



**Mohumed v Wajir County Assembly Service Board (Cause  
E094 of 2023) [2024] KEELRC 1813 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1813 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E094 OF 2023  
BOM MANANI, J  
JULY 8, 2024**

**BETWEEN**

**HABON KAHIYE MOHUMED ..... CLAIMANT**

**AND**

**WAJIR COUNTY ASSEMBLY SERVICE BOARD ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The Claimant instituted these proceedings through a Statement of Claim dated 9<sup>th</sup> February 2023. She avers that the Respondent hired her services as a secretary through a letter of appointment dated 25<sup>th</sup> September 2017. She contends that the appointment was subject to a probationary period of six (6) months.
2. She contends that upon the lapse of the six (6) months probationary period, the Respondent retained her services. Her salary was reviewed annually and as at May 2022, it stood at Ksh. 92,020.00 per month.
3. The Claimant avers that on 10<sup>th</sup> June 2022, the Respondent purported to issue her with a letter of confirmation of her contract of service. According to her, this letter was of no legal effect since her contract had already been constructively confirmed after the six (6) months probationary period lapsed sometime in April 2018.
4. The Claimant contends that after the lapse of the probationary period, she attained permanent and pensionable status. As such, she had legitimate expectation that if the Respondent was to terminate the relation, it would only do so for good cause and in accordance with due process.
5. The Claimant avers that at the close of August 2022, the Respondent unlawfully withheld her salary for the month. When she inquired from the Respondent's clerk about this development, she was verbally informed that her services were no longer required since her contract had lapsed.



6. The Claimant contends that the decision to terminate her contract was without prior notice to her. She further contends that the Respondent did not state the reasons for the decision. Neither was she accorded fair procedure in the process.
7. The Claimant prays that the court declares the decision to terminate her contract illegal. In addition, she prays that the court issues an order reinstating her back to her employment. She further prays for orders that the Respondent pays her: salary for August 2022; general damages; and costs of the case.
8. The Respondent filed a defense disputing the claim. However, it did not present evidence in the case.

### **Issues for Determination**

9. From the pleadings and evidence on record and the submissions by the parties, the following are the issues for determination:-
  - a. Whether the court has jurisdiction to entertain the dispute.
  - b. Whether the suit is incompetent on account of the doctrine of exhaustion.
  - c. Whether the Respondent's decision to terminate the Claimant's contract of service was unlawful.
  - d. Whether the Claimant is entitled to the reliefs that she seek through the Statement of Claim.

### **Analysis**

10. The Respondent did not call evidence in the cause. Instead, it opted to fight the claim on points of law.
11. The first point of law which the Respondent takes related to jurisdiction. It contends that the case ought to have been handled by the Magistrate's Court. As such, this court lacks the requisite jurisdiction to entertain it.
12. The Respondent relies on section 29(3) of the Employment and *Labour Relations Act* (ELRC Act) together with Gazette Notice No. 6024 of 2018 to advance this argument. By this notice, all employment disputes in which the employee's monthly salary is less than Ksh. 80,000.00 are to be handled by the Magistrate's Court.
13. The Respondent also relies on the case of *AVC Management Ltd v Emmanuel Jilani (2022) eKLR* (the AVC case), to advance its aforesaid objection. However, it is important to point out that the Employment and Labour Relations Court (the ELRC) did not transfer the suits in the AVC case for want of jurisdiction by the trial court to hear them. Rather, it (the ELRC) considered the convenience of the parties in making the order of transfer of the matters to a court that was within the local limits of the employer. As such, that decision is not helpful in resolving the jurisdictional issue that has been raised by the Respondent.
14. That said, it is important to note that the jurisdiction of the ELRC to entertain employment disputes stems from article 162 of *the Constitution*. This jurisdiction is amplified by section 12 of the ELRC Act which confers on the court both original and appellate jurisdiction over employment disputes.
15. The fact that section 29 of the ELRC Act empowers the Chief Justice to appoint magistrates to hear certain employment disputes does not take away the ELRC's constitutional and statutory jurisdiction to hear and determine such disputes so long as they are civil in nature. Indeed and as section 29(1) of the ELRC Act indicates, such conferment of jurisdiction on the Magistrate's Court was only intended



to facilitate reasonable, equitable and progressive access to judicial services in all counties. It was not intended to take away the ELRC's original jurisdiction to entertain the disputes.

