



REPUBLIC OF KENYA



**KENYA LAW**  
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**Itumbi v Public Service Commission & 3 others (Petition E101 of 2021)  
[2023] KEELRC 141 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 141 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E101 OF 2021  
JK GAKERI, J  
JANUARY 26, 2023**

**BETWEEN**

**DENNIS ITUMBI ..... PETITIONER**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**STATE HOUSE COMPTROLLER ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR AND CO-ORDINATION  
OF NATIONAL GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner filed the Petition herein against the Respondents on June 29, 2021.
2. The Petitioner avers that by letter dated July 9, 2014, he was offered the position of Senior Director, Digital, Innovative & Diaspora Communication Job Group T for a period of 3 years effective July 2, 2014.
3. The salary was as follows;
  1. 02/07/2014 – 01/07/2015 Kshs.213,640/=
  2. 02/07/2015 – 01/07/2016 Kshs.232,960/=
  3. 02/07/2016 – 01/07/2017 Kshs.254,000/=
4. The Petitioner avers he accepted the appointment and discharged his duties diligently and fastidiously.



5. That because of his outstanding performance , by letter dated 21<sup>st</sup> July, 2014, the 2<sup>nd</sup> Respondent notified him that he had been awarded 6 years increment for approved experience according to Section H 8(i) and (ii) of the Code of Regulations and his salary rose to Kshs.302,980/= per month.
6. The Petitioner further avers that the contract was renewed by letter dated May 15, 2018 for a further period of 3 years effective November 1, 2018 at Kshs.315,700/= per month.
7. That in March, 2020, in the midst of the COVID-19 Pandemic, he was informed that his employment had been terminated on account of abolition of the office following a re-organization of Government. That the letter dated March 18, 2020 was authored following a request by the 3<sup>rd</sup> Respondent.
8. It is the Petitioner's case that his employment was terminated pursuant to the provisions of section 28 of the Public Service Commission Act and there was no proper reason for termination of his services and was thus unlawful and unfair.
9. That abolition of office under Sections 28 and 29 of the Public Service Act is triggered by a written request from an authorised officer or suo motu.
10. That in this case, the 1<sup>st</sup> Respondent acted at the behest of the 3<sup>rd</sup> Respondent who was not the authorised officer for purposes of the Petitioner's employment and the abolition of office was therefore prima facie illegal.
11. That the 1<sup>st</sup> Respondent did not satisfy itself that the provisions of section 28(2) of the Public Service Commission Act had been complied with.
12. That there was no legal basis of involving the 3<sup>rd</sup> Respondent in the abolition of his office which led to termination of his employment.
13. That termination of his employment was illegal and the Respondents violated the provisions of Article 41, 47(1), 232 and 236(b) of the Constitution.
14. The petition is supported by the affidavit of the Petitioner dated June 25, 2022.
15. The Petitioner prays for;
  - i. A declaration that the abolition of the Petitioner's position was unlawful for violating Articles 41, 47, 232 and 236 of the Constitution as read with section 28 of the Public Service Act, 2017 and Regulation 73 of the Public Service Commission Regulations 2020.
  - ii. A declaration that the request by the 3<sup>rd</sup> Respondent contained in the letter dated March 18, 2020 seeking abolition of the Petitioner's position was unlawful, null and void ab initio.
  - iii. A declaration that the 1<sup>st</sup> Respondent violated Articles 41, 47, 232 and 236 of the Constitution by acting on an unlawful directive of the 3<sup>rd</sup> Respondent to abolish the Petitioner's office in patent violation of the procedures laid down by the Public Service Commission Act and Regulations thereunder.
  - iv. A declaration that the 2<sup>nd</sup> Respondent acted unlawfully in terminating the Petitioner's employment on the grounds of abolition of office which he had not requested for and obtained as stipulated by section 28 of the Public Service Commission Act.



- v. A declaration that the 3<sup>rd</sup> Respondent abused his office by issuing an illegal directive to the 1<sup>st</sup> Respondent to abolish the Petitioner's office knowing too well he was not the Authorised Officer to do so under section 28 of the [Public Service Commission Act, 2017](#).
- vi. A declaration that the Petitioner's appointment set out in the letter dated March 28, 2018 remains in force unless and until his office is abolished in accordance with the law or his contract is otherwise terminated in accordance with the law.
- vii. A declaration that the Petitioner remains the duly appointed Senior Director Digital, Innovative & Diaspora Communication unless and until his office is abolished in accordance with the law.
- viii. Compensation for unlawful termination of employment.
- ix. Damages for violation of the Petitioner's constitutional and legal rights.
- x. Costs of this Petition.

