



Kiage v Public Service Board - Kisii County Government & 2 others (Cause E087 of 2024) [2025] KEELRC 2149 (KLR) (22 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E087 OF 2024**

**JK GAKERI, J
JULY 22, 2025**

BETWEEN

JULIUS NYAMWEYA KIAGE CLAIMANT

AND

**PUBLIC SERVICE BOARD - KISII COUNTY GOVERNMENT ... 1ST
RESPONDENT**

**COUNTY SECRETARY & HEAD OF PUBLIC GOVERNMENT – KISII
COUNTY GOVERNMENT 2ND RESPONDENT**

KISII COUNTY GOVERNMENT 3RD RESPONDENT

JUDGMENT

1. The claimant commenced the instant suit vide a memorandum of claim dated 24th October, 2024 filed on 29th October, 2024.
2. The claimant’s case is that he was employed by the 1st respondent for a period of 3 years effective 22nd April, 2013 as a Personal Assistant to the Deputy Governor, was redesignated as Administrative Officer I office of the Deputy Governor vide letter dated 28th September, 2014 and his employment terminated vide letter dated 5th January, 2015, but reinstated to the position of Job Group “N” under a 2 year renewable contract which was renewed vide letter dated 16th July, 2019 to the position of Assistant Director Administration Job Group “P” and further renewed effective 1st January, 2021 to 30th June, 2023 under the office of the Deputy Governor.
3. The claimant avers that vide letter dated 14th July, 2021, he was deployed to the Department of Trade, Tourism and Industry as Deputy Director Administration.
4. That vide letter dated 5th September, 2000? the respondents reviewed his terms of employment by reducing the duration of the contract citing the provisions of Section 74 and 75 of the County



Governments Act and payment of salary was discontinued, appealed the decision and renewal of contract was declined, filed a suit in court which was struck out for want of jurisdiction on exhaustion filed an appeal with the Public Service Commission (PSC) which disallowed the appeal and issued certain directions including payment of gratuity.

The claimant prays for:

- a. A declaration that termination of the contract of employment by the respondent was unfair, unlawful and irregular.
- b. Damages including, special, exemplary, compensatory and punitive damages.
- c. Costs of the suit with interest at court rates.
- d. Any other, auxiliary compensatory relief that the court may deem fit to grant.

1st, 2nd and 3rd Respondents case

5. Vide a Memorandum of Response dated 26th March, 2025 the respondents aver that the 2nd respondent notified the claimant of termination of employment for gross misconduct and violating Article 232 of the Constitution of Kenya but reinstated him vide letter dated 24th August, 2017 for a period of 2 years, renewed on 16th July, 2019 for a further period of 3 years and later for another period of 2 years from 7th July, 2021 and was allocated duty vide letter dated 14th July, 2021 but the 2nd respondent invoked Sections 74 and 75 of the County Governments Act and reduced the contractual period from 30th July, 2023 to 31st August, 2022.
6. That vide letter dated 21st October, 2022, the 2nd respondent communicated the decision of the County Public Service Board declining renewal of the claimant's contract as he had attained the mandatory retirement age as he was 61 years.
7. The claimant's Reply to the respondent's response raised no new issue.

Claimant's submissions

8. As to whether termination of the claimant's employment was lawful, counsel cited the provisions of Section 41(1), 43(1), 45 and 47(5) of the Employment Act, to urge that the respondent had no good cause to do so.
9. Pushing the case further, counsel submitted that the termination of the claimant's employment was procedurally flawed for want of sufficient notice and disciplinary hearing.
10. On the reason for termination, counsel cited decisions in Muthaiga Country Club V Kudheiha Workers [2017] eKLR and Josephine M. Ngunga & Others V Plan International Inc [2019] eKLR to urge that while the employee is required to demonstrate a prima facie case that termination of employment was unfair, the respondent is required to prove that the termination of employment was justifiable in the circumstances.
11. On the provisions of Section 74 and 75 cited by the respondents as the basis for reducing the claimant's term of employment, counsel submitted that whereas the provisions mandated the respondents to take corrective action in respect of any irregularity and/or fraud, they did not except the respondents from the provisions of the Employment Act on termination of employment and the respondents had not adduced any evidence to demonstrate that the procedure was fair, no investigation was conducted and the termination of the claimant's employment was unfair, unprocedural and unfair and the claimant was entitled to salary in lieu of notice, compensation under Section 49(1) of the Employment Act and



