



**Kitemange v County Government of Kitui (Cause 1059 of 2018)  
[2023] KEELRC 1223 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1223 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1059 OF 2018**

**B ONGAYA, J  
MAY 25, 2023**

**BETWEEN**

**EMMA KAMENE KITEMANGE ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF KITUI ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed on June 26, 2018 the statement of claim through M/s E.K Mutua & Company Advocates. The claimant claimed against the respondent for:
  - a. 3 months' salary in lieu of notice Kshs 558, 516.00.
  - b. 12 months' salaries compensation for unlawful termination Kshs 2, 234, 064.00.
  - c. Salary withheld during interdiction for 5 months Kshs 930,860.00.
  - d. Salary for remainder of contract period being 31 months Kshs 5,771, 332.00.
  - e. Loan recovered by M/s Kitui Teachers Savings and Credit
  - f. Society Ltd Kshs 5,000,000.00.
  - g. Total claimed Kshs 14,494,772.00.
2. The claimant prayed for judgment against the respondent for:
  - a. A declaration that the claimant's termination was unlawful and unfair.
  - b. Reinstatement to her previous position or job without any loss of benefits.
  - c. Salary arrears for the entire period the claimant has been out of employment.
  - d. Damages for wrongful or unlawful termination



- e. Maximum 12 months' compensation for wrongful dismissal.
  - f. Damages for defamation of her person and character.
  - g. Cost of the suit with interest thereon.
3. The claimant was offered employment by the respondent on December 17, 2013 and she accepted the same. It was for the position of a Chief Officer, Youth Sports and Social Services on a 5-year contract of service ending on December 31, 2018. her monthly was Kshs 126,172.00; house allowance Kshs 60,000.00 per month; and other monthly allowances in the sum of Kshs20, 000.00.
  4. It is pleaded that she served with due diligence. Further, she received an interdiction letter dated December 10, 2015 conveying that the Governor had directed her interdiction on account of incompetence and inability to satisfactorily complete tasks to the required quality including agreed timelines; disrespect, insubordination, and lack of consultation; wilful disregard of rules and regulations in the performance of official duties; collusion with suppliers and contractors to inflate costs leading to compromise in service delivery; engaging in rent seeking and corrupt practices in collusion with suppliers and contractors; and poor departmental leadership and unsatisfactory performance of assigned duties and responsibilities. The letter stated that the interdiction was pending investigations. During the interdiction she was on half salary, full medical cover, and any allowances as was applicable. She was directed to handover by completing a provided template. By the letter dated December 30, 2015 by Khaminwa &Khaminwa Advocates for the claimant, it was conveyed to the Governor of County of Kitui that the interdiction was in contravention of Articles 47, section 4 (3) (b) of the *Fair Administrative Action Act* and Article 236(b) of the *Constitution* it was demanded that she is reinstated immediately on full salary and all withheld salaries be released to her.
  5. It is pleaded that the claimant is a stranger to the allegations as was levelled against her in the interdiction letter of December 10, 2015. It is her case that prior to the interdiction she did not receive a hearing per section 4(3) (b) of the *Fair Administrative Action Act, 2015*. She was not given an opportunity to be heard and to make representations in that regard. The interdiction was issued in breach of the *Employment Act*.
  6. It is her case that subsequently the respondent purported to conduct an investigation through a committee appointed by the Governor but which committee never invited the claimant to make a representation. By the letter dated May 19, 2016 the respondent terminated the claimant's employment upon the same matters enumerated in the interdiction letter.
  7. It is the claimant's case that the interdiction letter of December 10, 2015 and the subsequent termination letter of May 19, 2016 were malicious and driven by nefarious intentions on the part of the respondent. Her case is that the letters were illegal and unconstitutional as well malicious, the particulars of which were pleaded as follows:
    - a. Failing to give the claimant any adequate notice of the intended termination.
    - b. Failing to give the claimant a fair hearing or at all.
    - c. Humiliating the claimant by making false accusations against her without reasonable basis or justification to do so.
    - d. Terminating the services of the claimant without any reasonable basis or justification for so doing.
    - e. The interdiction letter was not prepared with authority from the County Secretary.