16. As such, employment matters whose threshold is below a salary of Ksh. 80,000 per month can still be handled by the ELRC. As such, the objection to the court's jurisdiction on this account fails.
17. The second point of law which the Respondent raises relates to whether the suit is incompetent for want of exhaustion of alternative dispute resolution mechanisms. The Respondent argues that the Claimant ought to have referred her case to the Public Service Commission as required under section 77 of the [County Governments Act](#) and section 85 of the [Public Service Commission Act](#).
18. In response, the Claimant contends that these provisions do not apply to her case. In her view, the provisions only apply to County employees who are in the service of the County Executive but not those serving in the County Assembly.
19. The Claimant appears to rely on the fact that whereas section 77 of the [County Governments Act](#) expressly refers to disputes emanating from decisions by the County Public Service Board as subject to appeals to the Public Service Commission, it does not make reference to disputes relating to County Assembly Service Boards. In her view, this necessarily means that the section does not cover employment disputes which relate to County staff who are in the service of County Assemblies.
20. The Claimant's argument may be attractive. However, it is misplaced. It is as a result of selective application of the statute in question.
21. Section 77(1) of the [County Governments Act](#) reads as follows:-

"Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in 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." Emphasis added by underlining.

22. In my respectful view, this provision requires appeals emanating from decisions made by any agency in purported exercise of disciplinary control over any county public officer to be presented to the Public Service Commission. This includes decision by individuals and agencies who are not the County Public Service Board.
23. It is noteworthy that the section deals with decisions against "any county public officer." Under section 2 of the Act, the term "County Public Officer" means any person appointed by the County Government and holding or acting in any county public office whether paid, unpaid, or on contractual or permanent terms but does not include a person engaged on a part-time basis in a county public body paid at an hourly or daily rate. The same provision defines the term "County Government" to mean a County Government as provided under Article 176 of [the Constitution](#). And article 176 of [the Constitution](#) defines the term "County Government" as connoting a County Assembly and a County Executive. Undoubtedly therefore, the term "County Public Officer" in section 77 of the Act covers employees serving both in the County Assembly and County Executive.
24. But even if I was wrong in the above analysis, I believe that section 85 of the [Public Service Commission Act](#) resolves the ambiguity in section 77 of the [County Governments Act](#). The section provides as follows:-

"The Commission shall, in order to discharge its mandate under Article 234(2)(i) of [the Constitution](#), hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of:-



- a. recruitment, selection, appointment and qualifications attached to any office;
  - b. remuneration and terms and conditions of service;
  - c. disciplinary control;
  - d. national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of the Constitution;
  - e. retirement and other forms of removal from the public service;
  - f. pension benefits, gratuity and any other terminal benefits; or
  - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.” Emphasis added by underlining.
25. Clearly, this section requires appeals from decisions affecting any person engaged with a County Government to be lodged with the Public Service Commission. This includes decisions which affect employees serving in a County Assembly which is one of the two components of a County Government.
  26. The Claimant relies on the decision in *John Mwivithi Mutie v Speaker Kiambu County Assembly & 2 others; County Secretary Kiambu County Government & another (Interested Parties)* [2022] eKLR which aligns with her exposition of the law on the matter. However, having regard to what I have stated above, I am not persuaded by the reasoning in the decision. As such, I arrive at the conclusion that the Claimant’s grievance was amenable to the dispute resolution mechanisms that are prescribed in section 77 of the County Governments Act as read with section 85 of the Public Service Commission Act.
  27. That said, the question for consideration is whether the doctrine of exhaustion operates to oust or merely postpone the court’s jurisdiction to entertain a dispute. In my view, the fact that a statute requires a party to a dispute to exhaust alternative dispute mechanisms before approaching the court does not mean that the court’s jurisdiction to entertain the dispute is thereby ousted. Rather, it (the jurisdiction) is postponed pending exhaustion of the alternative dispute resolution mechanism.
  28. This point is made in *Abdikadir Suleiman v County Government of Isiolo & another* [2015] eKLR when Ongaya J observed that section 77 of the County Governments Act does not oust the court’s jurisdiction to hear employment disputes from a County Government particularly where the matters raise grave allegations of illegality regarding the impugned decisions. Similarly, the decision in *RC v KKR* [2021] eKLR, underscores the fact that the doctrine of exhaustion of alternative remedies does not operate to oust but postpone the court’s jurisdiction to entertain a dispute.
  29. In effect, the court’s jurisdiction is not obliterated by provisions of a statute which provide for alternative mechanisms for dispute resolution. The jurisdiction is only held in abeyance for the duration that the parties have availed themselves the alternative mechanism for dispute resolution.
  30. Not being a question of ouster but postponement of jurisdiction, a party who wishes to object to a court entertaining a case on the ground that it should have been submitted to some other alternative dispute resolution processes in the first instance ought to raise this objection before commencement of the trial. He should not wait until the trial is concluded to flag the issue. If he does not take up the objection at the commencement of the trial, he will be deemed to have acquiesced to the court’s jurisdiction to adjudicate on the matter in lieu of submitting to the alternative dispute resolution forum.



