



Mghendi v Governor, Taita Taveta County & another (Cause E133 of 2023) [2024] KEELRC 1960 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1960 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E133 OF 2023**

M MBARÚ, J

JULY 4, 2024

BETWEEN

LIVERSON JULIUS MGHENDI CLAIMANT

AND

THE GOVERNOR, TAITA TAVETA COUNTY 1ST RESPONDENT

TAITA TAVETA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The claimant is a male adult. The 1st respondent is the office of the Governor, Taita Taveta. The 2nd respondent is established under the County Government Act.
2. The claim is that the claimant was appointed as County Secretary, of Taita Taveta County through a letter dated 11 March 2020. He was to serve for 4 years until 12 March 2024. The County Government Act (CGA) was amended and the County Secretaries' terms extended for 5 years. The claimant was to serve until 12 March 2025.
3. On 20 March 2023, the claimant was issued a show cause notice and interdiction letter. He was accused of changing the terms of his employment contract from a period of 4 years to 5 years and effecting changes in the Integrated Personal and Payment System (IPPD). He was accused of misleading the 2nd respondent to change the employment terms of the employees from contract to permanent and pensionable.
4. Before the interdiction, the claimant was not given a hearing. He responded to the show cause notice and noted that the changes in the terms of employment had been operationalized from 4 to 5 years upon amendments to the CGA which introduced Section 44(E). The changes to the contract had been with the full knowledge of the in-charge human resources and the 2nd respondent. The was not the custodian of IPPD and therefore court did not effect changes. The decision to change the contracts of two employees was made by the 2nd respondent and the County human resources advisory committee.



5. A disciplinary hearing was conducted by a committee of the Deputy Governor and the County Executive Committee members and on 29 May 2023 the respondents decided to retire the petitioner in public interest. Such a reason was baseless and not justified. Before taking such a decision, the claimant had 10 months left under his initial contract and 22 months under his subsequent contract.
6. Through a letter dated 29 May 2023, the 1st respondent informed the claimant that he would be paid Ksh.2, 500,000 for 10 months' salary. There was no explanation for this offer. The SRC through circular No.SRC/TS/24/6/7 had reviewed salaries for all County Secretaries effective 15 May 2023.
7. The retirement of the claimant was on 29 May 2023 after the salaries were reviewed by SRC. The 10 months' salary due to the claimant should have been calculated using the Ksh.404, 250 rate. The claimant agreed to be paid for 10 months based on his initial contract but the respondents refused to pay.
8. The claim is that there was an unfair termination of employment that lacked justification and the reasons used to terminate employment were not valid. The CGA was amended to allow the claimant to serve for 5 years and he had no access to the IPPD to make changes. On 26 November 2021, the County Executive Committee deliberated and passed a resolution to convert staff contracts from permanent to pensionable on the expiry of the existing contract subject to satisfactory performance. The matter was deliberated upon by the County human resources advisory committee where the claimant was the chair and resolved that contracts of 10 staff from the department of devolution be changed to permanent and pensionable. Hence the matters the claimant was accused of had no basis.
9. The claimant is seeking orders against the respondent for;
 - a. Declaration that his employment was terminated unfairly;
 - b. 10 months' pay for the remainder contract term Ksh.4,042,000;
 - c. 31% gratuity for 10 months Ksh.751,905;
 - d. 12 months damages for unfair termination of employment;
 - e. Interests in the awards;
 - f. Costs.
10. The claimant testified in support of his claim that the 2nd respondent has a mandate to issue him with employment contracts. Initially, he was serving under a 4 years contract ending on 12 March 2024. There was an amendment to the CGA Section 44(E), changing the term to 5 years and he had his contract changed to 5 years ending 12 March 2025. He was directed by the respondents to involve the human resources office and his contract term was changed. The human resources department made changes to the IPPD. The respondents alleged that he had a motive in the changes but no evidence was called to this effect.
11. The claimant testified that he was interdicted and called to a disciplinary hearing which resulted in a decision dated 19 May 2023 that he should be retired on public interest. The 1st respondent called him and indicated that he would be paid for 10 months pending in his initial contract but they could not agree. The claimant challenged the payment rate applied by the 1st respondent since SRC had issued a review of salaries and the rate due was Ksh.404, 200 per month with effect from 15 May 2023.
12. The claimant testified that he was ready to take his gratuity and exit employment but his due salaries under the contract were under-calculated. He filed suit to protect his rights resulting from unfair termination of employment by the respondents. The allegations against him were without basis, he did



