



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
PETITION NO. 15 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 11th October, 2016)

MUTEMI MUSYOKAPETITIONER

VERSUS

THE PUBLIC SERVICE COMMISSION OF KENYA1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL2ND RESPONDENT

JUDGEMENT

1. Before the Court is Petition dated 5th February 2015 where the Petitioner prays for judgment against the Respondent for:

1. A declaration that the Petitioner's fundamental rights and freedoms namely:-

a. Right to human dignity;

b. Right not to be subjected to psychological torture;

c. Right not to be subjected to inhuman and degrading treatment;

d. Right to fair labour practises;

e. Economic Rights;

f. Right to fair administrative action;

g. Right to fair hearing inter alia right to be tried without reasonable delay and not to be subjected to double jeopardy;

h. Right to due process of law as enshrined under Articles 22, 28, 29, 41, 43, 45, 47, 75, and 236 of the Constitution of Kenya 2010 have been violated with impunity by the respondents herein.

2. General damages for and/or an order of Compensation for the violation of the Petitioner's:

- a. Right to human dignity;*
- b. Right not to be subjected to psychological torture;*
- c. Right not to be subjected to inhuman and degrading treatment;*
- d. Right to fair labour practises;*
- e. Economic rights;*
- f. Family rights;*
- g. Right to fair administrative action;*
- h. Right to fair hearing inter alia right to be tried without unreasonable delay and not to be subjected to double jeopardy as enshrined under Article 22, 28, 29, 41, 43, 45, 75, and 236 of the Constitution of Kenya.*

3. A declaration that the Petitioner is entitled to be employed by the 1st Respondent on permanent and pensionable terms.

4. An order for reinstatement and deployment of the Petitioner.

5. Payment of Salary for the period from March 2013 until your petitioner is reinstated and redeployed.

6. Kshs. 103, 740 for leave accrued and unpaid for 5 years at Kshs. 20,748 for 5 years.

7. Damages for loss of salary, allowances and benefits.

8. General damages for severe psychological and mental torture.

9. Aggravated and exemplary damages.

10. Any such further orders this Honourable court shall deem just.

2. The Petition is supported by the affidavit of Mutemi Musyoka.

Facts of the Petition

3. The Petitioner herein was employed by the Ministry of Home Affairs as Subordinate Staff on or about the 22nd of January 2008 and was advised to apply to the Public Service Commission which he did and was employed from the 31st of January 2008, in Job Group A as Support Staff with effect from 8th January 2008 at the rate of Kshs.7,466.00 a month and allocated personal number 2008010774. His term of appointment stated that his employment could only be terminated by one month's notice or payment of equivalent salary in lieu of notice.

4. He performed his duties diligently up until March 2013 when his salary and allowances were withheld by the Respondent. Upon enquiry he was verbally informed by the Human Resource Manager in the office of the then Vice President that his services were no longer required after the abolition of the office of the then Vice President.

5. The Petitioner had worked for over five years for the Respondent, had not gone for his annual leave during that period and because of the length of his employment, the said employment cannot be said to be of temporary basis as this would be in violation of Section 5(3) (b) and Section 28 (1) (a) of the of the

Employment Act 2007. At the time of his termination he earned a gross salary of Kshs 19,420.00.

6. The Petitioner avers that despite the abolition of the office of the then Prime Minister, other staff were deployed to other Ministries but he was discriminated against and verbally dismissed having his salary withheld. He states that such behaviour was vindictive, inhumane, degrading, malicious, unconstitutional, unlawful and without reasonable cause. The decision has caused him immeasurable mental anguish, inconvenience and loss and damage to his family life.

7. The Respondents have filed grounds of opposition dated 20th April 2015 where they state that the Petitioner was employed temporarily as a Support Staff in the office of the Vice President. They state this was clearly stated to the Petitioner as he was fully aware that the office was to be abolished after the general elections of the year 2010 and it carried with it no guarantee of permanent employment.

8. They state that the Respondents were under no obligation whatsoever to absorb and or transfer the Petitioner to other government departments, further, reinstatement cannot stand since the office the Petitioner was employed in is no longer in existence.

9. They state that redundancy is a valid ground for termination of employment and the Respondents are satisfied that they met the conditions set out under Section 40 of the Employment Act 2007.

10. The Respondents have also filed a Replying affidavit to the Petition deposed to by one Alice Otwala the Secretary, Chief Executive Officer in the Public Service Commission who avers that the petition herein is in bad faith and full of concealed information.