8. The claimant pleads that in the circumstances she suffered great damage to her professional career and standing, loss and damage.
9. The respondent filed the statement of response on November 30, 2018 through Obura Mbeche & Company Advocates. The respondent admitted to the employment relationship as was pleaded for the claimant and, admitted interdiction letter of December 10, 2015 issued. The respondent stated that the interdiction followed the numerous adverse reports received by the Governor H.E Dr. Julius Malombe from members of the public, fellow workers and County Minister in charge of the claimant's portfolio. The complaints were as enumerated in the interdiction letter and confirmed in the investigation report exhibited for both parties. The claimant was given an opportunity to defend herself but failed to take up the opportunity and the respondents considered the allegations proved and a decision made to terminate her services and the County Secretary communicated the termination by the letter duly exhibited. The respondent states that the claimant was invited to attend before the investigation committee by the summons letter dated 29.03.2016 but she failed to do so. The investigation committee considered the allegations levelled and found the claimant culpable.
10. The claimant was a public officer subject to Public Service Commission Human Resource Policies and Procedures Manual for Public Service and the Public Service Commission of Kenya County Public Service Human Resource Manual which provided for interdiction of a public officer to give room for investigations into alleged offences allegedly committed by a public officer. The letter of interdiction stated that it was pending investigations. The provisions of the Fair Administrative Action 2015 were therefore complied with the respondent denied all claims made for the claimant and prayed that the claim be dismissed with costs. Further the 5-year contract in issue had since expired. The respondent's counsel ceased acting by leave of Court.
11. The hearing notice was served upon the respondent and the respondent's County Attorney. Counsel for the respondent attended but called no witness. The claimant testified to support her case. The final submissions were filed for the claimant and none for the respondent. The Court has considered the material on record and answers pertinent issues as follows.
12. To answer the 1<sup>st</sup> issue there is no dispute that the respondent employed the claimant per the letter of offer of appointment dated December 17, 2013. The employment was terminated by the letter of termination of contract dated May 19, 2016.
13. To answer the 2<sup>nd</sup> issue, the Court returns that the respondent failed to provide a witness to testify in court and establish the validity and existence of the alleged and stated reasons for termination of the claimant as was required under section 43 and 47(5) of the *Employment Act*. The Court cannot find that the reasons for termination have therefore been shown to have been fair as relating to the claimant's conduct, compatibility, capacity and the respondent's operational requirements as envisaged in section 45 of the *Employment Act, 2007*. The respondent's submission that the respondent adduced no evidence to establish gross misconduct as a reason for the termination is upheld. Further, the respondent as already found failed to discharge the burden of proving the reasons for termination as imposed by section 47(5) and 43 of the *Act*.
14. To answer the 3<sup>rd</sup> issue, the Court returns that the respondent relies on the Public Service Commission of Kenya County Public Service Human Resource Manual. Paragraph D.31(b) thereof required the respondent, after issuing the interdiction, to serve the claimant a show cause letter which was to contain as well communicating the interdiction in the case where, as it turned out to be, of dismissal. The Court finds that the interdiction letter that issued fell short of that provision because it did not require the claimant to show cause why her contract of service should not be terminated. It was procedurally unfair. While the investigation committee invited the claimant to attend in self-defence per the letter



of summons dated 29.03.2016, the claimant's position had already been prejudiced as she had not received a show cause letter with particulars or details of the allegation. The Court further finds that the Governor appointed the Committee with total disregard of the functions and powers of the County Public Service Board under the *County Governments Act, 2012*. In view of those findings, the Court returns that the procedure the respondent initiated towards the termination of the claimant's contract of service was unfair.

15. The Court has found that the termination of the claimant's contract of service on account of gross misconduct was unlawful for want of compliance with the provisions of the County Government Act as it was unfair both in procedure and merits. The Court has considered the factors in section 49 on award of compensation for unfair termination. The Court has considered that the claimant had 31 months of unexpired tenure. Further, the termination was in total breach of the service regulations and the applicable statutory provisions particularly the *County Governments Act*. Such are aggravating factors that entitle the claimant to 12 months' salaries making Kshs 2, 234, 064.00. She is awarded Kshs 930, 860.00 salary withheld during the interdiction period especially that the termination has been found to have been unfair and unlawful. No evidence and justification was given for 3 months' pay in lieu of notice and the Court awards the statutory one month under section 35 of the *Employment Act, 2007* making Kshs 186,172.00. The Court returns that nothing attributable to the contract of service or the respondent making it justifiable to award pay for 31-months unexpired tenure has been shown. In any event after the termination nothing has been attributed to the respondent making it impossible for the claimant to get into other gainful ventures. That claim will fail as unjustified. The particulars to justify claim on recovery of Sacco loan was not pleaded, no evidence was moved, no submission was made and the same is deemed abandoned or unjustified. Senior Counsel E.K. Mutua made no submissions on prayers for reinstatement and damages for defamation and the same are deemed abandoned and rightly so as they were not available in the circumstances of the case. The claimant has succeeded in her claims and is awarded costs.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The declaration that the claimant's termination was unlawful and unfair.
2. The respondent to pay the claimant the sum of Kshs 3,351,096.00 (less PAYE) by September 1, 2023 failing interest to be payable thereon from the date of this judgment until payment in full.
3. The respondent to pay the claimant's costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25<sup>TH</sup> MAY, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