31. The record does not show that the Respondent raised the objection that the cause ought to have been referred to the Public Service Commission for hearing and determination in the first instance on account of section 77 of the [County Governments Act](#) and section 85 of the [Public Service Commission Act](#) before the trial commenced. As such, it is deemed to have acquiesced to the court's jurisdiction to hear and determine the dispute.
32. The legal position is that if a defendant does not present evidence in a cause, the matter is deemed as undefended. This is notwithstanding that he had filed a defense to the cause (Kyalo Elly Joy v Samuel Gitahi Kanyeri [2021] eKLR).
33. However, the fact that a defendant has not presented evidence does not mean that the obligation on the Claimant to establish the unlawfulness of the defendant's actions falls by the wayside (Kyalo Elly Joy v Samuel Gitahi Kanyeri [2021] eKLR). In an employment dispute for instance, the employee/ Claimant is still obligated to provide prima facie evidence in terms of section 47 of the [Employment Act](#) pointing to the unlawfulness of the employer's/Respondent's decision.
34. The Claimant testified on oath on 30<sup>th</sup> November 2023 and 8<sup>th</sup> February 2023. During her testimony, she adopted her written witness statement which was filed together with the Statement of Claim. She stated that her first day of work with the Respondent was 2<sup>nd</sup> October 2017. She reiterated the fact that she continued in the Respondent's service until the close of August 2022 when her salary for the month was not paid.
35. She stated that when she made inquiry about this development, she was informed that her services were no longer required. It was her case that she understood her position at the Respondent's establishment as permanent and pensionable. Thus, she had expected that it could only be terminated for good cause and in accordance with fair procedure but this is not what happened.
36. In cross examination, the Claimant stated that the Respondent engaged her as a secretary. She stated that when she was employed, she was a diploma holder. However, at the time her employment was terminated, she had advanced her academic qualifications to degree level.
37. She stated that her salary at the commencement of her employment ranged between Ksh. 46,000.00 and 49,000.00. However, this had risen to approximately Ksh. 64,000.00 at the time of her exit.
38. She averred that she did not have a physical pay slip to confirm her salary range. She indicated that her pay slips were electronically uploaded on the Respondent's virtual platform. However, she never printed them for her records.
39. The Claimant stated that immediately the Respondent notified her that her services were no longer required, it (the Respondent) disabled her access to its virtual platform. As a result, she was not able to print any of her employment records including the pay slips.
40. I have considered the evidence by the Claimant. There is no doubt that the parties had an employment relationship which fell in place as from 1<sup>st</sup> October 2017. This fact is confirmed by the letter of appointment dated 25<sup>th</sup> September 2017 by which the Respondent engaged the Claimant's services as a secretary.
41. The letter shows that the engagement between the parties was initially on probationary terms for a period of six (6) months. There is no indication that this period was extended after it lapsed on 1<sup>st</sup> April 2018. However, there is evidence that the Claimant continued in the Respondent's service. As such, her contract was constructively confirmed at the close of her probationary term (Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR).