11. She avers that the Petitioner was duly and lawfully informed of his termination of services and was cleared vide a clearance form dated 28th June 2013, he was fully paid his dues upon clearing with the Ministry vide payment voucher dated 11th April 2014 and the allegation of non-payment of his dues is therefore baseless and unjustified.

12. They aver that all persons working under the then Vice President's office were absorbed back into main stream civil service other than those who were on temporary appointments.

13. Moreover, in his letter dated 4th February 2014, the Petitioner has indicated that he did not go on leave, and was not aware of regulations on deferment on leave and communication of leave for cash, the law regulating leave for public servants is very clear and the Petitioner has not indicated that he was denied the same.

14. They pray that the Petition be dismissed.

15. The Parties proceeded via way of written submissions.

16. The Petitioner submits that he enjoyed all the privileges, benefits and dues available to permanent employees of the Government which benefits were not enjoyed by casual employees. These benefits were:

a. Being issued with a staff identity card by the Ministry.

b. Being issued with an identification card as a civil servant.

c. Being paid through Electronic Funds Transfer.

d. Being paid allowances.

e. Being entitled to interest allowances.

17. More so, they submit that having worked for five years without a break in employment, he ceased to be a temporary employee after working for more than 3 months on the same job and under the terms. His temporary employment automatically converted to permanent and pensionable status by virtue of Section 37 of the Employment, 2007:

“37 (1) notwithstanding any provision of this Act where a casual employee:-

a. Works for a period or number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

b. Performs work which cannot be reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.

(2) In calculating wages and the continuous working days under subsection (1) a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

(3) an employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to had he not initially been employed as a casual employee.

18. They cite the case of Michael O. Odongo vs. Kenya Electricity Generating Co. Ltd Kisumu Industrial Cause No. 21 A of 2013 where it was stated that:

“In this case, the Claimant worked for a continuous period of 7 years and by virtue of Section 37, this casual employment converts automatically to permanent status which I declare as provided under Section (4) above. It is therefore the finding of this Court that the Claimant ceased to be a casual employee after continuously serving for 3 months on the same job or same terms.

It therefore follows in answer to issue No 3, that he was entitled to dues as other permanent employees in the establishment of Respondents. It is however unfortunate that the Claimant has not exhibited what other employees in his cadre were earning and his claim for payment of what others were earning cannot be granted without proof of the amounts payable.

The Claimant ceased to be a casual worker after three months in the service. His termination in service was therefore to be governed by the provision of the Law provided for under Section 41 of Employment Act. He was to be given notice and accorded a hearing. He was denied both. His termination was therefore unlawful and unfair..”

19. Further in the case of Grace N. Makori & Other vs. Murang’a County Public Service Board & Others, Nyeri ELRC Petition No 1 of 2015 it was stated at page 4:

“In making that finding the Court has considered that even in cases of casual employment, under Section 37 (1) of the Employment Act, 2007, the casual employment converts to permanent regular employment under the Act if the Casual Employee has worked for a period or number of continuous working days whose aggregate is not less than one month; or the casual employee performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to equivalent of three months or more. The Court finds that the Petitioner’s claim for regular permanent and pensionable service is within its general statutory principle of regular permanent service because the Petitioners have served for more than three years without break and all parties agreed that the work to be

performed is of a permanent nature.”

20. The Petitioner submits that the clearance form annexed by the Respondent is but a normal for all civil servants when they are transferring from one department to another or dismissed from employment. He did the said clearance after his salary had been withheld and after the Human Resource Manager of the defunct ministry had falsely represented to him that he was doing clearance pending redeployment and or transfer to another government department just like the other persons who had been working under the then defunct office of the Vice President.

21. Further, they submit that the said clearance could never amount to a valid and lawful termination notice as envisioned in the law.

22. They submit that unlawful termination would occur when no notice is given and where an employee is not afforded a hearing as required under Section 35 and 41 of the Employment Act respectively. Further the burden of proving that a termination was indeed unfair lies with the employee by virtue of Section 47(5) of the Employment Act 2007.

23. They submit that while the law recognises Redundancy as a valid and lawful ground for termination of an employee’s services, in this case, the Petitioner was neither declared redundant nor did the Respondents satisfy or meet the condition as set out under Section 40 of the Employment Act 2007 and paid him his dues.

24. The Petitioner submits that his constitutional rights were violated. He submits that Article 2 (1) of the Constitution of Kenya, 2010 provides as follows:

“this constitution is the supreme law of the Republic and binds all persons and all state organs at both levels of government.”

25. Further, it is the duty of everyone to uphold and respect the Constitution. They submit that Section 5(3) (b) of the Employment Act 2007 provides that:

“no employer shall discriminate directly or indirectly against an employee or prospective employee.”