## **Respondents case**

### **2<sup>nd</sup> Respondent**

- 16. In his Replying Affidavit in opposition to the Petition, the 2<sup>nd</sup> Respondent disposed that it was the mandate of the 1<sup>st</sup> Respondent to create and abolish offices in the Public Service as admitted by the Petitioner. That the 1<sup>st</sup> Respondent established the Petitioner's position in State House and the Petitioner was appointed to the office as Personal Staff to his Excellency the President on Local Agreement terms for 3 years from July 2, 2014 and the agreement provided for termination at any time.
- 17. That the appointment was renewed for a further period of 3 years from November 1, 2018 to October 31, 2021.
- 18. The affiant states that Cabinet Secretary, Ministry of Interior and Coordination of National Government guided by the principle and spint of collective responsibility and pursuant to Executive Order No. 6 of 2019, communicated the re-organization of Government to the Public Service Commission thus necessitating the abolition of the post held by the Petitioner in State House.
- 19. The affiant further states that the 1<sup>st</sup> Respondent abolished the office of the Petitioner in accordance with Article 234(2) of the [Constitution of Kenya, 2010](#) , Section 28 of the [Public Service Commission Act](#) and Clause 6(1) of the Local Agreement termination clause.
- 20. That after the office was abolished by the PSC, the affiant notified the Petitioner as procedurally required.
- 21. That after clearance, the Claimant was paid his terminal dues in accordance with the Local Agreement Contract i.e two (2) months salary in lieu of notice and gratuity on pro rata basis and the Petitioner signed the official declaration on leaving Government Services on April 27, 2020.
- 22. The affiant further states that there was no guarantee that appointment by the President or the PSC to serve as personal staff to the President would last the full term specified in the appointment hence the appointment being on Local Agreement terms with a determination clause.
- 23. That the Petitioner was handpicked and could not purport to remain in office until expiry of the 3 years term and had not been interviewed to determine suitability.



24. That the position was supernumerary with an option for termination.
25. That the petition is riddled with misinformation indicative of improper motive as the termination was occasioned by re-organization of Government and subsequent abolition of office by the PSC.
26. That the prayers, including, reinstatement were untenable as the office in question was abolished and the parties separated over 2 years ago and courts cannot force parties in a personal relationship to continue in it against the will of either party.
27. That the court has no jurisdiction to entertain the Petition as the contract in question had no statutory underpinning as to render a breach actionable by way of a constitutional Petition rather than by way of an ordinary suit.
28. That the Petitioner had not demonstrated with precision how his fundamental rights and freedoms under the Constitution had been violated or threatened and had not availed evidence to prove the alleged violations as espoused in *Mumo Matemu V Trusted Society of Human Rights Alliance* (2013) eKLR and *Anarita Karimi Njeru V Attorney General* (1979) KLR 154.

### **1<sup>st</sup> Respondent**

29. In its replying affidavit sworn by Dr. Simon K. Rotich, the Secretary, Chief Executive Officer of the 1<sup>st</sup> Respondent, the affiant states that under Article 234 of the Constitution of Kenya, 2010 the 1<sup>st</sup> respondent was empowered to establish and abolish offices in the Public Service as well as appoint persons to hold or act in those offices and to confirm appointments.
30. That by letter dated June 5, 2014, State House requested the Commission to establish the Petitioner's Supernumerary position and pursuant to Article 234(2)(a), the Public Service Commission established the position of Senior Director, Digital, Innovative & Diaspora Communication under the President's Delivery Unit (PDU) which was under the Comptroller of State House as the Authorised Officer and the Petitioner was appointed to the position.
31. The affiant further deposes that by Executive Order No. 6 of 2019 issued on August 22, 2019, the President effected changes in the structure of the Executive and placed the PDU under the Ministry of Interior and Coordination of National Government and was no longer under the Executive Office of the President under the Comptroller of State House.
32. That the Petitioner ceased to be under the Comptroller of State House and his Authorised Officer was the Cabinet Secretary of the Ministry.
33. The affiant deposes that by letter dated March 16, 2020, the Cabinet Secretary requested the Public Service Commission to abolish the Petitioner's position and the Commission acted accordingly and communicated by letter dated March 18, 2020.
34. That once an office or position was abolished, it was the duty of the Authorized Officer to terminate the employment contract of the affected officer in accordance with the termination clause and the Authorized Officer was advised accordingly.
35. The affiant states that in the Current Government, the Commission designated Cabinet Secretaries as the Authorized Officers of Ministries in the National Government and the Comptroller of State House ceased to be the Petitioner's Authorized Officer on August 22, 2019 and the Cabinet Secretary became the Petitioner's Authorized Officer.



36. That the request was made by the Authorized Officer and the averment that the 3<sup>rd</sup> Respondent was not an Authorized Officer was misplaced.
37. That the Petition does not disclose any reasonable cause against the Commission as the Commission discharged its statutory and Constitutional mandate.
38. The 1<sup>st</sup> Respondent prays for dismissal of the petition with costs.

#### **Petitioner's submissions**

39. In his lengthy submissions which were followed by a reply to the Respondents submissions, the Petitioner addressed not less than seven issues including costs of the Petition.
40. On Jurisdiction, it was submitted that the Petition raises issues of unlawful termination of employment and the court had jurisdiction in law. The decision in Samuel Macharia Kamau & another V Kenya Commercial Bank & 2 others (2012) eKLR was cited in support of the proposition that the court's jurisdiction flew from the Constitution and statute.
41. Reliance was also made on the provisions of Article 162(2)(a) of the Constitution, Sections 4 and 12 of the Employment and Labour Relations Court Act, 2011 to urge that the reliefs sought were provided for by the Act.
42. Further reliance was made on Regulation 7(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 on the rules applicable in the filing of Petitions as were the decisions in Prof. Moni Wekesa V Mount Kenya University (2018) eKLR and Judicial Service Commission V Gladys Boss Shollei & another (2014) eKLR to buttress the submission on reliefs.
43. As regards the threshold of a Constitutional Petition as enunciated in Anarita Karimi Njeru V Attorney General (1979) KLR 154 and Mumo Matemu V Trusted Society of Human Rights Alliance (Supra), it was urged that the Petitioner's Affidavit sworn on 25<sup>th</sup> June, 2022 detailed how the Respondents contravened the Petitioner's rights under the Constitution and the particulars set out in paragraph 22 of the Petition were relied upon as was the decision in Sella Rose Anyango V Attorney General & 2 others (2021) eKLR to urge that the Petition met the Constitutional threshold.
44. On the position occupied by the Petitioner, it was submitted that the Respondents position was contradictory as the 1<sup>st</sup> Respondent stated that the Petitioner's position fell under the PDU while the 2<sup>nd</sup> Respondent stated that he was appointed to serve as a Personal Staff to the President.
45. It was urged that State House intended the Petitioner to serve in the Executive Office of the President under the Presidential Strategic Communication Unit (PSCU) and requested for the establishment of the Petitioner's position as evidenced by the 1<sup>st</sup> Respondent's letter dated June 5, 2014 and the position was established by the 1<sup>st</sup> Respondent.
46. It was further urged that at no time was the Petitioner's position placed under the PDU as alleged by the Respondents. It was further urged that, parties were bound by their pleadings as underscored in numerous decisions including I.E.B.C. & another v Stephen Mutinda Mule & 3 others (2014) eKLR to reinforce the submission that the evidence provided by the Respondents showed that the Petitioner was not serving under the PDU but the PSCU.
47. The 2<sup>nd</sup> Respondent's argument that the Petitioner was appointed as personal staff to the President and as such had no guarantee that his term would last the full term was also assailed by the Petitioner as Personal Staff under the PSC Regulations, 2020 were low cadre employees.



