



REPUBLIC OF KENYA



KENYA LAW
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**Odongo v County Government of Siaya (Cause E084 of 2023)
[2024] KEELRC 13316 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13316 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E084 OF 2023
JK GAKERI, J
DECEMBER 3, 2024**

BETWEEN

JAMES ONYANGO ODONGO CLAIMANT

AND

COUNTY GOVERNMENT OF SIAYA RESPONDENT

JUDGMENT

1. The Claimants initiated this claim vide a Memorandum of Claim dated 31st October, 2023 alleging that their employment was unfairly terminated by the Respondent.
2. It is the Claimants case that they were employed by the Respondent as Chief Officers at a starting salary of Kshs.132,000.00 exclusive of allowances. That all Chief Officers were sent on compulsory leave on 4th October, 2023 until July 2023 to pave way for a comprehensive audit review but were later recalled.
3. That on 4th October, 2023, the Respondent appointed additional Chief Officers and others to act in positions held by the Claimants who were sent on terminal leave and no communication was provided on the Notice of termination dated 4th October, 2024.
4. The Claimants pray for;
 - a. Spent.
 - b. An order of setting aside the notice of termination of employment dated 4th October, 2023 and communicated through press statement and letter dated 4th October, 2023 addressed to the Claimants and reinstate them to their position with full salaries and benefits.
 - c. Payment of all salaries, benefits and allowance in accordance with the contracts of employment between the Claimants and the Respondents.



- d. In the alternative, the Claimant seek payments for salaries, allowances and benefits for the remainder of the contracts of employment between them and the Respondents until end of such contracts.
- e. In the alternative a declaration that the termination of the Claimants contracts of employment without providing reasons or grounds thereof offends Section 43 and 45 of the Employment Act and the Constitution and hence amounts to unfair termination thereof, is illegal and unlawful.
- f. In the alternative, issuance of certificates of service with no conditions thereof.
- g. Costs of the suit herein.
- h. Interest on (c), (d) and (g) above.
- i. Any other relief or relies the Court deems fit to grant.

Response

5. The Respondent admitted that the Claimants were its employees and that it appointed a task-force and sent all Chief Officers on leave on 4th October, 2023. It denies having extended the compulsory leave or sending the Claimants on terminal leave.
6. It is the Respondent's case that the termination of the Claimant's employment was conducted procedurally and in the public interest.
7. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

8. On cross-examination, CWI Mr. James Onyango Odongo confirmed that his employment was unlawfully terminated in that his contract was due to lapse on 16th February, 2025, but admitted that the terms of appointment enabled either party to terminate the contract by giving the other one (1) month's notice and in this case the employer gave notice and salary was paid.
9. The witness admitted that he did not disclose where the press statement was made or where he sought the same from.
10. He admitted having received the letter of termination of employment dated 4th October, 2023 on 5th October, 2023 though he had no evidence of the phone message to collect the letter.
11. On re-examination, the Claimant testified that the termination letter did not provide a reason for termination of employment.
12. CWII M/s Elizabeth Oduor adopted the witness statement and produced the documents relied on but was not cross-examined as Counsels were in agreement that the case is similar to that of CWI and the evidence on record was sufficient.

Respondents Evidence

13. RWI, Mr. Joseph Oguttu confirmed on cross-examination that he is the County Secretary, Siaya County Government and knew the Claimants as Chief Officers of the County serving under a five (5) years term but their employment was terminated prior to expiry of the contracts.



14. The witness admitted that the termination of employment was informed by a report released after an investigation, but was unsure of whether there was any wrongdoing on the part of the Claimants.
15. RWI further confirmed that the Claimants were not taken through any disciplinary hearing and on re-examination testified the Claimants were paid salary and allowances until the one (1) month's notice lapsed.

Claimants Submissions

16. As to whether termination of their employment was unlawful and unfair, counsel submitted that it was unexpected and the letters dated 4th October, 2023 provided no grounds or justification.
17. Reliance was made on the decision in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* [2014] eKLR to urge that since the provisions of Section 41 of the Employment were not complied with and no reasons were given, termination of the Claimants' employment was unlawful and unfair.
18. Concerning entitlement to compensation for the remainder of the contract counsel submitted that they were as they were serving under fixed term contracts expected to lapse in February, 2026.
19. Counsel urged that the circumstances in which the Claimants employment was terminated justified compensation equivalent to the remaining period of their contracts of employment.
20. Reliance was also made on the decision in *Kenfreight (EA) Ltd V. Benson K. Nguti* [2016] eKLR to urge that the principles of fairness demanded that they be restored to the position they would have been but for the Respondent's unlawful actions.
21. Finally, on costs counsel submitted that since the Respondent forced them to incur expenses, it should bear the costs.

