



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

**AT NAIROBI**

**CAUSE NO.104 OF 2016**

**FARHIYA IBRAHIM ISSACK.....CLAIMANT**

**VERSUS**

**WAJIR COUNTY ASSEMBLY SERVICE BOARD.....RESPONDENT**

**JUDGEMENT**

1. The Claimant moved the court on 28<sup>th</sup> January 2016 by filing application under Certificate of Urgency, a Notice of Motion and the Memorandum of claim seeking urgent orders that she be reinstated back to her position with the Respondent that had unfairly been terminated and that her salaries be paid. The court did not issue the interim orders sought but directed that the Respondent be served to attend hearing on 4<sup>th</sup> February 2016.

2. The matter was before court on 26<sup>th</sup> April 2016 when the Respondent was absent. New dates were taken for 25<sup>th</sup> July 2016, the Respondent was served but remained absent. Affidavit of Service sworn by Daniel Maithya and filed on 18<sup>th</sup> July 2016.

3. I have perused the entire file and find that this matter was filed in a series of other claims particularly cause No.106 of 2016, which have since been withdrawn. The Respondent was served with summons and affidavit of service filed, a hearing date was taken previously and the affidavit of service filed but the Respondent remained absent.

4. On the evidence that the Respondent is aware of the suit against them and has taken the option of being absent, the Claimant was heard on her case.

**Claim**

5. The Claimant was employed on 14<sup>th</sup> July 2014 as a Second Clerk Assistant by the respondent, the County Assembly Service Board as established under section 57 of the county Government Act. The Claimant was issued with a letter of appointment stating her salary, allowances and other benefits. By letter dated 3<sup>rd</sup> December 2015 served upon the Claimant on 12<sup>th</sup> January 2016, the Respondent without notice or due process terminated the claimant's employment. There was no reasons given for the arbitrary action of the Respondent in terminating the claimant's employment. The Claimant asked for an explanation but the Respondent did not respond.

6. The claim is that the termination was unfair as there was no notice, no reasons given or a hearing undertaken so as to know why the termination was effected. At the time of termination there were 13

permanent employees of the Respondent that were arbitrarily terminated but 2 Abbas Guleid and Omar Rashid, Assistant Sergeant and Assistant ICT officers respectively have since been reinstated.

7. The claim is for A declaration that the termination is illegal, unlawful and unwarranted and that the Claimant be reinstated back to her position without loss of benefits; payment of general and punitive damages; costs of the suit and any other legal entitlement due.

8. The Claimant testified in support of her claim setting out she was issued with letter of appointment and diligently performed her duties and was due to move scales but instead was termination. She was asked by the clerk of the Respondent to do a letter seeking a promotion on 1<sup>st</sup> November 2015 but was later told to wait until 1<sup>st</sup> January 2016. On 4<sup>th</sup> January 2016 she was verbally informed that she would be terminated in her employment and eventually a letter dated way back 3<sup>rd</sup> December 2015 was served on her on 13<sup>th</sup> January 2016. The letter did not give any reasons for the termination, there was no disciplinary case in issue or a show cause letter setting out the rationale for such termination.

9. The Claimant also testified that she was subjected to torture, inhuman and degrading treatment and unfair labour practice when she was made to work only to learn that she had been terminated after a month. She is seeking damages, back pay and reinstatement.

### **Submissions**

10. The Claimant also filed written submitted that restate the claim.

### **Determination**

11. The Constitution, 2010 gives the foundational framework for county governments. With the establishment of the Counties, Parliament also passed the constitutive legislation on its functions. The County Assembly Service Board (the Board) such as the respondent, is established under Section 12 of the County Government Act 2012. Under Section 12(2);

***The County Assembly Service Board, shall be a body corporate with perpetual succession and a common seal.***

12. The section proceeds to list the membership and qualifications of the Board. As a body corporate with a common seal, the Board has power to sue and to be sued. The suit herein is therefore premised on these foundational provisions.

13. It is important to state here that the County Governments are now part and parcel of the governance system in Kenya and with their formation undertake crucial decisions for the people of Kenya. The formation of the Boards such as the Respondent is one such structure of ensuring that services to the people are made a reality. The Respondent was served with the suit herein, but despite the very serious allegations made against them opted not to attend the same. Such action does not support the role for which boards such as the Respondent were formulated based on the constitutional framework.

