



Onyango v Speaker County Assembly of Migori & 3 others (Cause E088 of 2023) [2025] KEELRC 403 (KLR) (17 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 403 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E088 OF 2023
JK GAKERI, J
FEBRUARY 17, 2025**

BETWEEN

TOM OPERE ONYANGO CLAIMANT

AND

THE SPEAKER COUNTY ASSEMBLY OF MIGORI 1ST RESPONDENT

MIGORI ASSEMBLY SERVICE BOARD 2ND RESPONDENT

CLERK, COUNTY ASSEMBLY OF MIGORI 3RD RESPONDENT

COUNTY ASSEMBLY OF MIGORI 4TH RESPONDENT

JUDGMENT

1. The Claimant commenced this suit vide a memorandum of claim filed on 29th November, 2023 which was subsequently amended on 18th December, 2023 and filed on 29th February, 2024.
2. The claimant avers that he was employed as a clerk of the 4th respondent County Assembly at a month salary of Kshs.80,000.00 and served diligently until 12th January, 2021 when he was interdicted by the 2nd respondent following his arrest and charging in Kisumu Anti-Corruption Case No. E002 of 2020.
3. It is the claimant’s case that the charges against him were based on the Anti-Corruption Criminal Case and the issue was discussed on 14th December, 2023 his appointment as Clerk, Migori County Assembly was revoked and the respondents did not avail documents requested by the claimant to enable him respond to the charges.
4. The claimant avers that the revocation of his appointment was prejudicial, malicious and done in bad faith.

The claimant prays for:



- a. A declaration that the actions of the 2nd respondent of framing the charges against the claimant on the basis of Anti-Corruption Case No. 002 of 2020 and proceeding to hear the charges and subsequent revocation of appointment as clerk of the Migori County Assembly was unprocedural, illegal, malicious and a violation of Article 47 of *the Constitution* of Kenya.
- b. An order suspending the 4th respondent's resolution dated 14th December, 2023 revoking the claimant's appointment as Clerk Migori County Assembly pending the hearing and determination of Kisumu Anti-Corruption Case No. 2 of 2020.
- c. Costs of this claim with interest at court rate.
- d. Any other remedy the court may deem fit and just to grant.

Respondents case

2. The 4th respondent admits that the claimant was its employee and was earning Kshs.80,000.00 per month.
3. The 4th respondent avers that the claimant's appointment was revoked pursuant to the provisions of Section 23(8) of the County Assembly Service Act and ought not to have sued his office as he was the Clerk and no wrong doing has been attributed to the Speaker of the Assembly.
4. That it was necessary to interdict the claimant from service after he was charged with offences implicating his integrity and diligence and could not be reinstated and in any case he had not rendered any service to the County since January 2021 and the pendency of a criminal case could not prevent the employer from commencing disciplinary proceedings against the claimant, subject to due process as it was not subject to the outcome of criminal proceedings.
5. That he was furnished with the charges, particulars thereof and basis of the charges and had copies of the documents, witness statements and all the circumstances that led to the criminal case, the foundation of the disciplinary process.
6. It is respondent's case that they could not reproduce the materials in the Kisumu Anti-Corruption case as he had access to them as he was the authorized officer and could respond to the charges.
7. That the claimant's argument that disciplinary action could not be taken until the criminal case was concluded was unsustainable and his appointment as Clerk of the County Assembly of Migori was revoked on 14th December, 2023.
8. Finally, the respondent avers that as the provisions of Section 23 of the *County Assembly Services Act* were complied with, the claimant is not entitled to any of the reliefs sought and prays for dismissal of the claimant's case with costs.

Claimant's evidence

9. The claimant admitted that he was suspended from office on 27th July, 2019 and again on 12th January, 2021 after he was charged in Kisumu Anti-Corruption Case No. E002 of 2020 which is pending determination.
10. That he received and responded to the respondent's notice to show cause and requested for documents and the request was declined on the ground of confidentiality and insisted on access and perusal at the Clerk's office.



