



**Mohamed & 2 others v Ahmed, Wajir County Public Service Board Secretary. & 2 others (Petition E047 of 2024) [2024] KEELRC 2058 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2058 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E047 OF 2024**

**B ONGAYA, J**

**JULY 26, 2024**

**IN THE MATTER OF ARTICLES 19(1) (2) (3), 20(1), (3)(A)(B), (4), 21(1), 22(1), 23(1), 26(1), 27(1) (2), 28, 41(1) 159(1) (2), 232, 234(2) (1), 236 & 162(2)(A) OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF PUBLIC SERVICE COMMISSION COUNTY APPEAL NOS. 55, 56, 57 & 58 OF 2023 DECISION (HANDED DOWN ON 6TH SEPTEMBER 2023);**

**AND**

**IN THE MATTER OF AN ORDER OF MANDAMUS PURSUANT TO ARTICLE 23(3)(F) OF THE CONSTITUTION OF KENYA;**

**BETWEEN**

**IBRAHIM ABDI MOHAMED ..... 1<sup>ST</sup> PETITIONER**  
**AHMED GUHAD OMAR ..... 2<sup>ND</sup> PETITIONER**  
**MOHAMUD HASAI MUSA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**ADOW OSMAN AHMED, WAJIR COUNTY PUBLIC SERVICE BOARD SECRETARY. .... 1<sup>ST</sup> RESPONDENT**  
**THE COUNTY GOVERNMENT OF WAJIR ..... 2<sup>ND</sup> RESPONDENT**  
**HILLOW ISSACK MUMIN, COUNTY SECRETARY, WAJIR COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**



## JUDGMENT

1. The petitioners filed the petition dated 03.04.2024 through the firm of Harry & Associates Advocates making the following prayers:
  - a. Declaration that the respondents contravened Article 232(1) 236(b) of *the Constitution*.
  - b. Declaration that stoppage of the petitioners' salaries was arbitrary, unfair and contrary to Articles 10(2)(c), 27(1), 41(1), 47, 50(1) of *the Constitution*.
  - c. Payment of net salaries of each of the Petitioner herein computed from April 2023 up to the date of delivery of this judgment.
  - d. The Respondents to remit all statutory deductions of the petitioners to the appropriate statutory agencies.
  - e. An order of mandamus be and hereby issued against the 3<sup>rd</sup> respondent to ensure compliance with Public Service Commission County Appeal Nos. 55, 56, 57 and 58 of 2023 and judgment/decree of this Honourable Court.
  - f. General damages.
  - g. Exemplary damages.
  - h. Costs of this Petition.
2. The petitioners averred that they seek an order of Mandamus under Article 23(3)(f) of *the Constitution* of Kenya inter alia to compel the respondent to comply with the decision of the Public Service Commission County Appeal dated 6<sup>th</sup> September 2023, that:
  - a. The appellants revert back to the positions they held before they were seconded by the County Public Service Board.
  - b. The County Government of Wajir be and is hereby directed to pay the appellants all the accrued salaries, allowances and benefits from the date they were redeployed back by the County Public Service Board; and
  - c. The respondents and the County Secretary, Wajir County Government be and are hereby directed to implement the [of the Public Service Commission] decision.
3. The petitioners' case was that they were appointed in various capacities in the County Government of Wajir by way of secondment and were on permanent terms in various departments of the said County Government for quite a long time. They asserted that they performed their designated secondment roles for the allocated period until they were redeployed to their former positions sometime in late 2022, pursuant to section 72 of the *County Governments Act* No. 17 of 2012.
4. The petitioners averred that in April 2023, their salaries were stopped suddenly without prior notice and there was also no communication about their employment status with the Wajir County Government and the County Government Public Service Board. That with the silence of the respondents, they each filed County Appeal Nos. 55,56,57 & 58 of 2023 at the Public Service Commission (hereinafter "the PSC") for the violation of their rights and fundamental freedom. That the aforementioned decision of the PSC of 6<sup>th</sup> September 2023 then rendered and sent to all parties and their advocates on 11<sup>th</sup> September 2023. The petitioners noted that despite their advocate on record



expressly seeking for an update on the said decision, there has been no communication regarding their employment status and salaries from April 2023.