42. The record shows that the Respondent issued the Claimant with a letter dated 10<sup>th</sup> June 2022 purporting to confirm her employment. However, this was of no legal effect since the Claimant's contract had already been confirmed by operation of law immediately her probationary period lapsed and the Respondent allowed her to continue in service without reference to the probationary term.
43. As such, the Respondent's letter of 10<sup>th</sup> June 2022 was of no legal consequence. The only purpose it served was to confirm that the Claimant was still in the Respondent's employment as at June 2022.
44. The Claimant stated on oath that at the close of August 2022, the Respondent withheld her salary for that month. When she asked for an explanation for the action, the Respondent's clerk verbally informed her that her services were no longer needed. As a result, she lost her employment.
45. The Respondent did not provide evidence to controvert the Claimant's version of events. In my view, the evidence tendered by the Claimant sufficiently establishes the fact that her employment was terminated when the Respondent informed her that her services were no longer required.
46. There is nothing to suggest that other than asserting that the Claimant's services were not required, the Respondent provided a valid reason to support its decision to terminate her services. It is also evident that the Respondent did not subject the Claimant to a disciplinary process before her services were declared as no longer required. In effect, the Claimant has sufficiently demonstrated that the Respondent's decision to terminate her contract of service was unlawful.
47. Sections 41, 43 and 45 of the *Employment Act* require an employer to terminate an employee's services only for valid reasons and in accordance with fair procedure. The law requires the employer to notify the employee of the reason for his decision. This could either be: poor performance; physical incapacity; misconduct by the employee; or the operational requirements of the employer. In addition, the employer must hear out the employee before he/she is let go.
48. The *Employment Act* places the burden of justifying the decision to terminate an employee's services on the employer. Where the employer fails to discharge this burden, the termination is deemed as unlawful (*Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR).
49. There is no evidence to suggest that the Respondent informed the Claimant of the reason for its decision. There is no evidence that the Claimant was afforded a chance to defend herself before she was let go.
50. Clearly, the Respondent's decision to terminate the Claimant's contract was unlawful in so far as it failed to meet the threshold that is set by sections 41, 43 and 45 of the *Employment Act*. Accordingly, the court declares that the Claimant's contract was unfairly terminated.
51. The last issue to address is whether the Claimant is entitled to the reliefs that she seek through the Statement of Claim. I have already granted one of the reliefs by declaring the Respondent's decision to terminate her contract unlawful.
52. In addition to the above relief, the Claimant has prayed for other reliefs. These include the following:-
  - a. Salary for August 2022.
  - b. Reinstatement back to her position.
  - c. General damages.
  - d. Costs of the claim.
  - e. Any other relief which the court may deem just to grant.



53. The request for general damages for breach of contract is not permissible. As a general rule, general damages are not payable for breach of contract. This includes contracts of service (*Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR). Consequently, this request is declined.
54. The aforesaid relief having been declined, the only other reliefs that are available to the Claimant under section 49 of the *Employment Act* as read with section 12 of the ELRC Act and which are pleaded are: salary for August 2022; and reinstatement.
55. The relief of reinstatement ought to be granted quite sparingly and only in deserving cases. The Court of Appeal has emphasized that courts should generally be disinclined to grant this remedy because the employment relation is anchored on trust between the parties which is likely to have been destroyed due to the events which led to their separation. In such case, it will be undesirable to issue an order for reinstatement as this will be tantamount to forcing two individuals who have lost confidence in one another to continue relating (*Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR).
56. Notwithstanding the foregoing, the law recognizes reinstatement as one of the remedies which the ELRC may grant to an employee whose contract has been unfairly terminated. However, whilst considering whether to grant the remedy, the court is required to consider: the practicability of implementing the relief; the desires of the parties; the opportunity for the employee to secure alternative employment among other considerations (*Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR).
57. In the instant case, the Claimant expressed her desire to be reinstated to her employment. On the other hand, the Respondent did not express its view on the matter having elected not to tender evidence in the cause.
58. I have considered the fact that the Respondent is a public employer. As such, the Claimant is able to reintegrate easily without the possibility of unnecessary friction.
59. In addition, I have considered the difficulties of securing employment in the country. This renders the relief of reinstatement appropriate in the circumstances of this case.
60. Taking the above factors into account and having regard that the fact that the Claimant's contract was terminated in August 2022, approximately two (2) years back, I consider this a suitable case to order reinstatement. Consequently, the court hereby orders the Respondent to reinstate the Claimant to her previous position without loss of benefits.
61. I award the Claimant costs of the case.

### **Summary of the Award**

62. After evaluating the evidence on record and submissions by the parties, the court arrives at the following conclusion and the attendant orders:-
  - a. The court has the requisite jurisdiction to entertain the case.
  - b. The suit was not rendered incompetent for want of exhaustion of alternative dispute resolution procedures.
  - c. The Respondent's decision to terminate the Claimant's contract of service was unlawful.
  - d. The Respondent is ordered to reinstate the Claimant to her position without loss of benefits.
  - e. Costs of the case are granted to the Claimant.



**DATED, SIGNED AND DELIVERED ON THE 8<sup>TH</sup> DAY OF JULY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

**JUDGE**