- not change his contracts and the two employees he was alleged to have changed their contracts from term to permanent were based on a resolution of a full committee.
13. Upon cross-examination, the claimant testified that his initial contract was effective from March 2020 to March 2024 a term of 4 years.
 14. His second contract was for a term of 5 years from March 2020 to March 2025.
 15. The 5 years term contract was changed in 2022 but signed on 12 March 2020.
 16. There was an advisory to change the contract from the human resources department. There was a need for approval by the 1st respondent which was not done.
 17. The claimant testified that Peter Sakai was the payroll manager and he converted his contract from contract to permanent term based on the respondents' resolutions.
 18. Samuel Mwanyasi had his term contract converted to permanent terms. He is the one who changed the IPPD to the benefit of the claimant.
 19. The claimant admitted that his employment contract was to lapse in March 2024 and not March 2025. He was happy to negotiate for payment for 10 months and exit employment honourably but the 1st respondent declined.
 20. In response, the respondents admit that the claimant was an employee but he illegally and irregularly altered his terms and tenure of employment. He was issued with show cause notice to which he replied. He was invited to a disciplinary hearing.
 21. The tenure of the claimant's employment was not extended procedurally. The claimant, as the head of the County Public Service Board, was able to influence operations affecting the IPPD system. He was responsible for irregular changes to the contracts of 2 employees from fixed-term contracts to permanent and pensionable terms.
 22. The grounds constituting the disciplinary hearing were cogent and valid. They were substantiated but instead of termination of employment, the claimant was retired. There were valid and justified grounds for termination of employment.
 23. On the claims, the term contract allowed for termination for justified reasons. The claimant was to receive terminal dues of Ksh.2, 500,000 which was subject to tax deductions. He was not entitled to salary reviews upward and the SRC circular referred to did not apply to the claimant. The tabulation of terminal dues based on a salary of Ksh.404,200 does not apply to the claimant and the claims made should be dismissed with costs.
 24. In evidence, the respondents called Mwakio Mwangombe advocate and County Attorney who testified that the claimant was appointed through a letter dated 11 March 2020 with terms and conditions thereof. He accepted the appointment and signed the letter. The term of employment was 4 years ending 11 March 2024 but the claimant changed his contract by altering page (2) for a term of 5 years ending 11 March 2025. He further caused a change to the IPPD system to indicate that his contract ends on 11 November 2025.
 25. The claimant in his capacity as the Head of County Public Service deliberately misled the 1st respondent to illegally and irregularly change the employment terms of 2 senior employees, Samuel Mwanyasi, Director of Human Resources and Peter Salai, Payroll Manager from contract to permanent and pensionable. The claimant wrote a letter dated 14 July 2022 to the 1st respondent forwarding extracts of minutes of the County human resources advisory committee meeting held on 5 July 2022



