



Mbugua v Governor, County Government of Nakuru & another (Cause 9 of 2020) [2023] KEELRC 1056 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1056 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 9 OF 2020
HS WASILWA, J
MAY 4, 2023**

BETWEEN

JAMES KURIA MBUGUA CLAIMANT

AND

GOVERNOR, COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU 2ND RESPONDENT

JUDGMENT

1. The claimant instituted this claim vide a Memorandum of claim dated 31st January, 2020, alleging to have been unfairly terminated and seeking for compensation for the unfair termination. He sought for the following reliefs;
 - a. A declaration that the Respondent's termination of the claimant was wrongful, illegal and unfair.
 - b. Compensation for unfair termination equivalent to 12 months' salary at Kshs 221,854 amounting to Kshs 2,662,248.
 - c. An order directing the Respondents to reinstate the claimant to his position of secretary to the county Public Service Board or in the alternative pay him the salary and benefits he could have earned for 6 years until his retirement and issue him with a certificate of service.
 - d. Special damages for defamation, libel and or maligning the claimant's reputation.
 - e. General damages.
 - f. Any order directing the Respondents to indemnify the claimant from any liability, acts and or omissions that may have been perpetrated after the 15th day of January 2019 when he was forcefully removed from office.



- g. Interest and costs incidental to this suit.
- h. Any such other or further relief as this Honourable Court may deem fit and just to grant.

Claimant's Case.

2. The claimant avers that at all material times he was the county secretary of Nakuru County Public service board, having been appointed as such vide the letter of 31st May, 2013. He was designated the County Accounting officer in line with section 148(1) of the Public Finance Management Act, 2012 with effect from 2nd December, 2013.
3. Prior to his appointment, he had been employed by Public Service Commissions (PSC) on permanent and Pensionable terms in 2009 and seconded to the County Government of Nyeri pursuant to section 138 of the County Government Act and later transferred to Nakuru County.
4. The circumstances that led to his termination is that on 15th January, 2019, he, together with other employees serving in his office, were forcefully ejected from his office in an uncouth and barbaric manner without any notice of any wrongdoing.
5. He reported the matter to Nakuru central Police station under him OB number 87/15/1/19 and soon after, still under the hostage of the Respondent's servants/agents, he was served with a letter dated 14th January, 2019 titled, 'illegal recruitment', alleging that the claimant had illegally recruited staff. On that offense he was placed on 45 days' compulsory leave.
6. The letter also indicated that the claimant had been found guilty of other gross misconduct being insubordination, malpractice and incompetence as per investigations and report of the County Ad Hoc Committee. The report recommended the Removal of the claimant from Public Service Board.
7. On 22nd January, 2019, seven days after the claimant was placed on compulsory leave, the Respondent advertised the Claimant's position in Daily Nation newspaper at page 28 and for some employees of the Public Service board.
8. The claimant avers that the Respondent in an act of defamation published the letter of 14.1.2019 in a newspaper and made comments on justifications for placing the claimant on compulsory leave.
9. After the expiry of the 45 days, the claimant kept calling the Respondent on the outcome of the investigation and way forward but none was forthcoming. During that time, the claimant was paid his salary up to May, 2019 and no communication of any disciplinary proceedings were ever communicated to him to date.
10. On 14th June, 2019, The Respondent carried out interviews to fill in the position of the claimant affirming that indeed the services of the claimant had been terminated.
11. The Claimant maintains that there was no disciplinary process that was carried out to officially terminated his services from the Respondent's employ, as such the termination was unfair and contrary to the dictates of sections 41, 44 and 45 of the Employment Act as read with Articles 41,47,236 of the Constitution. Further that the Respondent breached Sections 58(5)(a) of the County Government Act in terminating his services.
12. On the defamation allegation the claimant stated that defamatory word were captured as followed 'On Tuesday the Country Boss sent the entire board on compulsory leave to facilitate investigations into what he termed as Gross misconduct. The People Daily published that 'Nakuru Governor Lee