for wrongful termination at Kshs.5,000,000 and unpaid wages for the month of September 2023, 2022 to 30th June, 2023 Kshs.144,910.00, exemplary damages at Kshs.5,000,000 and costs of the suit.

Respondent's submissions

12. As to whether the instant claim was an abuse of court process and disclosed no cause of action, counsel for the respondents submitted that it indeed was and disclosed no cause of action.
13. According to counsel, the critical issue was whether the claimant was an employee of the 1st respondent as his letter of appointment dated 21st May, 2013 was from the office of Governor and the 3rd respondent's recruitment policies were governed by Article 232 of the Constitution of Kenya.
14. Counsel further relied on the provisions of the County Governments Act on re-designation, Part VI of the Public Service Commission Act on advertising of vacancies and the County Government HR Manual, to urge that the claimant was not employed as per the law and policies in force and was thus not an employee of the 1st respondent.
15. Counsel submitted that the claimant could not be re-designated because he was not serving in the Public Service, the position he held was not advertised, shortlisted, interviewed etc and was thus appointed through an irregular or illegal process contrary to the Constitution of Kenya and several statutes.
16. Reliance was placed on the sentiments of the court in *Evans Kipchumba Lokabei V County Public Service Board Baringo, County Government & another* [2020] eKLR, where it was held that the claimant's employment ended upon expiry of the 5 year appointment unless it was renewed, to argue that the claimant had no letter of appointment to the Role of Administrative Officer or other role outside the Personal Assistant to the Deputy Governor.
17. Counsel submitted that the purported reinstatement in 2017 vide letter dated 24th August, 2017 was irregular as he could only be reinstated to the same position he held and had no contractual relationship with the 3rd respondent and employment after termination in 2015 was illegal a null ab initio and the suit was an abuse of court process citing the decision in *Satya Bhama Gandhi V Director of Public Prosecutions & 3 Others* [2018] eKLR, to urge that since the claimant had no lawful contract with the respondents, he had no valid cause of action.
18. Reliance was made on the sentiments of the Court of Appeal in *Mapis Investment (K) Ltd V Kenya Railways Corporation* [2005] 2 KLR on the maxim *ex turpi causa non oritur actio*.
19. As to whether termination of the claimant's employment was unlawful or unfair counsel submitted that the claimant's claim had no legal basis.
20. That the term of the claimant's tenure was coterminous with the term of the Deputy Governor citing a Ruling of the Public Service Commission.
21. Further counsel submitted that the variation of the claimant's contract of employment was occasioned by the illegalities and irregularities in the recruitment process citing the decision in *Erick Otieno Oricho & 6 Others V County Public Service Board & 2 Others* [2019] KEELRC 2195 (KLR) on the import of Section 75 of the County Governments Act.
22. Strangely, counsel submitted that the respondents had pleaded that in correction of an irregularity it ought to pursue the illegally earned salaries and allowances through criminal proceedings with agencies such as the EACC, citing the decision in *Ethics & Anti-Corruption Commission V Evans Nyaoga Rombeka* [2023] KEHC 996 (KLR).



23. Counsel submitted that the claimant failed to prove a prima facie case for the respondent to establish the reason(s) for termination of his employment.
24. On reliefs, counsel submitted that the claimant was not entitled to any as he had not proved that he was an employee of the 3rd respondent citing the decision in *Karume V Tana Water Works Development Agency* [2025] eKLR, where the court declined to enforce an action to aid a person who had acted illegally.

