



REPUBLIC OF KENYA



KENYA LAW
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**Were v Ministry of Interior and National Administration & 3 others (Petition
E049 of 2022) [2023] KEELRC 466 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 466 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E049 OF 2022
S RADIDO, J
FEBRUARY 22, 2023
IN THE MATTER OF ARTICLES 22 AND 258
OF THE CONSTITUTION
OF KENYA, 2010
AND
IN THE MATTER OF ALLEGED THREAT OF
VIOLATION OF ARTICLES
3, 10, 19, 20, 21, 22, 23,
24, 25(C), 27, 28, 41,
50, 51 AND 232 OF THE
CONSTITUTION OF
KENYA, 2010
AND
IN THE MATTER OF THE PUBLIC SERVICE
COMMISSION ACT, 2017
AND
IN THE MATTER OF THE EMPLOYMENT ACT,
2007
AND
IN THE MATTER OF THE FAIR
ADMINISTRATIVE
ACTIONS ACT.



BETWEEN

SYLVESTER ONYANGO WERE PETITIONER

AND

**MINISTRY OF INTERIOR AND NATIONAL ADMINISTRATION 1ST
RESPONDENT**

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER- NDHIWA 4TH RESPONDENT

JUDGMENT

1. Sylvester Onyango Were (the petitioner) was appointed as Chief, South Kanyamwa Location, on or around March 30, 2021.
2. On November 28, 2022, the Deputy County Commissioner wrote to the petitioner to inform him that the Public Service Commission had declined his request for re-appointment as Chief, and further directed that he be discharged from service.
3. The petitioner then moved the court on December 5, 2022, alleging unfair termination of employment. The petitioner sought orders:
 - (a) A declaration that petitioner's rights and fundamental freedoms secured in the bill of rights under articles 25, 27, 28, 41, 47 and 51 of the Constitution have been infringed by the 1st and 2nd respondents and that his termination was unprocedural, null and void.
 - (b) An order of reinstatement of the petitioner as the Chief of South Kanyamwa location and that the petitioner be paid his unpaid salaries from the date of his appointment to date.
 - (c) General damages against the respondents jointly and severally to be quantified by the court as appropriate in the circumstances.
4. Filed at the same time was a motion under a certificate of urgency. The court declined to certify the motion as urgent.
5. The court gave directions on the hearing of the motion and the petition on December 13, 2022.
6. Consequently, the Secretary/Chief Executive Officer of the Public Service Commission filed a replying affidavit on January 19, 2023 (the other respondents did not file affidavits).
7. The petitioner filed his submissions on February 6, 2023, and the 1st, 3rd and 4th respondents on February 15, 2023.
8. The court has considered the motion, petition, affidavits and submissions.

Unfair removal from office

9. It is not in dispute that the petitioner had previously served as a teacher and that he was dismissed from service by the Teachers Service Commission effective from July 19, 2017.



10. It is also not disputed that the petitioner applied for the position of Chief, South Kanyamwa location, was interviewed and emerged successful and was appointed into office.
11. Further, it is not disputed that the petitioner did not disclose in the application for the position of Chief that he had been dismissed from the service by the Teachers Service Commission.
12. The respondents removed the petitioner from office of Chief because of the failure to disclose the dismissal by the Teachers Service Commission.
13. Article 236 of the Constitution protects public officers from removal from office without due process. The protection is also assured by articles article 41 and 47 of the Constitution, the Fair Administrative Actions Act as well as sections 35(1), 41, 43 and 45 of the Employment Act, 2007.
14. There is no suggestion by the respondents that the petitioner was afforded an opportunity to be heard before he was discharged from the office of chief.
15. The court has no hesitation in finding the removal was unfair.

Appropriate remedies

Arrears of salary

16. The petitioner sought an order compelling the respondents to pay him earned wages. The respondents had informed the petitioner that he would be paid. They produced in court a voucher tabulating the payments.
17. By the time of the hearing, payment had not been effected. It is only fair that the court orders the respondents to make payment.

Reinstatement or compensation?

18. The petitioner did not make a material and relevant disclosure while seeking employment as a chief.
19. Public office is a trust and utmost integrity must be maintained. The petitioner failed the integrity test by showing dishonesty.
20. The court, therefore, declines to order reinstatement and since the respondents have in the submissions offered the equivalent of 2 months' gross wages as compensation, and considering the length of service, the court will award the equivalent of 2 months' gross wages as compensation.

Conclusion and Orders

21. From the foregoing, the court finds and declares that the removal of the petitioner from office was unfair.
22. The petitioner is awarded:
 - i. Arrears of salary.
 - ii. 2 months' gross wages compensation.
23. The respondents to compute and pay the awards within 30 days, in default the awards to attract interest at court rates from the December 5, 2022.
24. The petition did not meet the threshold for approaching the court through the petition route and the petitioner is denied costs.



DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF FEBRUARY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For petitioner Onyango Owaka & Associates

For 1st, 3rd and 4th respondents Ms Masaka, Principal Litigation Counsel, Office of the Hon Attorney General

For 2nd respondent Hon Attorney General

Court Assistant Chrispo Aura

