



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 84 OF 2017**

**JOSEPH KIPLANGAT KOECH.....CLAIMANT**

**VERSUS**

**COUNTY GOVERNMENT OF MANDERA.....RESPONDENT**

**JUDGEMENT**

1. The Claimant was appointed by the defunct Nakuru County council as a clerical officer 1 in the year 1993 at a salary of Kshs. 3,200. He worked for Nakuru town council for 14 years till 7<sup>th</sup> February, 2007 when he was transferred to town council of Chepareria as the Town's treasurer earning a salary of Kshs. 29,040.
2. Sometimes on 19<sup>th</sup> August, 2009, the Claimant was further transferred to the County council of Ijara and maintained his position of a treasurer but now earning a salary of Kshs 64,281. Subsequently he was promoted by the public service commission to the grade of Accountant 1 with effect from 30<sup>th</sup> September, 2010 and on 8<sup>th</sup> November, 2012 he was transferred to the county government of Mandera, the Respondent herein, under the same position of a treasurer and earning a gross salary of Kshs 95,380.
3. By a letter dated 23<sup>rd</sup> April, 2013, the Claimant was deployed to the Transition Authority effective immediately which authority seconded the Claimant to Kericho County Government as an interim head of County Treasury heading the budget supply Unit.
4. While working for Kericho County Government, the Transition Authority vide a letter dated 10<sup>th</sup> December, 2014 re-deployed the Claimant back to Mandera County government in line with the agreement reached by the council of Governors and as per section 138 of the County Government Act as read with Section 57 of the Cities and Urban Areas Act.
5. The Claimant avers that, he reported to Mandera County Government sometime in March following a bout of illness that kept him out of work. That the County secretary to the public service board instructed him to report in two days as he consults with the board on his deployment. The Claimant kept checking with the Respondent and in May 2015 he reported to the secretary who maintained that they are still in consultation with the board
6. On 22<sup>nd</sup> June, 2015, the Claimant was informed by the secretary to the Board of the Respondent, that the consultations were successful and a letter had been done to that effect. He was then asked to report back in 2 days that's on the 24<sup>th</sup> June, 2015 to the Human resource to pick up the letter.
7. On 24<sup>th</sup> June, 2015, the Claimant reported to the human resource as directed and to his dismay, he received a letter of termination on the basis that the Claimant had absconded duty.

8. The Claimant in a way tried appealing the decision explaining his whereabouts during the redeployment and forwarded the letter to the Human resource for onward transition to the County secretary. Another reminder on the termination was done by the Claimant on the 11<sup>th</sup> May, 2016, which did not elicit any response.

9. The Ministry of Devolution also explained the Claimants whereabouts vide the letter dated 13<sup>th</sup> May, 2016 addressed to the Respondent. Despite receiving this letter, the Respondent failed to reinstate the Claimant or pay him his terminal dues.

10. The Claimant therefore contends that he has been unfairly terminated from employment and prays for the following reliefs;

**a) A declaration that the Claimant was constructively dismissed by the Respondent on the 14<sup>th</sup> December, 2016.**

**b) A declaration that the act of the Respondent is in violation of the rights of the Claimant under Articles 27, 28 and 41 of the Constitution of Kenya.**

**c) An order that the Claimant be reinstated to his position as the Accountant of the Respondent and be paid all the salary, benefits and privileges with effect from May, 2015 or the Respondent re-engages the Claimant in comparable work at the same salary, allowances and benefits until the statutory retirement age unless lawfully earlier terminated or in the alternative the Respondent to pay the Claimant Kshs.9,919,520 for prospective future earnings and issue him with certificate of service.**

**d) Maximum compensation of Kshs.1,144,560 for unlawful dismissal under section 49 of the Employment Act.**

**e) General damage under Article 23 of the Constitution for the violations and or breach of the Claimant's rights in prayer (b) above.**

**f) Costs of this suit and interest on the sum awarded at Court rates.**

11. The Respondent entered appearance and filed a response to claim dated 21<sup>st</sup> January, 2020 on 22<sup>nd</sup> January, 2020.

12. The Respondent avers that the Claimant was indeed transferred to Mandera County in November, 2012 as a treasurer having cleared from Ijara County Council. It was further stated that the Respondent did not receive the letter communicating its decision to transfer the Claimant to the Transitional Authority, though they admitted getting wind of the Transition Authority intention to transfer the Claimant. Nevertheless, that the Claimant left the county council without properly handing over as per laid down procedures of deployment of public servants.

13. The Respondent admitted receiving the letter dated 10<sup>th</sup> December, 2014 releasing the Claimant back to Mandera County, but that the Claimant did not report to the county as directed as such deserted employment.