11. The claimant testified that he sought more documents aligned to IFMIS vide letter dated 1st November, 2023 and on 20th November, 2023, he appeared for the hearing but sought an adjournment to be furnished with documents and have legal representation and the request was granted and documents were to be availed but were not and hearing proceeded on 30th November, 2023 and a recommendation made to the 4th respondent that his appointment be revoked.
12. The claimant testified that the 2nd and 4th respondent had no mandate to investigate financial omissions and commissions.
13. The claimant admitted that the charges were based on the charges in the criminal case and were prepared by the 2nd respondent, who prepared a report which was forwarded to the 4th respondent which discussed it on 12th December, 2023 and revoked his appointment.
14. That the Gazette Notice on revocation was published in the morning of 14th December, 2023 before the matter was discussed at 2:00pm and the same was malicious and prejudicial to him.
15. On cross-examination the claimant admitted that he did not respond to the charges and later admitted that he responded to them and the advocate appeared for the hearing on his behalf.
16. The witness confirmed that a report was prepared and the County Assembly formed an investigative committee and his lawyer did not attend on invitation and a report was prepared and he received the Gazette Notice on his removal from office.
17. That the Adhoc Committee Report was forwarded to his advocate and the committee's recommendation was adopted and a Gazette Notice published on 14th December, 2024.
18. The Claimant thereafter changed his mind and testified that the Gazette Notice he had No. 1716 Special Issue was published on 19th December, 2024 and additionally admitted that he was the Accounting Officer of the County Assembly and his last day of work was 27th August, 2019 as he was suspended and interdicted thereafter and was reported to the Directorate of Criminal Investigation (DCI) and had not rendered services since then.
19. On re-examination the claimant testified that he was suspended on 27th August, 2020 based on certain allegations.
20. It was his testimony that he asked for documents to enable him respond and prepare for the hearing and the same were related to those in the Criminal Case, but were not supplied and did not attend the hearing but his advocate did.
21. That other persons were charged with him but were not taken through a disciplinary hearing.
22. That although revocation of his appointed was stayed on 29th February, 2024, the County Assembly advertised the position but the recruitment was stopped by the court and he was on half pay.
23. The witness urged the court to stay the case until the criminal case was concluded.

Respondents evidence

24. Mr. Christopher Odhiambo Rosana confirmed that he was appointed on 28th May, 2024 and before then he was a County Executive member of the County Government of Migori and was aware that the claimant was suspended in 2019, sued in ELRCC No. 29 of 2019 was reinstated on 26th September, 2019 and was aware of Kisumu Anti-Corruption Case No. E002 of 2020 and the charges were corruption related and was aware of the interdiction requirements of the law.



25. The witness admitted that the respondent commenced disciplinary proceedings against the claimant during the pendency of the criminal case and Mr. Abala and Mr. Evans Ouma were also subjected to disciplinary proceedings and Mr. Evans Ouma was dismissed from employment.
26. That the claimant was accused of financial impropriety under the *Anti-Corruption and Economic Crimes Act*.
27. That the Deputy Speaker, and one Mr. Rioba were also charged and Mr. Rioba was being vetted by the County Assembly for the position of Chief Officer but the County Assembly did not clear him.
28. According to the witness the claimant was provided with all the documents he need and signed have been shown the documents.
29. That the claimant had sought more time to appear before the committee but the committee declined and his counsel attended the hearing on 30th November, 2023.
30. According to RWI, the County Assembly sat on 14th December, 2023 to discuss the matter and the Adhoc Committee of the Assembly could sit anywhere.
31. It was his testimony that although the position of clerk was advertised on 8th January, 2024, it is yet to be filled.
32. That the claimant was an employee of the County Assembly and it revoked his appointment through the Board and he was accorded due process.

Claimant's submissions

33. As to whether the charges against the claimant by the respondent were similar to those in Kisumu Anti-Corruption Case No. E002 of 2020, counsel for the claimant submitted that they were similar.
34. On supply of documents counsel cited Article 47(1) and 50(2) of *the Constitution* of Kenya on the right to fair administrative action and fair trial to urge that the respondent did not accord the claimant a fair hearing as it refused to supply copies of documents it was relying on in support of the charges which impeded the claimant's ability to substantively respond to each charge as those documents were necessary.
35. Counsel submitted that all the respondent did was to show copies of documents to the claimant and thus was not accorded fair administrative action.
36. On discrimination, counsel submitted that all public officers were interdicted pending the hearing and determination of the Anti-Corruption case but the respondent singled out the claimant for disciplinary proceedings and the Deputy Speaker remains in office and RWI had no evidence to show that the others were taken through disciplinary proceedings.
37. Counsel submitted that the claimant was treated in a discriminatory manner.

Whether the respondent could discuss a matter pending in court.

38. According to counsel for the claimant since the charges were similar to those in Kisumu Anti-Corruption Case No. E002 of 2020, the County Assembly could not discuss the report under the standing Orders of the County Assembly and the resolution passed was void ab initio.
39. On the reliefs sought, counsel submitted that the claimant is entitled to them because the respondent did not furnish the claimant with the documents on which the charges were based and contravened the sub judice rule.