- for their action. While referring to the minutes, the 1st respondent wrote a letter dated 28 July 2022 to the claimant seeking clarification concerning 10 employees. The Board noted that the change would only be upon the expiry of the term contracts and based on good performance.
26. In response to the 1st respondent, the claimant wrote a letter dated 29 July 2022 and indicated that;
- a. contracts expiring on 31st July 2022 should be renewed temporarily for 6 months for officers whose contracts were expiring and
 - b. For the rest, considerations would be made as and when the contracts came to an end.
27. Mwangombe testified that the 1st respondent acted on the claimant's clarification and extended Samuel Mwanyasi and Peter Salai's contracts for 6 months through letters dated 2 August 2022 effective 4 August 2022 to 4 February 2023.
28. Despite the claimant having clarified the position noted by the 1st respondent through his letter of 28 July 2022 and the 2 employees' contracts extended and before they could lapse, the claimant wrote another letter dated 31st August 2022 misleading the 1st respondent to place Samuel Mwanyasi and Peter Salai on permanent and pensionable terms relying on minutes of 5 July 2022. The 1st respondent erroneously acted on this advice from the claimant and issued appointment letters with effect from 1st September 2022.
29. Mwangombe testified that the claimant's conduct amounted to gross misconduct and abuse of office. He was issued with a notice to show cause on 20 March 2023 to explain why he was abused of office and violated *the constitution* and hence disciplinary action be taken against him for gross misconduct. The claimant responded but he failed to give satisfactory reasons and was invited to a disciplinary hearing.
30. At the disciplinary hearing, the claimant admitted to wrongdoing and pleaded with the disciplinary committee for an alternative punishment. He asked to be redeployed and in the alternative, payment of his dues to leave office. The disciplinary committee made a finding that the accusation made against the claimant was true and they recommended termination of his employment.
31. The recommendations were forwarded to the appointing authority, the 1st respondent under the provisions of Section 76(4) (c) of the CGA who retired the claimant on the grounds of public interest instead of dismissing him as recommended. The claimant was not entitled to any payment but the 1st respondent offered him ex gratia Ksh.2, 500,000 which was equivalent to 10 months basic pay. The payment was subject to tax.
32. The claim for gratuity from March 2020 to March 2023 has been subjected to Lapfund, a pension scheme of the claimant's choice. The claimant is entitled to gratuity up to the time of his employment. At the close of the hearing, both parties filed written submissions.
33. The claimant submitted that his employment was terminated on account of retirement in the public interest without any justification. In the case of *D. K. Ngagi Marete v Teachers Service Commission* [2013] eKLR, the court held that retirement in the public interest is a discretion which is susceptible to abuse and uncontained, it allows public bodies to terminate public officers' service without justification. This is reiterated in the case of *Sheikh Abubakar Bwanakai Abdallah v Judicial Service Commission & another* [2017] eKLR.
34. The claimant submitted that the allegations made against him were without foundation and he acted within his mandate, he did not change his contracts but replied on the legal amendments, the IPPD was not in his department or application and the contracts of two employees were reviewed by the 2nd respondent. Under Section 43 of the *Employment Act*, the respondent had no valid reason to justify



- the termination of his employment in the public interest. In the case of *Samson ole Kisirkoi v Maasai Mara University & another* [2018] eKLR the court held that retirement on public interest is a form of termination of employment instigated by the employer and would therefore fit the description of involuntary termination. It is the responsibility of the employer to prove the reasons for the retirement.
35. The claimant submitted that his rights were violated and his claims should be awarded with costs.
 36. The respondents submitted that the claimant changed his employment contract by altering a page to reflect 5 years instead of 4 years which he admitted. As a result, he caused a change to the IPPD to reflect that he should be paid for 5 years until November 2025. He further caused the two officers who assisted him in this regard to have their contract converted from term contracts to permanent and pensionable terms, which was an abuse of office and gross misconduct. In the case of *Jane Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR the court held that the conduct and culpability of the employee must be looked at when terminating employment. Retirement of an employee in the public interest is allowed as long as the employee is taken through due process as held in *D.K. Njagi Marete v Teachers Service Commission*. In this case, the respondents had valid and justified reasons to terminate the employment of the claimant for abuse of office and gross misconduct which were matters of public interest.
 37. The claim for payment for an unserved term contract is not justified since the claimant did not work for that period. He was offered *ex gratia* equivalent to his 10-month pay subject to tax. He cannot claim future earnings for work not done as held in *Hema Hospital v Wilson Makongo Marwa* [2015] eKLR. He cannot base his claim based on an SRC rate that did not apply to him. His employment was terminated lawfully and no compensation is due.
 38. On the claim for payment of gratuity, such is only due at the end of each successful year of employment. What is due is not payable to the claimant but to the pension fund established under Section 132 of the CGA which fund caters for all employees of County Governments and the claim should be dismissed with costs.