14. Sometimes in 2015, the Respondent's County public service Board conducted a payroll audit to weed out ghost workers and in the process, it was discovered that the Claimant was among the workers who were still drawing salary from it for 23 months from April, 2013 to March, 2015 totaling to Kshs.2, 193, 740, when he was on transfer to Transition Authority.

15. To get to the crux of the matter, the Respondent summoned the Claimant vide a letter to show cause dated 24<sup>th</sup> June, 2015 why he had deserted duties and continued drawing salary from the Respondent. The Claimant was to Respondent within two weeks which he failed and as such the Respondent deemed the Claimant termination as desertion without notice.

16. On 23<sup>rd</sup> July, 2015, the Respondent receive the Claimant's response to the notice to show cause though it did not have any explanation for the delay in the response. The Claimant was at pain to explain his whereabouts from December, 2014 till June, 2015 when he had been redeployed back to Mandera County. He also did not deny receiving salary from the County Government.

17. It is stated that the Claimant's allegation of withheld salary is without basis in light of the fact that the Claimant failed to report

to work from December, 2014 to June, 2015 without any lawful excuse and the medical notes produces is suspect.

18. It is the Respondent's case that the Claimant acted illegally when he failed to properly handover in April, 2013 thus continued drawing salary and also failed in reporting to work back to the Respondent in December, 2014 as instructed. It is contended therefore that the Claimant terminated his employment by desertion and the termination was not unfair as alleged.

19. The Respondent then urged this Court to find in its favour and dismiss the Claimant's claim with costs.

#### **Hearing.**

20. During hearing the Claimant testified as CW-1 and adopted his witness statement dated 23.2.2017 which reiterated the claim and in addition stated that he was redeployed to the Respondent in the December, 2014 and reported in March, 2015 to the county Public service board secretary who directed him to stay away as they consults with the Board. He testified that he never received any money illegally as the same was paid by the payroll manager. He stated that his last pay was in April, 2015. He then maintained that he did not desert work as alleged.

21. Upon cross examination, the Claimant testified that he was transferred from Mandera County on 23.4.2013 to Kericho county government till 31<sup>st</sup> December, 2014 and redeployed back to Mandera. He stated that he did not report in that December but in March, 2015 as he was awaiting communication of the reporting date and also due to his illness. He also admitted receiving a notice to show cause letter dated 24<sup>th</sup> June, 2015 and responded to it on 23<sup>rd</sup> July, 2015.

22. On further cross examination he confirmed that the Respondent paid him his salary from December, 2014 to July, 2015 when his salary was stopped. He then testified that he was sick from December, 2014 as shown by the doctor notes.

23. On re-examination the witness testified that he explained his whereabouts and the Transitional authority wrote a backup letter explaining his whereabouts therefore that he never deserted duty as alleged.

24. The Respondent also called one witness, **Edihila Mohamud Issak**, the chairman of Mandera Public service Board as RW-1 who adopted her witness statement dated 21.1.2020 which basically reiterated the Respondent's defence and in addition testified that the Claimant was initially employed by the Respondent in the year 2013 and on 23<sup>rd</sup> April, 2013 the Public service Commission communicated its a decision to formerly transfer the Claimant to Transition Authority but a formal letter was never copied to the Respondent. The Claimant was later on in December, 2014 deployed back to the Respondent however that the Claimant never reported back to work.

25. On cross examination, RW-1 testified that the termination letter of 24.6.2015 was based on the fact that the Claimant deserted his duties. She further testified that they never dismissed the Claimant rather that the Claimant deserted employment without notice therefore that they could not conduct a disciplinary hearing. She admitted that the Respondent received the response by the Claimant to the show cause letter but did not respond to it, because it was served way out of time. With regard to the alleged irregular pay by Mandera County the witness testified that on the letter of 23.4.2013 from transitional Authority indicated who was to pay the Claimant therefore that the Respondent had no basis of continuing paying the Claimant.

#### **Claimant's Submissions.**

26. The Claimant submitted on two issue; whether the Claimant was constructively dismissed and whether he is entitled to the reliefs sought.

27. With regard to the first issue, it was submitted that that the Claimant was constructively terminated by the Respondent. It was argue that the letter dated 10<sup>th</sup> December, 2014 releasing the Claimant back to the County Government of Mandera had indicated therein that the Respondent was to give a date within which it required the Claimant to report to the office, however that the Respondent did not respond to the letter or gave any tentative date for reporting therefore that the alleged dismissal on the basis of desertion is not justified in the circumstances rather that the termination was constructively carried out by the Respondent. In this the Claimant cited the case of **Coca cola East and Central Africa V Maria Kagai Ligaga [2015] eKLR**.

