



**Sweta v County Government of Kakamega & 3 others (Employment and Labour Relations Cause E023 of 2023) [2024] KEELRC 1554 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1554 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E023 OF 2023**

**JW KELI, J  
JUNE 20, 2024**

**BETWEEN**

**JOSEPH AGINGU SWETA ..... CLAIMANT**

**AND**

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

**THE SECRETARY, KAKAMEGA PUBLIC SERVICE BOARD, KAKAMEGA  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**KAKAMEGA PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**CECM FOR PUBLIC SERVICE AND ADMINISTRATION KAKAMEGA  
COUNTY ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant, following the refusal by the Respondents to reinstate him to the position of Works Officer 1 in Kakamega County Public Service as ordered by the Public Service Commission, on the 17<sup>th</sup> November 2023 filed the Memorandum of Claim dated 15<sup>th</sup> November 2023 supported by his verifying affidavit of an even date, seeking the following reliefs: -
  - a. A declaration that the termination of the Claimant's employment was unfair, wrongful, unprocedural, and ultimately unlawful.
  - b. An order directing the Respondents to reinstate the Claimant as Works Officer I as per the decision of the Public Service Commission delivered at Nairobi on the 28<sup>th</sup> of July 2023.
  - c. An order directing the Respondents to pay the Claimant accumulated salary arrears from termination to reinstatement date.
  - d. A declaration that the respondents are in contempt of Section 89(2) of the Public Service Act.



- e. Costs of this suit be awarded to the Claimant with interest at Court rates from the date of filing this claim.
  - f. Any other relief this Honourable Court may deem fit to grant.
2. The Claim was accompanied by the Claimant's list of witnesses dated 15<sup>th</sup> November 2023, the Claimant's undated witness statement, a list of documents dated 15<sup>th</sup> November 2023, and his bundle of documents (JAS -1a, 1B, 2, 3, 4, 5, 6, 7A, 7b, 8a).
  3. The Respondents in objection to the Claim on 11<sup>th</sup> March 2024 filed a Memorandum of Response dated 9<sup>th</sup> March 2024, accompanied by the witness statement of Catherine Gathoni Otenyo dated on an even date, and the list of documents of an even date and one document enclosed being an extract of the Auditor General's Report for the year ending 30<sup>th</sup> June 2022.
  4. The Claimant on 13<sup>th</sup> March 2023 filed a further affidavit sworn on an even date in answer to the Respondents' Memorandum of Response.

### **Claimant's Case**

5. The Claimant was appointed as a Works Officer III on 7<sup>th</sup> April 1999 and rose through the ranks to the position of Works Officer I under the Lugari County Council until 2011 when he was transferred to the defunct Kakamega Municipal Council in the same capacity vide a letter Ref: C/1358XIII (122) of 3<sup>rd</sup> May 2011(JAS2).
6. By dint of the Transitional and consequential provisions in the 6<sup>th</sup> Schedule of the Constitution as regards the defunct Local Authorities, he was absorbed by the County Public Service of Kakamega as a Works Officer I in 2013.
7. He was on 23<sup>rd</sup> December 2012 until 4<sup>th</sup> October 2020 appointed as a County Chief Officer; and from 5<sup>th</sup> October 2020 until 6<sup>th</sup> March 2022, engaged as a Chief Officer of Roads, Transport, and Energy (JAS4).
8. On 7<sup>th</sup> March 2022, the former Kakamega County Governor extended the term to 31<sup>st</sup> December 2022 (JAS5) which appointment was stated to be terminated on the appointment of new Chief officers according to Section 45(10)(a) and (b) of the County Governments Act or by effluxion of time whichever was earlier.
9. On 15<sup>th</sup> December 2022, the County Secretary informed the Claimant of the impending expiration of his contract as Chief officer on 31<sup>st</sup> December 2022(JAS6) to wit the Claimant wrote to the 2<sup>nd</sup> Respondent to be redeployed to his permanent and pensionable position (JAS 7a) considering the Policy Letter by the Board of 16<sup>th</sup> April 2021 to the effect that employees engaged on a permanent and pensionable basis who were appointed on a contractual basis to senior positions would revert if they opted to, to their previous position on the termination of the contract engagement (JSA7b).
10. The Claimant's case is that upon taking up the Chief Officer's position he was assured he would revert to his permanent and pensionable position as was practice in the county. The Claimant states that other employees such as Eng. Philip Otenyo, Kelvin Mwenda Marangu, and Frandina Kavere, who had previously served as Chief officers as the Claimant, reverted to their permanent and pensionable positions.
11. The Claimant wrote several letters that went unanswered on his reinstatement (JAS8a and 8b), only on 15<sup>th</sup> February 2023 through a letter Ref; CGKK/PSA/HR/199900xxxxx, from the Chief Officer