Determination

39. Through notice dated 20 March 2023, the 1st respondent interdicted the claimant and invited him to show cause why disciplinary action should not be taken against him for;
 - a. Altering page two of your appointment letter dated 11th March 2020 and caused the changes to be captured in the IPPD system to show that your contract ends on 11th November 2025;
 - b. Deliberately misled the County Public Service Board to illegally and irregularly change Mr Samuel Mwanyasi's and Mr Peter Salai Mwakio's employment terms from contract to permanent and pensionable.
40. The claimant testified that he had the 2 contracts, one for 4 years being his initial contract and the second arose after the CGA was amended to change the tenure of County Secretaries under Section 44(E) to a term of 5 years hence the second contract. He admitted to altering page 2 of the initial contract to reflect 5 years instead of 4 years. These alterations were not sanctioned by the 1st respondent as the appointing authority did not go through vetting by the County Assembly.
41. Before the disciplinary committee, the claimant was taken to task, he asked that he be allowed to serve under his initial contract of 4 years and not the contested 5-year contract.
42. About the changes to the IPPD, this was to take care of the 5-year contract.



43. On the second charge, the claimant responded that on 26 November 2021, the respondents had decided to change contracts for 10 employees from term contracts to permanent and pensionable terms and the 2nd respondent made changes including contracts for Samuel Mwanyasi and Peter Salai because their contracts were ending in August 2023 and being senior officer, the claimant felt there was no need to have a void in such senior positions.
44. Under the provisions of Sections 41 and 44 of the *Employment Act*, 2007 (the Act), the employer is allowed to issue notice to the employee to answer to matters of misconduct and gross misconduct. These are matters that the employer finds to genuinely exist at the time and relate to the conduct or gross misconduct of the employee in terms of the contract of employment and the law as held in *Keen Kleeners Limited v Kenya Plantation and Agricultural Workers Union (Civil Appeal 101 of 2019)* [2021] KECA.
45. Once the employer has established genuine reasons, the next steps are to apply the provisions of Section 43 of the Act which requires the employer to not only undertake procedural justice but prove the reasons for termination of employment as held in the case of *Muthaiga Country Club v KUDHEIHA Workers* [2017] eKLR.
46. The Court of Appeal in the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR aptly captured the standard to apply and held that;
- Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.
47. In this case, the claimant put to task over his conduct presented two contracts, the initial one dated 11 March 2020 for a term of 4 years ending and signed on 12 March 2020.
48. The claimant also produced a second contract for a term of 5 years dated 11 March 2020 and signed on 12 March 2020.
49. The basis of the claimant’s claim and evidence was that the changes to his term of contract had been operationalized from 4 years to 5 years by the CGA which introduced Section 44(E) that provided for the term of a county secretary to be a period of 5 years and that the change to his contract was with the knowledge of the 2nd respondent.
50. However, the appointing authority for the position of County Secretary is the office of the 1st respondent with the approval of the County Assembly under Section 44 of the CGA. The 1st respondent and the County Assembly were not privy to the alterations effected to the claimant’s contract changing his term to 5 years.
51. The initial contract is signed under the hand of H.E. Granton G. Samboja on 13 March 2020. The changes to the CGA related to a different period but the second contract bears the same details and



dates under the hand of H.E. Granton G Samboja and not H.E. Andrew Mwandime the 1st respondent. This then became an important issue for the claimant to address.

52. Alteration of official documents and records is a criminal offence. Criminal conduct by an employee is a matter described under Section 44(4) (g) of the Act and is liable to summary dismissal;

an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Summary dismissal did not issue.

53. On the second issue that the claimant had misled the 2nd respondent in converting the contract for 2 employees, the claimant was found culpable to the extent that based on his letters and follow-up clarification, the 2nd respondent relied on his advice as the chairperson of the County human resources advisory committee.

54. Well aware that Samuel Mwanyasi and Peter Salai were serving under term contracts, the claimant went ahead to use his position to mislead the 2nd respondent that these contracts could be converted to permanent and pensionable terms in line with 10 other employees.

55. The claimant held a high office of responsibility. Through the exchange of communications, the 2nd respondent sought his views and clarification but he opted to use the position to mislead others. Taking into account that Samuel Mwanyasi played a key role in alterations of the claimant's term contract and IPPD and that Peter Salai was involved as well, there was sufficient motive for the claimant to use his office to mislead the 2nd respondent.

