



**Ouma & another v County Government of Nyamira & 3 others (Miscellaneous Case E102 of 2024) [2024] KEELRC 1268 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1268 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CASE E102 OF 2024**

**JK GAKERI, J**

**MAY 15, 2024**

**BETWEEN**

**DUNCAN OTIENO OUMA ..... 1<sup>ST</sup> APPLICANT**

**MILLER KEFFA ATUTA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NYAMIRA ..... 1<sup>ST</sup> RESPONDENT**

**NYAMIRA COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY CHIEF OFFICER FINANCE, COUNTY GOVERNMENT OF NYAMIRA ..... 3<sup>RD</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court is the Applicants Notice of Motion dated 29<sup>th</sup> February, 2024 seeking ORDERS THAT:
  1. The decision of the Public Service Commission dated 27<sup>th</sup> February, 2023 that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents do pay to the Applicants herein 12 months of their gross monthly salary as compensation for unlawful termination be recognized, adopted and enforced as a judgement of this court.
  2. A decree to issue forthwith.
  3. Costs of the application be awarded to the Applicants.
2. The Notice of Motion is expressed under Section 89 of the *Public Service Commission Act* and Section 3(1) and 12 of the Employment and *Labour Relations Act*, 2011 and is based on the grounds set forth on its face and the Supporting Affidavit of Duncan Otieno Ouma sworn on 29<sup>th</sup> February, 2024.



3. The affiant deposes that he and the 2<sup>nd</sup> appellant filed an appeal against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents challenging the termination of employment vide letter dated 12<sup>th</sup> January, 2021.
4. That the 4<sup>th</sup> Respondent awarded 12 months compensation which remains outstanding, Kshs.1,890,000/= and Kshs.1,328,880/= for the 1<sup>st</sup> and 2<sup>nd</sup> appellant respectively.
5. The affiant deposes that despite several demands, the Public Service Commission decision remains unsatisfied and no review has been preferred against the decision.
6. The Notice of Motion was served on all the Respondents and none responded.

### **Analysis and determination**

7. The only issue for determination is whether the court should adopt as judgment the decision by the Public Service Commission rendered on 27<sup>th</sup> February, 2023.
8. It is common ground that the Mr. Otieno Ouma and Mr. Miller Keffa Atuya, who were employees of the 3<sup>rd</sup> Respondent were dismissed from employment vide letter dated 12<sup>th</sup> January, 2021 and filed an appeal dated 24<sup>th</sup> May, 2022 with the Public Service Commission (PSC) which rendered its decision on 27<sup>th</sup> February, 2023.
9. The Commission found that it had jurisdiction to hear and determine the matter, appellant's employment was not tied to the tenure of the Governor, termination of employment was unfair and unlawful and awarded 12 months gross salary as compensation for unlawful termination.
10. All the other prayers failed.
11. The appellants seeks the court's discretion to adopt the decision of the Public Service Commission. The Public Service Commission is one of the constitutionally established commissions under Article 233 of *the Constitution* of Kenya, 2010. Article 233, additionally prescribes the membership of the Public Service Commission.
12. Significantly, Article 234 of *the Constitution* of Kenya enumerates the powers and functions of the Commission as follows;
  1. The functions and powers of the Commission are as set out in this Article.
  2. The Commission shall –
    - a. subject to this Constitution and legislation –
      - i. Establish and abolish offices in the public service; and
      - ii. Appoint persons to hold or act in those offices, and to confirm appointments;
    - b. exercise disciplinary control over and remove persons holding or acting in those offices;
    - c. promote the values and principles referred to in Articles 10 and 232 throughout the public service;
    - d. investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
    - e. ensure that the public service is efficient and effective;
    - f. develop human resources in the public service;



- g. review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
  - h. evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the public service;
  - i. hear and determine appeals in respect of county governments' public service; and
  - j. perform any other functions and exercise any other powers conferred by national legislation.
13. As discernible from the foregoing, the Public Service Commission enjoys a wide spectrum of powers and functions over the Public Service and is required to ensure that the Public Service Commission is not only efficient but effective. Similarly, it has wide disciplinary powers over persons holding office in the Public Service.
14. Significantly, under Article 234(2)(j), the Commission is empowered to;
- “perform any other functions and exercise any other power conferred by national legislation”.
15. Closer home, under Section 86 of the *Public Service Commission Act, 2017*;
- 1. Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government, Public Service may appeal to the Commission against the decision.
  - 2. An appeal under sub-section (1) shall be in writing and made within ninety days from the date of the decision provided that the Commission may consider an appeal out of time, if in the opinion of the Commission, the circumstances warrant it.
  - 3. The Commission shall make regulations to guide the hearing and determination of appeals from the County Public Service boards.
  - 4. After considering an appeal, under this section, the Commission may –
    - a. uphold the decision;
    - b. set the decision aside;
    - c. vary the decision as it considers to be just; or
    - d. give such directions as it may consider appropriate with respect to the decision.
16. Similarly, Regulation 21 of the Public Service Commission (County Appeals) Procedures Regulations, 2022 provides that –
- The Commission may, in relation to an appeal –
- a. uphold the decision being challenged.
  - b. set aside the decision being challenged.
  - c. vary the decision as may be just in the circumstances; or
  - d. give such other directions as may be appropriate in the circumstances.