Respondent's submissions

22. On termination of the claimant's employment, counsel submitted that the letters of appointment on record provided for termination of employment by notice of either party, and the claimants were paid for one (1) month's notice.
23. Reliance was made of the decisions in *South Nyanza Sugar Co. Ltd V Leonard O. Arera* [2020] eKLR where the Court of Appeal cited the decision in *Pius Kimaiyo Langat V Co-operative Bank of Kenya Ltd* [2017] eKLR for the proposition that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.
24. Counsel urged that where the contract provided for the manner of termination the court may make an adverse finding if the terms of the contract were not complied with and Section 45 of the *Employment Act* only applies where the termination of employment is pursuant to a disciplinary process citing the decision in *Monica Wanza Mbavu V Roofspee & Allied works Co. Ltd* [2021] eKLR.
25. On reliefs, counsel submitted that the remedy of setting aside the termination of employment was unavailable as there was nothing to set aside and no contract to be reinstated as the position had already been filed and cited the decision *Joab Mehta Oudia V Coffee Development Board of Trustee* [2014] eKLR that a Court cannot stay a termination of employment.
26. Reliance was also made on the Court of Appeal decision in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 Others* [2014] on practicability of reinstatement and the discretionary nature of the remedy.



27. Counsel submitted that the claimants have failed to prove that termination of their employment was conducted unfairly.

Analysis and determination

28. It is not in dispute that the Respondent employed the claimants as Chief Officers in various dockets following the 2022 General Election, under five years contracts of service.
29. That the Respondents conducted an audit review until early 2023 when the Claimants were recalled from compulsory leave as they were not found culpable.
30. Equally not in contest is the fact that the contract of employment provided for termination by either party giving the other one (1) month's notice and the Respondent did so and the letters of termination had no reason for termination of employment.
31. Having considered the claim, evidence on record and submissions by the parties, the issues for determination are:
- i. Whether termination of the Claimants employment by the Respondent was unfair and unlawful.
 - ii. Whether the Claimants are entitled to the reliefs sought.
32. On the 1st issue, it is trite that the provisions of Section 41, 43, 44, 45 and 47(5) of the [Employment Act](#) provide that for a termination of employment to pass the fairness test, it must be proved that the employer had a valid and fair reason to terminate the employees employment and conducted it in accordance with a fair procedure.
33. In *Walter Ogal Anuro V Teachers Service Commission* [2013] the Court aptly captured the foregoing in the following words;

“...For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination”.

See also *Naima Khamis V Oxford University Press (EA) Ltd* [2017] eKLR.

Reasons for termination

34. It is common ground that the Claimants were Chief Officers of the 1st Respondent hired competitively and serving under written contracts of service.
35. The appointment of County Chief Officers is provided for under Section 45 of the County Government Act. Though nominated by the County Public Service Board, Chief Officers are appointed by the County Governor and their office is an office in the County Public Service and are authorised officers in the exercise of delegated power.
36. Being employees of the County Public Service Board, it is the only body with the mandate to terminate their employment.



37. It is trite that County Chief Officers are public Officers within the meaning of Article 260 of *the Constitution* of Kenya and Section 2 of the *County Governments Act* and are therefore protected by the provisions of Article 236 of *the Constitution* of Kenya, which provides that –
- A public officer shall not be –
- a. Victimized or discriminated against for having performed the functions of office in accordance with this Constitution.
 - b. Dismissed, removed from office, demoted on rank or otherwise subjected to disciplinary action without due process.
38. Clearly, a County Chief Officer can only be removed from office by observing due process, otherwise the removal or dismissal will be an infringement of the provisions of Article 236 of *the Constitution* of Kenya and Section 43 and 45 of the *Employment Act*.
39. Contrary to the Respondents argument that the Claimants were bound by the terms of the contract of employment that it was unilaterally terminable by one (1) month’s notice, the Claimants were additionally public officers and employees whose employment is governed by the provisions of *the Constitution* of Kenya and the *Employment Act* which supersede the common law as articulated by Courts of law.
40. The Respondent is obligated to prove that it had a reason to terminate the Claimants employment and terminated their employment in accordance with a fair procedure bearing in mind that the Claimants were serving under a five years contract of service.
41. The termination of employment had to be justified and due process followed.
42. The provisions of Section 43 of the *Employment Act* are clear on this requirement.
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
 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.
43. In this case, the Respondent has not provided any evidence to explain why it terminated the Claimants employment in the manner it did. RWI testified an investigation was conducted and a report prepared, but could not explain to the Court whether the investigation found the Claimants culpable in any respect.
44. In sum, the Respondent did not attribute the termination of the Claimants employment to any wrong doing or allegation.
45. RWI admitted that the Claimants were given a notice of termination and no disciplinary hearing took place.
46. Contrary to the Respondent’s submissions that Section 45 of the *Employment Act* only applies to instances where a disciplinary process is involved, the provision applies to all instances where a termination of employment takes place by dint of Article 41 of *the Constitution* of Kenya.



