



**Mukui v Kenya Airports Authority (Petition E078 of 2023)
[2024] KEELRC 927 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 927 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E078 OF 2023**

B ONGAYA, J

APRIL 8, 2024

**IN THE MATTER OF VIOLATION OF ARTICLE 10,
28, 41(2), (A) (B) 2, 47 OF THE CONSTITUTION.**

AND

IN THE MATTER OF SECTION 5 OF THE EMPLOYMENT ACT.

AND

IN THE MATTER OF SECTION 34 (3) OF THE PUBLIC SERVICE COMMISSION ACT

BETWEEN

ENG. RAPHAEL NGUGI MUKUI PETITIONER

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 25.04.2023 through Kemunto Moenga & Company Advocates seeking the following reliefs:
 - a. A declaration that the respondent violated the petitioner's rights under 28, 41(2) (a) & (b), 47 of the Constitution of Kenya, 2010.
 - b. A declaration that the respondent breached Section 5(5) of the Employment Act.
 - c. A declaration that the respondent breached Clause E.11 (2) and Clause G.4 (5) of the Human Resource Manual.
 - d. A declaration that the respondent breached Section 34 (3) of the Public Service Commission Act.



- e. A declaration that the petitioner is deemed to have been lawfully appointed to the position of Manager, Airport Development and Contract on November 13, 2018 at the expiry of the acting period.
 - f. The respondent be and is hereby directed to pay total underpayment of Kshs. 3,033,504.40 as tabulated in Table RNM1, plus interest.
 - g. The respondent be and is hereby directed to compensate the petitioner for violation of his rights.
 - h. The respondent be and is hereby ordered to issue the petitioner with a Certificate of Service reflecting confirmation to the position of Manager, Airport Development & Contract.
 - i. Any other or further orders as this Honourable Court deems fit and appropriate.
 - j. Provide costs to the petitioner.
2. The petition was based upon the supporting affidavit of the petitioner and annexures thereto filed together with the petition and sworn on 25.04.2023. The petitioner's case is as follows:
- a. That he is a registered engineer by profession. The respondent appointed him to the position of Civil Engineer (Grade 12) by the appointment letter dated September 6, 2007 effective on November 19, 2007. He annexed the appointment letter as exhibit.
 - b. He worked diligently in his position with dedication and competence and was accorded commendations and awards as exhibited.
 - c. That vide a letter dated May 10, 2018, he was appointed to the position of Acting Manager Airport Development and Contract which was a short term appointment as per the provisions of Clause E.12 of the Respondent's HR Manual which appointment was intended to relieve the incumbent Engineer Kamau who was proceeding on leave for 147 days starting April 27, 2018. He exhibited the appointment letter as exhibit.
 - d. According to Clause G.4 (5) of the Respondent's HR Manual, he was entitled to acting allowance and was eligible for privileges and allowances attached to the post he was acting in except house allowance.
 - e. The petitioner assumed the said position of Manager Airport Development and Contract in acting capacity on April 27, 2018 for a period of 147 days which period lapsed in November 13, 2018.
 - f. Upon the lapsing of the said period, the incumbent Manager Eng. Kamau did not resume work and the Petitioner herein continued to hold the position irregularly without any explanation or regularization by the respondent.
 - g. By a letter dated April 20, 2022, the petitioner herein wrote to the respondent requesting that the said position be regularized by confirming his appointment or filling the position since the HR Manual Clause E.11(2) provides that an acting position should not exceed a period of six months.
 - h. That via an email dated August 19, 2020, the respondent informed the Petitioner to continue working in the said position without regularization, which, the petitioner says, was demoralizing and demotivating although he continued to work in the position in which he made notable achievements.



- i. That on July 13, 2021, the Respondent made an internal advertisement to fill the substantive office which the petitioner pleaded that the call was irregular and unnecessary as the appointment of the petitioner in acting capacity had been preceded by a similar process in which he was certified the most suited to be appointed. He annexed the internal advertisement as exhibit.
- j. That the foregoing is affirmed in Clause E.12 (2) of the respondent's HR Manual which provides

“(2) The employee appointed to act shall be the most suitable based on predetermined criteria to perform the duties of a higher post.