Analysis and determination

25. This case turns on the evidence adduced by the parties bearing in mind that counsels proposed that the matter proceeds by way of written submissions and the documentary evidence on record as ordained by the Employment and Labour Relations Court (Procedure) Rules, 2024.
26. The respondents availed documents showing that vide letter dated 21st May, 2013, the Interim County Secretary, Mr. Johnstone O. Ndege of the Office of the Governor offered the claimant employment as a Personal Assistant in the office of the Deputy Governor at Kshs.53,140, house allowance of Kshs.17,000 and commuter allowance of Kshs.8,000.00 total Kshs.78,140 per month.
27. The letter was unambiguous that the appointment would be regularised by the County Public Service Board and had no term limit.
28. However, by letter dated 28th September, 2014, the claimant was re-designated by the County Public Service Board to the post of Administrative Officer I on similar basic salary and commuter allowance but enhanced house allowance at Kshs.24,000 per month.
29. In a dramatic turn of events, the 1st and 2nd respondents terminated the claimant's employment vide letter dated 5th January, 2025 and no reason was provided. However, by a further letter dated 8th January, 2025, under reference termination of employment, the 2nd respondent wrote to the claimant explaining how he joined the County Government of Kisii and that his position had been regularized by the 1st respondent.
30. The letter informed the claimant that his employment was terminated for unidentified gross misconduct and was required to handover County Government property in his custody.
31. In another turn of events, the acting Secretary of the 1st respondent by letter dated 24th August, 2017 notified the claimant that the County Public Service Board had vide its letter Ref. No. KCPSBE/APP/11/07/17 dated 24th July, 2027 resolved to reinstate the claimant in the payroll under a 2 year contract effective 1st July, 2017 and the claimant resumed duty.
32. The contract was renewed vide letter dated 16th July, 2019 by the 2nd respondent citing the 1st respondent's decision vide letter Ref. KCPSB/HR/APP/08/07/2019 dated 3rd July, 2019, as an Assistant Director Administration at Job Group "P" for 2 years effective 1st July, 2019 and the contract was renewed again vide the 2nd respondent's letter date 7th July, 2021 pursuant to a decision of the County Public Service Board vide letter Ref No. KCPSB/HR/APP/04/07/21 for a further 2 years to 30th June, 2023 and was deployed to Department of Trade, Tourism and Industry as Deputy Director Administration reporting to the Chief Officer of the Governor.
33. Finally, vide letter dated 5th September, 2022, the 2nd respondent informed the claimant that his terms of employment had been varied by the County Public Service Board Minute No. KSI/CPSP/1/09/2022 dated 2nd September, 2022, terminating the contract effective 31st August, 2022, a communication the claimant contested on the premises that he was not a Personal Assistant to the former Deputy Governor



following a re-designation vide letter dated 28th September, 2014 as Administration Officer I, letters the respondents could not deny having authored.

34. By a response dated 21st October, 2022 the 2nd respondent informed the claimant that his contract could not be renewed because he had attained the age of retirement.
35. Clearly, the respondents response to the claimant's concerns addressed a different issue. The claimant had not sought a renewal of his employment contract. He was contesting the unilateral variation of the contract which amounted to termination of his employment.

The court finds.