5. It was the petitioners' averment that the stoppage of their salaries was arbitrary and a violation of their right to natural justice embraced in *the Constitution* of Kenya under Articles 25(c), 27(1), 47(1)(2) and 50(1). That the stoppage of their salaries having been done without notice was in contravention of Article 232 on the values and principles of public service, and of Article 236(b) of *the Constitution*. That the same was also contrary to national values and principles of good governance under Article 10(2) (b)(c) of *the Constitution* such as human dignity, equity, human rights, good governance, integrity, transparency and accountability.
6. The petitioners explained that the respondents' arbitrary decision contravened their right to equal protection and equal benefit of the law under Article 27(1) of *the Constitution*. That the petitioners' right to life under Article 26 is frustrated because the stopped salary was a source of their livelihood and is painful even to their dependents. That their right to fair labour practices was infringed when the respondents stopped their salaries and refused to inform them of the reasons. The petitioners asserted that the respondents' failure to appeal for review of the PSC decision dated 6<sup>th</sup> September 2023 or move the High Court to challenge the said decision despite the PSC issuing them a notification that gave them six (6) months leave from the date of the said decision to apply for review, is a violation of the right to natural justice.
7. The petitioners further argued that the aforementioned decision of the PSC of 6<sup>th</sup> September 2023 has juridical effect having drawn its force from Article 169(1)(d) of *the Constitution* of Kenya and that non-compliance thereof is tantamount to contempt of court and a contravention of Article 159(1)(2) of *the Constitution*.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their response to petition dated 30.04.2024 through Nchogu, Omwanza & Nyasimi Advocates. They asserted that the order of mandamus sought by the petitioners is unmerited and not available to the petitioners. Further, that no hard copies of the impugned decision of the PSC were delivered to the parties and the same only came to the attention of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents later on. They asserted that they will be seeking to appeal the said decision out of time.
9. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents' case is that by a letter dated 7<sup>th</sup> December 2022, the County Public Service Board allegedly requested the County Secretary to redeploy the petitioners herein to their previous positions, in line with section 72 of the *County Governments Act*. That the said request was based on facts and circumstances obtaining then, namely, that the County Secretary had the requisite power to deploy or redeploy, or otherwise as the law may permit. The respondents stated that however, the petitioners were not redeployed whatsoever to their previous positions as they were under a contract with specific terms and the previous positions were not available or waiting for them to resume, and that any such insinuation is against the *County Governments Act*, as the Petitioners are not expected to hold dual offices. That further, the said letter dated 7<sup>th</sup> December 2022 requesting the process did not elicit response.
10. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' averred that there was no basis for the payment of the salaries of the petitioners, as their contracts had lapsed and they were not redeployed substantively to their previous positions. That the employment relationship with the petitioners had already abated upon lapse of their contracts in the positions held during the period. Moreover, there was no requirement for recruitment of new employees because the positions were already filled upon the transition of the Petitioners to contractual appointments.



11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further argued that by dint of assumption of duties in their new and contractual offices, the petitioners relinquished their previous positions and were aware of the effect of the transition. The respondents contended that the alleged secondment of the petitioners to executive-appointed offices and then back to their previous offices could entitle them to enjoy and be recycled in public offices to the detriment of other qualified members of the public.
12. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents particularly noted the advisory by the Council of Governors issued on 29<sup>th</sup> July 2022, to effect restating the position that it is irregular for officers to hold the position of Chief Officers then revert to their substantive positions once their contracts lapse. The respondents posited that the said advisory stands to guide such transitions as it has not been challenged in any court or declared unconstitutional. That therefore in this case, it would have been irregular for the petitioners to revert to their previous positions upon lapse of their contractual terms.
13. Regarding the alleged contraventions of *the Constitution*, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent maintained that the appointment of the petitioners to their contractual offices followed due procedure and the lapse thereto is consistent with both procedural and substantive law to the letter. That the respondents observed the petitioners' right to fair labour practices while effecting the transition, in line with the advisory of the Council of Governors, and therefore did not breach the alleged Articles of *the Constitution*. That furthermore, the respondents adhered to the petitioners' respective contracts, which did not provide any term for redeployment after expiry and there was no legal basis for payment of their salaries.
14. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent further stated that the petitioners' claim for preferential treatment by retention after serving contractual terms is what may be deemed as discriminatory, but not the respondents' act of following the law. They denied the allegation of contravention of the right to life, asserting that the same lacks legal basis as their actions cannot qualify as such under any circumstances.
15. On the allegations of contempt, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred that no such proceedings have been pursued to afford them an opportunity to respond to the said allegations. They prayed for the petition to be dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. While making that finding, the Court further returns that the Commission's
16. The parties filed their respective submissions as directed by the Court. The Court has considered the material on record and returns as follows:
  - a. Parties agree that the petitioners correctly invoked the appellate jurisdiction of the Public Service Commission in accordance with the relevant constitutional, statutory and regulatory provisions. The Commission has since made a decision, which the petitioners seek to enforce in the instant proceedings.
  - b. The respondent's only objection to enforcement of the Commission's decision is that they will be seeking a review. It is not in dispute that the time to seek review as communicated by the Commission has since lapsed. The Court also considers that the substantive matter the respondents would wish to raise in the review are not subject of determination by the Court as urged in the instant petition. In any event, no cross-petition was urged. In further any any event, the Court considers that even if there were a cross petition, the principle on exhaustion would apply so that the respondents would be required to pursue a review before the Commission.
  - c. As relates to the alleged constitutional violations, the Court considers that the petitioners' grievances are sufficiently purged by the decision of the Commission and which the petitioners are entitled to its adoption for enforcement as a decree of this Court. Until the decree is issued and served, the alleged contempt does not arise at all.



d. Accordingly, the other remedies prayed for in the petition are not justified except that the petitioners have succeeded and they are awarded costs of the suit.

In conclusion, judgment is hereby entered for the petitioners against the respondents for:

1. The declaration that the decision by the Public Service Commission herein is hereby adopted as a decree of the Court and the decree to issue for orders:
  - a. The appellants revert to the positions they held before they were seconded by the County Public Service Board.
  - b. The County Government of Wajir be and is hereby directed to pay the appellants all the accrued salaries, allowances and benefits from the date they were redeployed back by the County Public Service Board; and
  - c. The respondents and the County Secretary, Wajir County Government be and are hereby directed to implement the decree.
2. The respondents to pay the petitioners' costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26<sup>TH</sup> JULY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

