

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS**

**CONSTITUTIONAL PETITION NO. E005 OF 2025**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLE 27 AND 41 OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATIONS AND INFRINGEMENT OF  
FUNDAMENTAL RIGHTS AND FREEDOMS**

**BETWEEN**

**DANIEL MUNYAO MUNYOTO.....PETITIONER**

**-VERSUS-**

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

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

**CORAM**

***Before Lady Justice J.W. Keli***

***C/A Otieno***

**JUDGMENT**

**Introduction**

1. The Petitioner, upon expiry of his fixed term contract, commenced this suit vide a Petition dated 12<sup>th</sup> June 2025 seeking for the following relief:-

- a) *A declaration that the Respondents violated the Petitioner's rights by unilaterally changing the Petitioner's terms of employment from permanent and pensionable to a fixed term contract.*
- b) *A declaration that the Respondent's act of issuing the Petitioner with an appointment letter as a Sub-County Administrator on a fixed contract of five (5) years and on the same day issuing appointment letters to his colleagues in the same position on permanent and pensionable terms of service was discriminatory and unconstitutional.*
- c) *An order reinstating the Petitioner as a Sub-County Administrator on permanent and pensionable terms of service without any loss of benefit or salary.*
- d) *An order directing the Respondents to pay the Petitioner forthwith his withheld salary and all allowances from 2<sup>nd</sup> August 2023 until the day he reports back to work.*
- e) *Damages.*
- f) *Costs of the suit.*

2. The Petition was filed alongside the Supporting Affidavit of the Petitioner sworn on 12<sup>th</sup> June 2025 with the bundle of documents in support of the Petition attached.

3. In response to the said Petition, the Respondents filed a Replying Affidavit sworn by Florence Munanie Makindi on 25<sup>th</sup> August 2025.

### **Hearing and evidence**

4. The petition was canvassed by way of written submissions. Both parties filed.

### **The Petitioner's case in summary**

5. The Petitioner complains that he was and has continues to be discriminated against by the Respondent on account of his age contrary to Articles 27 and 41 of the Constitution as follows:
6. It is the Petitioner's case that on 2nd May 2018, the Respondents herein advertised in the Daily Newspaper Eight (8) vacant positions of the Sub-county Administrator and called upon interested and qualified persons to apply for consideration. The Petitioner, a then employee of the Teachers Service Commission on permanent and pensionable terms holding a TSC No.075983, submitted an application within the required timelines and was subsequently interviewed by the Respondents. On 2nd August 2018, the Petitioner was appointed to the position of Sub-county Administrator, on a five (5) year contract.
7. The Petitioner was issued with an appointment letter which he received on 13<sup>th</sup> August 2018 under protest, owing to the fact that the position that was advertised and for which he applied was on permanent and pensionable terms. Further, four (4) of his colleagues, Stephen Ngesu, Patrick Kyusya, Ambrose Muthama and Alex Mutemi, who were interviewed for the same position at the same time as the Petitioner had been appointed on permanent and pensionable terms. To allay the Petitioner's objections, the Respondent assured him that it was an anomaly and promised to correct it in due course.

8. The Petitioner subsequently attended several meetings with the Chairperson and the Board's Secretary/CEO over the issue, who reiterated that the issue would be clarified before the end of the contract. To no avail. Eventually, the Petitioner's contract lapsed in 2023, without the issue being remedied. During the meetings with the Respondents Chair and CEO, the Petitioner communicated that his former employer, TSC, where he was on permanent and pensionable terms, had already transferred his services to the Respondents and so he stood to suffer prejudice if the anomaly was never corrected in time to avoid losing his benefits.
9. As a result of the Respondents' conduct, the Petitioner argues that his Constitutional rights under Articles 27 on equality and freedom from discrimination; 41 on fair labour practices; have been violated and/or infringed on by the Respondents, who unilaterally changed the terms of the job he was interviewed, recruited and appointed into. The Petitioner later learnt that this change was effected in his particular case, due to his age and the fact that he was approaching retirement.
10. The Petitioner avers that he had a legitimate expectation that he would be employed on permanent and pensionable terms due to the indication given in the job advertisement that the positions were permanent and pensionable, and due to the promises given by the Respondents, institutions of reputable standing. The Petitioner relied upon the said promises, applied for and took up the appointment, and has thereby suffered loss and damage. In further reliance on the Respondents' promises, the Petitioner resigned from his earlier employment with the TSC and had his services transferred to the Respondents, only to have his employment unlawfully determined by the Respondents. The foregoing has

caused a negative impact on the Petitioner's social and economic life because he has lost his pension as a social benefit.

