Jefwa v County Government of Kilifi & another (Petition 1 of 2023) [2024] KEELRC 1835 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1835 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI

PETITION 1 OF 2023

AK NZEI, J

JULY 11, 2024

BETWEEN

ARNOLD MKARE JEFWA ..... PETITIONER

AND

COUNTY GOVERNMENT OF KILIFI & ANOTHER & ANOTHER & ANOTHER & ANOTHER ..... RESPONDENT

JUDGMENT

1. By a Petition dated 4th January 2023 and filed against the 1st and the 2nd Respondents, the Petitioner sought the following reliefs:-

   a. A declaration that:-

      i. a letter dated 8/11/2022 sending the Petitioner on compulsory terminal leave was illegal, null and void for violating the Petitioner's rights to fair labour practices under Article 41 of the *Constitution*, and

      ii. the Petitioner's termination was unfair and/or unlawful.

   b. An order for reinstatement of the Petitioner as the County Secretary Kilifi County Government, without loss of benefits and victimization and/or interference with his employment by the Respondents without following due process of law.

   c. In the alternative to (b) above, the Respondents to create for the Petitioner a portfolio and/or position within Kilifi County Government equivalent to the Petitioner's job group (T) with similar benefits and renumeration as the County Secretary.

   d. In further alternative to (b) and (c) above, the Respondents be compelled to pay the Petitioner dues as follows:-

i. salary in lieu of notice .....ksh. 274,000

ii. general damages for unfair termination (12) months @ ksh. 274,000)..... .....ksh. 3,288,000

iii. unexpunded contract (from September 2022 to September 2023 12 months @ ksh. 274,000).....ksh. 3,288,000

iv. NHIF for the unexpounded contract 12 months @ ksh. 1,700)..... .....ksh. 20,400

v. leave days for the unexpounded contract (26/30X274,000) .....ksh, 237,466.70

Total ksh. 7,107,466.70

e. Interest on (d) above as Court rates.

f. An order of permanent injunction restraining the Respondents from terminating the Petitioner's contract until the completion on 30/9/2023 without reasons or following due process.

g. Certificate of service, and

h. The Respondents to pay costs of the petition together with interest thereto from the date of judgment until payment in full.

i. Such other reliefs as the Court shall deem fit to grant in the circumstances.

2. The Petitioner pleaded that he was the Kilifi County Secretary until his termination, having been appointed to the position vide a letter of appointment executed on 22/2/2018; and that his termination was abrupt and did not follow the procedure provided for in law. The Petitioner further pleaded:-

a. that having been appointed in 2018, the Petitioner's employment was to determine in March 2023 pursuant to Section 44(2E) of the *County Government Act*.

b. that vide a letter dated 30/8/2022, the Petitioner's contract was extended for a further period of six (6) months, hence the contract was set to expire in September 2023, but after barely two months, the 2nd Respondent sent the Petitioner on compulsory terminal leave vide a letter dated 8/11/2022.

c. that the Petitioner wrote a letter on 9/11/2022 outlining his dissatisfaction with the terminal leave, but his letter did not elicit any response.

d. that the Petitioner was never served with any notice prior to the termination, and was not given an opportunity to be heard.

e. that the Petitioner's termination ought to have complied with not only the *Constitution* (Article 27(1) on equality and Article 41(1) (on fair labour practices) and the *Employment Act*, but also the County government Act.

f. that the Petitioner's termination was without justification as grounds for removal of a County Sectary as set out in Section 44(3A) of the *County Government Act* did not exist, and that even where grounds for removal exist, the Secretary must be informed of such reasons (intended removal) in writing, which was not the case with the Petitioner.

g. that notice of termination is a statutory right under Sections 35 and 36 of the *Employment Act*, and that the Petitioner's termination did not comply with the said statutory provisions.

h. that the Petitioner's termination was unfair, unlawful for failure to comply with the relevant labour laws, and violated the Petitioner's Constitutional rights.