- Kinyanjui has suspended the County Public Service Board over claims of insubordination and gross misconduct.’
13. In justification of the said newspaper article, the then Governor gave a press briefing on 20th January, 2019 that was published in the Standard Newspaper as follows “Mr. Kinyanjui defended his actions, saying the Board members who were hired by his predecessor Kinuthia Mbugua had gone Rogue. Since 2015 the Board has been on the spot over illegal recruitment, nepotism and skewed promotions contributing to ballooning wage Bill that hit 6.2 Billion in the current financial year.’
 14. According to the claimant these publications are defamatory to his person as it castigated him in very bad light in the eyes of right thinking members of the Public. He added that the said words portrayed him as a defiant person, unruly, disobedient, unethical, guilty of gross misconduct and insubordination and unsuitable to hold any public office. Additionally, that these allegations have exposed him to ridicule, public odium and lowered his reputation with the effect of diminishing his chances of getting employment in the private of public sector.
 15. During hearing the claimant testified as CW-1 and adopted his witness statement of 31.1.2020 and produced documents filed on 3.2.2020 and 14.7.2022 as exhibit 1-18 respectively. He also produced the supplementary list of documents filed on 5.6.2022. In summary he testified that he was worked for the Respondent till January, 2019 when his services were terminated abruptly. He sought to be reinstated without loss of any benefits. He also stated that his reputation was injured in the process of his termination which he seeks compensation. He maintained that he was ejected from office by goons and never given time to hand over.
 16. Upon cross examination, he testified that he was employed by PSC on permanent and pensionable terms then transferred to Nyeri County Government, then seconded to Nakuru County Government. He admitted that his letter of employment indicates that he is employed under Section 58(1)(c) of the County Government Act as a member of the Board with effect from 28.5.2013 but that he was the secretary of the Board and not a member as contemplated under the said section. He also admitted that the said section provides for employment of members for a non-renewable term of 6 years. He however testified that he was ejected from the office in January, 2019 before the expiry of his term and later paid his salary up to May, 2019.
 17. On further cross examination he testified that he was the secretary of the Board and not a member of the County Public Service Board. He maintained that he was unfairly terminated and not removed because of expiry of his term. He testified that he was not informed of the investigation report carried out by the Ad Hoc Committee in 2016 and only became aware when he was placed on 45 days’ compulsory leave.
 18. On the defamation, he testified that the first defamatory allegation were published on 20.1.2019, the second on 10.4.2019, third on 22.1.2019 and 18.1.2019 and last on 17.1.2019 , while this suit was filed on 3rd February, 2020 more than a year after the said publications. He also testified that all these publications were made by newspapers and that his name was not mentions in any of the said newspapers.
 19. On -re-examination the claimant testified that he was appointed as a Board Secretary not a member of the Board. he also testified that he was a secretary of Nyeri County Board before being seconded under Section 138 of the County Government Act as such the terms remain the same as those he enjoyed in Nyeri County Government. He also reiterated that he was sent on compulsory leave for alleged illegal recruitment and recommendation by the Ad Hoc Committee but there was no disciplinary hearing conducted before his termination, making the termination unfair. He told this Court that the publication by Standard newspaper of 20th January, 2019 mentioned his name,



Respondents' Case.

20. The Respondents entered appearance on the 17th June, 2020 through the firm of Mirugi Kariuki and filed a response to claim on 11th February, 2022 denying the claim and in particular stated that since the claimant has confirmed that he was appointed under section 58(4)(a) of the [County Government Act](#), his term of service is on a six-year non-renewable term which expired by effluxion of time.
21. The Respondents denied the allegation that the claimant's employment was on permanent and pensionable terms and maintained that as per the employment letter of 31st May, 2013 he was to serve pursuant to provisions of section 58(4)(a) for a non-renewable period of six years. Therefore, that upon the expiry of the said period, he was peacefully ejected from the office but he retaliated and fought the agents who were aiding him out of the said office.
22. The Respondents admitted that indeed an ad hoc Committee had carried out investigation into the conduct of the claimant and wrote a report on or around 5th April, 2016 finding him guilty of gross misconduct and even recommended his removal, a report which was acted upon by the Respondents on 14th January, 2019 when the claimant was placed on 45 days compulsory leave. Aggrieved by that decision, the claimant filed Judicial Review serialized as ELRC JR No. 1 of 2019 which has since been dismissed by this Court for want of prosecution.
23. The Respondent stated that by the time the claimant exhausted his leave days, his term of office had come to an end and for continuity of that office, the Respondent invited qualified persons to fill in the vacancy that arose and the office was duly filled. The advertisement of the vacancy was carried out in accordance with the provisions of section 58 A (5) of the [County Government Act](#).
24. The Respondents denied all the allegations of defamation pleaded in the claim and stated that they were not in control of the media reporting and that they have freedom of media provided for under Article 34 of the [Constitution](#). In addition, the Respondent questioned the jurisdiction of this Court to handle defamation Case and maintained that such Cases are a preserve of the High Court as provided for under Article 165 of the [Constitution](#).
25. The Respondent contends that the suit herein is incurably defective for misjoinder of causes by the claimant who seeks for compensation for unfair termination on one hand and damages for defamation which issues did not arise from same transaction. The Respondent reiterated that if any defamation was to be filed then the claimant ought to have sued the newspapers houses and not the Respondents herein.
26. During hearing, the Respondents called Charles Koech, the Chief Officer Public Service as it RW-1 who adopted his statement of 15.2.2023 and upon cross examination testified that his job entail administration of Human Resource. He testified that the claimant was indeed the secretary of the Board having been seconded as per section 138 of the [County Government Act](#).
27. He testified that the claimant was sent on 45 days' compulsory leave for incompetence's and malpractice. He admitted that the Ad hoc Committee came up with a report but the recommendation for the removal of the secretary and chairperson of the board was not approved by the assembly. He testified further that the term of the claimant expired at the time of serving the 45days compulsory leave but on further cross examination he told the Court that the claimant's term expired in May, 2019 and not February, 2019 when the leave period came to an end. He also admitted to receiving the letter of secondment from Nyeri County Government dated 14.5.2013.