Respondent's submissions

40. Counsel submitted that the speaker of the County Assembly and the Clerk were wrongly joined as respondents as they had no role to play and their inclusion was an abuse of the court process and should be struck off the proceedings and no adverse evidence was being adduced against them.
41. As to whether criminal proceedings were a bar to a disciplinary hearing, counsel submitted that they were not as that is a distinct and separate process from internal disciplinary processes by the employer and cited the Court of Appeal decision in *Clement Karuri V Kenya Ports Authority* [2018] KECA 607 KLR to reinforce the submission that the institution of criminal proceedings is not a bar to civil proceedings or disciplinary hearing on similar facts as they are distinct processes. See also *James Mugeru Igati V Public Service Commission* [2014] eKLR.
42. Counsel urges that Section 62 of the *Anti-Corruption and Economic Crimes Act* provides for suspension of an employee charged under the Act and is put on half-pay and does not bar the employer from escalating the suspension to a dismissal.
43. According to counsel, the claimant had not make a case for the grant of an injunction, which according to him is a private law remedy which is not tenable in this case.
44. Counsel urges that there is no property in a public office and there is no justification for retaining the position of Clerk Migori County Assembly without a substantive holder.
45. The decision in *Attorney General & Independent Electoral and Boundaries Commission V Andrew Kiplimo Sang Muge, County Assembly Forum & Richard Ouna Oginda* [2017] KECA 191 (KLR) is cited to reinforce the submission that there was no justification to reinstate the claimant and his relief lies in damages as the County Assembly Service Board employed him and had the power to suspend and remove him from office.
46. As to whether the respondents had justifiable reasons to revoke the claimant's appointment, counsel submitted that the claimant admitted having been suspended in 2021 after he was charged and had been out of office since August 2019.
47. Counsel urges that since the claimant was the Accounting Officer and the Authorized Officer and the charges against him implicate his integrity as a public officer, it was proper for the respondent to subject him to disciplinary proceedings.
48. That the claimant did not deny the charge of improperly conferring a benefit of Kshs.4,122,456 of public funds to M/s Travel Times Leader Co. Ltd in abuse of office and conferred additional benefits of public funds to M/s Pamawe Contractors Ltd.
49. Counsel urged that the charges the claimant was facing are corruption related as they relate to misappropriation of public funds amounting to Kshs.10,149,037.00.
50. On due process, counsel submitted that the County Assembly Service Board was statutorily empowered to revoke the appointment of the Clerk of the Assembly with approval of members of the County Assembly after the allegations were investigated by a select committee.
52. Counsel urges that the respondents complied with the provisions of Section 23 of *County Assembly Services Act* and the Board Committee and the County Assembly played their role as by law required and the claimant's advocate mitigated on his behalf on 30th November, 2023. Counsel submitted that the Adhoc Select Committee prepared a report on 11th December, 2023 and the same was discussed



by a special sitting of the County Assembly on 14th December, 2023 and approved and he was notified by letter dated 15th December, 2023 and a Gazette Notice for public information.

53. According to counsel for the respondents, the elaborate processes prescribed by the provisions of Section 23 of the *County Assembly Services Act* were complied with and the Board's action of commencing disciplinary processes against the claimant violated no legal provision. Counsel urged the court to dismiss the claimants case.

Analysis and determination

54. The instant suit was filed on 29th November, 2023 and came up on the same day for consideration of the Notion of motion dated 29th November, 2023.
55. At the time, disciplinary process against the claimant was on-going and directions of service on the respondents were given. The application was subsequently withdrawn as it was overtaken by events.
56. As adverted elsewhere in this judgment, the process was concluded on 14th December, 2023 when the 4th respondent approved the revocation of the claimant's appointment as the Clerk of the County Assembly and the respondents went ahead to advertise the vacancy on 8th January, 2024, which the claimant opposed vide a Notice of Motion dated 15th January, 2024.
57. In its ruling dated 29th February, 2024, the court restrained the respondents from implementing the resolution of the County Assembly dated 14th December, 2023 revoking the appointment of the claimant as clerk of the County Assembly.
58. An application dated 15th January, 2024 was however disallowed on 15th July, 2024.
59. Documentary evidence on record shows that the claimant was appointed and confirmed as Clerk of Migori County Assembly on 12th July, 2017 and notified vide letter dated on even date.
The letter detailed the claimant's duties and responsibilities.
60. It is equally not in contest that by letter dated 22nd January, 2021, the claimant was interdicted indefinitely on account that he and others and were arrested by the Ethics & Anti-Corruption Commission (EAC) charged in Kisumu Anti-Corruption Case No. E002 of 2020 under the provisions of the *Anti-Corruption and Economic Crimes Act*.
61. The criminal case is still on-going and the claimant remains on interdiction.
62. Subsequently, the respondents initiated the process to remove the claimant from office based on charges not dissimilar to those in Kisumu Anti-Corruption Case No. 002 of 2020 and the letter dated 13th October, 2023 communicating the charges attached relevant particulars.
63. The claimant responded vide letter dated 18th October, 2023 seeking evidence and materials upon which the charges were grounded. He sought specific information on each charge.
64. He also cited the sub judice rule and was categorical that the information was necessary for his response.
65. Finally, the claimant also sought extension of time to respond, having initially been accorded 7 days, a request the 2nd respondent acquiesced vide letter dated 30th October, 2023 and a hearing was slated for 20th November, 2023.
66. On documents requested for, the respondent, vide letter dated 30th October, 2023 rejected the request but offered the claimant "access and perusal" of documents on 3rd November, 2023 from 2:30pm to 4:00pm, a duration of 1¹/₂ hours.