“in respect of recruitment, training, promotion , terms and conditions of employment, termination of employment or other matters arising out of the employment.”

26. They further rely on Article 27 (1), (2), (3), (4) & (5) of the Constitution of Kenya 2010 which provides for the equality of all persons before the law, and Article 28 which guarantees that every person has inherent dignity and the right to have that dignity respected and protected.

27. They submit that the unfair termination of the Petitioner without regard to Section 40 and 41 of the Employment Act 2007 is in violation of all the rights and enshrined in the Constitution.

28. The Petitioner submits that employing him on a temporary basis for a period of over 5 years without promoting him and improving his terms and conditions of employment violated Section 5(3)(b) of the Employment Act 2007 as well as the Petitioner’s right to fair labour practises as enshrined in Article 47 of the Constitution. They rely on the case of **Shanka Sakali vs. DHL Global forwarding (k) Ltd (2002) eKLR** where the Court cited with approval the case of **Kenneth Njiru Njorani vs. Dodhia Packaging Limited Cause No 431 of 2010 at Nairobi** where it stated as follows:

“in making this finding the Court recognizes termination has constitutional basis as provided for in Article 47(1) of the Constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the Constitution on the right to fair administrative action. The Constitution breaks the curtains

and it does not matter whether the employer is in public service or private sector. The Constitution in Article 10 clearly states that the national values and principles of governance apply to all persons and the principles and values include human rights. Thus in this instant case, the respondent was bound to accord the claimant the right to fair administrative action through observation of the rules of natural justice and as expressly envisaged in Section 45 (5) of the Act.”

29. The Petitioner submits that in light of all the rights that were violated as shown, he is entitled to the reliefs sought. They rely on the case of James Orengo vs. Attorney General Nairobi HCC No 207 of 2002 where the Court stated as follows:

“...The case law is clear that damages are designed not only to compensate the Plaintiff, but also deter wrongful behaviour. In Rookes v. Bernard (supra) the Court elaborated on the use and importance of exemplary damages: “it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power.” The Court emphasizes the use of exemplary damages in cases such as this one:

“There are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording practical justification for admitting into the civil law a principle which ought logically to belong to the criminal The first category is oppressive, arbitrary or unconstitutional action by the servant of the government...where one man is more powerful it is inevitable that he will try to use his power to gain his ends...servants of the government are servants of the people and the use of their power must always be subordinate to their duty of service....”[Emphasis added].

Taking into account the need for deterrence of this sort of behavior, especially by those in positions of power similar to the Defendants, and due to the lack of evidence and explanation provided by the Defendants, and the overwhelmingly innocent behavior of the Plaintiff, I find that the events that took place on 4th February, 2001 were unnecessary, unconstitutional, and malicious, and that the Defendants are fully liable for damages suffered by the Plaintiff under various heads outlined in this Judgment. Without breaking these down into different heads, I would award a global sum of Kshs.5,000,000 (Five Million) to the Plaintiff with costs and interest. ...”

30. As to exemplary damages, the Petitioner submits that the Court should include injury to the Plaintiffs dignity and pride, mental suffering and loss of reputation as elucidated in the James Orengo case (supra) where the court states at page 5 that:

“.. in assessing exemplary damages, the court should include the injury the plaintiff has endured to his dignity and pride, mental suffering and loss of reputation..”

31. They pray that the Court awards the Petitioner Kshs. 20,000,000.00 as general damages and exemplary damages for the breach and violation of the Petitioner’s statutory and constitution rights.

32. The Petitioner submits that since he was in employment for more than three months, his employment converted to permanent and pensionable terms by virtue of Section 37 of the Employment Act 2007, and he is therefore entitled to the same benefits as those who were working for the defunct office of Vice President. The Petitioner therefore has the right to be reabsorbed into main stream civil service and or transfer to other government agencies.

33. The Petitioner submits that he is entitled to compensation in lieu of leave not taken as well as costs for this petition. In conclusion he prays for the Court to award as prayed.

34. Having considered the submissions of both parties, I would set out herein the employment history of the Claimant:-

- On 31.7.2008, the Petitioner applied for a job with the Public Service Commission as exhibited by Appendix MM2.
- On 11th March 2008, he was issued with a letter of offer of employment (Appendix MM3) which indicated as follows:-

“Offer of Appointment”

This is to convey the decision of the Authorized Officer that you be appointed to the grade of Support Staff III Job Group ‘A’ in this Office and Ministry on temporary terms of service with effect from 8th January, 2008.

