



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 213 OF 2013

DAVID LEI SOIT.....CLAIMANT

- VERSUS -

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th June, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 11.07.2013 through Kiplenge &Kurgat Advocates. The claimant prayed for:

- a. **A declaration that the termination of the claimant was illegal, unfair and without any basis in law.**
- b. **An order directing the respondent to immediately reinstate the claimant as an office clerk.**
- c. **An order for payment of the claimant's salary from the month of October, 2012 till the date of reinstatement.**
- d. **Twelve months salary as compensation for unfair termination.**
- e. **Kshs.4,500.00 as house allowance from 27.06.2010 until October, 2012 or date of reinstatement.**
- f. **Three months salary as annual leave for the years 2010, 2011, 2012.**
- g. **In the alternative, terminal benefits inclusive of (d), (e) and (f) above plus salary in lieu of notice and service gratuity for two complete years.**
- h. **Costs of this cause.**

The respondent filed the reply to the statement of claim on 08.08.2013 through Mirugi Kariuki & Company Advocates. The respondent prayed that the respondent's suit be dismissed.

The claimant gave evidence to support his case. The respondent's witnesses included Kiprono Towett, Regional Electoral Co-ordinator for Central Rift at part of the material time (**RW1**), Ali Mohamed Ibrahim the Regional Electoral Co-ordinator for Central Rift at part of the material time (**RW2**) and Sarah Mogati Ogaro, Regional Elections Co-ordinator for South Rift.

The claimant's case is that he was employed by the respondent effective 27.6.2010 on a 6 months contract as a constituency office clerk, deployed to the Nakuru regional office then to Eldama Ravine constituency. The 6 months lapsed, no further written contract was issued but the claimant was retained in employment for a further period of over 2 years at Eldama Ravine constituency in the same capacity. The claimant testified that he was paid Kshs.30,000.00 per month.

It was the claimant's evidence that on 28.09.2012, he was called by RW2 who paid the claimant salary for August and September, 2012 being Kshs.60,000.00. RW then asked the claimant to report to the Bomet South Rift regional office under RW3 because, according to the claimant's evidence, RW2 said that the respondent's head office in Nairobi had directed that all the constituency clerks be transferred. The claimant's evidence was that RW3 then advised him to go back to Eldama Ravine and prepare to report at Emurua Dikirr constituency in Narok County.

The claimant testified that on 11.10.2012, he was called by one Mercy, RW3's secretary at Bomet and conveyed that one Ibrahim from respondent's office was visiting and the claimant testified went to Bomet and he testified he met RW3 and the said Ibrahim. It was his testimony that they discussed new salary scales effective October, 2012 under which the claimant would earn Kshs.72,300.00 per month plus medical cover for self, spouse and children. The claimant testified that the two told him that he would be introduced to constituency election coordinator and he was given 3,000.00 for his night expenses in Bomet to wait for the constituency election coordinator. The claimant testified that on 13.10.2012, the election coordinator called Samuel Chacha came, introduction took place and they agreed to co-operate. Administrative issues were discussed and the claimant, as per his testimony, then requested for one week to move his family from Eldama Ravine to Emurua Dikirr constituency.

On 3.11.2012, the claimant testified that Mercy called him and told him that she had received a message on her cell phone that the claimant was to report for on-going training at Eldoret. At that time, the claimant testified that he was in Nairobi trying to defer his studies and he had not received any training news. On 5.11.2012, the claimant testified he went to see the respondent's Human Resource Manager called Ibrahim who advised the claimant that there were issues surrounding the claimant's employment which could be explained only by the respondent's Chief Executive Officer called Oswago. The claimant testified that he met the said Oswago who advised the claimant that some of the respondent's commissioners had said the claimant should not work at Emurua Dikirr constituency because the majority population in the constituency were Kipsigis and the claimant belonged to the Maasai minority population of the constituency. The claimant protested, as per his evidence, that he was recruited as the respondent's employee and the reason advanced was unfair, that he had served in Eldama Ravine outside his Kilgoris home constituency and where the clerk was one Julius Muiru who was not a Maasai.

The claimant testified that he subsequently met the respondent's chairperson Isaak Hassan between 24th and 28th November, 2012 and the chairperson called the said Oswago to explain about the claimant's being out of work. The claimant testified that Oswago explained to the chairperson that there were no constituency clerks in North Horr, Baringo South, Jomvu, Mbooni and Emurua Dikirr constituencies due to in-fighting among the respondent's commissioners. The claimant's testimony was that the chairperson then directed he proceeds to Emurua Dikirr constituency as deployed because the respondent was not to promote tribalism. The Chief Executive, Oswago, asked the claimant to see him on 17.12.2012 and when the claimant did, the claimant's testimony was that the said Oswago told him that the in-fighting was too high and that the claimant would be called later. The claimant made a follow up but he was not called at all and he decided to file the suit after making demands through his advocates, the Commission on Administrative Justice, Commission on National Cohesion and Integration and Kituo Cha Sheria.

The claimant testified that the position of constituency clerk was later changed to constituency office assistant and the same advertised in the Daily Nation of 24.01.2013 to push the claimant out. To urge his

case, the claimant testified that the advertisement was with respect to only five constituencies out of 290 constituencies in circumstances whereby there were 80 newly created constituencies. The claimant's case was that he was paid Kshs.69,668.00 being salary for August and September inclusive Kshs.9,668.00 being transfer allowance.