48. As regards termination of employment by way of redundancy, it was submitted that the purported ground was baseless and untenable as the Respondents had not provided a valid reason for the redundancy.
49. Reliance was made on the decision in *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR to urge that a redundancy must be substantively and procedurally fair.
50. As regards procedural fairness, reliance was made on sections 40, 43 and 45 of the *Employment Act* to urge that the Respondents failed to comply with the prescribed procedure in cases of redundancy.
51. The decisions in *Hesbon Ngaruiya Waigi V Equatorial Commercial Bank Ltd* (2013) eKLR, *Freight In Time Ltd V Rosebell Wambui Munene and Thomas De La Rue Ltd V David Opondo Omutelema* (2013) eKLR were relied upon to buttress the submission.
52. On substantive justification, it was urged that although the re-organization of the government qualified as an operational requirement in the context of section 45 of the *Employment Act*, the Petitioner's employment in the PSCU was not affected by Executive Order No. 6 of 2019.
53. Reliance was made on the decisions in *Kenya Union of Domestic Hotels, Educational Institutions & Hospitals Workers V Mombasa Sports Club* (2014) eKLR as well as *Aviation & Allied Workers Union V Kenya Airways & 3 others* (Supra) to urge that the court was bound to investigate the facts and circumstances in a redundancy to ascertain whether the employer acted reasonably.
54. It was submitted that the Respondents did not place before the court any document to demonstrate the alleged re-organization of Government.
55. It was urged that the Respondents tendered no evidence to demonstrate that the Petitioner's services had become superfluous.
56. On compensation for unfair termination, it was submitted that the redundancy relied upon by the Respondents was unfair and the Petitioner was entitled to compensation.
57. Relying on the decisions in *Ol Pejeta Ranching Ltd V David Wanjau Muhoro* (2017) eKLR and *Kiambaa Dairy Farmers Co-operative Society Ltd V Rhoda Njeri & 3 others* (2018) eKLR, it was urged that the Petitioner was entitled to an award of 12 months compensation.
58. It was further submitted that termination of the Petitioner's employment was malicious and severance pay was not paid and the sum of Kshs.947,100/= was prayed for.
59. On violation of the Petitioner's rights and fundamental freedoms, it was urged that his right to fair labour practice under Article 41 of the *Constitution of Kenya, 2010* was breached.
60. The decisions in *Elizabeth Washeke and 62 others V Airtel Networks (K) Ltd* (2013) eKLR as well as *George Onyango Akuti V Security Services Kenya Ltd* (2013) eKLR were cited to urge that termination of the Petitioner's employment under redundancy was not conducted in accordance with the provisions of the *Employment Act* and the *Public Service Commission Act, 2017*.
61. It was further submitted that the Respondents violated the provisions of the *Fair Administrative Action Act*. The decision in *Olympic Sports House Ltd V School Equipment Center Ltd* (2012) eKLR was relied upon to buttress the submission.
62. Finally, as regards adherence to values and principles of Public Service enshrined in Article 232 of *the Constitution* of Kenya, 2010, it was urged that the values and principles were not complied with.