**Respondent's case in brief**

11. The Respondents highlight Section 59 of the County Governments Act Cap 265 of the Laws of Kenya, which mandates the 2<sup>nd</sup> Respondent to appoint persons to hold or act in offices of the County Public Service including Boards of cities and urban areas within the County, and; to confirm appointments of such persons in the County Public Service. Section 50 of the same Act establishes the office of the Sub-County administrator, who shall have qualifications and knowledge in administration or management and shall be competitively appointed by the Board in accordance with the provisions of the Act.
12. Pursuant to the above provisions, in May 2018, the 1<sup>st</sup> Respondent, through the 2<sup>nd</sup> Respondent, advertised job vacancies for the position of Sub-County Administrators within the Kitui County Public Service. The said advertisement invited suitable members of the public to submit applications for consideration for the advertised positions. Upon interviewing the shortlisted candidates, the 2<sup>nd</sup> Respondent, vide a letter dated 2nd August 2018, offered the Petitioner an appointment in the Kitui County Public Service on a fixed-term contract basis for a period of five (5) years. The said letter of offer expressly stipulated that the appointment was subject to the terms and conditions contained therein, and invited the Petitioner to confirm his acceptance by appending his signature upon the acceptance form attached thereto. On 3rd August 2018, the Petitioner duly appended his signature on the attached acceptance form annexed to the letter of offer and returned a copy to the 2<sup>nd</sup> Respondent.

13. The Respondents explain and admit that the Petitioner could not be employed on permanent and pensionable terms because of the non-contributory nature of the pension scheme under Section 6(1)(a)(iv) of the Pensions Act CAP. 189 as he was over 50 years.
14. During the Petitioner's entire contractual term, both the Petitioner and the 2<sup>nd</sup> Respondent faithfully discharged their respective contractual obligations, with the Petitioner reporting for duty and rendering services, and the 2<sup>nd</sup> Respondent paying salaries and allowances in strict conformity with the contract.
15. On 25<sup>th</sup> August 2023, the 2<sup>nd</sup> Respondent informed the Petitioner that his five-year contractual term of service had lapsed on 1st August 2023, through a letter bearing the same date.
16. It is averred that Section 10 (5) of the Employment Act, Cap 226 Laws of Kenya, provides for revision of terms of an employment contract only where there exists an ongoing employer-employee relationship and a mutual desire by either party to vary the terms. The issuance of the initial offer in 2018 was not a variation of existing terms but the formation of a contract, which the Petitioner voluntarily accepted.
17. The Respondents argue that the advertisement issued by the 2<sup>nd</sup> Respondent in May 2018 was merely an invitation of applications from prospective applicants, and not a binding contract as the Petitioner purports. It cannot be relied upon or enforced as though it were a legally binding agreement. The 2<sup>nd</sup> Respondent subsequently presented a formal offer to the Petitioner, and upon his acceptance by signing, a binding five year-term contract for service

came into existence, with its terms governing the relationship thereafter. The Petitioner had the opportunity to reject and/or renegotiate the offer but instead chose to accept it *in toto*. They state that once a contract is formed, the parties are bound by its express provisions, and any expectations outside those provisions cannot be sustained on the doctrine of legitimate expectation. A fixed-term contract does not confer upon the employee any legitimate expectation of renewal unless there is an express representation or promise to that effect. They are emphatic that the 2<sup>nd</sup> Respondent made no representation or promise whether orally or in writing, to renew, extend, or convert the Petitioner's contractual engagement into a permanent appointment.

18. In light of the above, it is the Respondent's case that the Petitioner has not demonstrated or produced evidence showing how the Respondent discriminated against him. His employment terminated through the effluxion of time when his five years contract lapsed and there was no extension of the same. Therefore, he cannot be reinstated to his position. On the issue of salary allowances, the Respondents state that the claim for salary and allowances from 2<sup>nd</sup> August until the day the Petitioner reports to work is devoid of legal merit because the contract expired, no work was done and no fresh agreement exists.

### **DETERMINATION**

19. Following directions by the court that it would determine the Petition through written submissions, both parties filed their respective submissions.

### **Issues for determination**

20. The Petitioner filed submissions dated 18<sup>th</sup> September 2025, where they submitted generally on the Petition.
21. The Respondents filed submissions dated 22<sup>nd</sup> September 2025, where they submitted generally on the Petition.
22. The Court was of the considered opinion that the issue for determination was whether the petition was merited