28. On re-examination he testified that the Ad Hoc Committee report recommending the removal of the claimant from office was approved by the county assembly. He maintained that the claimant served the compulsory leave till his term expired.

Claimant's Submissions.

29. The claimant submitted from the onset that he was employed by the 2nd Respondent as the secretary to Nakuru County Public Service Board by the letter dated 31st May, 2013 in line with provisions of section 58(1) (c) of the County Government Act. He argued that his appointment to Nyeri county Government was on transfer as provided for under section 138 of the County Government Act, the terms of service applicable should be those he enjoyed while working for Public Service Commission, which was on permanent and Pensionable terms.
30. It was submitted that as per the provisions of section 58(3) of the County Government Act, the secretary to the Board is not considered as a member of the Board for the purposes of subsection (4)(a) that caps the term limit to 6 years non-renewable and maintained that the time limitation is for members of the Board which the claimant being the secretary of the Board is not a member of.
31. On the compulsory leave, it was submitted that the claimant was placed on 45 days compulsory leave beginning in January, 2019 which lapsed at the end of February, 2019. However, the Respondents before the completion of the compulsory leave advertised for the claimant position and called for application indicating that what ever process was to be followed could not be genuine because the Respondents had already made up their mind to replace him. He argued, nonetheless, that the Respondents did not invite him to disciplinary hearing or give him a chance to defend himself on the allegations facing him, terminating his services unfairly. Further that the allegation that the Ad Hoc Committee report of 2016 was adopted is far from the truth because the plenary of the County assembly did not pass the part for the removal of Secretary of Public Service Board, a fact which was confirmed by the fact that the claimant continued rendering his services for a further three years till 2019. In summation, the claimant submitted that the termination of his services either on allegation of Ad Hoc Committee report or the expiry of term was never justified and unfair in the circumstances. To reinforce this position, the claimant relied on the case of Kenfreight E.A Limited v Benson K Nguti [2016] eKLR where the Court insisted on the need to follow the provisions of section 41 and 45 before an employee is termination, failure to which the termination will be termed as unfair.
32. On defamation, it was submitted that the words stated in the claim that were uttered by the Respondents were defamatory, referred to the claimant, published by the Respondent and were false. In this they relied on the case of John Ward V Standard Ltd HCCC 1062 of 2005 which laid the ingredients for defamation. On that basis, it was submitted that the said published text lowered how right thinking members of society viewed the claimant.
33. In conclusion, the claimant submitted that the termination was not justified by a valid reason, neither was he subjected to any disciplinary process, thus the termination was unfair and urged this Court to allow the claim as prayed.

Respondent's Submissions.

34. The Respondent submitted on four issues, whether the claimants term of employment came to and end by operation of law, whether the claim for unfair termination was viable in the circumstances, whether there was defamation as claimed and whether costs should issue.



35. On the first issue, it was submitted that the indeed the claimant was appointed as the secretary of the Board as provided for under section 58(1)(c) of the [County Government Act](#) who, as provided therein, is a member of the County Public Service Board, whose term limit is 6 years as provided for under subsection 4. Therefore, that since the claimant was appointed on 28th May, 2013 his term lapsed by operation of the law on 28th May, 2019.
36. On whether the termination was unfair, it was submitted that the claimant was employed on a fixed term contract which came to an end in May, 2019, despite the fact he was sent on compulsory leave, the Respondent paid the claimant all his dues up until May, 2019 when the contract came to an end. In this they relied on the case of [Ronald Ongori Gwako v Styroplast Limited](#) [2022] eKLR where the Court relied on the holding by Justice Rika, in [Margaret A. Ochieng v National Water Conservation & Pipeline Corporation](#) [2014] eKLR thus;
- “Automatic renewal would undermine the very purpose of the fixed-term contract, and the revert to indeterminate contracts of employment..... Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities..... The Court is persuaded that the Claim has no merit. The fixed term contract had its own in-built termination notice, in that the date of termination was advised to the Claimant on execution of the three-year contract in December 2008. She knew termination would be upon the lapse of the three years in 2011.....”
37. They also cited the Court of Appeal decision in [Registered Trustees of the Presbyterian Church of East Africa & another V Ruth Gathoni Ng'otho](#) [2017] eKLR where the Court held;
- “29. Bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contract ought not have been maintained. This is in relation to the salary for the months 5th of April up to May, 2010. Similarly, since the respondent’s contract came to an end by effluxion of time any claim for wrongful termination could not be maintained.
38. On that basis, it was submitted that the advertisement made in January, 2019 was in to fill the inevitable vacancy that was eminent as the claimant’s contract was coming to an end in May, 2019. Thus the process cannot be said to be unfair.
39. On the defamation claim, the Respondent defined what defamation statement entail by relying on Gately on [Libel and Slander](#) 6th Edition which stated that;
- “A defamatory statement is a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule to convey any an imputation on him disparaging or injuries to him in his office, profession, calling, trade or business.”
40. They then relied on the case of [Abdi Mohammed Farah v Nairobi Star Publication Limited and another](#) [2015] eKLR where the Court relied on the case of [Wycliffe A Swanya v Toyota East Africa](#)