RW1 testified that he signed the original 6 months contract with the claimant and the claimant was paid Kshs.1,000.00 per day and paid for as many days in every month. RW 1 testified that the claimant was deployed to Eldama Ravine and upon lapsing of the 6 months, the claimant continued to work without a break and without concluding another written contract. RW1's evidence was that in his new station in Garissa effective January, 2012, clerks like the claimant were laid off and he recruited new ones in July, 2012 on the basis of KCSE mean grade C- or above, candidate from local constituency, and competence. RW1 further testimony was that the claimant had been deployed to Eldama Ravine before introduction of requirement that the person recruited was to be resident and local of the constituency; a requirement necessary in assisting in mapping registration centres. RW1 testified that all constituency clerks were terminated on a date he did not recall.

RW2 testified that he recruited constituency clerks per the respondent's guidelines conveyed in April, 2012. RW2 testified that for Eldama Ravine, the claimant from Kilgoris and one Marisa from Eldama Ravine were serving clerks. The guidelines prescribed a candidate being resident and a local of the constituency. Thus, RW2 testified that he conducted suitability interview for Marisa and she was appointed as qualified. RW2 testified that he did not conduct suitability for the claimant but he was terminated by the memo dated 6.7.2012 and he was paid his terminal dues including one month salary, 21 days leave allowance for every completed year of service, 15 days wages for every full completed year of service. RW2 testified that in July 2012, the claimant had worked for 26 days and he was paid Kshs.26,000.00 as per the claimant's written request for pay. The claimant's final dues were Kshs.95,668 less the Kshs.26,000.00 already paid making Kshs.69,668.00 which was paid to the claimant's account.

RW3 testified that the claimant applied for constituency office clerk to serve in Emurua Dikirr constituency and he appeared for an interview on 12.10.2012. RW1 testified that the claimant did not hold KCSE grade C- and above as prescribed but instead, he held a D+ so that he lacked the minimum academic qualifications prescribed for the job. The claimant's C.V. did not show his KCSE grade and the respondent asked him to avail his certificate the following day which he did and the copy of the certificate exhibit **R8** showed he attained D+ in KCSE. He was therefore not eligible and was not given the job on that ground alone but having been excellent on all other parameters.

The court has considered the pleadings, the evidence and the submissions filed for the parties and consider the main question for determination to be whether the claimant was unfairly terminated or unfairly denied continued employment by the respondent. The court makes findings as follows:

1. The claimant was employed by the respondent in writing on a term of six months and he continued in employment until his termination as per the suitability interviews carried out by RW2 on behalf of the respondent. The court has carefully considered the evidence and find that the documentary evidence produced by RW2 is clear that the claimant having not been successful at the suitability interviews on account of not being from Eldama Ravine constituency, he was declared redundant and paid all his dues. Taking all circumstances into consideration, the court finds that the respondent cared and complied with provisions of section 40 of the Employment Act, 2007 on termination on account of redundancy by paying the claimant his terminal dues. Accordingly, the court finds that the termination was not unfair.
2. The claimant has urged that he was prejudiced and discriminated on account of his ethnicity. The court has considered all the evidence as presented and finds that the respondent instituted and implemented a nation-wide policy that constituency office clerks or constituency office assistants as they came to be known later were to be recruited from serving officers of that cadre, through suitability interviews and from candidates who are locals or residents except in cosmopolitan towns. In so far as the court finds that the policy applied to all candidates, the court also finds that the policy did not discriminate the claimant at the suitability interviews. The court has carefully

revisited the claimant's case and it is his case that the policy or guideline was invoked to deny him the job at Emurua Dikirr. Far from that, the court finds RW3's evidence as credible that the claimant was not recruited and appointed at Emurua Dikirr on account of his academic shortfall and not ethnic or any other consideration. The court finds that the claimant was therefore not discriminated against in any manner. The court further finds that the respondent was entitled to impose such guideline or policy as not being discrimination under section 5(3) (b) of the Employment Act, 2007 which entitled the respondent to distinguish, exclude, or prefer candidates based on their local residence in the given electoral constituency as the basis of an inherent requirement of the job.

3. The claimant referred to his discussions with the respondent's chairperson Isaac Hassan and the respondent's Chief Executive Officer, one Oswago and in his evidence suggested his termination or failure to be recruited at Emurua Dikirr was due to interference and in-fighting of the respondent's commissioners. The evidence in the findings of the court above is clear on why the claimant lost at the suitability interviews and why he was not so recruited for Emurua Dikirr constituency. Accordingly, the court finds that the claimant's insinuations against the respondent's commissioners were misconceived, incredible, on the whole remote to the issues in dispute, and thus irrelevant and unfounded.
4. Finally, the court finds that the claimant has not established any basis for the grant of any of the remedies as prayed for except the prayer for annual leave and the other prayers will fail.

In conclusion, judgment is entered for the respondent to pay the claimant annual leave as prayed for and parties will bear own costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday 13th June, 2014.

BYRAM ONGAYA

JUDGE