56. There was abuse of office. This is contrary to constitutional principles and the law.

57. At the disciplinary hearing, the committee found the claimant culpable and placed the matter before the appointing authority to address. Before the disciplinary committee, the claimant pleaded that the second contract be removed from the record and that he should be paid for the remainder of his initial contract term for 10 months. Alternatively, the claimant pleaded to be redeployed to finish his 4 years contract ending on 11 March 2024.

These recommendations were placed with the 1st respondent.

58. Upon the clear findings of gross misconduct and abuse of office on the part of the claimant, the 1st respondent opted to apply the reason of retirement on public interest as a reason for termination of employment. On the one hand, this reason is problematic because the issues identified as forming part of the claimant's gross misconduct and abuse of office were within the office of the 1st respondent. This is the person who issued the notice to show cause. On the other part, there was no public invited or called to render itself in the matters facing the claimant.

59. Indeed as submitted by the claimant, in the case of D.K. Njagi Marete v. Teachers Service Commission, the Court of Appeal held that;

The respondent had the onus to show objective and demonstrable grounds warranting the retirement of the claimant. When a public employer justified the premature termination of a contract of employment, on the grounds of public interest, such an employer had to show its decision was driven by public policy objective, and that the decision taken was legitimate and justifiable. It was not enough to merely write a letter to the employee and inform him



that a decision to retire him on public interest had been made. There had to be shown valid reasons amounting to public interest, to justify termination.

60. Further, the court held that it required the employer to among other things;

The respondent did not justify the retirement of the claimant in the public interest. It was not shown that there was a complaint against the claimant, initiated by a member of the public or by the respondent; that this complaint was investigated; the claimant was given a chance to answer the complaint; and that a decision was made to retire him based on valid grounds.

The rationale must be that;

If public employers were allowed to merely invoke public interest in retiring employees, without elaboration of the circumstances giving rise to the infringement of public interest, the employment protections given under the *Employment Act* 2007 would be meaningless to public servants.

61. At the hearing, Mr. Mwangombe the respondent gave a clear outline of matters forming the basis for the termination of the claimant's employment. He was of gross misconduct and abuse of office. These related to the functions of his duties internally within his office and no complaint was lodged from any member of the public or indeed the other stakeholders save the 1st respondent. See *Apondo v Kenya National Examination Council (Cause 261 of 2021)* [2022] KEELRC.

62. The reason for the alteration of findings by the disciplinary committee to a different cause of action hence resulting in a termination of employment that was not justified. It lacked any basis in law or fact. There was unfair termination of employment contrary to Section 45 of the Act.

63. On the reliefs sought, the claimant is seeking payment for 10 months of the unexpired term contract. He did not serve under this contract to the end. This resulted from gross misconduct and abuse of office as outlined above. In this regard, Section 45(5) of the Act requires the court to take into account such conduct. Save for the want in reasons given, the claimant was taken through due process and there were valid and justified grounds for his summary dismissal. He was offered ex gratia payment. To award more would be to reward gross misconduct and abuse of office. See *Lillian W. Mbogo-Omollo v Cabinet Secretary Ministry of Public Service and Gender & another* [2020] eKLR the court made a finding that there was a lapse in due process and put into consideration the conduct of the employee and awarded one shilling. Equally, in this case, a similar award of one Shilling is found appropriate.

64. The rate to be applied in tabulating the award is the salary the claimant was earning as of 29 May 2024 under his contract dated 12 March 2020. There was no written review to justify any third-party amendments. There is no addendum to the letter of appointment for the claimant to invoke the motions of Section 10(5) or 13 of the Act.

65. On the claim for payment of gratuity, the response was that there exists a scheme under which the claimant was a member and party for his gratuity and pension dues, such schemes operate under their rules and regulations. For the period of employment ending 29 May 2023, the claimant's due gratuity is to be processed and accessed through the established scheme.

66. On costs, the lapse in due process and findings above would justify the award of costs. In this regard, the claimant is entitled to ksh.10, 000 in his costs for the suit.

67. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;



- a. Declaration that his employment was terminated unfairly;
- b. Compensation of Ksh.1 (one Shilling);
- c. The claimant to access his gratuity through the pension scheme rules and regulations;
- d. Costs of 10,000.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

