



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CLAIM NO. 304 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

1. HESBON AYUYA OYOLO

2. JULIA WAKHU MOYI

3. CAROLYNE BROWN LUTTAH.....CLAIMANTS

-Versus-

EXECUTIVE, COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT

PUBLIC SERVICE COMMISSION.....INTERESTED PARTY

JUDGEMENT

The Claimants **HESBON AYUYA OYOLO, JULIA WAKHU MOYI** and **CAROLYNE BROWN LUTTAH** were all appointed by the Town Council of Malava by identical letters dated 1st February 2013 as Senior Market Attendants, Job Grade SS17 at a starting salary of Shs.7,500 under scale 7743 x 258 - 9291 x 288 - 11019 x 321 - 12945 x 354 - 13299 per annum. The letters stated that they were each entitled to 28 days annual leave and that their terms will be governed by terms and conditions of service "prevailing at the moment." The letters were signed by DOMINIC MAKORI, the Clerk to Council and copied to the Permanent Secretary, Ministry of Local Government, Nairobi and the Secretary, Public Service Commission also in Nairobi.

On 27th March, 2013 the Claimants each received a letter titled "Termination of Recruitment." The letter reads as follows:-

RE: TERMINATION OF RECRUITMENT

Circular dated 25th March, 2013 Ref. No. MLG 1308/XII(126) from the Ministry of Local Government refers.

The Ministry of Local Government has revoked employments in Local Authorities in the year 2013. We regret to inform you that recruitment has been terminated following the directive from Public Service Commission vide the above mentioned circular until further notice.

Dominic M. Makori

TOWN CLERK

The letter referred to in the termination letters is one dated 25th March, 2013 from the Permanent Secretary, Ministry of Local Government as reproduced below;

The Clerk, City Council of Nairobi

All the Town Clerks, Municipal and Town Councils

All the Clerks to County Councils

RE: RECRUITMENT BY LOCAL AUTHORITIES

The Public Service Commission acknowledges that the devolution of functions and resources including staff to County Government level is picking momentum. This development has the implication on Local Authorities.

This is therefore to inform all the Clerks that the Commission has decided to put on hold all recruitment in Local Authorities until after the General Elections. The requests already received from various Councils shall therefore remain in abeyance.

J. K. Gichomo (Mrs.)

For: PERMANENT SECRETARY

The Claimants were aggrieved by the termination and filed this suit vide their Statement of Claim dated 20th July, 2015 and filed on 12th August, 2015. In the statement of claim they allege that the termination of their employment was malicious as the circular cited as the basis for revocation of their appointments sought to halt recruitment of employees until 4th March, 2014 general elections which had already been held and that the circular did not provide for the termination of employment of persons already in service. They further claim that the termination did not comply with the Employment Act and the County Government Act. They alleged that the termination was influenced by politicians from the Sub-County of Malava in Kakamega County who desired that persons working within the sub-county should be locals from the sub-county. The Claimants prayed for reinstatement with immediate effect and payment of arrears and benefits, and for costs.

Both the Respondent and the interested party filed response to the statement of claim. The Respondent denied the existence of any employment relationship between the Claimants and itself as the Respondent was not in existence at the time of recruitment of the Claimants on 1st February, 2013.

The Interested Party represented by the Office of the Attorney General also denied ever employing the Claimants and averred that the positions were never advertised. The Interested party averred that the recruitment of Claimants was irregular as there was a moratorium on recruitment by local authorities vide circular No.MLG 1308/XII(79) dated 27th September, 2012 and a follow up circular No.MLG 1308/XII(126) dated 25th March, 2013.

The case was argued by way of written submissions by consent of the parties.

Findings and Determination

There is no contention that the Claimants were appointed on 1st February, 2013 and terminated by letters dated 27th March, 2013 by the Town Clerk, Town Council of Malava. There is also no contention that at the time of employment of the Claimants the Respondent was not in existence. The employer of the Claimants was therefore the Public Service Commission through the Town Clerk, Town Council of Malava. The letters of Appointment refer to approval contained in letter MLG 1308 - 145(69) of 11th January, 2013 which was not availed to the court but whose existence the Interested Party has not

contested or denied.

Section 138(1) of the County Government Act provides that;

138.(1) Any public officer appointed by the Public Service Commission in exercise of its constitutional powers and functions before the coming to effect of this Act and is serving in a county on the date of the constitution of that county government shall be deemed to be in the service of the county government on secondment from national government with their terms of service as at that date and—

(a) the officer's terms of service including remuneration, allowances and pension or other benefits shall not be altered to the officer's disadvantage; and

(b) the officer shall not be removed from the service except in accordance with the terms and conditions applicable to the officer as at the date immediately before the establishment of the county government or in accordance with the law applicable to the officer at the time of commencement of the proceedings for the removal;

and

(c) the officer's terms and conditions of service may be altered to their advantage.

The Interested Party's argument that section 138 does not apply to the Claimants is therefore not correct as there is no proof by the Interested Party that the authority to employ the Claimants cited in their letters of appointment did not exist. It is not for the Claimants to prove that the person who appointed them had no authority to do so. It is the Interested Party making the allegation and whose onus it is to prove the same.

I therefore, find that the Interested Party has not proved that the Claimants' were not validly employed by the Town Clerk and hold that they were bona fide employees of the Public Service Commission.

The termination of the Claimants having failed to comply with the Employment Act and the relevant regulations governing employment by the Public Service Commission, was unlawful and I find and declare accordingly.

Remedies

The Claimants prayed for reinstatement. Section 49(4) of the Employment Act provides that reinstatement can only be ordered in exceptional circumstances. The Claimants have not proved that there are any exceptional circumstances to entitle them to the order of reinstatement.

Having worked for only about 5 months from 1st February to June 2013, the Claimants are only entitled to nominal compensation. According to their payslips they were all earning Shs.36,110 as at June 2013 when they received their last salaries.

Section 49(1) provides that an employee who is unfairly terminated is entitled to pay in lieu of notice. I award each of the Claimants Shs.36,110 being one months notice. I further award each claimant one months salary as compensation. Each Claimant is therefore entitled to Shs.72,220.

The case against the Respondent is dismissed with no orders for costs. The Interested Party shall pay Claimant's the decretal sum and costs of this suit.

Dated, Signed and Delivered this 6th day of July, 2016

MAUREEN ONYANGO

JUDGE