- Public Service of the County, communicating the decision of the County Service Board through the Secretary to decline to re-engage the Claimant to his position as a Works Officer I(JAS9).
12. The Claimant appealed against the decision by the Board of 15<sup>th</sup> February 2023, for violating the EACC's Circular EACC 7/10/1/Vol IV (8) of 22<sup>nd</sup> September 2022 on the management of existing county staff, new recruitment pending bills in the county by incoming governors (JAS10).
  13. The Claimant's appeal to the Public Service Commission was successful and the Respondents refused to reinstate the Claimant despite many reminders.
  14. The Claimant asserts that the Respondent breached his rights under Article 27 of the Constitution and Section 5(2) & (3) of the Employment Act by discriminating against him and violating the doctrine of legitimate expectation.
  15. The Claimant also asserts that the Respondents violated sections 59, 78, and 79 of the County Governments Act on how a Permanent and pensionable employee can exit service and states that his termination was unfair, and occasioned him great economic loss, damage, and prejudice in his financial affairs.
  16. The Claimant asserts that the assertion that he was deemed to have retired from his position was untrue and he was not on a secondment basis; the voluntary retirement clause only applied to seconded employees under Section 42(6) of the Public Service Act.
  17. He asserts that his position was as a Work Officer I and has never been filled and he was not a Ward Administrator to be reinstated as such.
  18. The Claimant states that the County has continued to employ different persons as evidenced on its website and cannot therefore be said to be trying to comply with the Auditor's Report to curb the wage bill since even after the alleged report was published, the Respondents in the period between 19<sup>th</sup> November 2022 to 19<sup>th</sup> January 2024 have had many job advertisements (JA1a and JA 1b).
  19. The Claimant asserts that he is aware that there were persons in his position who were absorbed back into their jobs and it is discriminatory for the Respondents to draw the line when it comes to his case.
  20. The Claimant states that he was a permanent and pensionable employee and not a new hire and the reasons for Budgetary constraints advanced by the Respondents are not legal reasons to deny his reinstatement.
  21. He asserts that he has worked hard for the county without any disciplinary issues and that the move to deny him his pension is unfair and illegal, that he still has a few years on his contract and is entitled to his pension which he has worked long for.
  22. He further asserts that the Court has jurisdiction to determine his claim.

### **Respondent's Case.**

23. It was the Respondents' case that, they were still reconsidering the Claimant's reinstatement when he appealed to the Public Service Commission.
24. That the Respondents are unable to enforce the PSC's decision to reinstate the Claimant due to budgetary constraints, as once the Claimant took over the Chief Officer's position, the Respondents filled the role of Ward Administrator and there is no vacancy existing presently.
25. That the Respondent cannot be reinstated without an adequate budget to remunerate the Claimant going by the economic constraints facing the national and County government.



26. The respondents further assert that the Claimant stayed in secondment exceeding the Statutory period of six years and it was deemed that he had voluntarily retired from his position and as such he cannot be reinstated to his old position.
27. The respondents assert that owing to the report of the Auditor General which they state determined that the 1<sup>st</sup> Respondent had an over-established staff in the year ended 30<sup>th</sup> June 2022, resulting in a huge wage bill, contrary to the Public Finance Management ([County Governments Act](#)) Regulations 2015, they are constrained to reinstate the Claimant.
28. The Respondents aver that they can compensate the Claimant for his services accordingly.
29. The Respondents assert that the Court lacks jurisdiction to determine the prayers (a), (b), and (c) of the Claim to wit (a)A declaration that the termination of Claimant's employment was unfair, wrongful, unprocedural, and ultimately unlawful, (b)A declaration that the respondents are in contempt of Section 89(2) of the Public Service Act and (c)An order directing the Respondents to pay the Claimant accumulated salary arrears, allowances and other benefits from the date of termination to reinstatement.
30. The Respondents seek that the claim be dismissed.