47. In this case as no reason was given, the Respondent has failed to prove that it had a substantive justification to terminate the Claimant's employment and the termination was thus unfair for want of a reason.

Procedure

48. It is trite that provisions of Section 41 of the *Employment Act* are mandatory as held in *Mary Chemweno Kiptui V Kenya Pipeline Co. Ltd* (Supra) and by the Court of Appeal in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR.
49. In the *Mary Chemwono Kiptui's Case* (Supra) the Court stated as follows:
- ...Section 41 of the *Employment Act* is couched in mandatory terms where all employer fails to follow these mandatory provisions, whatever the outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair”.
50. Having admitted that the Claimants were not taken through a disciplinary process, the Respondent admitted that they did not comply with the provisions of Article 236 of *the Constitution* of Kenya and Section 41 of the *Employment Act* and the resultant termination of the Claimants employment was flawed for want of procedural propriety and thus unfair.
51. In sum, it is the finding of the Court that termination of the Claimant's employment by the Respondent did not meet the threshold under Section 45 of the *Employment Act* and was thus unfair and unlawful.

Appropriate Reliefs

i. Reinstatement

52. This is one of the reliefs provided by the provisions of Section 12(3)(vii) of the *Employment and Labour Relations Court Act* read with Section 49(3)(a) of the *Employment Act* available to the employee within 3 years of termination of employment and the Claimants case falls within the 3 year period.
53. However, as explained by Maraga J A (as then was) in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 Others* (Supra), analogous to other reliefs under Section 49 of the *Employment Act*, reinstatement is discretionary and every case is considered on the basis of its facts.
54. In this case, the Respondent argues that the remedy is unavailable to the Claimants because the positions the Claimants occupied have successors and thus unavailable.
55. On their part, the Claimants neither testified nor submitted that the positions were still available and it would be practicable for them to be reinstated.
56. Bearing in mind that the Claimants held very senior positions in the County Government and the positions, typically ought not to remain vacant for long, the Court is not persuaded that a case for reinstatement of the Claimants has been established.
57. The relief is declined.



ii. Payment of all salaries, allowances in accordance with the contracts of employment.

58. It is unclear to the Court as to the salaries and allowances being claimed under this head other than those recoverable in the event of reinstatement which has already been declined.
59. The claim is declined.

iii. In the alternative salaries, allowances and benefits for the remainder of the contract of employment.

60. It is common ground that the Claimants employment contracts were terminated slightly over 15 months before they were due to lapse on 16th February, 2025 hence the claim.
61. Regrettably, this claim is not sustainable as there was no guarantee that the Claimants would have indeed served until 16th February, 2024, as the contracts had an exit clause invocable by either party.
62. Significantly, this is a claim for anticipatory earnings which lacks a legal anchorage in the face of Section 19 of the *Employment Act* on payment of salary and allowances as an employer is only required to pay the wages earned by or payable to an employee for work done by the employee pursuant to a contract of service.

See D. K. Njagi Marete V Teachers Service Commission 2020) eKLR, Engineer Francis Gachuri V Energy Regulatory Commission [2014] eKLR and Wakanyi Kibe V Telkom Kenya [2014] eKLR.

iv. In the alternative declaration that termination of employment was unfair.

63. Having found that termination of the Claimants employment by the Respondent was unfair for want of a substantive justification and procedural fairness, the declaration sought is merited.
64. As a consequence of the foregoing, the Claimants are entitled to compensation for the unfair termination, under the provisions of the provisions of Section 49(1)(c) of the *Employment Act*.
65. The Court has considered that the Claimants served for about 4 years which is short, had no record of warning letter or misconduct, wished to serve till the end of their contracts of employment and did not contribute to the termination of employment, the Court is satisfied that the equivalent of 10 months salary is fair.

v. Certificate of service

66. The Claimants are entitled to a Certificate of Service by dint of Section 51 of the *Employment Act*.
67. The upshot of the foregoing is that judgment is entered in favour of the Claimants against the Respondent in the following terms:
- a. Declaration that termination of the Claimants employment was unfair and unlawful.
 - b. Equivalent of ten (10) months gross salary as compensation to each Claimant.
 - c. Certificate of service.
 - d. Costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD DAY OF DECEMBER, 2024.

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

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