



Omar v Ministry of Interior & National Administration & 3 others (Employment and Labour Relations Petition E156 of 2023) [2025] KEELRC 100 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 100 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E156 OF 2023**

**MN NDUMA, J
JANUARY 23, 2025**

BETWEEN

ABEY HISH OMAR PETITIONER

AND

**MINISTRY OF INTERIOR & NATIONAL ADMINISTRATION 1ST
RESPONDENT**

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

THE COUNTY COMMISSIONER WAJIR COUNTY 4TH RESPONDENT

JUDGMENT

1. The petition serving before court was filed on 3/8/2023 by the Petitioner seeking the following reliefs: -
 - I. . A declaration be; and is hereby issued, that, the national values stipulated in Article 10 of *the Constitution* and principles of public service set out in Article 232 of *the constitution* apply to all state organs.
 - II. A declaration be; and is hereby issued, that the 1st Respondent violated Articles 1, 2, 3 (1), 4(2), 10, 25, 27, 28, 41, 47, 50, 232 & 249 of *the Constitution*.
 - III. A declaration be; and is hereby issued that, the Petitioner's enjoyment of his rights and fundamental freedoms secured in the Bill of Rights under Articles 25, 27, 28, 41, 47, 50 and 51 of *the Constitution* have been threatened and infringed or are threatened by the Respondents by failing, neglecting and refusing to consider payment of his wages and other allowances as they fell due and unfair termination of his appointment.



- IV. A declaration be; and is hereby issued that the termination of the appointment of the Petitioner as Chief II of Athibohol Location, Hadado Division of Wajir West Sub-County by the 1st Respondent through its letter dated 25th November 2022 and all the processes flowing from the said letter were unprocedural, illegal and null and void.
 - V. A declaration be; and is hereby issued that the letter of the 1st Respondent dated 25th November 2022 terminating the appointment of the Petitioner is unjust, unconstitutional and null and void.
 - VI. A writ of certiorari be, and is hereby issued, calling into this Honourable Court the 1st Respondent's decision to dismiss the Petitioner vide letter dated 25th November 2022, for purposes of it being quashed and by the same writ the decision be quashed.
 - VII. An order be; and is hereby issued that the Petitioner be reinstated as Chief II of Athibolol Location, Hadado Division of Wajir West Sub-County in line with the letter of appointment dated 11th of June 2021 and for that purpose, the Petitioner reports to the office of Chief II of Athibohol Location, Hadado Division of Wajir West Sub-County and perform all those functions and duties allocated to him pursuant to the letter of appointment to resume in the service of the Sub-County in accordance with the law.
 - VIII. In the alternative to VII above, the Petitioner be paid damages for unfair termination by the 1st Respondent.
 - IX. An order be; and is hereby issued that the Respondents to pay the Petitioner all unpaid salaries, dues, terminal benefits and allowances from the date of appointment to date.
 - X. That court do find that the Petitioner is entitled to damages for violation of his constitutional rights.
 - XI. An order be; and is hereby issued in the nature of a permanent injunction do issue restraining the Respondents jointly and severally, either acting on their own and/or through their agents, employees, servants and/or any other person acting and or purporting to act under their instructions and/or orders from implementing and enforcing the impugned termination letter dated 25th of November 2022 relating to the Petitioner.
 - XII. Any other order that the court deems fit for purposes of administering justice to the case.
 - XIII. The Respondent be condemned to pay the Petitioner the costs of the petition.
2. The cause of action arises from simple facts being that the Petitioner was appointed Chief II of Athibohol Location, Hadado Division of Wajir West Sub-County by a letter dated 11/6/2021. This followed a competitive process. It is pertinent to note that the appointment was not on a fixed term contract and was presumably permanent and pensionable as per terms of public service in Kenya.
 3. The Petitioner received a letter dated 25/11/2022 from Deputy County Commissioner, Wajir informing the Petitioner that the Public Service Commission had declined his request for appointment to the service as Chief II Athibolol Location. The letter also stated that the Petitioner was discharged from service and to be paid for the period worked. It is worth noting that the Petitioner had already served as Chief II for a period of more than one year and five months.
 4. The Petitioner was instructed to vacate the position of Chief Athibolol and hand over to the Assistant Chief Athibolol Sub-Location who was to serve on an acting capacity until the post is filled up.