67. The claimant responded vide letter dated 1st November, 2023 and catalogued the documents he required in order to respond to the charges.
68. The claimant did not attend the “access and perusal” session or offer an apology and was accorded another chance vide letter dated 7th November, 2023 on 16th November, 2023 from 2:30pm to 4:00pm and written response required by 17th November, 2023, and hearing on 20th November, 2023 failing which the 2nd respondent would notify the Speaker of the County Assembly revocation of the claimant’s appointment.
69. The claimant responded to the charges vide letter dated 17th November, 2023.
70. On the 1st charge the claimant stated that “the payments were credited to Pamawe Construction Company not to Tom Opere Onyango” and the company could explain. He denied having made the payment or authorize anyone to do so.
71. On the second charge, the claimant responded that payments were not a unilateral act he was not a member of the Procurement Committee and was answerable to the County Assembly Services Board and had no voting right.
72. On violation of Chapter VI of *the Constitution* of Kenya, the claimant stated that he had no company of which he was a director or proxy company that offered services to the Migori County Assembly.
73. On towing of an uninsured motor vehicle KBW, the claimant responded that he had given instructions that a canter be used to carry the Prado KBW and minutes of the HOD meeting were available from one Sally Nguka.
74. Significantly, the claimant admitted that he was suspended from employment on 27th August, 2019 while on leave alleging that his IFMIS username was used after 30th June, 2019.
75. Puzzlingly, the claimant did not explain why he was suspended in August 2019, before criminal charges were preferred against him more than 5 months later.
76. Finally, the claimant reiterated his request for all the documents requested for a comprehensive response to the charges.
77. On 20th November, 2023, the claimant appeared before the County Assembly Services Board and sought an adjournment and liberty to access the documents and the Board granted the requests and hearing was rescheduled to 30th November, 2023 at 9:30pm and he could access and peruse the documents on 23rd November, 2023 at 2:30pm.
78. However, dated 24th November, 2023, the claimant indicated that he could not attend a hearing at night, undertook to peruse the documents on 27th November, 2023 at 9:30am and the respondent could liaise with his lawyer on a convenient hearing date in early December.
79. Notably, the claimant identified about 18 documents he wished to peruse including Board deliberations on the accident involving motor vehicle KBY 985C, Board minutes and memos for April to July 2019 Procurement Plan 2018/2019, Audit Report of Pamawe Building and Construction Co. Ltd and M/s Travel Times Ltd among others.
80. Strangely, the claimant requested that Mr. Boaz Owiti, former speaker, Lucy Wanja and James Kibuthu Nduati of Pamawe Construction Co. Ltd, Willis Onyango Gor and Miss Joan Atieno of M/s Travel Times Ltd, Mr. Dickson Odie, Novy Odhiambo, driver to Clerk, Nahasion Ojwang driver of KBY 985C and Alcent Matiko, former Human Resource Officer to be availed as witnesses.



81. By handwritten letter dated 27th November, 2023, the claimant confirmed that he was taken through evidence relied upon in framing the charges and requested time to enable his lawyer submit a comprehensive response and a hearing date after 5th December, 2023. The request was denied vide letter dated on even date which captured the history of the matter and the many times the Board had accommodated the claimant.
82. It is common ground that the claimant did not attend the hearing on 30th November, 2023 but his advocate did.
83. Subsequently, the County Assembly Service Board prepared a Report dated 5th December, 2023.
84. The report stated that the sum of Kshs.6,026,581.65 paid to Pamawe Construction Co. Ltd in 2019 for the construction of Isebania Ward offices related to a project previously awarded to JMAK Contractors and General Supplies Ltd on 13th June, 2016 which, the company accepted and completed and a Certificate of Practical Completion issued on 22nd February, 2017 and the claimants signatures appeared on both contracts.
85. On M/s Travel Times Ltd, the Board found that although the claimant realized that there was an irregularity and illegality in the documents used to authenticate the payment and froze the payment from the bank, the same was later released to the company.
86. The Board found that the claimant failed to exercise diligence, honesty and responsibility and was thus guilty of gross misconduct in relation to the payments to the two companies which led to the loss of Kshs.10,149,037.00, and violated the provisions of the Public Officer Ethics Act.
87. The County Assembly Services Board found the claimant culpable as charged and forwarded the report to the Speaker of the County Assembly for his removal from office.
89. All members of the Board present together with the Secretary signed the report.
90. Subsequently, the claimant was invited to appear before the Adhoc Committee of the County Assembly vide letter dated 5th December, 2023 for a hearing slated for 8th December, 2023 but did not attend and provided no reason and pursuant to Gazette Notice No. 16982 the Migori County Assembly held a special sitting on 14th December, 2023 from 9:30am and adopted the Adhoc Select Committee Report revoking the appointment of the claimant as the Clerk of Migori County Assembly.

The foregoing is a detailed context of the case before the court.

91. The claimant faults the revocation of his appointment as the Clerk of Migori County Assembly on the ground of fair hearing and the fact that the charges were similar to those in Kisumu Anti-Corruption Criminal Case No. E002 of 2020.

The issues for determination are:

- i. Whether revocation of the claimant's appointment was justifiable and fair.
 - ii. Whether the claimant is entitled to the reliefs sought.
92. Before delving into the foregoing issues, it is essential to dispose of two other issues raised by the claimant's counsel, namely; discrimination and the matter was pending in Court when it was discussed by the County Assembly.
 93. On the alleged discrimination, the claimant's counsel submitted that the respondents singled out the claimant for disciplinary process yet other accused persons were not.