## 2<sup>nd</sup> – 4<sup>th</sup> Respondents submissions

63. Counsel for the 2<sup>nd</sup> – 4<sup>th</sup> Respondent, isolated the issues of jurisdiction applicability of the [Employment Act](#) to this case, termination, legitimate expectation and damages.
64. On jurisdiction, it was submitted that the court lacked jurisdiction to hear the dispute since the claim was formulated as a petition under Article 41 of the [Constitution](#) of Kenya, 2010 which is given effect by the provisions of the [Employment Act](#), 2007.
65. Reliance was made on the South African decisions in *Barbara De Klerk V Cape Union Mart International (PTY) Ltd* No. C 620/2011/2012 ZALCCT 22 and *Minister of Health & another V New Clicks SA Ltd & otherS* (2006) (2) SA 311 (CC) to urge that it was impermissible for a party to bypass an existing Act of Parliament to ground an action on the [Constitution](#).
66. The decision in *Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR was also cited to urge that the suit herein was an ordinary employment claim as were the decisions in *Communication Commission of Kenya & others v Royal Media Services Ltd & 5 others* (2014) eKLR, *Uhuru Muigai Kenyatta V Nairobi Star Publications Ltd* (2013) eKLR, *Speaker of the National Assembly V James Njenga Karume* (1992) eKLR, *Gabriel Mutava & 2 others V Managing Director of Kenya Ports Authority & another* (2016) eKLR and *Humphrey Nyongesa Makhoha & another V CAK & another and Francis Wangusi* in ELRC JR No. 4 of 2018 among others to urge that the dispute herein could be resolved without invoking the constitutional route. That where there are other remedies, constitutional reliefs should not be sought as not all employment disputes raise constitutional issues.
67. The decision in *Sumayya Athmani Hassan V Paul Masinde Simidi & another* (2019) eKLR was also relied upon to reinforce the submission.
68. It was urged that the Petitioner could not be paid from 18<sup>th</sup> March, 2020 to 31<sup>st</sup> October, 2021 when the contract was scheduled to lapse as he was not in employment.
69. It was further urged that the court had no jurisdiction to question the constitutional mandate of the President under Article 132(2)(g) of the [Constitution of Kenya, 2010](#).
70. Relying on the provisions of Article 162(2) of the [Constitution of Kenya, 2010](#) and section 12 of the [Employment and Labour Relations Court Act, 2011](#), it was submitted that there was no employer/employee dispute in the present suit.
71. Reliance was also made on the Supreme Court decision in *Republic v Karisa Chango & another* (2017) eKLR to urge that the jurisdiction of the court was restricted to the statutory provisions under which the court was established. That the court's jurisdiction was limited to violations of constitutional rights in matters that fall under the court's jurisdiction.
72. The decisions in *Harun Mwau v Attorney General* (2015) eKLR, *Marbury v Madison* 1 Cranch 137, 165, *Tom Luusa Munyasya & another v Governor, Makueni County & another* (2014) eKLR were relied upon to urge that the Presidents had discretion in appointing persons to execute their policies.
73. As regards applicability of the [Employment Act](#), 2007, it was urged that Article 132(2)(g) of the [Constitution](#) was self-executing and no other statute could be relied upon to interpret it.
74. The decision in the *County Government of Nyeri & another V Cecilia Wangechi Ndung'u* (2015) eKLR and *Tom Luusa Munyasya* were relied upon to urge that the provisions of the [Employment Act](#), 2007 were inapplicable to Members of the County Executive Committee and Cabinet Secretaries who are deemed to have a special employment relationship.



75. It was urged that the *Employment Act* was inapplicable to the Petitioner's case as he was handpicked by the President through the exercise of executive functions.
76. On termination of the Claimant's employment, it was submitted that the Petitioner was appointed pursuant to a recommendation of the President to serve in the PSCU and the position was established by the PSC for that purpose. That he was not competitively engaged. The PSC only came in to establish the position and the Petitioner was thus appointed by the President under Article 132(2)(g) of the *Constitution of Kenya, 2010* and the separation was occasioned by a re-organization of Government by the President and it was in accordance with Clause 6(1) of the Local Agreement.
77. The decision of the Court of Appeal in *National Bank of Kenya Ltd V Hamida Bana & 103 others (2017) eKLR* was relied upon to urge that a party cannot accept and reject an instrument at the same time.
78. Reliance was further made on the decision in *Tom Luusa Munyasya (Supra)* to urge that State Officers engaged by the President and Governors were employed under special contracts and appointees were dismissible at the will of the crown as was the decision in *Miguna Miguna V Permanent Secretary, Office of the Prime Minister & another (2011) eKLR*.
79. As regards legitimate expectation, it was submitted that the issue was not pleaded.
80. It was urged that the Petitioner's contract was between him and the President and could not supercede the *Constitution*.
81. It was further submitted that the requirements of legitimate expectation did not exist in this case.
82. The decision in *Marianne Kitany V Chief of Staff and Head of Public Service & 2 others (2021) eKLR* was relied upon to urge that the President ought to have some latitude to appoint and remove persons he personally appoints in his capacity as President.
83. That the Petitioner could not expect to complete the 3 years term as his appointment was at the pleasure of the President.
84. Finally, it was submitted that, no compensation or damages were due to the petitioner as the *Employment Act* was inapplicable and severance pay was never pleaded and could not be raised in the submissions as the latter was not evidenced as held by the Court of Appeal in *Daniel Toroitich Arap Moi V Mwangi Stephen & another (2011) eKLR*.
85. The 2<sup>nd</sup> – 4<sup>th</sup> respondents urged the court to dismiss the petition with costs.

### **1<sup>st</sup> Respondent**

86. By November 16, 2022 when the court retired to prepare this judgement, the 1<sup>st</sup> Respondent had not filed submissions.
87. The Petitioner filed a reply to the Respondent's submissions specifically on jurisdiction of the court and the applicability of the *Employment Act*, the pleasure doctrine and compensation. It was urged that the Petitioner was not a State Officer under article 260 of the *Constitution of Kenya, 2010*.
88. It was urged that the pleasure doctrine did not apply to the Petitioner.
89. It was urged that the Marianne Kitany Case (Supra) was irrelevant to the circumstances of the instant case.



90. On Presidential Immunity, the Petitioner submitted that he was an employee of the 1<sup>st</sup> Respondent and not the President.