3. The Petition was opposed by the Respondents. The 1st Respondent filed a replying affidavit sworn by Martin Mangi Mwaro, the 1st Respondent's Acting County Secretary and Head of County Public Service, on 7/2/2023. It was deponed in the said replying affidavit that according to documents exhibited by the Petitioner (letter of appointment dated 22/2/2018), the Petitioner was engaged by the 1st Respondent for a term commensurate to the term of the Governor, his Excellency Amason Jeffah Kingi; and that the Petitioner accepted the appointment on 1/3/2018.

4. It was further deponed on the part of the 1st Respondent:-

a. that the 2nd Respondent, having been elected on 9/8/2022, and having been sworn into office as Governor of Kilifi County on 25/8/2022, extended the Petitioner's contract of service by six (6) months from 30/8/2022.

b. that vide a letter dated 8/11/2022, the 2nd Respondent released the Petitioner to proceed on leave.

c. that the Petitioner was in the employment of the 1st Respondent; and had not been removed from office as contemplated in Sections 44(3A) (3B) and (3C) of the *County Government Act* and Sections 35 and 36 of the *Employment Act*. That the Petitioner has not demonstrated how the Respondents have violated the said provisions of the law.

d. that the Petitioner has continued to draw a salary from the 1st Respondent and will, after expiry of the extension of his contract, be entitled to his benefits.

5. The 2nd Respondent filed a replying affidavit, sworn by himself on 9th January 2023, and echoed the averments made in the 1st Respondent's replying affidavit reproduced in paragraphs *3* and *4* of this Judgment. The 2nd Respondent further deponed that the petition herein does not raise a constitutional moment, that it is a simple claim for compensation for an alleged breach of contract. That the procedure for such claims is not to approach the constitutional jurisdiction of this Court.

6. Paragraph 1 of the Petitioner's letter of appointment dated 22/2/2018 reads:-

> "You will be engaged on contract for a term commensurate to the term of the Governor, commencing 1st March 2018."

7. The Petitioner duly executed an acceptance of the appointment and the terms and conditions indicated therein on 1/3/2018.

8. Upon expiry of the Petitioner's contract term in August 2022 pursuant to election of a new Governor, the Petitioner's contract of service was, vide a letter dated 30/8/2022, extended for a period of six (6) months from the date of the letter. The letter, signed by the new Governor, stated in part:-

> "Following the expiration of the terms of your contract of employment, I am pleased to convey the decision of the County Government of Kilifi to extend your contract under the same terms of service for a period of six(6) months from the date of this letter."

9. The said letter is copied to the Secretary, County Public Service Board, County Government of Kilifi.

10. Vide the 1st Respondent's letter to the Petitioner dated 8/11/2022 and signed by the 2nd Respondent (the new Governor), the Petitioner was released to proceed on leave, and was directed to hand over to the 1st Respondent's Director of Administration. The letter reads in part:-

> " A decision has been made that you proceed on leave. While on leave, you may be called upon to clarify certain issues when need arises. After the expiry of the extension of your contract, you will be entitled to your benefits. The benefits will be released upon satisfactory clearance.
>
> You are directed to hand over to the Director of Administration Martin M. Mwaro, who will hold the office in acting capacity until a substantive holder of the office is appointed."

11. The letter was copied to the County Public Service Board. It is this letter that sparked off the proceedings herein. The Respondents deponed that during the leave period referred to in the said letter, the Petitioner remained an employee of the 1st Respondent, and drew a salary from the 1st Respondent. The Petitioner never disputed this fact. Indeed, the letter dated 8/11/2022 did not state that the Petitioner was proceeding on an unpaid leave, and did not state that the Petitioner was proceeding on compulsory leave. Further, no charges or allegations of wrongdoing were levelled against the Petitioner by his employer (the 1st Respondent).

12. Parties filed written submissions on the Petition pursuant to the Court's directions in that regard, which I have considered.

13. Issues that fall for determination, in my view, are:-

    a. whether the Petitioner has demonstrated violation or threatened violation of his fundamental rights guaranteed in the *Constitution* of Kenya.

    b. whether the Petitioner's employment was unlawfully or unfairly terminated by the Respondents.

    c. whether the Petitioner is entitled to the reliefs sought.