94. Counsel's suggestion appears to be that the accused persons ought to have been treated equally by the employer if it proposed to take disciplinary action against them. Counsel for the respondent did not directly address this issue.
95. Significantly, the claimant did not plead that he was discriminated or set out particulars of the alleged discrimination and counsel availed none in support of his submission.
96. It is trite law that parties are bound by their pleadings as held by the Court of Appeal in *Independent Electoral & Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others* [2014] eKLR citing the sentiments of Adereji, JSC, Supreme Court of Nigeria in *Adetun Oladeji V Nigeria Breweries PLC* SC 91/2002. See also *Salim Said Mtomekela V Mohamed Abdallah Mohamed* Civil Appeal No. 149 of 2019 (Tanzania), *Raila Amollo Odinga & Another V IEBC & 2 Others* [2017] eKLR.
97. However, RWI confirmed on cross-examination that other employees of the respondent were also taken through a disciplinary process and at least one was dismissed from employment.
98. In the absence of concrete allegations on the alleged discrimination coupled with verifiable particulars for the respondents to rebut reliance on statements made by a witness on cross-examination cannot be a firm basis on which to allege discriminatory conduct.
99. Both Article 27 of *the Constitution* of Kenya and Section 5(3) of the *Employment Act* prohibit discrimination generally.
100. Although the ultimate burden of proof to show that there was no discrimination lies on the alleged violator, the alleged victim must lay the basis of the allegation.
101. In *Raila Odinga & Others V Independent Electoral and Boundaries Commission & Others* [2014] eKLR, the Supreme Court stated:
- “... a Petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden”.
102. In *Gwer & 5 Others V Kenya Medical Research Institute & 3 Others* [2020] KESC 66 (KLR) the Supreme Court expressed itself as follows:
- “In the foregoing context, it is clear to us that the petitioners, in the instant case bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary.
- ... It is clear to us that, by no means, did the burden of proof shift to 1st respondent”.
103. These sentiments apply on all fours to the facts of this case. Since the claimant neither pleaded nor alleged discrimination and demonstrate how it was perpetrated, the burden of proof could not shift as the respondent's had nothing to rebut.
104. It is clear that counsel's submission lacked the requisite factual underpinning.
105. As to whether the Migori County Assembly had authority to discuss a matter pending before a court of competent jurisdiction, while the charges before the criminal court and those facing the claimant at the hearing related to the same set of circumstances they are not the same in form and requirements.



106. Counsel relied on Section 86 of the Standing Orders of the 4th respondent to submit that the 4th respondent had no power to discuss the matter.
107. That violation of the Standing Order rendered the discussion and outcome null and void.
The respondent did not respond to this issue.
108. For starters, the claimant had not pleaded this issue in his claim or provided a demonstration of how the 4th respondent violated Section 86 of the Standing Orders and whether the proceedings could be impeached at this stage, bearing in mind these events occurred in December, 2023 and the claimant had the opportunity to amend his memorandum of claim and did so 18th December, 2023 but did not raise this issue for a rebuttal.
109. At any rate, the court is not persuaded that 4th respondent discussed the case before the court, it merely received a report of the Adhoc Select Committee which had investigated and heard the claimant (though he declined the invitation to attend the hearing).
In determining this issue, the court is guided by judicial authority.
110. It is trite law that parliamentary and County Assembly proceedings are impeachable, but the question is always whether the breach of Standing Orders merits judicial intervention bearing in mind that a County Assembly is one of the organs of a County Government and as the Supreme Court has observed
“institutional between the three arms of government must not be endangered by unwarranted intrusions into the workings of one arm by another”.
111. Similarly, in *Speaker of the Senate & Another V Attorney General & 4 Others*, [2013] eKLR, the Supreme Court stated as follows:
“this court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. the court cannot supervise the workings of parliament...”
112. Finally, in *Republic V National Assembly Committee of Privileges & 2 Others Ex Parte Ababu Namwamba* [2016] eKLR, W. Korir J. (as he then was) stated
“Failure to comply with the rules regulating the execution of business of a legislature will surely attract the courts intervention. Parliament like any other constitutional organ must play by the rules set for it by *the Constitution* to guide its operations, it ought to comply with such rules”.
113. The foregoing sentiments, in the Court’s view, apply in relation to County Assemblies.
114. Having not pleaded the issue and/or provided particulars of how Standing Order 86 of the 4th respondent was violated, having failed to promptly impeach the proceedings and decision, it is surmisable that the submission was an afterthought.
115. In any event, and analogous to the allegation of discrimination, no relief has been sought and none is granted.
116. As to whether revocation of the claimant’s employment was justifiable and fair, parties have adopted opposing positions with the claimant maintaining that it was unfair and ought to have awaited conclusion of the criminal case pending since early, 2020.



The respondent submitted that the respondents observed due process.