### **Determination**

91. The issues that commend themselves for determination are;
- i. Whether the court has jurisdiction to entertain the Petition.
  - ii. Whether the petitioner’s constitutional rights were violated.
  - iii. Whether the Petitioner was a State or Public Officer and the applicability of the *Employment Act, 2007*.
  - iv. Whether termination of the Petitioner’s employment was unfair.
  - v. Whether the petitioner is entitled to the reliefs sought.
92. As regards jurisdiction, there is no gainsaying that this court derives its jurisdiction from the provisions of Article 162(2)(a) of *the Constitution* of Kenya, 2010 read with section 12 of the *Employment and Labour Relations Court Act, 2011*.
93. While the Petitioner urged that the court has jurisdiction, the Respondents submitted that it did not as the Petitioner’s appointment was made pursuant to the provisions of Article 132(2)(f) of the *Constitution of Kenya, 2010* which states that;
- “The President shall nominate, and with approval of the National Assembly, appoint, and may dismiss –
- a. ...
  - b. ...
  - c. ...
  - d. ...
  - e. ...
  - f. in accordance with this constitution, any other state or public officer whom this constitution requires or empowers the President to appoint or dismiss.”
94. The respondents relied on the decisions in Republic V Karisa Chengo & another (Supra), Harun Mwau V Attorney General (Supra) and Tom Luusa Munyasya (Supra). In the latter case, Rika J. underscored the need to accord the President and Governors room to remove their appointees whenever it deemed appropriate.
95. In this case, it was urged that the President’s re-organization of the Government which culminated in the termination of the petitioner’s employment was a Presidential prerogative. Reliance was also made on the decision in Miguna Miguna (Supra).
96. Needless to belabour, jurisdiction is everything and without it a court of law must down its tools as aptly captured by Nyarangi JA in Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd (1989) KLR.



97. As correctly submitted by the Petitioner’s counsel, the Employment and Labour Relations Court has jurisdiction to hear and determine constitutional issues that may arise in suits before it. This position has been underscored in several Court of Appeal decisions including Registrar of Trade Unions V Nicky Njuguna and 4 others (2017).
98. The fact that the Petitioner was an appointee of the President per se does not of itself deny the court jurisdiction to inquire into the alleged violations of the Constitution as the supreme law.
99. Relatedly, the Local Agreement, the basis of the relationship between the parties is not explicit that the Petitioner would serve at the pleasure of the appointing authority. The court is satisfied that it has jurisdiction to entertain the petition.
100. As to whether the petitioner’s constitutional rights were violated, the petitioner relied on paragraph 22 of the petition which made reference to Articles 41, 47, 232 and 236 (b) of the Constitution of Kenya, 2010.
101. The threshold of a Constitutional Petition was articulated in Anarita Karimi Njeru v Republic (Supra) and has been restated in several decisions including Sella Rose Anyango V Attorney General (Supra) and comprises:
- i. A precise statement of the constitutional provisions allegedly violated or threatened with violation,
  - ii. Manner of the alleged violation or threat.
  - iii. Nature and extent of the alleged violation or threat.
102. The burden of proof lies with the Petitioner. (See Trusted Society of Human Rights Alliance v Attorney General & 2 others (2012) eKLR, Kiambu County Tenants Welfare Association v Attorney General & another (2017) eKLR.
103. It was the Petitioner’s case that the petitions met the constitutional test enunciated in the Anarita Karimi Njeru Case (Supra).
104. The alleged violations are stated as;
- i. The abolition of the petitioner’s office was initiated by the 3<sup>rd</sup> respondent who was not the authorized officer. That the provisions of section 28 of the PSC Act were violated and amounted to unfair labour practice.
  - ii. That the procedure adopted to abolish his office was unreliable and unfair and violated Article 47 of the Constitution.
  - iii. Failure to adhere to the values and principles outlined in article 232 of the Constitution as the 3<sup>rd</sup> respondent was not the petitioner’s authorized officer as provided by section 28 of the PSC Act.
  - iv. Violation of article 236(b) of the Constitution 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 or any other law; or
    - b. dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.



105. Before delving into the foregoing issue, it is elemental to determine whether the petitioner was a state officer or a public officer. The Petitioner’s counsel submitted that he was a state officer.
106. Article 260 of the *Constitution of Kenya, 2010* provides that –
- Public officer means –
- a. Any state officer; or
  - b. Any person other than a state officer, who holds a public office.
107. Relatedly, public office means an office in the National Government, a County Government or the Public Service, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by parliament.
108. Article 260 of the *Constitution of Kenya, 2010* also defines the phrase “State Office” to mean the offices mentioned there under and does not include the Claimant’s position of Senior Director Communication (Digital, Innovation and Diaspora Communication, Job Group T.
109. The Petitioner’s appointment was as follows;
1. By letter dated June 5, 2014, the State House Comptroller, Mr. L.N. Lenayapa informed the Secretary, Public Service Commission that he had been directed by the President that certain seven (7) persons including the Petitioner be appointed as indicated against their names.  
The listed stated the name of the person, officer position, job group and remuneration.  
That the officers would serve in the Executive Office of the President Presidential Strategic Communication Unit (PSCU) and would supervise all Directors of Communication and Public Communications Officers in Ministries and Departments.
  2. By letter dated July 2, 2014, the Secretary Public Service Communication under reference ‘Creation of Supernumerary Posts/Appointments’ informed the Comptroller of State House that the PSC had established seven (7) Supernumerary positions and they be appointed on Local Agreement Terms for 3 years effective July 2, 2014. The salaries were structured accordingly and entry level was fixed and normal allowances were to apply.  
The PSC requested for the reviewed structure of the PSCU.
  3. By letter dated July 9, 2014, the Comptroller of State House notified the Petitioner his appointment as the Senior Director, Digital, Innovative and Diaspora Communications Job Group T on Local Agreement Terms for 3 years effective 2<sup>nd</sup> July, 2014 with a starting salary of Kshs.213,640/= per month as directed by the PSC. Allowance due were also tabulated.  
The letter added that the appointee was also entitled to all the benefits accorded to civil servants and was eligible for gratuity of 31% of the basic salary on completion of the contract.  
The letter enclosed the Local Agreement forms for signature, *Official Secrets Act*, Declaration Form on employment and Certificate of Medical Examination for completion by a Medical Officer.  
Finally, the letter requested for copies of the Petitioner National Identity Card, KRA Pin Certificate, Birth Certificate, Academic and Professional Certificates and 2 coloured passport size photographs.  
The writer congratulated the Petitioner for the appointment.