### **Decision**

23. The petitioner alleged a violation of constitutional rights under articles 27, 41, and 43 by the respondent on account of the alleged unilateral change of terms of the job he was interviewed, recruited, and appointed to. The petitioner contended that the position advertised was permanent, and after the interview, he was issued with a fixed-term contract of 5 years. The petitioner stated that he had a legitimate expectation that he would be entitled to benefits appropriate to a permanent position. That he relied on the promise of the respondent and took up the offer and left his permanent job with Teachers Service Commission. The petitioner in support of his petition placed before the court the advert by the respondent of the position of sub-County administrator (**DMM1**) and court established that the terms of service were indicated as permanent; and a letter dated 2<sup>nd</sup> August 2018 being offer of appointment to the position of sub-County administrator for a fixed term contract of 5 years (DMM2). The letter asked the Petitioner to confirm acceptance. The petitioner did not produce the acceptance page but it was produced by the respondent as exhibit **FMM1** under replying affidavit of Dr Florence Munanie Makindi dated 25<sup>th</sup> August 2025. The petitioner signed the contract on 3<sup>rd</sup> August 2018 and indicated in a

handwritten note, 'received today 03/0818 at 10.00am But under protest since I expected it to be permanent and pensionable''. The petitioner further filed a release letter dated 18th September 2018 by Teachers Service Commission which was effective 17th September 2018. The petitioner was issued with an end of contract letter dated 25th August 2023 by the respondent which triggered the filing of the petition.

24. The court is invited to address whether the petitioner proved that his rights under articles 27,41, and 43 of the Constitution were violated. The petitioner stated he was discriminated against compared to the other 4 persons who received permanent letters to the same position. The said appointments were not placed before the court. The respondent, on the other hand, contended that the petitioner was over 50 years of age and could not be placed under the pension terms pursuant to section 6(1)(a)(iv) of the Pensions Act, and further that there was no change of terms of engagement as the contract was not a variation of the existing terms of service. The Respondent relies on the decision of Kioko & 2 others v Safaricom Limited (2023)KEELRC 2399(KLR)(Judgment ) to effect that the advertisement was not an offer or invitation to treat but a display of opportunities. I would see it as an invitation to treat with the contract as the offer, which the employee can accept or reject. Acceptance is Consent: If the employee signs the offer letter, they are deemed to have accepted the terms in the contract, even if they contradict the advertisement. The contract was an offer subject to the employee's acceptance, thereby upon acceptance established the employer-employee relationship. The court finds in the instant case that, although the advertised positions were stated to be permanent, the petitioner was issued a 5-year fixed-term contract. The petitioner had the opportunity to decline the offer and remain in the Teachers Service Commission, but, for their own reasons, they chose to accept the 5 year term contract. The Pension Act,

section 6(1)(a)(vi) 6(1)(a) states ‘No pension, gratuity or other allowance shall be granted under this Act to any officer except on his retirement from the public service in one of the following cases—vi)states-in any other case not falling within the succeeding paragraphs of this subsection, on or after attaining the age of fifty years.’’ The petitioner did not deny he was over 50 years of age at the time of the offer. The petitioner was not eligible to be employed as permanent and pensionable under the Pensions Act section 6(1) above. The Court holds that the terms in the offer to the petitioner was justified and lawful. The petitioner should have weighed the benefits and the court believes he did, hence the reason he left his permanent and pensionable job with Teachers Service Commission. The issue of discrimination was not proved for lack of evidence. The contracts of the alleged other persons for the same position were not placed before the court, plus their ages. There was no variation of terms of employment as the petitioner accepted the contract, which was the offer and the basis of the employer-employee relationship. The alleged promises, the basis of the alleged legitimate expectation, were not proved before the court. The Court of Appeal in determining this question relied on the decision by this court in [Communications Commission of Kenya & 5 other v Royal Media Services Limited & 5 others](#) (supra) and succinctly summarized the principles on legitimate expectation as follows:

- a. There must be an express, clear and unambiguous promise given by a public authority;
- b. The expectation itself must be reasonable.
- c. The representation must be one which it was competent and lawful for the decision-maker to make; and
- d. There cannot be a legitimate expectation against clear provisions of the law or the *Constitution*.” (Decision upheld by the Supreme Court in [Muthuuri & 4 others v Attorney General & 2 others](#) [2023] KESC 52 (KLR) ). The court is

bound to rely on the written contract as the exclusive proof of the terms of employment without evidence to the contrary. The court found no evidence of an express, clear and unambiguous promise given by a public authority, the respondent, that the appellant would be placed on permanent terms. The contract offered a fixed term of 5 years, which the petitioner accepted, albeit in mistaken protest, and proceeded to resign from another public body. I say mistaken as the petitioner had the option of rejection of the contract, but signed and proceeded to work for the respondent and resigned from his other permanent and pensionable term job. The court found no merit in the petition, as the decision was lawful under the Pensions Act, and the petitioner knowingly accepted the contract and resigned from a permanent position with the Teachers Service Commission weeks later.

25. The petition is dismissed for lack of merit. Each party to bear own costs.

26. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup>  
DAY OF DECEMBER, 2025.**

**J.W. KELI,  
JUDGE.**

**IN THE PRESENCE OF:**

Court Assistant: Otieno

Petitioner: Muinde

Respondents – absent

ORIGINAL