36. To the question whether the claimant was an employee of the 3rd respondent, the answer is in the affirmative for the simple reason that the respondents admitted that fact under paragraph 3 of their memorandum of Response and acknowledged the re-designation as an Administrative Officer I.
37. Similarly, and as adverted to elsewhere in this Judgment, vide letter dated 8th January, 2015 the respondents confirmed that the claimant was an employee of 3rd respondent as the County Public Service Board had regularized his appointment which would explain his reinstatement on the payroll and subsequent renewals of the contract until 2021.
38. In the court's view nothing turns on this issue on account that the respondents neither plead nor evidentiary demonstrated that the contract of employment between the claimant and the 3rd respondent was illegal or irregular and if it was how not less than three (3) County Secretaries and Heads of County Public Service and the County Public Service Boards would get it all wrong from 2013 to September 2022?
39. Counsel's submissions that the claimant's contract of employment was illegal or irregular was an overreach.
40. Finally, the respondents availed no scintilla of evidence to show that the claimant was in any way to blame for the purported illegality or irregularity if any.
41. As to whether termination of the claimant's employment was unfair counsels adopted contrasting positions. While the claimant's counsel submitted that it was unlawful counsel for the respondents submitted that the 1st respondent was correcting an irregularity under Sections 74 and 75 of the [County Governments Act](#).
42. It is trite law that the County Public Service Board is empowered to establish, abolish offices in the County Public Service and appoint persons to hold or act in offices of the County Public Service. It also mandated to exercise disciplinary control over, and remove persons holding or acting in those offices.
43. It is equally trite law that all persons appointed to act or hold office in the County Public Service are public officers within the meaning of Article 260 of [the Constitution](#) of Kenya and thus protected by the provisions of Article 236 of [the Constitution](#) of Kenya which provides;
A public officer shall not be-
44.
 - a. victimised or discriminated against having performed the functions of office in accordance with this constitution or any other law; or
- 45.



- b. dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.
46. It requires no over dramatization that due process in the removal, dismissal or disciplinary action is a constitutional imperative and being the supreme or pre-eminent law, its provisions must be complied with by law.
47. It is not in contest that by letter dated 7th July, 2021, the 3rd respondent's renewed the claimant's employment contract for a period of 2 years effective 1st July, 2021 to 30th June, 2023 other terms and conditions of employment would remain the same.
48. Equally not in contest, vide letter dated 14th July, 2021 the claimant was deployed from the Department of Trade, Tourism and Industry to the office of the Deputy Governor as the Deputy Director Administration and as adverted to elsewhere in this judgment, the respondents unilaterally varied the duration of the claimant's contract of employment and by so doing terminated his employment citing minute No.KSI/CPSB/1/9/2022 dated 2nd September, 2022 and Sections 74 and 75 of the [County Governments Act](#).
49. The tenor respondents' letter leaves no doubt that according to them the two provisions are a carte blanche to deal with employees of the County Public Service as it pleased them.
50. For starters, Section 74 and 75 of the [County Governments Act](#) provide as follows:
Section 74
51. The County Public Service Board shall regulate the engagement of persons on contract, volunteer and casual workers, staff of joint ventures and attachment of interns in its public bodies and offices.
Section 75
52. If it comes to the attention of the County Public Service Board that there is reason to believe that any process or decision under this Part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may—
- (a) revoke the decision;
- (b) direct the concerned head of department or lawful authority to commence the process afresh;
or
- (c) take any corrective action including disciplinary action.
53. In the court's view, although the term regulate used in Section 74 generally involves control, it does not confer authority upon the County Public Service Board to unilaterally interfere with existing contracts of employment and if it did so the provisions of all other relevant laws including [the Constitution](#) of Kenya and the [Employment Act](#) become part of the matrix and the employer is required to observe their provisions.
54. The provisions of Section 75 of the [County Governments Act](#) reproduced above cannot avail the respondents on account that they adduced no evidence to demonstrate that the 1st respondent had ascertained that there was any irregularity or fraud in the employment of the claimant or indeed any other employee of the 3rd respondent, investigated the matter and was satisfied that there had been an irregularity or fraud and the termination of the claimant's employment was the optimal corrective action.