### **Written Submissions**

31. The parties consented and the Court directed that the Claim be canvassed by way of written submissions. The parties complied. The Claimant's written submissions dated 1<sup>st</sup> April 2024 were filed by Malalah & Company Advocates on 12<sup>th</sup> April 2024. The Respondents' undated written submissions were filed by Lutta & Company Advocates on 5<sup>th</sup> May 2024.

### **Determination**

#### **Issues for determination**

32. The Claimant identified the following issues for determination in the claim: -
  - a. Was the Claimant a permanent and pensionable employee of Kakamega County.
  - b. Was the termination of his employment lawful.
  - c. Is the Claimant entitled to the reliefs sought.
33. The Respondent identified the following issues for determination in the claim: -
  - a. Preliminary issues
    - a. Whether the Claimant's further affidavit dated 13<sup>th</sup> March 2024 is defective.
    - b. Whether this Honourable has jurisdiction to grant orders not granted by the Public Service Commission.
  - a. Substantive issue
  - c. Whether the Claimant is entitled to remedies sought.
34. The Court having perused pleadings by the parties and their submissions was of the considered opinion that it was not in dispute that the cause of action was the failure of the Respondent to reinstate the Claimant back to his position as Works Officer 1, the position which he held before appointment



as Chief Officer of the 1<sup>st</sup> Respondent. It was also not in dispute that the Claimant had served as a Chief Officer from 23<sup>rd</sup> December 2015 to 31<sup>st</sup> December 2022 when his last fixed contract expired. It was also not in dispute that the Claimant had appealed to the Public Service Commission which had exercised its mandate under section 77 of the County Government Act and section 86 of the Public Service Commission Act and determined the dispute with finality and in its decision dated 28<sup>th</sup> July 2023 C- JASIB stated among others,

“the Commission allows the appeal regarding the prayer for reinstatement of the Appellant as Works Officer 1, a position he held prior to appointment as chief officer. a. Denies the request for promotion.”

35. I find this is the same cause of action in the instant case save that the Respondent failed to reinstate the Claimant to work as held by the Commission. Taking into consideration the prayers in the suit and the Parties’ written submissions, the Court holds the issues placed by the parties for determination before it was as follows: -
- i. Whether the Claim is properly before the Court.
  - ii. Whether this Honourable Court has jurisdiction to grant orders not granted by the Public Service Commission.
  - iii. Whether the Claimant is entitled to remedies sought.

#### **Whether the Claim is properly before the Court**

36. As stated above, the cause of action was based on the refusal by the Respondents to reinstate the Claimant back to the position of Works Officer 1 held in the County Government before he was appointed as Chief Officer. There was no appeal against the decision of the Public Service Commission which ordered the reinstatement.
37. Section 77 of the County Government Act provides:

“77. Appeals to the Public Service Commission (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in the exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision. (2) The Commission shall entertain appeals on any decision relating to the employment of a person in a county government including a decision in respect of— (a) recruitment, selection, appointment, and qualifications attached to any office;(e)retirement and other removal from service; or any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard. (5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a disciplinary case may apply for review and the Commission may admit the application if— (a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or(b) there is an error apparent on record of either decision.”

There was no evidence of such application for review of the Commission decision. The decision of the Commission remains valid.



38. Section 88(4) of the Public Service Commission provides: “

“(4) Despite the right of appeal or the right to apply for review by this Part, the implementation of the decision shall not be deferred or suspended pending the determination of the appeal or the application for review.”

39. The enforcement of the decision of the Commission is as provided for under section 89 of the Public Service Commission Act to wit:

“89. Enforcement of appeal decision (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. (2) Any person who refuses, fails, or neglects to implement the Commission’s decisions is liable to disciplinary action by the applicable laws including removal from office.”

40. Consequently, I hold and determine that the Public Service Commission (PSC) having exercised its statutory mandate and determined the cause of action with finality and there being no appeal, it was res judicata to file a similar cause before this Court. Under the doctrine of exhaustion and Article 159 (2)(c) of the Constitution to wit:-

“alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”

The Court is obliged to respect and promote alternative dispute resolution mechanisms.

41. The mandate of PSC to determine disputes under the County Governments Act has been recognized by the court. The superior courts of Kenya have unanimously upheld the decision of the Court of Appeal in the Speaker of the National Assembly v James Njenga Karume [1992] eKLR to wit:-

“where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

42. The mandate of PSC to determine disputes under section 77 of the County Governments Act is an alternative justice system. The Court is obliged to respect that system under Article 159 (2)(c) of the Constitution (*supra*). The Court of Appeal in the case of Secretary, County Public Service Board & Another vis- Hulbbhai Gedi Abdille (2017) eKLR in allowing an appeal against a decision of the High Court which had assumed jurisdiction held that:-

“Where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the Court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime ... in our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance”. This is just but one of the numerous decisions to the same effect.

