respondent prays that the suit be dismissed with costs.

### **Determination**

14. The claimant filed the suit claiming damages for unlawful termination. The claimant alleges breach of her contract of employment by the respondent in that her employment was terminated without basis and the termination was thus not justifiable. That the decision to terminate her employment was not documented nor was it communicated to the claimant prior.

15. The respondent on the other hand relies on the response to the claim and list of documents dated 9<sup>th</sup> February 2016. The Respondent states that the termination of the claimant was lawful and in terms of her contract of employment.

16. That the claimant was notified of the termination and reason for the decision. That the office in which the claimant worked, being that of the Prime Minister had become defunct after the 2013 general elections as per the constitution necessitating the termination of her contract.

17. The claimant and RW1 Remmy Mulati testified in support of the differing positions taken by the parties. It is not in dispute that the claimant's contract had not come to an end. In recognition of the fact, Public Service Commission wrote the letter of 13<sup>th</sup> March 2013 communicating that the claimant be retained in service till the end of her contract pursuant to the Local Agreement Terms.

18. The decision by the government to overrule the Public Service Commission by its letter of 15<sup>th</sup> April 2013 was not justified by any reasonable and/or valid reasons. No notice of the intention to terminate the contract was issued, no due process was followed and the court is of the considered conclusion that the decision was arbitrary unreasonable and therefore illegal.

19. The 1<sup>st</sup> respondent was therefore in breach of the claimant's contract of employment and the decision negated legitimate expectations by the claimant that she would serve the full term of the fixed term

contract. As a result, the claimant unlawfully lost her employment and has suffered loss and damages.

20. The claimant has in the circumstances proved on a balance of probability her claim for unlawful and unfair termination of employment and is entitled to payment of compensation. In terms of the letter of termination, the claimant was paid one month's salary in lieu of notice. The claimant was also paid gratuity.

21. The Public Service Commission by a letter dated 13<sup>th</sup> March 2013 had communicated its decision to the permanent secretary office of the Prime Minister that it had made a decision to absorb the claimant and others into the mainstream civil service only to dash her hopes on 31<sup>st</sup> July 2013, when the office of the Deputy President wrote a letter of termination to the claimant.

22. This aggravated the pain and suffering by the claimant particularly because other employees in the list were absorbed into permanent and pensionable positions. The claimant was literally discriminated against. The manner in which she was treated traumatized her and was demeaning to say the least.

23. Considering all the factors and given that the claimant had five (5) more months to serve under the contract of service, the court awards her 10 months' salary as compensation in terms of section 49(1) (c) as read with section 49 (4) of the Employment Act, 2007 the sum of Kshs 4,083,700.

24. In the final analysis the court makes the following orders;

The claimant is entitled to payment by the 1<sup>st</sup> and 2<sup>nd</sup> respondent;

- i. Kshs 4,083,700 being 10 months' salary for unlawful and unfair termination of employment
- ii. Interest at court rates on the award from date of filing suit till payment in full
- iii. Costs of the suit

25. Other reliefs sought in the memorandum of claim are not granted in consideration of the award above.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of June 2016**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**