17. Under Section 88 of the [Public Service Commission Act](#), a person dissatisfied or affected by a decision by the Commission after an appeal may apply for review within 6 months from the date of the decision.
18. The Respondents tendered no evidence of any concluded or pending review proceedings.
19. From the foregoing, it is clear that neither the provisions of the [Public Service Commission Act](#), 2017 nor the Regulations expressly confer upon the Public Service Commission jurisdiction to award compensation or award damages.
20. But having said that, both the Act and the Regulations use the phrase “give such other directions as may be appropriate as it may consider appropriate with respect to the decision” or in the circumstances.
21. Would this phrase which is of general signification encompass the award of compensation as the commission did in this case?
22. First, if the legislature intended to confer upon the Public Service Commission power to award monetary compensation and/or damages to employees for unfair termination of employment or summary dismissal, nothing would have been easier.
23. Second, the Regulations, 2022 merely replicate the provisions of Section 86 of the [Public Service Commission Act](#), as opposed to exemplifying the directions the PSC could give after hearing an appeal.
24. Third, and more significantly, would the phrase of general signification reproduced above include an award of compensation if construed using the relevant cannon of statutory construction namely; ejusdem generis rule which literally means ‘same kind or class’?
25. In simple legal parlance, the ejusdem generis rule means that where words or phrases of general signification follow words or phrases of particular signification, the words or phrases of general signification must be construed as being confined to the class or things identified by the words or phrases of particular signification.
26. No doubt it may be argued that the phrase “Give such other directions as may be appropriate” would include a monetary award.
27. Assuming that was the intention of the Legislature, why did it not prescribe or define the scope or limits of such awards and what parameters which ought to be taken into account as it would involve the exercise of discretion by the Commission?
28. The foregoing suggests that the Public Service Commission is parallel system of resolving employment disputes affecting public officers and enjoys powers similar to those of the Employment and Labour Relations Court, but regrettably relies on the court to accord its decision some judicial aura which renders the court subservient to the Commission. Could that have been the intention of the framers of [the Constitution](#) of Kenya, 2010 and the Legislature under article 234 and Section 86 of the [Public Service Commission Act](#)? This is however, as far as the court is prepared to go.
29. As regards adoption of the decisions of the Public Service Commission, emerging jurisprudence is that the court’s jurisdiction is summary and non-litigious. (See County Government of Mandera V Hussein Daywo (2020) eKLR, Kenya Union of Clinical Officers V Kirinyaga County Public Service Board; Public Service Commission (Interested Party) (2023) KEELRC 3349 (KLR) and Murimi V County Government of Kirinyaga & 2 others; Public Service Commission (Interested Party) (2023) KEELRC 3354 (KLR) among others).



30. Strangely, however, the Commission grounded its award of compensation on the provisions of Section 49(1)(c) of the Employment Act, 2007 which restricts compensation to 12 months gross wage or salary in cases of summary dismissal or unfair termination of employment.
31. Notably, Section 49(1) of the Employment Act, 2007 provides;
- “Where in the opinion of a Labour Officer summary dismissal or termination of a contract of an employee is unjustified, the Labour Officer may recommend to the employer to pay the employee any or all of the following – . . .”
32. Relatedly, under Section 50 of the Act provides;
- “In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of Section 49.”
33. Needless to belabour, both the Labour Officer and the Employment and Labour Relations Court are guided on how to exercise the discretion reposed in them by law which is not extended to the Public Service Commission.
34. In its decision rendered on 27<sup>th</sup> February, 2023, the Public Service Commission invoked the provisions of Section 49(1)(c) of the Employment Act, 2007 without citing any constitutional or legislative or other legal justification as it is neither a labour officer nor the Employment and Labour Relations Court.
35. The Commission is by so doing assuming the role of a court of law or the Labour Officer which has neither constitutional nor legislative underpinning and thus in the court’s view exceeded its mandate.
36. Finally, on enforceability of the decisions of the Public Service Commission, Section 89 of the Public Service Commission Act provides that;
1. Any person who is affected by the decision of the Commission made under this part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162(2)(a) of the Constitution.
37. Notably, this provision is not obligatory. This is perhaps because Section 89(2) threatens disciplinary action against persons who refuses, fails or neglects to implement the Commission’s decisions.
38. Having found that the Public Service Commission exceeded its mandate by invoking the provisions of Section 49(1)(c) of the Employment Act, the court is not persuaded that the award herein is adoptable as a judgment of this court.
39. Consequently, the Notice of Motion dated 29<sup>th</sup> February, 2024 is declined with no orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MAY 2024**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