28. It was submitted further that the letter of termination dated 24<sup>th</sup> June, 2015 indicated at paragraph 2 that the desertion was with regard to the duration in which the Claimant had been transferred to Transition authority and then to Kericho County Government which was well explained both by the Claimant and the Transition Authority. Consequently, it was submitted that the Claimant did not desert work as alleged. The Claimant then relied on the case of **Ezra Nyamweya Motari V Kanini Haraka Enterprises Limited [2016] eKLR** where the Court differentiated between desertion and being absent from work without permission of lawful cause.

29. The Claimant then submitted that when he was seconded by the Transitional Authority to Kericho County, he was still an employee of the Respondent and the release letter was merely to formalize his redeployment back to its main employer. In this he cited the case of **Mary Nyangasi Ratemo & 9 other V Kenya Police staff Sacco Limited and another [2013] eKLR**. It was submitted that the allegation of desertion was without any basis the Respondent having been his employer and in Kericho County Government only on secondment which employment was foreseeable to come to any end by 31<sup>st</sup> December, 2014 and the Claimant was to revert back to the Respondent's employment.

30. The Claimant submitted that Respondent constructively dismissed him from service when it failed to absorb him back to employment despite reporting to them in March, 2015. He thus prayed for the claim to be allowed as prayed.

31. With regard to the prayers sought, it was submitted that when the Respondent stopped the Claimants' salary, it subjected him to financial hardship and emotional distress since he was unable to meet his financial obligations being the sole bread winner. It was thus argued that the stoppage of his salary violated his constitutional rights under Articles 27, 28 and 41 of the Constitution. The Claimant urged this Court to award him damages for violations of his rights and relied on the case of **VMK Vs Catholic University of East Africa [2013] eKLR** and the case of **Jonathan Spangler V Center for Africa Family Studies (CAFS) [2017] eKLR**.

#### **Respondent's Submissions.**

32. The Respondent submitted from the onset that the Claimant left its employ voluntarily and was never dismissed as alleged. It was argued that the Claimant absconded duty from December, 2014 when he was transferred back to Mandera country and only reported in June 2015 about six months later without any explanation, therefore that the Respondent deemed the Claimant to have resigned without Notice.

33. It was further submitted that, when the Claimant failed to report to work as instructed in the deployment letter, the Respondent summoned him to a disciplinary hearing scheduled vide the letter to show cause dated 24<sup>th</sup> June, 2015 requiring the Claimant to respond within 2 weeks however that the Claimant failed to respond till 23<sup>rd</sup> July, 2015, therefore that the Claimant's response was received after the fact. The Respondent further argued that, in the response received on 23<sup>rd</sup> July, 2015, the Claimant had accounted for his whereabouts from the 2013 to December, 2014 and deliberately failed to account for the time between December, 2014 and June 2015 which the Respondent was interested in. It is the Respondent submission that no explanation was given for the desertion of duty from December, 2014 to June, 2015.

34. The Respondent submitted that the desertion of duty by the Claimant warranted it to terminate its services as empowered under section 44 (4) (a) of the Employment Act for being absent from work without any lawful excuse. In support of its case the Respondent cited the case of **Joseph Nzioka V Smart Coatings Limited [2017] eKLR** where the Court held that:-

**'Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties. The Claimant herein was undergoing prosecution for an offence where the Respondent was the complainant.'**

35. Accordingly, it was submitted that the Respondent contacted the Claimant and even issued him with a notice to show cause, which the Claimant failed to respond to within the stipulated time, therefore that Respondent followed due procedure before terminating the services of the Claimant.

36. In further support to its arguments, the Respondent relied on the case of **Kenneth Onialo Vs Majlis Resort Lamu t/a Majlis Lamu Limited** where the Court held that :-