14. The labour force behind the Respondent work is a critical mass that require to be respected, promoted and supported. Systems and structures of the board should therefore ensure that each employee hired for service or contracted to undertake a role such as the Claimant was is given the requisite support to undertake their functions without fear or intimidation that they are likely to lose their job through whims.

15. This court has previously encouraged employers to attend court and state their case for the court to be seized of the challenges that are faced by employers in the context of implementation of the constitution in view of the workforce and other related matters. Where an employer fails to submit any defence, fails to enter appearance, the court is denied of critical information that would lead to a well-reasoned decision. However, where the Respondent is not keen to attend despite being served with summons, there is a Claimant who is keen to assert her rights and must be given a hearing.

16. The letter leading to the dispute herein is the one issued to the Claimant and dated 3<sup>rd</sup> December 2015 stating;

*Re: termination of employment*

*We regret to inform you that your employment with Wajir County Assembly is hereby terminated with effect from 31<sup>st</sup> December 2015 vide County Assembly Service Board decision on 30<sup>th</sup> November 2015.*

17. The Claimant moved the court seeking urgent order upon the issuance of the above letter on 28<sup>th</sup> January 2016 as this letter was only brought to her attention on 12<sup>th</sup> January 2016. The Board made its decision on 30<sup>th</sup> November 2015 and the letter by the clear is dated 3<sup>rd</sup> December 2015. This in essence means that where the Claimant was supposed to remain at work until 30<sup>th</sup> December 2015, she was not aware of the letter of termination until the same took effect and attended to her duties until 12<sup>th</sup> January 2016.

18. Reading the Respondent letter to the claimant, there is no reason assigned to the termination. The Respondent does not give any reason at all as to why the Claimant was terminated from her employment with the Board. It is not sufficient for an employer to state that notice pay shall be paid and therefore effect termination of employment at will. Section 43 of the Employment Act is clear with regard to the mandatory requirement to give reasons for the termination thus;

*43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

19. Without giving the reasons that are genuine so as to terminate employment, section 45 of the employment Act must apply. Such termination of employment is unfair. In **James Giuchuru versus Board of Governors St. Teresa Girls Secondary School, Cause No.1329 of 2011** the court held that where there is no substantive reasons for the termination of employment, the same is unfair and the Claimant was awarded compensation. Also in Jenny Luesby versus Standard Group Limited, Cause No.137 of 2014 the court held;

*In terms of section 43 of the Act, a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure as outlined in section 41 of the Act that lays out the basis for a fair procedure.*

20. In this case, the Claimant was not given any notice, a hearing or reasons for the termination that I find was arbitrary, was without due process and contrary to the tenets of fair labour practices and fair administrative action required of the board. The termination was contrary to the provisions of section 45 of the Employment Act and I find the same to be unfair.

## **Remedies.**

21. Noting the option taken by the Respondent not to appear or defend the suit, and the emphasis by the Claimant that she is seeking reinstatement such shall be allowed. This is reference to the best wishes of the Claimant as stated in her evidence she is seeking a reinstatement and payment of her back wages and with regard to the provisions of section 49 of the Employment Act. A reinstatement will adequately remedy the violations against the Claimant by the respondent. I also make reference to **Mary Chemweno versus Kenya Pipeline Company [2014] eKLR** where the Claimant was reinstated back to her employment with back payments of her due salaries as this was her main claim. And in **Reuvel**

**Waithaka and Other versus Kenya Revenue Authority, Cause No.1421 of 2014**, the claimants were reinstated back into their employment for re-engagement into suitable positions as this was the only appropriate remedy the unfair labour practices committed against them by the employer.

22. The Claimant is also seeking damages for what she testified to be inhuman and degrading treatment due to her termination without notice or being given a hearing or any reasons. With the reinstatement, a specific performance order, the same goes with payment of all due wages not paid since the termination. No damages shall be awarded.

23. Costs are claimed and these are due. Costs shall be paid.

**Judgement is hereby entered for the Claimant against the Claimant as follows;**

- a. A declaration that the Claimant was unfairly terminated from her employment with the respondent;**
- b. The Claimant shall be reinstated back to her employment with the Respondent immediately with payment of all due back wages and without loss of any benefits, allowances, promotions due and rights at work;**
- c. The Claimant shall report on duty on 1<sup>st</sup> September 2016 to the Clerk, Wajir County Assembly Board for allocation of duties;**
- d. the dues back wages shall be paid not later than the 10<sup>th</sup> of September 2016;**
- e. Costs of the suit.**

Delivered in open court this 29<sup>th</sup> day of August 2016.

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Lilian Njenga