5. By a letter dated 28/7/2023 the Deputy County Commissioner Hadado Sub-County, Wajir, proceeded to place an advertisement for filling of the post of Chief II Athibolol Location Hadado Division, which position the Petitioner states was not vacant and was at the material time lawfully held by him. The Petitioner has sued the four Respondents who he states have responsibility not to threaten and/or violate his rights protected under Articles 27, 41, 47 and 232 of *the Constitution* of Kenya 2010.
6. The Petitioner states that the conduct by the Respondents further violates section 45 of the *Employment Act* 2007.
7. That the action constitutes unfair labour practice; unfair administrative action; breach of rule of natural justice and negation of equality of the Petitioner before the law.
8. The Petitioner attached the application letter dated 30/12/2020 pursuant to which he was recruited and employed as Chief II of Athibohol as stated above. The Petitioner has outlined his qualifications that supported that appointment and states that the decision to remove him from office was irrational, unfair and unjustified.
9. The petition is embellished by the statement of facts; supporting and supplementary affidavits with attached documents that elaborate his case set out in the petition.

Replying Affidavit by 2nd Respondent

10. The petition is defended by a replying affidavit of Remmy N. Mulati, (Deputy Commission Secretary Corporate Services) of the Public Service Commission (PSC).
11. The 2nd Respondent admits the facts set out by the Petitioner that he was appointed to the position of Chief II Athibolol Location, Hadado Division Wajir by a letter dated 11/6/2021 pursuant to a competitive process.
12. The 2nd Respondent further admits that the appointment of the Petitioner was revoked as set out in the petition and the Respondents sought to fill up the position afresh in that it had been discovered that the Petitioner had not disclosed material facts regarding his previous engagement by the Kenya Prisons Service, where the Petitioner had served until 23rd March 2015 when he was dismissed from service on account of absence from duty. That the 1st Respondent had sought concurrence by PSC with the impugned appointment which was declined. The 2nd Respondent admits that the power to appoint Chiefs had been lawfully delegated by PSC to the Cabinet Secretary Interior and so the appointment of the Petitioner was lawful but the concurrence of PSC became necessary upon realization of the facts not disclosed earlier by the Petitioner.
13. That the 2nd Respondent therefore withheld its concurrence on the re-appointment of the Petitioner with effect from 10th June 2021.
14. That the 2nd Respondent has by a letter dated 28/9/2022 directed that the Petitioner be discharged and he be paid for the period worked.
15. PSC states that the initial appointment was not lawful because the Petitioner had failed to fill the PSC-2 form revised 2016 at the time of applying for the job and only filled it after he had left the employment of the Ministry on 10/6/2021 before he was appointed by the letter dated 11/6/2021.
16. That the conduct by the Petitioner violates the value and principle of public service and therefore the prayer for reinstatement should not be granted.



17. In the supplementary and further Affidavit, the Petitioner states that he had scored 89.4% at the interview before his appointment and was qualified for the position.
18. That Petitioner denies that he had not disclosed his previous employment with the Prison Service because he had clearly indicated the previous employment with Kenya Prisons Service in the application letter dated 30/6/2020.
19. The Petitioner deposes that the discharge from Prison Service did not disqualify him from appointment as Chief II.
20. The Petitioner reiterates that he was not given any opportunity to be heard before termination of his employment as Chief II nor did he face any disciplinary hearing at all with regards to the service he rendered as a Chief II for a period of more than one year and five months.
21. That the appointing authority had taken into account all relevant factors before appointing the Petitioner to the position of Chief II and there were no rational or justifiable reasons to terminate the appointment arbitrarily.
22. That upon disclosure of his previous employment with the Prison Service it was incumbent on the 1st Respondent to make any further inquiries on the matter before appointing the Petitioner as a Chief II.
23. The Petitioner added in the further supplementary affidavit that he was aware that the position of Chief II of Athibolol had been re-advertised thrice with no suitable candidate being selected. The Petitioner attached to the affidavit a 3rd re-advertisement dated 29/3/2024 done by the 4th Respondent.

That the petition be allowed as prayed.