“Having considered the evidence as presented, it is clear to me that this is not a case for unlawful dismissal as pleaded by the Claimant. The Respondent did not terminate the contract of service between the parties. Rather, the Claimant voluntarily resigned from duty to seek greener pastures. Consequently, sections 41, 43 and 45 of the Employment Act have no application to this dispute. I will therefore answer issue number one (1) as framed by the Respondent in the negative.<sup>32</sup> The Claimant having voluntarily resigned from duty, this case falls for consideration under the provisions of sections 35, 36 and 38 of the Employment Act. Suffices to mention that under the current regime of employment law in Kenya, whilst the employer must justify a termination of a contract of service by providing reasons for the decision, no such obligation exists as against an employee. All the law requires of an employee terminating the contract is to issue the employer with the requisite notice to terminate or pay to the employer an amount equivalent to the notice period should he/she opt not to give notice. I have read the decision by my sister Mbaru J in *Jaswinder Kaur Ghataanura v Naredrasing R. Mahinda & Another* (2013) eKLR suggesting that the employee has a duty to justify his/her resignation in much the same way as the employer. With respect, I hold a contrary view as expressed above. Having carefully considered Part VI of the Employment Act which deals with termination and dismissals, I am unable to find the provision of law that justifies the conclusion that an employee must furnish the employer with reasons for the decision to resign from employment <sup>33</sup>. Under section 38 of the Employment Act, the employer can elect to waive the obligation on the employee to continue working during the duration of the resignation notice period. Where such waiver is granted, the employee will be required to cease employment immediately. And the employer waiving the notice will be required to pay the employee the full salary for the duration covering the notice period. <sup>34</sup>. In the current case, there is no evidence that the Respondent waived the need for the Claimant to continue serving during the notice period contemplated in law. Consequently, section 38 of the Employment Act does not apply to the dispute.<sup>35</sup> The net effect of the foregoing is that the Claimant was in law required to issue the Respondent with the requisite notice to terminate the contract of service. Under section 35 of the Employment Act, the duration of the notice to terminate is directly proportionate to the duration one has to work in order to earn a wage. In this case, the oral contract of service appears to have been one in respect of which the Respondent was to pay the Claimant salary periodically at intervals of one month. Such arrangement would only regularly terminate if either party issues the other a termination notice of not less than twenty eight (28) days unless the parties have agreed on an extended period of notice.”

37. With regard to whether the Claimant was constructively terminated, it was argued that the Claimant has not satisfied any element as enunciated in the *Coca Cola East and Central Africa Limited V Maria Kagai Lugaga (Supra)* since the Claimant case is on unfair termination and not on allegation of any resignation cause by the Respondent.

38. In conclusion, the Respondent argued that the separation from employment was voluntary on the part of the Claimant, since he had deserted work for about 6 months without explanation. The Respondent then prayed for the claim to be dismissed with costs.

39. I have examined the evidence and submissions of the parties herein. Vide a letter dated 23/4/2013, the Transition Authority conveyed the decision of the PSC (K) to the Claimant herein to deploy him as an interim Head of Treasury to Kericho. The Claimant was expected to report to the Interim County Secretary.

40. The Claimant was to be head of Budget and was responsible to the interim Chief Finance Officer. According to this letter, the terms and conditions of service hereto were to be as per his current appointment in the Public Service.

41. He was to be deployed on temporary basis and was to continue drawing his salaries and all other allowances from his current parent ministry/department. However he was to be paid all allowance of kshs.30,000/= per month for extra responsibilities given to him.

42. He signed this letter on 23/4/2013 and on 10/12/2014, the Transition Authority wrote to the Claimant a letter releasing him back to Mandera County Government.

43. The letter indicated that the letter was in line with guidelines agreed upon with the Council of Governors and other stakeholders that all staff of the defunct counties stand seconded to the counties as specified in Article 135 of the County Government Act and Article 57 of Cities and Urban Areas Act.

44. On 24/6/2015, the Respondent herein wrote to the Claimant indicating that he had deserted duty and that it was contemplated to be dismissed from service. He was given 2 weeks to respond.

45. Vide a letter dated 23/7/2015 the Claimant explained himself that his absence was due to the fact that he had been seconded to the County Government of Kericho vide a letter dated 23<sup>rd</sup> April, 2013 and took over the duties on 29/4/2013.

46. The Claimant submitted his payslips for November 2014 and March and April 2015 to show he was always paid by the Mandera County as had been indicated in the letter deploying him to Kericho.

47. In the meantime, the Respondent avers that the Claimant never handed over as he left for Kericho. They also aver that the decision to second him to Kericho was not copied to them. Whereas a letter from the PSC may not have been copied to the Respondent, that is not a mistake to be visited against the Claimant.

48. The Respondent have also averred that the Claimant drew salary from April 2013 to March 2015 when he had been seconded to Kericho.

49. This was no illegality as the letter seconding him to Kericho had indicated that he was to continue being paid by Mandela County.

50. As for the show cause letter, it is apparent that it was premised on the wrong notion that he had absconded duty when in fact he had been seconded to Kericho County.

51. It is therefore my finding that the decision to dismiss the Claimant from the service on account of desertion was wrong and illegal.

**1. In the circumstances, I find for the Claimant and I declare that he be paid maximum compensation for the unlawful and unfair termination given that he lost out on his future earning.**

**= 12 x 95,380 = 1,144,560/=**

**2. I also direct that the Claimant be paid kshs.2million as damages for breach of his constitutional rights in employment.**

**TOTAL = 3,144,560/=**

**Less statutory deduction**

**3. I also convert the termination into a retirement with attendant retirement benefits.**

**4. The Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED IN OPEN COURT THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Magata for Claimant – present

Agwata for Respondent – present

Court Assistant - Fred



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