I certify that the employee recommended is being called upon to perform duties which are separate and distinct from those of his substantive post, and that the post demands a higher degree of responsibility and initiative. I further certify that the employee being called upon to perform these duties has the required qualifications and experience to execute the functions of this job satisfactorily.”
- k. That additionally, Clause E. 12 (2) of the Respondent's HR manual provides for a rotational acting appointment in the event more than one employee satisfies the criteria and that then having served solely in the period it is inferred that he was the only one suited for the job.
- l. That he applied for the position after the advertisement and the shortlisting happened only six months to his retirement, which he believes, was made to lock him out of the process.
- m. That in the interest of facilitating job interest transition he turned down the interview invitation via an email dated January 25, 2022, which email he has exhibited.
- n. That he then continued to work in his acting capacity until June 14, 2022 when he received a letter from the respondent advising him that his acting appointment had ceased with effect from June 1, 2022, which was a month before he was due for retirement. He exhibited that letter.
- o. That by the prolonged filling of the substantive position of Manager and having him act all that long was a violation of his right to fair remuneration and right to fair administration action.
- p. The Petitioner particularised the monetary and non-monetary disadvantages suffered as a result of the respondent's omissions and commissions as follows:
 - i. Basic salary for Manager Airport Development & Contract (salary scale S8) determined in accordance with the Human Resource Manual 2011, section F.6, Paragraph 1 as read with section F.6 (4) i.e 5 annual increments. He exhibited his payslip and the respondent's salary scale extract.
 - ii. Airtime allowance payable every month through direct airtime credit to his phone and an additional sum in his monthly payslip to cover the corresponding fringe benefit tax. From November 14, 2018, his net monthly airtime allowance should have been adjusted upwards from Kshs. 3000.00 to Kshs. 4000.00 an increase of Kshs. 1000.00 net (Totalling to Kshs. 1814.29 gross)
 - iii. The housing allowance in salary grade S8 is Kshs. 60,000.00 while that in salary grade S7 is Kshs. 50,000.00. From November 14, 2018, his housing allowance should have been adjusted upwards from Kshs. 50,000.00 to Kshs. 60,000.00.



- iv. In line with the Human Resource Manual 2011, section D.19 club membership facility is accorded to employees in salary scale grade S8 and above. An employee salary grade S8 is entitled to a sports club membership and annual subscription facility paid for by the Employer. The limit of club membership fee is Kshs. 800,000.00.
 - v. Every employee on permanent and pensionable terms of service is entitled to Employer pension contribution totalling to 15% of the basic pay per month. By not confirming him to the position of Manager, Airport Development & Contract (salary scale S8) and not paying him the correct basic (pensionable) salary, he was denied his right to benefit from the Employer contribution towards my pension totalling to 15% of the basic pay per month.
 - vi. Leave allowance attributable to the substantive post holder was Kshs. 32,000.00 annually. In his acting capacity he was paid Kshs. 25,000.00. Accordingly, he lost a total of Kshs. 28,000.00 because of the respondent failing to confirm him.
3. He urged that he had issued statutory notice of intention to sue and a reminder, which he exhibited.
4. The Respondent filed its replying affidavit sworn by its General Manager, Human Resource Development, Anthony Njagi on December 5, 2023 with exhibits. He stated as follows:
 - a. That the matter ought to have been a normal claim instead of a constitutional petition.
 - b. He confirmed that the petitioner was an employee of the respondent and was appointed to act as Manager Airport Development & Contract.
 - c. That the Petitioner was invited for an interview for position of Manager on Monday January 31, 2022.
 - d. That the Petitioner via an email dated 26.01.22 declined to attend the interview on grounds that he had a few months before his retirement.
 - e. That due to the Covid-19 health protocols the interviews did not take place. It was rescheduled to 31.01.22 where the petitioner was invited and still declined to attend.
 - f. That the prolonged period of the petitioner serving in acting position was due to the Covid-19 protocols.
 - g. He confirmed owing to the petitioner the difference in airtime and conceded to make good. He however stated that club subscription fee on the other hand is paid directly to the club and not the staff.
 - h. That the petitioner has not demonstrated any form of violation of his constitutional rights.
 - i. He prayed that the petition be dismissed with costs.
5. The Petitioner filed final submissions. The Court has considered all the material on record and returns as follows.
6. To answer the 1st issue, there is no dispute that parties were in a contract of service. The evidence is that the petitioner served as Acting Manager Airport Development and Contract from 27.04.2018 for 147 days and the acting appointment lapsed on 13.11.2018 when the substantive holder of the post failed to resume duty. The petitioner appears to have continued to act but without formal extension of the acting appointment. The petitioner further confirms that clause E.11(2) of the respondent's HR Manual of 2011 stipulated that an acting appointment shall be for a period not exceeding six months