14. On the first issue, and as rightly deposed by the 2nd Respondent, the petition herein does not raise any constitutional moment. It is a simple claim for compensation arising from an alleged breach of an employment contract. The petition does not demonstrate any question of interpretation or application of the *Constitution*. The Court of Appeal stated as follows in the case of *Summaya Athman Hassan v Paul Masinde Simidi & Another* [2019] eKLR:-

> " It is evident that the petition was hybrid combining violations of various rights, employment rights under the *employment Act* and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of a certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the *Employment Act*.
>
> The Article 41 rights are enacted in the *Employment Act* and *Labour Relations Act*. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the *Constitution* for enforcement of contractual rights governed by the *Employment Act* without seeking a declaration of invalidity of the provisions of the *Employment Act* or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the *Constitution*. We adopt and uphold

the general principle in the persuasive authority in Barbara De Klerk (*supra*) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the *Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the Communication's Commission Case (*supra*)."

15. Still on the same issue, it was stated as follows in *Francis Atonya Ayeka V Kenya Police Service & Another* [2017] eKLR:-

> " ...the cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.
>
> A litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the *Constitution* on the right to fair labour practices. The purpose of the *Constitution* is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the *Labour Relations Act* are primary.
>
> The primary legislation should not be circumvented by seeking to rely directly on a Constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to Constitutional rights."

16. I find and hold that the Petitioner's petition herein does not demonstrate violation or threatened violation of the Petitioner's fundamental rights and freedoms as guaranteed in the *Constitution*. It is a simple and/or ordinary employment claim.

17. On the second and third issues, it is clear from documents exhibited by the Petitioner that he was employed by the 1st Respondent vide a letter of appointment dated 22/2/2018, and that his contract of service was fixed, in that it was commensurate to the term of the appointing Governor. The appointing Governor's term came to an end on 9/8/2022 upon election of the 2nd Respondent as the Governor. On 30/8/2022, the Petitioner's contract was extended for a fixed term of six months. The Petitioner has not demonstrated that his contract as extended was either unfairly terminated by the Respondents or was threatened with termination. All that the Respondents did was to release the Petitioner to proceed on leave, and assured him that his benefits would be paid upon expiry of the six (6) months extended contract period. The Petitioner did not demonstrate illegality or unfairness in what the Respondent's did. His fixed term contract, including the six months' extension, lapsed by effluxion of time. This being the case, the reliefs sought by the Petitioner are not available to him, and cannot issue. The Petition must fail.

18. Court decisions on the legal implication of termination of fixed term contracts by effluxion of time abound. Counsel for the first Respondent referred the Court to the case of *Tranparency International Kenyav Teresa Carlo Omondi* where the Court stated:-

> " 24. We quote the findings of the learned Judge with approval and hold that there are no reasons that we can discern, that would make one depart from those findings. Indeed, the doctrine of legitimate expectation does not arise in the renewal of a fixed term contract and its non-renewal cannot constitute unfair termination or dismissal. Having noted that the Respondent was in employment under a fixed term contract and that the contract came to an

end at the appointed time, we are of the view that any relief sought by the respondent on the basis of her assertion that her employment was unfairly terminated was automatically not available to her. The Court of Appeal decision in Registered Trustees of the Presbyterian Church of East Africa & Another v Ruth Gathoni Ngotho [2017] eKLR lends credence to our holding, where the Court pronounced itself thus:-

"29. Bearing the foregoing in mind, we note that a fixed term contract carries no right, obligation or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the Respondent's contract ought not to have been maintained.

This is in relation to the salary of the months 5th April upto May 2010. Similarly, since the Respondent's contract came to an end by effluxion of time, any claim for wrongful termination could not be maintained."

19. Further, the Court of Appeal stated as follows in *Registered Trustees De La Salle Christian Brothers T/a St. Mary's Boys Secondary School v Julius M. D Bainin* [2017] eKLR as follows:

> " In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed is the same thing as demanding from an employer to give reasons why a potential employee should not be employed....."

20. The Petitioner's contract of employment having been a fixed term contract which came to an end by effluxion of time, the reliefs sought in the Petition herein cannot issue. The Petition is devoid of merit, and is hereby dismissed.

21. Each party will bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH JULY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the

applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Petitioner

.....for 1st Respondent

..... for 2nd Respondent