The salary scale attached to this grade is within Job Group ‘A’ viz Kshs. 7,466 x 42 – 7,508 x 48 – 7,700 x 49 – 7,896 x 50 – 7,946 per month.

This appointment is subject to the production of medical fitness certificate for which I have attached the G.P 69 form for you to be examined by a Government Medical Officer of health and thereafter forward the form to this office.

I have enclosed the next of kin and official secrets Act declaration forms for your completion and signature-----.

You will be subject to all regulations of the regulations of the Public Service of Kenya which are now in force or which may be promulgated from time to time. You are requested to signify the acceptance of this appointment in writing.

Yours faithfully,

F. N. KAREI (MISS)

For: Permanent Secretary

35. The letter shows that indeed the Petitioner had a P/No.2008010774. This appointment was accepted by the Petitioner vide his letter of 12th March 2008 (Appendix MM3). Thereafter he was issued with a letter of Temporary appointment dated 6.3.2008 which letter is in similar terms as that of the offer of employment and written on the letter head of the Public Service of the Republic of Kenya. In addition it is indicated on the letter that:

“...this appointment is purely temporary and carries with it no guarantee of permanent employment. It can be terminated by one months’ notice or either side or payment of equivalent salary in lieu of notice.

You will be subject to all regulations for officers of the Public Service of Kenya which are now in force or which may be promulgated from time to time.

You are liable to be posted to any station within Kenya to discharge the usual duties of your office....”.

36. It is also evident that the Petitioner was issued with a Civil Servants Identity Card. He commenced his services and was paid accordingly and also received his payslip indicating he was a Support Staff (3) in the office of the Minister for Home Affairs.

37. It is not clear how the Petitioner’s services were terminated. However, Appendix M1-page 36 of Respondent’s documents is a Clearance Certificate for the Petitioner which shows that it was a Clearance Certificate for officers who are on transfer from the Ministry of Interior and Coordination of National Government. The Clearance Certificate did not indicate to which Ministry he was being transferred to and did not indicate he was being terminated.

38. There is no termination letter that was actually served upon the Petitioner and he avers that he was verbally notified that his services were no longer required after the abolition of the office of the then Vice President.

39. This Petition proceeded by way of written submissions and though the Respondents were expected to file their submissions by 1.9.2016, they never attended Court and so the Court proceeded on the submissions of the Petitioner filed herein and pleadings on the file.

40. I would examine what a temporary appointment is. According to Black Law Dictionary 9th Edition at page 605 temporary employment is:

“work for a specific need or fixed duration usually agreed upon beforehand”.

41. The appointment of the Petitioner though termed as temporary is far from such an appointment because there is no indication of the specific need or fixed duration that the Petitioner was to serve.

42. I have looked at the appointments envisaged in the Public Service of Kenya and there is provision for such an appointment. Under the Public Service Regulations 2006, however it is not defined. The Public Service Act 2012 also does not state what they envisage as temporary appointments.

43. Having stated as much, I refer to Section 9 of Employment Act which states as follows:

1. “A contract of service:

a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.

2. An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

3. For the purpose of signifying his consent to a written contract of service an employee may:-

1. sign his name thereon; or

b. imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.

4. Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.

44. It is envisaged here that an appointment for work exceeding 3 months cannot remain of such a temporary nature. The Petitioner worked for 5 years and the temporariness of this appointment cannot be sustained.

45. What the Respondent should have done if indeed the work he was doing was abolished, they should have either redeployed him in the public service or declare him redundant. This is even visible from the Clearance Certificate which shows that he was being cleared on transfer from the Ministry on 2/12/2013.

46. He was never given any termination letter but was verbally informed that his services were no longer necessary.

47. Having found as above, it is my finding that the Petitioner having served for 5 years in continuous employment, he could only be terminated whilst following due process or redundancy as envisaged under Section 40 of Employment Act:

1. "An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-

a. Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e. The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f. The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g. The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service ".

48. It is quite evident that for the Petitioner, he was not subjected to the process listed above. I find his termination unfair and unjustified and I declare it so.

49. I accordingly award him as follows:

1. 12 months salary as damages for unlawful termination = $12 \times 19,420/=$ 233,040/=.

2. 1 month salary in lieu of notice = 19,420/=.

3. Severance pay equivalent to 15 days salary for each year of service = $\frac{1}{2} \times 19,420 \times 5 =$ 48,550/=.

4. 1 month salary in lieu of leave not taken in year 2012/2013 = 19,420/=

Total awarded 320, 430/=

Les statutory deductions

5. Costs of this suit.

6. The above amount to attract interest at Court rates with effect from the date of this judgement.

Read in open Court this 11th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Claimant

No appearance for the Respondent