Ltd & Another [2009] eKLR which listed the ingredient of defamation that must be proved by the complainant to include;-

“For the purpose of deciding a case of defamation, the Court is called upon to consider the essentials of the tort generally and to see whether these essentials have been established or proved. It is common ground that in a suit founded on defamation the plaintiff must prove:-

“(i) That the matter of which the plaintiff complains is defamatory in character.

(ii) That defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.

(iii) That it was published maliciously

(iv) In slander, subject to certain exceptions, the plaintiff has suffered special damage.”

41. Accordingly, it was submitted that the Claimant has not proved the ingredients stated in the above cited case, neither has he demonstrated any publications made by the Respondent to warrant the issuance of the Orders sought in his claim under this head.

42. It was submitted further that even if the said publication were indeed defamatory, the same were published in January, 2019 and the suit herein filed in February, 2020 more than an year later as such the defamation claim is barred by limitation of action which provides for defamation claims to be filed within 12 months of such publications.

43. On costs, it was submitted that the same follow event and urged the Court to award the Respondents costs of this suit.

44. I have examined all evidence and submissions submitted by both parties herein.

45. The claimant has averred that he was unfairly terminated by the respondent.

46. I have looked at the claimant’s document dated 14th May, 2013 where he was seconded to the County Government Nyeri.

47. Vide a letter dated 31/5/2013, he was appointed as a member of the Nakuru County Public Service Board Secretary with effect from 28th May, 2013.

48. He was thereafter appointed vide a letter dated 2/12/2013 as the Accounting Officer having been appointed as the Secretary, Public Service Board.

49. In his evidence the claimant admitted that under the section upon which he was appointed, the appointment provided for employment of members for a non-renewable term of 6 years but that he was ejected out of the office in January 2019 before expiry of his term and later paid his salary up to May 2019.

50. He indicated that he was Secretary of the board and not a member of the County Public Service Board.

51. The claimant was appointed under Section 58 (i) (c) of the County Government Act which provides as follows;-

“ 58. The County Public Service Board shall comprise —

(1)



- (a) a chairperson nominated and appointed by the county governor with the approval of the county assembly;
- (b) not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and
- (c) a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board”.

52. The section provides for appointment of members of the County Public Service Board.
53. The claimant was therefore appointed as a board member which appointment is for 6 years non-renewable.
54. His appointment as secretary was just an addition which allowed him to be the Accounting Officer of the County Public Service Board.
55. The claimant has admitted that though he was on suspension he was paid his salary up to May 2019 when the contract was due to end.
56. He was never served with any termination letter before May 2019. It is therefore my finding that his contract ended by effluxion of time and his assertion that he was unfairly terminated is not tenable. The prayer for compensation cannot stand.
57. The claimant also averred he was defamed by the respondents who maligned his reputation.
58. He has alluded that the defamation stemmed from the fact that the 1st respondents in a press release made comments justifying his being placed on compulsory leave.
59. These comments were said to have been published in January 2019.
60. This claim was however filed on 3rd February, 2020 more than a year after such claims were said to have been made.
61. Section 20 of the *Defamation Act* Cap 36 LOK on limitation of action relating to the fort of defamation provides as follows;-
- “ subsection (2) of Section 4 of the *Limitation Act* is hereby amended by the addition thereto of the following;- provided that an action for libel or slander may not be brought after the end of twelve months from such date”.
62. The issue of defamation herein having been filed after 12 months is therefore untenable for want of time.
63. The same is time barred and is therefore dismissed.
64. I find the entire suit lacks merit and is therefore dismissed accordingly with costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 4TH DAY OF MAY, 2023.

HON. LADY JUSTICE HELLEN

JUDGE

In the presence of:



Kahiga for Claimant – present

Respondents – absent

Court Assistant – Fred