110. The contents of the letter were explicit that the Petitioner’s position was established by the PSC on request by the President and the Petitioner was appointed as a Supernumerary.
111. The Concise Oxford Dictionary, 12<sup>th</sup> Edition defines Supernumerary as in excess of the normal or requisite number or not belonging to a regular staff but engaged for extra work.
- Blacks Law Dictionary 10<sup>th</sup> Edition defines the term as persons above the number, officials beyond the permitted number.
112. The communication referred to herein above between the Comptroller of State House and the Secretary Public Service Commission leave no doubt that the Petitioner was appointed to hold an office in the Public Service and was more of a Public Officer.
113. I will revert to the Petitioner’s employment status later in this judgement.
114. Having established the beacons of a Constitutional Petition, I will now proceed to assess whether the Petitioner’s allegations met the threshold.
115. The pith and substance of the Petitioner’s case is that the abolition of his office was not conducted in accordance with the provisions of Section 28 of the [Public Service Commission Act, 2017](#) in that the 3<sup>rd</sup> Respondent was not the Authorized Officer.
116. Section 28 of the PSC Act entitled “Conditions for abolition of office” provides as follows;
1. The Commission shall abolish an office in the Public Service upon receiving a written request by an authorised officer.
  2. The Commission in making a determination as to whether to abolish an office shall satisfy itself that –“
117. Section 2 of the PSC Act defines the phrase “authorised officer” in relation to the Commission means; any officer, body or authority appointed by the Commission to perform its delegated functions in a Ministry or State Department or any member of the Commission.
118. The Petitioner’s submission and averment that the 3<sup>rd</sup> Respondent was not the authorized officer under section 28 of the PSC Act in puzzling in that Section 28(1) of the PSC uses the phrase ‘an authorised officer’ as opposed to a particular authorized officer and section 2 of the Act define who an authorized officer is. The Petitioner adduced no evidence to demonstrate that the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government was not an authorized officer within the meaning of Section 2 and 28 of the PSC Act. Moreover, Article 234(5) of the [Constitution of Kenya, 2010](#) confer upon the Commission power to delegate in writing with or without conditions, any of its functions and powers under this Article to any officer, body or authority in the Public Service.
119. In the premises, the court is not satisfied that the request by the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government was unprocedural and a violation of Article 41 of the [Constitution of Kenya, 2010](#) . Even assuming that the request was made by an unauthorized officer, would the irregularity be unconstitutional? In the court’s view, it would not but would render the process statutorily flawed.
120. Since the alleged violation of section 28 of the PSC Act is the only ground relied upon to urge that violations of the [Constitution](#) took place, the court is not persuaded that the threshold in Anarita Karimi Njeru v Republic (Supra) was established as no violations of provisions of the Constitutional were demonstrated.



121. The court is further guided by the sentiments of Muriithi J. in *Josphat Koli Nanok & another V Ethics and Anti-Corruption Commission* (2018) eKLR as follows;

“ . . . I think that it trivializes the Constitution, its values and principles when empty allegations of infringement are made. A Petitioner who cites a violation of the constitution must by cogent evidence relate alleged breaches with real, concrete and direct loss, damage or injury arising out of the violation. It does not help to allege violation, drop conceptual abstracts and interpolations to fit some artificial textbook arguments of the nature and extent of constitutional principles . . .”

122. Having found that the Petitioner was appointed to hold a public office and was thus a Public Officer, it is essential to determine the nature of his employment in order to appreciate its implications.

123. Although the President has power to appoint state and public officers in accordance with the provisions of the Constitution of Kenya, 2010 and applicable statutes, he has no power to establish offices in the Public Service, the power is exclusively vested in the Public Service Commission.

124. Article 234 of the Constitution of Kenya, 2010 provides;

1. . . .

2. The Commission shall –

a. Subject to this Constitution and legislation –

i. establish and abolish offices in the Public Service; and

ii. appoint persons to hold or act in those offices and confirm appointments;”

This provision does not apply to the offices identified by Article 234(3) of the constitution among other functions.

125. Documentary evidence on record shows that the Comptroller of State House communicated to the PSC the President’s directive for the creation of Supernumerary posts or positions for the PSCU and the directive was implemented. The Commission directed how the appointment was to be made.

126. Instructively, the PSC did not declare any vacancy or purport to appoint the Petitioner. It merely established the positions and directed on how the appointment would be done and at what remuneration.

127. The Petitioner signed the Local Agreement Terms which the Public Service Commission was not party to contrary to the Petitioner’s counsel submissions, that the Petitioner was an employee of the PSC. Since the PSC is the only public institution constitutionally mandated to establish and abolish offices in the Public Service, the president had to rely on it to establish the positions he needed in his Executive Office including that of the Petitioner.

128. Relatedly, the Petitioner furnished no evidence that the Public Service Commission offered him employment, articulated his duties or paid him for the services rendered. It did not interview him to assess his suitability for the position nor had it advertised the position the Petitioner was offered.

129. In a nutshell, the Petitioner has not availed evidence to demonstrate that he was an employee of the Public Service Commission. Who then appointed the Petitioner and what were the terms of service?