117. Significantly, the procedure on the termination of the employment of a Clerk of a County Assembly is prescribed by law and is intended to ensure due process.
118. Under Section 22 of the *County Assembly Services Act* the County Assembly Service Board is empowered to suspend a Clerk for:
 - (a) inability to perform the functions of the office, whether arising from infirmity of body or mind;
 - (b) gross misconduct or misbehaviour;
 - (c) incompetence;
 - (d) bankruptcy;
 - (e) violation of the provisions of Chapter Six of *the Constitution*; or
 - (f) violation of the provisions of this Act.
119. As adverted to elsewhere in this judgment, the claimant had been on suspension long before he was interdicted vide letter dated 22nd January, 2021.
120. Section 23 of the *County Assembly Services Act*, entitled ‘Procedure for removal of the Clerk’ provides –
 - (1) Where the Board considers it necessary to remove the Clerk under section 20, the Board shall—
 - (a) frame a charge or charges against the Clerk;
 - (b) forward the statement of the said charge or charges to the Clerk together with a brief statement of the allegations in support of the charges;
 - (c) invite the Clerk to respond to the allegations in writing setting out the grounds on which the Clerk relies to exculpate himself or herself; and
 - (d) invite the Clerk to appear before the Board, either personally or with an advocate as he or she may opt, on a day to be specified, to exculpate himself or herself.
 - (2) If the Clerk does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Board the Clerk fails to exculpate himself or herself, the Board shall submit a notice of a motion to the Speaker seeking that the county assembly revokes the appointment of the Clerk.
 - (3) A motion under subsection (1) shall specify—
 - (a) the grounds set out in section 21 in which the Clerk is in breach; and
 - (b) the facts constituting that ground.
 - (4) Upon notice of the motion under subsection (2), the Speaker shall refer the matter to a select committee of the assembly consisting of eleven members and established in accordance with the Standing Orders of the assembly to investigate the matter within ten days of receipt of the motion.
 - (5) The select committee shall, within ten days, report to the assembly whether it finds the allegations against the Clerk to be substantiated.



- (6) The Clerk shall have the right to appear and be represented before the select committee during its investigations.
 - (7) The assembly shall consider the report of the select committee and resolve whether to approve the motion.
 - (8) If the assembly approves a motion filed under this section, the Clerk against whom the motion was filed shall be deemed to have been removed from office from the date the motion was approved.
121. Worthy of note, all the provisions of Section 23 of the [County Assembly Services Act](#) reproduce herein above, are couched in mandatory tone.
 122. Needles to underline, the elaborate and mandatory process under Section 23 above is designed to ensure that there is a justification for removal of a Clerk from office and due process is observed as envisioned by the provisions of Article 236(b) of [the Constitution](#) of Kenya.
 123. Based on the evidence on record, it is arguable that the respondents' complied with the provisions of Section 23 of the [County Assembly Services Act](#) as the claimant was taken through the entire process.
 124. However, the process is faulted on the ground of fairness in that the respondents did not supply the claimant with copies of documents on the basis of which the charges were drawn.
 125. Initially, the respondents cited confidentiality but at the insistence of the claimant the respondents agreed on "access and peruse" which eventually took place on 27th November, 2023 and hearing took place on 30th November, 2023.
 126. Since the claimant was a public officer and an employee of the respondent, the provisions of the [Employment Act](#) germane to termination of employment applied to him and as held in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR.

" ...However, for a termination to pass the fairness test, it must be shown that there was not only substantive for the termination but also procedural fairness..."

See also *Naima Khamis v Oxford University Press (EA) Ltd* [2017] eKLR.
 127. As to the reason for termination of employment, the claimant was accused of various forms of misconduct and initially responded vide letter dated 17th November, 2023, but had by letter dated 6th November, 2023 requested for documents which were never availed. I will revert to this issue when I address procedure.
 128. In his response, the only one on record, the claimant appeared largely to rubbish the charges, blaming others and appear to have forgotten that he was Authorised Officer and the Accounting Officer of the County Assembly of Migori and the buck stopped at his desk for all administrative and accounting and financial matters.
 129. As the Chief Administrative officer of the County Assembly, under Section 19(a) of the [County Assembly Services Act](#), he superintended over daily activities and operations of the County Assembly and was the Secretary to the Board.
 130. He could not compare himself with any other employee in his office, nor were their degree of their responsibilities and accountability the same.



131. All other staff were answerable to him, including the procurement officer and was personally required to ensure that the provisions of the *Public Procurement and Asset Disposal Act* (PPAD) and the *Public Finance Management Act* were complied with among others.
132. After all, the claimant approved all payments, signed all contracts between the County Assembly Service Board and 3rd parties, and was thus personally accountable.
133. In sum, as the only Accounting Officer in the County Assembly of Migori, he was accounted for everything that transpired on matters administration, finance, accounting and procurement among others. He could not pass the buck.

Section 43 of the *Employment Act* provides

- (1) ...
 - (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
134. In *Kenya Revenue Authority V Reuvel Waitthaka Gitahi & 3 Others* [2017] eKLR, the Court of Appeal expressed itself as follows:

“We have carefully re-evaluated the evidence on record on this issue and we think, with respect, that the trial court applied a skewed standard of proof, and, certainly, not the one provided for under section 43 (1) of the Act. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.

