



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT GARISSA
CAUSE NO. 1 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS IN ARTICLES 1, 2,3(1), 10, 19, 20,
21, 22, 27, 28, 41, 43, 47 & 174 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE EMPLOYMENT ACT (NO. 7 OF 2007),
THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

BETWEEN

OSMAN ABDULLAHI SHEIKH.....CLAIMANT

VERSUS

GARISSA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

JUDGMENT

The claimant filed his claim vide a Memorandum of claim dated 11th August 2015 in which he prays for the following remedies.

1. A declaration that the respondent withholding the claimant's salary since September 2017 to date is unfair, unlawful and wrongful.
2. Reinstatement to the payroll without loss of benefits or seniority
3. Salary Arrears from September 2017 to date Kshs.1,165,274.05
4. Damages for loss of income/earnings (gross wage x 12)

5. Alternatively;

- a. Damages equivalent to salary for the remaining part of the contract of employment up to November 2045 totalling Kshs.31,462,425.00
- b. Salary in arrears from September 2017 to date Kshs.3,178,020.00
- c. Severance Pay
- d. Respondent to issue certificate of service to the claimant stating that he left the organization honourably and without blemish
- e. Costs of the suit
- f. Interest until payment in full.

The respondent did not file a response to the claim herein nor participate in the proceedings although there is evidence that was properly served. The facts as pleaded in the Memorandum of claim **are thus uncontested.**

The claim having been undefended, the court gave directions that it is disposed of by way of written submissions.

The claimant avers that he was recruited by the Garissa County Public Service Board on 10th February, 2014 to the position of ICT Manager. That throughout his employment he never committed any misconduct or undergo any disciplinary action that could justify the respondent to expunge his name from the payroll.

That from September 2017 the respondent expunged the claimant's name from the payroll. The claimant further states that on the 4th December 2017 he was summoned to appear before the Public Service Board of the respondent who was dismayed that the claimant's name was not in the payroll and directed that he be reinstated.

The claimant avers that despite several attempts to have the issue resolved by the respondent he has not received any positive response and that the wrongful and unlawful expunging from the payroll and withholding the salary are a measure to frustrate him into resignation.

The claimant avers that the respondents has since recruited two personnel who have usurped his duties thus rendering him redundant. The claimant further states that the Respondents withholding of his salary has led to him defaulting in servicing his unsecured loan facility as a consequence of which he has been blacklisted by the Credit Reference Bureau thus unable to access any financial institution.

The claimant states that on 23rd August 2018 he appeared before two board members and two secretariat members of the Respondent who stated that they were unaware of his predicament.

The claimant states that the Respondent admitted it had erroneously removed the claimant from the payroll and reinstated the claimant vide a letter dated 6th November 2018 but on reporting to work he was informed that he was not a member of staff.

Claimants Submissions

The claimant submits that termination of his contract was unlawful as the Respondent did not comply with Section 45(1) and (2) of the Employment Act.

The claimant relies on the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the court

held that;

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has no doubt has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination”

The claimant further relies on section 45(4)(b) of the Employment Act which provides that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee.

The claimant also relied in the case of **Alphonse Machanga Mwachanya v Operation 680 Limited (2013) eKLR** which summarised the legal fairness requirement for termination of employment on grounds of misconduct, poor performance or physical incapacity as set out in Section 41 of the Employment Act. He further relied on the case of **Nicholus Muasya Kyula v Farmchem Limited Industrial Case Number 992 of 2011; (2012) LLR 35 (ICK)**.

The claimant submits that the relationship between him and the Respondent has disintegrated and it is unlikely that the Respondent will obey orders of reinstatement. The claimant urges the court to grant prayers sought in the alternative being payment of damages, salary arrears, severance pay, certificate of service, costs and interests.

Determination

The law relating to termination of employment is contained in Sections 41, 43 and 45 of the Employment Act.

The claimant submitted that he was removed from the payroll without his knowledge and his salary withheld since September 2017 to date without any notice. That the respondent vide a letter dated 6th November 2018 to the payroll manager directed that the claimant be reinstated which letter was never complied with.

Based on the above I find that the claimant was unfairly terminated. Section 45 prohibits the unfair termination of employment by employers and provides that for termination to be lawful the employer must comply with both fair procedure and prove valid reason for the termination. Section 45 of the Employment Act provides for unfair termination as follows: -

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness.

*Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the **termination.***"

I find that the claimant has been constructively dismissed by the Respondent by fundamental breach of his contract. This amounts to unfair dismissal.

Whether the claimant is entitled to the reliefs sought;

a) Withheld salary since September 2017

The claimant having been unfairly removed from the payroll which fact the respondent has admitted by its letter of 6th November 2018 (annexure OAS 5 of the claim) which also approved his reinstatement, the claimant is entitled to his withheld salary, which I award him up to the date of filing this claim being August 2020. Based on his last gross monthly salary of Kshs.158,535.00, I award him **Kshs.5,707,260.00**

b) Reinstatement to the payroll without loss of benefits

The Employment Act provides under Section 49(4) that reinstatement is to be ordered only in very exceptional circumstances, being an order for specific performance of personal services.

The claimant has in his submissions doubted that the Respondent will comply with any orders of reinstatement and has prayed for the alternative prayers in his judgment. The claimant having in effect abandoned the prayer for reinstatement, the court makes no order with respect to the same.

c) Damages for Unfair Termination

Having found the termination of his employment unfair, and taking into account the unfair manner in which the said employment was terminated, the fact that the claimant did not contribute to the same and the fact that the Respondent's County Public Service Board admitted that it was an error and approved his reinstatement which it did not follow through, I award the claimant maximum compensation equivalent to 12 months' salary. According to the claimant's payslip for the month of August 2017, he was earning a monthly gross salary of Kshs.158,535.000. I therefore award him the sum of **Kshs.1,902,420.00** as compensation.

The claimant is not entitled to payment of salary to date of retirement, as this is not provided for by the law.

d) Certificate of Service

The Respondent is directed to issue a certificate of service to the claimant in terms of Section 51 of the Employment Act.

e) Costs and Interest

In view of the fact that the Claimant was unrepresented, I award him **Kshs.50,000** to cover disbursement in respect of filing fees, travel and other reasonable expenses associated with the filing of the suit, considering also that the suit was filed in Garissa and heard in Nairobi.

Conclusion

The upshot is that judgment is entered for the claimant against the Respondent in the total sum of Kshs.7,609,680.00. The same shall attract interest from date of judgment.

The Respondent to issue a certificate of service to the claimant and also pay the Claimant costs assessed at Kshs.50,000.00.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF APRIL 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE



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