130. Documentary evidence on record demonstrate that the Petitioner’s office or position was created by the PSC at the instigation of the President of the Republic of Kenya.



131. The letter dated July 9, 2014 offered the Petitioner the position of Senior Director, Digital, Innovative and Diaspora Communication. The letter was silent on the Supervisor and job description.
132. It is common ground that the Petitioner's position was established by the PSC specifically for him to serve in the Executive Office of the President under the PSCU.
133. From the communication between the Comptroller of State House and the Secretary PSC, it is discernible that the Petitioner's position was created for him specifically to facilitate the President's communication strategy, hence the designation of Supernumerary post as it was not part of regular public service staff, a public officer sui generis.
134. Although the court is in agreement with the Petitioner's counsel's submission that the Petitioner was not appointed part of the President's Personal Staff, he was appointed as part of the staff appointed to deliver the President's Communication Strategy and was to all intents and purposes an appointee of the President.
135. Relatedly, Article 132(2)(f) of the [\*Constitution of Kenya, 2010\*](#) provides that;
- The president shall nominate and with approval of the National Assembly, appoint and may dismiss –
- a. ...
  - b. ...
  - c. ...
  - d. ...
  - e. ...
  - f. in accordance with this Constitution, any other State or Public Officer whom this Constitution requires or empowers the President to appoint or dismiss.”
136. The court is in agreement with the Respondents submission that this provisions is not subject to statutory restrictions or limitations as suggested by the Petitioner and as submitted by the Respondents, the manner of appointment was analogous to the appointment of Cabinet Secretaries, Principal Secretaries and Members of the County Executive Committee who are hand-picked by the President or the Governor in exercise of executive functions.
137. The court is further guided by the holding of Warsame J. (as he then was) in *Miguna Miguna V Permanent Secretary Office of the Prime Minister & another* (Supra) as follows;
- “... In conclusion, it is my decision that the applicants appointment was not by the Public Service Commission but by the President of the Republic of Kenya. He was appointed to a political office which was not underpinned by the statute or by Public Service regulations. The applicant cannot expect to be subjected to a process outside his employment contract.”
138. This position finds support in the sentiments of Rika J. in *Tom Luusa Munyasya* (Supra) that Presidential appointees were not ‘status employees’ and were appointed to serve at the pleasure of the President under special contracts.
139. A copy of the Local Agreement Terms on record reveals that it is not the typical contractual document typically executed by the Public Officer in that it had no probation clause among other clauses.



140. As regards the applicability of the *Employment Act, 2007*, parties have adopted divergent positions with the Petitioner relying on the provisions of Section 40, 43 and 45 of the Act to urge that they were not complied with and the termination of employment was thus unfair within the meaning of section 45 of the Act.
141. Intriguingly, the Petitioner’s counsel made no attempt to justify the application of the *Employment Act* to the determination of a Petition founded on allegations of violations of the *Constitution*.
142. The 2<sup>nd</sup> – 4<sup>th</sup> Respondents on the other hand rely on the provisions of Section 2 of the *Interpretation and General Provisions Act* to urge that the provisions of the *Employment Act* could not apply in the interpretation of the *Constitution* and relies on the sentiments of the Court of Appeal in the County Government of Nyeri & another v Cecilia Wangechi Ndung’u (Supra) on whether the provisions of the *Employment Act* were applicable to State Officers and Members of County Executive Committee.
143. The court held that;
- “We are of the considered view that the *Employment Act* does not apply to State Officers. A State Officer’s terms and conditions of service are regulated by the *Constitution* or the relevant statute, principles of fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Office is not subject to the provisions of the *Employment Act*.”
144. Similar sentiments were expressed by Rika J. in Tom Luusa Munyasya (Supra).
145. Be that as it may, although the court has found that the Petitioner was neither a State Officer nor a Public Officer properly so called and having further found that his appointment and conditions of engagement were analogous to those of State Officers, it behoves the court to analyse the terms of engagement in greater detail to determine whether the provisions of the *Employment Act* were indeed inapplicable. The Local Agreement Terms signed by the Petitioner in the presence of a witness and dated May 15, 2018 was entitled ‘Employment on Contract Term’ and the Claimant was engaged for Thirty Six (36) months. This was an extension of the earlier agreement.
146. Noteworthy, the Local Agreement Terms were revised in 2017 as evidenced on its face.
147. Clause 3 of the agreement provided that;
- “This agreement is subject to the conditions set forth in the schedule hereto annexed, and other regulations in force from time to time applicable to pensionable officers of the public service which shall be read and construed as part of this agreement.”
148. More significantly, clause 6(1) of the Local Agreement Terms entitled ‘Determination of Engagement’ stated as follows;
- “Subject to the provisions of the *Employment Act*, the Government may at any time determine the engagement of the employee by giving him two (2) months notice in writing or paying him two months salary in lieu of notice.”
149. Relatedly, the letter dated March 18, 2020 informing the Petitioner that his position had been abolished stated inter alia;
- “Further to the termination clause in the local agreement contract (PSC 38), you will be paid salary in lieu of notice vide section 6(1) and in compliance with section 36 of the



Employment Act. Your service gratuity will be processed in pro rata basis upon clearance of any Government liability.”