The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee’s services. This is a partly subjective test...”

See also *Galgalo Jarso Jillo V Agricultural Finance Corporation* [2021] eKLR.

135. In the *Kenya Revenue Authority* case (Supra), the Court of Appeal further relied on the guidelines in *Halsbury’s Laws of England* 4th Edition, Vo. 16 (1B) Para 642 on the range of reasonable responses test as follows:

”... In adjudicating on reasonableness of the employer’s conduct an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employees conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; but if the dismissal falls outside the band, it is unfair”.

See also, *British Leyland (UK) Ltd V Swift* [1981] IRLR91.



136. Based in the evidence on record, and guided by the foregoing statutory provisions and judicial authorities, it is the finding of the court that the respondents have demonstrated on a preponderance of probabilities that they had a substantial justification to revoke the claimant's employment as Clerk of the Migori County Assembly.

Procedure

137. As held in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR, the elaborate process set out in Section 41 of the *Employment Act* is mandatory and any dismissal or termination of employment without compliance with the provisions of Section 41 is procedurally flawed and thus unfair within the meaning of Section 45 of the *Employment Act*.

138. Although the provisions of Section 23 of the *County Assembly Services Act* are undoubtedly comprehensive on due process, they are reticent on whether the Clerk is entitled to call witnesses before the Board as the provisions of Section 23(1)(d) of the Act are explicit that the Clerk can only appear in person or with an advocate.

139. The provisions are also silent on the Clerk's right to be supplied with or furnished with the documents and materials the Board or select Committee will rely on in prosecuting their case against the Clerk.

140. These are essential ingredients of the right to be heard and fair hearing and cannot be dispensed with.

141. See *Judicial Service Commission V Mbalu Mutava & Another* [2015].

In this case, and as adverted to elsewhere in this judgment, the claimant many several written requests to be supplied with certain documents which he identified and the best the respondents could do is to accord him what they called "access and peruse" for about 11/2 hours and eventually, when it happened on 27th November, 2023, the claimant interacted with copies of about 19 documents from 9:30am to 11:04am, about one(1) hour and thirty four (34) minutes and the claimant confirmed having seen the copies.

142. Having declined to furnish copies of the documents to the claimant, the alternative the respondents had chosen ought to have been equally effective, but it was indisputably not as the duration given was not sufficient.

143. Even if the claimant's note taking skills were perfect the duration provided was not sufficient.

144. Notably, in his quest to obtain copies of the documents, the claimant maintained that the documents would enable him submit a comprehensive and/or substantial response to the charges.

145. The fact that they were not availed after the initial request in October meant that the claimant could not rely on them in the preparation of his response which the respondents demanded by 17th November, 2023 and a hearing was slated for 30th November, 2023 and took place.

146. The issue of availment of documents to an employee who is undergoing disciplinary process has been addressed by the Court of Appeal in several decisions.

147. In *OI Pejeta Ranching Ltd V David Wanjau Muhoro* [2017] eKLR, the court held: -

"The respondent, before the re-scheduled disciplinary 'hearing' requested the appellant to furnish him with a copy of the audit report so as to sufficiently prepare for his defence as is envisaged by the principles of fair hearing. Fairness in the circumstances would inform that



the respondent be supplied with the allegations against him in sufficient detail to adequately prepare for a defence...

That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair”.

148. Similarly, in *Regent Management Co. Ltd V Wilberforce Ojiambo Oundo* [2018] eKLR, the court stated:

“We are at a loss as to why the appellant refused to grant the respondent certified copies of the documents requested even at his own expense. In our view, these documents were integral to the respondent preparing his defence. By only availing the documents for his perusal at its premises for a number of hours was not adequate...”

These sentiments apply on all fours to the facts of this case.

149. Finally, in *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR, the Court stated as follows:

“...The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The respondent faced serious indictments which could torpedo his entire career and destroy his future...

For all those reasons, we agree with the trial court that the procedure adopted by the appellant was short of a fair one. We so find”.

150. These sentiments resonate with the facts of the instant case as the respondent’s denied the claimant documents he considered integral to the preparation of his defence and hearing.

151. For unexplained reasons, the claimant snubbed the invitation of the Adhoc Select Committee to appear on 8th December, 2023 at 9:30am to help with the investigation.

152. The fact that neither the claimant nor his counsel appeared, yet they were aware of the invite did not create a positive impression on the claimant.

153. Finally, the claimant pleaded and testified that the internal disciplinary proceedings ought to have awaited the outcome of Kisumu Anti-Corruption Criminal Case No. E002 of 2020.

154. The respondents submitted that pendency of criminal proceedings was not a bar to internal disciplinary processes as there are distinct processes independent of each other.

155. In *Regent Management Ltd V Wilberforce Ojiambo Oundo* (Supra) the Court of Appeal held –

“To begin with, there is a clear distinction between internal disciplinary proceedings of an employer and criminal proceedings for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required. This distinction was appreciated by Okwengu JA in *Judicial Service Commission v Gladys Boss Shollei & Another* [2014] eKLR”.