Determination

24. The parties filed written submissions which the court has carefully considered together with the deposition by the parties and the issues for determination are: -
 - i. Whether the Respondents have proved any valid reason for terminating the appointment of the Petitioner in the position of Chief II of Athibolol, Wajir County.
 - ii. Whether the Respondents followed a lawful and fair procedure in terminating the appointment.
 - iii. Whether the Petitioner is entitled to the reliefs sought.
25. In answer to issue (i) aforesaid the fact of appointment of the Petitioner to the position of Chief II Athibohol Location, Hadado Division, Wajir West Sub-County following a competitive process is not in dispute. It is also not in dispute that the appointment was not for a fixed term period but same was for an indefinite period as stated on the letter of appointment dated 11/6/2021.
26. It is not in dispute that the Petitioner served in that position for a period of over one year and five months and had no disciplinary record during that period.
27. It is not in dispute that by a letter dated 25/11/2022, the 1st Respondent purported to terminate the appointment of the Petitioner aforesaid on alleged direction by the 2nd Respondent (PSC).
28. The letter dated 25/11/2022, did not indicate any reasons for the termination of the appointment of the Petitioner lawfully done on 11/6/2021.



29. The letter does not state any due process was followed in which the Petitioner was provided opportunity to be heard before the decision to terminate his employment was arrived at by the 1st and 2nd Respondents. Indeed, no notice to show cause was issued to the Petitioner to explain why the appointment as Chief II by a letter dated 11/6/2021 should not be terminated was issued to the Petitioner nor was the Petitioner called to any disciplinary hearing to face disciplinary hearing regarding charges of misconduct or non-performance while he worked as Chief II. Indeed, the Respondents have failed to prove that they had any valid reasons to terminate the employment of the Petitioner.
30. It is the court's decision that the Respondents have failed not only to prove any valid reason for the termination but have also failed to demonstrate that a fair process was followed before the said termination.
31. The Petitioner has proved that the conduct by the Respondents amounted to unfair labour practices in violation of Article 41(1) of *the Constitution*. Furthermore, the Petitioner has proved that the conduct by the 1st and 2nd Respondents amounted to unfair administrative action in violation of Article 47 of *the Constitution* read with section 4 of *Fair Administrative Action Act* 2015.
32. Furthermore, by failing to follow Article 232 of *the Constitution* which mandates the Respondents not to subject an employee to arbitrary punishment, the Respondents in the same breath violated Article 27 of *the Constitution* by failing to treat the Petitioner equally before the law and availing him all available legal channels to show why it was not fair and just to discharge him from the position of Chief II.
33. The court is satisfied that, to-date the Respondents have not found any suitable replacement for the Petitioner in the position they discharged him from which fact demonstrates that the decision by the Respondents was not well thought out and was arbitrary and irrational.
34. The court relies on the Supreme Court decision in the case of Gladys Boss Sholei versus Judicial Service Commission and another [2022] eKLR in which the court held that the failure to provide written reasons for the termination violated the right to fair administrative action which right applied to all public officers.
35. The court further relies on the case of Postal Corporation of Kenya versus Andrew K. Tann [2019] eKLR where it was held that section 41 of the *Employment Act* 2007 provides the minimum standard of a fair procedure that an employer ought to comply with. Four elements must thus be discernable for the procedure to pass muster: -
- i. An explanation of the grounds of termination in a language understood by the employee.
 - ii. The reason for which the employer is considering termination
 - iii. Entitlement of an employee to the presence of another employee of his choice when explanation of grounds of termination is made; and
 - iv. Hearing and considering any representation made by the employee and the person chosen by the employee.
36. The Respondents in this matter failed the above test dismally. Accordingly, the Petitioner has proved all the essential elements of his case as presented and the court finds that the petition has merit in its entirety and makes an order in the following terms in favour of the Petitioner against the Respondents jointly and severally: -



- I. A declaration be; and is hereby issued, that, the national values stipulated in Article 10 of *the Constitution* and principles of public service set out in Article 232 of *the constitution* apply to all state organs.
- II. A declaration be; and is hereby issued, that the 1st Respondent violated Articles 1, 2, 3 (1), 4(2), 10, 25, 27, 28, 41, 47, 50, 232 & 249 of *the Constitution*.
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- X. The Respondent be condemned to pay the Petitioner the costs of the petition.

DATED AT NAIROBI THIS 23RD DAY OF JANUARY 2025

MATHEWS NDUMA

JUDGE

Appearance:

Ms. Chelangat for Petitioner

Ms. Aluoch for 1st, 3rd and 4th Respondents



Ms. Wangechi for 2nd Respondent

Mr. Kemboi – Court Assistant