after which period the incumbent will either be confirmed on the post or the post will be filled by substantive appointment of another suitable candidate. It is also clear that the petitioner was invited for an interview for consideration for substantive appointment but he declined. The petitioner wrote on 20.04.2022 requesting to be confirmed in the position retrospectively effective 27.10.2018 and for payment of all outstanding salaries in that regard. As submitted for the respondent, the petitioner has not established a contractual or statutory provision that entitled him to a legitimate expectation for such retrospective appointment. Upon lapsing of 147 days of acting appointment, it appears to the Court that the acting appointment thereby lapsed, as no other acting appointment appears to have issued. The Court finds that the petitioner has failed to establish contravention of fundamental rights as was alleged and prayed for the petitioner. As submitted for the respondent parties are bound by the terms and conditions of the contract, the petitioner knew the terms of the acting appointment and the policy on confirmation into substantive service in the position.

7. To answer the 2nd issue, the Court finds that by operation of provisions of the respondent's HR Manual and more so section 34 of the *Public Service Commission Act, 2017*, the acting appointment could not go beyond the mandatory maximum acting tenure of six months. Thus, it is the Court's opinion that the petitioner cannot find a cause of action upon a purported acting appointment that went against the express policy and statutory provision. It appears to the Court that the petitioner failed to mitigate his circumstances by reverting to his substantive position when the 147 days of acting appointment lapsed or when the maximum 6-months' tenure of acting lapsed. The Court will not aid the parties' unexplained failure to comply with the policy and statutory provisions of the tenure of acting appointments. It appears to the Court that *Oyatsi -Versus- Judicial Service Commission* Petition E111 of 2021 [2022]KEELRC 3 (KLR) is distinguishable from the instant case as in that decided case, there were no statutory provisions fixing, affecting or limiting the tenure of the acting appointment as was the case in the present petition. Further, while the petitioner appears to dispute the letter of extension of acting appointment dated 01.10.2019 (extending the acting appointment from 21.09.2018 until the position was filled substantively) there is no reason to doubt that letter but which the Court finds to have been contrary to section 34 of the *Public Service Commission Act, 2017* limiting acting tenure to a maximum of six months. The Court finds that the acting tenure was invariably unlawful and the Court cannot make a finding of constitutional violations as alleged or award reliefs by way of denied earnings founded upon that extension or conduct of parties that breached the statutory provision. Further, the respondent cannot be found liable as alleged for the petitioner because the undisputed evidence is that the petitioner was invited to an interview to fill the post substantively but he declined the same upon his own reason that he had a few months to retirement. It appears that nothing would have stopped the respondent from making a retrospective appointment in that regard and as now claimed, if the petitioner attended and put his case at the interview. The petitioner umpired himself towards his purportedly impugned circumstance and his actions cannot be construed as the respondent's failures.
8. To answer the 3rd issue the Court finds that the remedies as prayed for would collapse except delivery of a certificate of service. The respondent participated in the failure to implement the statutory and policy provisions on the tenure of the acting appointment and each party to bear own costs of the petition.

In conclusion, the petition is hereby determined with orders:

- a. Each party to bear own costs of the petition.
- b. The respondent to deliver the certificate of service within 30 days from today.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8TH APRIL 2024.



BYRAM ONGAYA
PRINCIPAL JUDGE