156. Similarly, in *R. V. Wigglesworth* [1984], 1984 Canlil 2275 (SK CA) 11 C.C.C. (3D) 27, 7 D.L.R. (4TH) 361 38 C.R (3D) 388 (Sask C. A.) the court held –

“ A single act may have more than one aspect and it may give rise to more than one legal consequence. It may, if it constitutes a breach of duty a person owes a society amount to a crime, for which the actor must answer to public. At the same time, the act may, if it involves injury and breach of one’s duty to another constitute a private cause of action for damages for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of duties of one’s office or calling in which event the actor must account to his professional peers...

Similarly, a policeman who assaults a prisoner is answerable to the state for his crime; to the victim for the damage he caused and to the police force for discipline”.

157. It is now settled that institution of criminal proceedings is not a bar to civil proceedings on similar facts. In *Geoffrey Kiragu Njogu V Public Service Commission & 2 Others* [2015] eKLR, the court stated,

“With the foregoing in mind, we concur with the majority decision of this court in *Attorney General & Another V Adrew Maina Githinji & Another* [2016] eKLR that a dismissed employee need not await the outcome of any criminal proceedings that may be mounted concurrently with internal disciplinary processes that may culminate in the impugned dismissal before challenging such a dismissal...”

The Court is in agreement with the respondent’s submissions.

158. Clearly, the respondents were not obligated to await the outcome of the criminal case as inter alia its purposes is to remedy a social wrong while internal disciplinary process are intended to remedy wrongs against the employer.

Reliefs

159. Having found that the revocation of the claimant’s appointment as Clerk Migori County Assembly was substantively justifiable but procedurally flawed and thus unfair, the Court proceeds as follows:

i. Declaration

Having found that termination of the claimant’s employment by the respondent’s was unfair for want of procedural propriety, a declaration to that effect is merited.

ii. Revocation of the 4th respondent’s resolution dated 14/12/2023 (Reinstatement)

Reinstatement is one of the remedies provided under Section 12(3)(vii) of the *Employment Act* read together with Section 49(3)(a) of the *Employment Act* and analogous to all other reliefs under Section 49 of the *Employment Act*, its award is discretionary as succinctly captured by Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya* [2014] eKLR.

160. That discretion is exercised in accordance with the parameters set out under section 49(4) of the Act.

161. In this case, it is evident that the claimant has expressed his wish to remain in the employment of the respondents. Secondly although the claimant was appointed in July, 2017, he was suspended in 2019 and subsequently interdicted in early 2021, which means that he only rendered services for about 2 years, which is a short time. Third, the claimant has a criminal case pending determination. Fourth,



the claimant substantially contributed to the revocation of his appointment in that according to the respondents he did not exhibit diligence in the discharge of his duties and none of the members of the Adhoc Select Committee dissented.

162. Finally, as regards practicability of reinstatement, the court is guided by the sentiments of the Newzeland Court of Appeal in Educational Institute V Board of Trustees of Auckland Normal Intermediate School [1994] 2 E RN2 414 (CA) cited by A. Murgor JA in Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & Others (Supra) as follows -

“Whether... it would not be practicable to reinstate (the employee) involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is no uncommon for this court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship.

Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully.

Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences”.

163. Although the position of Clerk, Migori County Assembly has no substantive holder pending determination of this case, the claimant left the office in 2019.
164. Having regard to the circumstances in which the claimant left his place of work and the yet to be concluded Kisumu Anti-Corruption Criminal Case No. E002 of 2020, the court is not persuaded that reinstatement would be practicable in this instance.
165. Relatedly, the claimant has not demonstrated any unique or extraordinary or special circumstances to justify qualification of the common law principle that specific performance is not available in contracts of personal service.
166. In the end, the prayer for revocation of the 4th respondent’s resolution is declined.
167. However, as correctly submitted by the respondent’s counsel, the claimant’s remedy lies in compensation for the unfair termination of employment in accordance with the provisions of Section 49(1)(c) of the *Employment Act*.
168. The foregoing is fortified by the decision in Kenfreight (EA) Ltd V Benson R. Nguti [2019] eKLR, where the Supreme Court held-

“What then should be the correct award on damages be based on? Having keenly perused the provisions of section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, section 49 applies”.

169. Considering that the claimant was already on suspension by the time he was charged and subsequently interdicted, and substantially contributed to the revocation of his appointment as Clerk of Migori



County Assembly and having further considered that the claimant served the respondents for slightly over 2 years before suspension and wished to remain in employment, the court is satisfied that the equivalent of two (2) months salary is fair.

170. The upshot of the foregoing is that judgment is entered in favour of the claimant against the 2nd and 4th respondents in the following terms:

- a. Declaration that revocation of appointment of the claimant as Clerk Migori County Assembly was unfair.
- b. Equivalent of 2 months gross salary.
- c. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 17TH DAY OF FEBRUARY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