150. This paragraph leaves no doubt that the parties had made the Employment Act part of the Local Agreement Terms.
151. Instructively, the Local Agreement Terms dated July 2, 2014 made no reference to the provisions of the Employment Act, 2007 in relation to termination of the engagement. In the courts view the amendment was specifically intended to render the provisions of the Act applicable to the contract.
152. From the foregoing, it would appear that the parties intended and made the provisions of the Employment Act part of the Local Agreement Terms.
153. For the above stated reasons, it is the finding of the court that the provisions of the Employment Act, 2007 were applicable to the agreement between the Petitioner and the Government and had to be complied with.
154. As to whether termination of the Petitioner’s employment was unfair, it is common ground that the Petitioner left employment on account of redundancy occasioned by a re-organization of the National government occasioned by.
155. Having found that the provisions of the Employment Act, 2007 were applicable to the instant case, I will now proceed to determine whether termination of employment was unfair as alleged by the Petitioner.
156. It is common ground that by letter dated March 16, 2020, the Cabinet Secretary, Ministry of Interior and Coordination of National Government requested the Public Service Commission to abolish certain 5 offices including that of the Petitioner due to re-organization of Government occasioned by Executive Order No. 1/2018(revised), No. 1 of 2019 and No. 2 of 2019.
157. The letter indicated that structural realignment and institutional adjustments necessitated the abolishing of some of the offices moved from the PSCU to eliminate duplications and overlaps of functions as provided by section 28 (2) (e) of the PSC Act.
158. By a response dated March 18, 2020, the Secretary, Public Service Commission advised the Cabinet Secretary that the 5 offices/positions had been abolished.
159. The Commission Secretary advised the Cabinet Secretary to terminate the contracts of employment on account of redundancy to facilitate payment of gratuity on pro rata basis.
160. The Claimant was notified on the same day.
161. Although the Respondents adduced no evidence of the actual re-organization, the communication between the Cabinet Secretary and the Public Service Commission show that indeed there was a re-organization of Government and the PSCU had been moved from the Executive Office of the President.
162. In sum, the Petitioner’s employment was terminated on account of redundancy as defined under Section 2 of the Employment Act, 2007.
163. Redundancy is one of the legitimate and legally sanctioned ways of bringing an employment relationship to an end and section 40 of the Employment Act prescribes the essentials of a redundancy.
164. The conditions or requirements have been explained and summarised in several decisions such as Jane Khalechi v Oxford University Press EA Ltd (2013) eKLR and are;



- i. Give notice to the union or Labour Office a month before the process commences.
  - ii. For those not unionised, personal letters copied to the Labour Officer.
  - iii. Use a criteria of seniority, abilities, skill and reliability of each employee.
  - iv. Where there is a CBA, the same should not disadvantage any employee.
  - v. Leave days due should be paid in cash.
  - vi. One month notice or one month pay in lieu of notice and
  - vii. Severance pay not less than 15 days for each year of service.
165. These conditions are mandatory as explained in *Hesbon Ngaruiya Waigi V Equatorial Commercial Bank Ltd (Supra)* and *Freight In Time Ltd V Rosebell Wambui Munene (Supra)* and non-compliance thereof renders the termination of employment unfair within the meaning of section 45 of the *Employment Act*. (See *Francis Maina Kamau V Lee Construction (2014) eKLR* and *Caroline Wanjiru Luzze V Nesite Equatorial African Region Ltd (2016) eKLR*).
166. From the documentary evidence on record, it is clear that neither the provisions of the *Employment Act* on redundancy nor or termination of employment were complied with.
167. The Respondents may have had a valid and fair reason to terminate the Petitioner's employment but did not comply with the requirements of the provisions of the *Employment Act, 2007* to guarantee procedural fairness in the process.
168. For the above stated reasons, it is the finding of the court that termination of the Petitioner's employment on account of redundancy was unfair for want of procedural fairness.
169. Having found that termination of the Petitioner's employment was unfair, I will now proceed to assess the appropriate remedy.
- i. Having found that the alleged violations of the *Constitution* germane to the abolition of the Petitioner's office were statutory not Constitutional oriented and the Petition did not meet the Constitutional threshold, the declarations sought in prayers a – g are unmerited and are declined.
  - ii. Compensation for unlawful termination of employment
170. Having found that termination of the Petitioner's employment by the 3<sup>rd</sup> Respondent was unfair, the Petitioner is entitled to the relief provided by section 49(1)(c) of the *Employment Act* subject to the provisions of section 49(4) of the Act.
171. In arriving at the level of compensation, the court has considered the fact that;
1. The Claimant was an employee of the Government for about 5 years 8 months and wished to continue till the end of the contract in October 2021.
  2. The Petitioner did not contribute to the termination of employment and had no warning letter or disciplinary issue.
  3. The Petitioner was handpicked for the position and was not interviewed by the Public Service Commission.
172. For these reasons, the court is satisfied that the equivalent of two (2) month's salary is fair.



- iii. Damages for violation of the Petitioner’s constitutional rights
173. Having found that the Petition did not meet the threshold in *Anarita Karimi Njeru V Republic (Supra)*, the prayer for damages for violation of constitutional rights is unmerited and is disallowed.
- iv. Costs of this Petition
174. Having found that termination of the Petitioner’s employment was unfair means that the Petition is only partially successful and the Claimant is awarded 50% of the costs.
- v. The prayer for severance pay made in the submissions is clearly unsustainable as it was neither pleaded nor proved and parties are bound by their pleadings and submissions are not evidence.
175. In conclusion, judgement is entered for the Petitioner against the 3<sup>rd</sup> Respondent in the following terms;
- a. Equivalent of two (2) months salary.
  - b. For the avoidance of doubt, all other prayers are disallowed.
  - c. Having found that the Petitioner failed to prove the petition met the threshold for a constitutional petition and the suit is only partially successful, It is only fair that parties bear own costs.
176. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JANUARY 2023**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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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