43. The Court holds that consideration of the merits of the reinstatement order in the absence of an appeal would be tantamount to undermining the statutory mandate of PSC. The Court will thus stay away from considering the merits of the reinstatement in this judgment for lack of jurisdiction.



Whether this Honourable has jurisdiction to grant orders not granted by the Public Service Commission

44. Having held the claim was improper, the actual cause of action having been determined by a body with the statutory mandate, I have no jurisdiction over the same cause of action and/or to grant orders outside what the Public Service Commission granted after consideration of the complaint by the Claimant.

**Whether the Claimant is entitled to remedies sought.**

45. The Claimant has sought the following reliefs:-
- a. A declaration that the termination of Claimant 's employment was unfair, wrongful, unprocedural, and ultimately unlawful.
  - b. An order directing the Respondents to reinstate the Claimant as Works Officer I as per the decision of the Public Service Commission delivered at Nairobi on the 28<sup>th</sup> July 2023.
  - c. An order directing the Respondents to pay the Claimant accumulated salary arrears from the date of termination to reinstatement date.
  - d. A declaration that the respondents are in contempt of Section 89(2) of the *Public Service Act*.
  - e. Costs of this suit be awarded to the Claimant with interest thereon at Court rates from date of filing this claim.
  - f. Any other relief this Honourable Court may deem fit to grant.

46. The enforcement of the decision of the PSC is as provided for under 89 of the *PSC Act* to wit:-

“89. Enforcement of appeal decision (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. (2) Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.”(emphasis added)

The Claimant ought to have approached the Court for enforcement of the decision of the Commission as provided for under section 89 of the *PSC Act* and not by way of a new cause with new prayers on the already determined dispute.

47. The Court holds that it has no jurisdiction over such cause of action pursuant to section 77 of the *County Governments Act* or to grant any remedy outside the unchallenged decision of PSC. The Court can only exercise enforcement jurisdiction under section 89 (4) of the *PSC Act* to wit;

“89. Enforcement of appeal decision (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. (2) Any person who refuses, fails or neglects to implement the Commission's decisions is liable to disciplinary action in accordance with the applicable laws including removal from office.”



48. The Court perused the *PSC Act* and found that the procedure of enforcement of the PSC decision is not provided. The Employment and *Labour Relations Act (Procedural) Rules* provides in Rule (7)(3):-
- “Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court .’
49. The Claimant among the many prayers, sought for an order of enforcement of the decision of PSC as follows:
- “ An order directing the Respondents to reinstate the Claimant as Works Officer I as per the decision of the Public Service Commission delivered at Nairobi on the 28<sup>th</sup> July 2023.”
50. In response to the issue, the Respondent vide witness statement of Catherine Otenyo, admitted that they had failed to implement the PSC decision and relied on the Report the Auditor General for the year 2022 stating the County Government was dealing with inflated wage bill. The Court finds that this issue was not raised before the PSC which heard and determined the case. On page 2 of the decision, the Respondents’ case before PSC and the Court noted the issue of inflated wage bill was not raised. This is an afterthought defense. Again there is no appeal against the PSC’s decision before me on the merits of the reinstatement.
51. Applying rule 7 (3) of *Employment and Labour Relations Act (Procedural) Rules*, I find that the prayer for an order directing the Respondents to reinstate the Claimant as Works Officer I as per the decision of the Public Service Commission delivered at Nairobi on the 28<sup>th</sup> July 2023 was available to the Claimant under the claim.
52. The Court adopts the decision of the Public Service Commission Dated 28<sup>th</sup> July 2023 as a judgment of the Court.
53. The Respondents are ordered to comply with the reinstatement Order and ensure that the Claimant is reinstated to the position of Works Officer 1 within 7 days of this Judgment.
54. Costs to the Claimant payable by the Respondents.
55. All other prayers are disallowed.
56. It is so Ordered.

**DATED, DELIVERED, AND SIGNED VIRTUALLY FROM MOMBASA THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**J.W. KELI,**

**JUDGE.**

Virtually in the presence of

For Claimant : - Ms. Mburu Advocate

For Respondents: - Absent (Firm was logged in but silent)