55. Finally, after the respondents varied the duration of the claimant's employment and the claimant raised concerns about it, including not being a Personal Assistant of the Deputy Governor, which was factual as acknowledged by the re-designation, the respondents cited the claimant's age of 61 as the impediment to the renewal of contract, which begged the question since the claimant never sought renewal of his contract of employment.
56. The claimant was contesting the variation, which not only shortened the duration but terminated his employment without due process.
- Section 10(5) of the *Employment Act* provides that:
57. Where any matter stipulated in sub-section (1) changes, the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing.
58. The particulars covered under Section 10 (1) of the Act include the duration of the contract of employment.
59. Puzzlingly, the 2nd respondents/letter on variation of the claimant's term of employment had not reason as to why the action was taken or deemed necessary and the termination of employment took place before the letter was written.
60. In *James Ang'awa Atanola V Judicial Service Commission* [2017] eKLR the Court held:
- “Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and/or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the Fair Labour Practice Principle”.
61. It is trite that a unilateral variation of an essential term of contract of employment amounts to a repudiation of the contract and entitles the employee to treat the contract as repudiated and could in such circumstances resign and sue for constructive dismissal as exquisitely captured by Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* [1978] ICR 222.
62. In this instance, the claimant could not resign because the variation effectively terminated the employment relationship.
63. Needless to emphasize, for a termination of employment to pass as fair it must be demonstrated that the employer had a substantive justification to terminate the employee's employment and conducted it in consonance with a fair procedure as held in *Walter Ogal Anuro V Teachers Service Commission* [2013] eKLR and *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR.
64. Put in the alternative, the employer is required to prove that it had a valid and fair reason to terminate the employee's employment and the procedure used was fair as ordained by the provisions of Section 45(2) of the *Employment Act*.
65. From the evidence on record, other than citing Section 74 and 75 of the *County Governments Act* and without explaining when they were invoked and how and in particular Section 75 of the Act, the respondent availed no reason as to why it terminated the claimant's employment.



66. As regards the claimant's age cited after the fact, it is trite law a fixed term contract is governed by the terms and conditions therein as agreed upon by the parties and in this instance the claimant's age was not one of the terms of the contract.
67. If the 3rd respondent intended to make the claimant's services dependent of his retirement age, nothing would have been easier.
68. On due process, it is clear that other than service of the letter dated 5th September, 2022 no procedural formalities were complied with.
69. Non-compliance with the provisions of Section 41 of the Employment Act rendered the termination of the claimant's employment procedurally flawed as the procedure is mandatory, as held in Pius Machafu Isindu V Lavington Security Guards Ltd [2017] eKLR.
70. See also the sentiments of Mbaru J in Jane Samba Mukala V OITukai Lodge [2013] eKLR.
71. The totality of the foregoing is that the court is satisfied that the respondents' have failed to demonstrate that they had a justification to terminate the claimant's employment or did so in accordance with a fair procedure.
72. The termination of the claimant's employment was unfair within the meaning of Section 45 of Employment Act.

Appropriate Reliefs

Declaration

73. Having found that termination of the claimant's employment by the respondent was unfair and unlawful, the declaration sought is merited.

Compensatory damages

74. Although the provisions of the Employment Act make no provision for compensatory damages, Section 49(1)(c) provides for compensation up to a maximum of 12 month's salary, and having found that termination of employment was unfair, the claimant is entitled to compensation subject to the provisions of Section 49(4) of the Act.
75. Considering that the claimant contested the termination of employment, but did not pray for reinstatement, did not contribute to the termination of his employment, had served for more than five (5) years after the reinstatement in 2017 expected to serve until expiry of the contract in 2023 and chances of securing comparable or suitable employment with another employer are minimal in light of the age, the equivalent of four (4) month's gross salary is fair.
76. In the end, judgment is entered in favour of the claimant against the 3rd respondent in the following terms:
 - a. Declaration that termination of the claimant's employment by the respondent was unfair.
 - b. Equivalent of four (4) month's gross salary.
 - c. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 22ND DAY OF JULY, 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.

DR. JACOB GAKERI

JUDGE

