



**Nyagah v County Government of Embu & 2 others (Cause
44 of 2019) [2023] KEELRC 1444 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1444 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE 44 OF 2019
ON MAKAU, J
JUNE 9, 2023**

BETWEEN

JOHNSON MWANIKI NYAGAH CLAIMANT

AND

COUNTY GOVERNMENT OF EMBU 1ST RESPONDENT

MARTIN NYAGA WAMBORA 2ND RESPONDENT

EMBU COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

JUDGMENT

1. By an Amended Statement of claim dated 15th November 2019 the claimant alleged that he was employed by the respondents on 10th January, 2018 as the chief of staff and Head of Governor's Delivery Unit. His terms of service were set out in the letter of Appointment dated 10th January, 2018 which annexed a Job Description. He averred that by dint of Article 260 of *the Constitution* he was a public officer and therefore an employee of the County Public Service Board.
2. He further averred that he rendered diligent and honest service until the County Secretary began frustrating him by denying him work and withholding his salary despite his continued reporting to work. He averred that the said conduct by the respondent amounted to constrictive dismissal from employment. Further that the dismissal was unfair under section 45 of the Employment and it violated his right to human dignity, right to fair hearing and right to fair labour practices as envisaged in Article 28, 41 and 50 of the Constitution.
3. The suit seeks the following reliefs:-
 - a) A declaration that the Respondents violated the claimant's fundamental rights and freedoms when they purported to terminate his services without reasons, and without giving him a right to fair hearing.



- b) A declaration that the termination dated 4th December, 2019 was unfair.
 - c) An order that the Respondents do pay to the claimant's salary gratuity, benefits and leave days accrued as at 4th December, 2019.
 - d) An order that the Respondents do pay the claimant:
 - i. Salary and benefits withheld from October, 2019 to 4th December, 2019;
 - ii. Kshs.7,366,800.00 being gross salary of 35 months' balance of the contract term from October 2019;
 - iii. Service gratuity at 31% of the annual gross salary from January, 2018 to 4th December, 2019;
 - iv. Compensation for violation of his constitutional rights; frustration and damage to his long service career of 32 years.
 - v. Interest on (ii) until payment in full.
 - vi. Issues of a certificate of service.
 - e. Costs of the suit plus interest until payment in full.
4. The respondents filed a joint defence on 28th November, 2022 contending that the court lacks jurisdiction by dint of section 77 of the County Government Act, section 80 and 88(5) of the Public Service Commission (PSC) Act and Article 234 of *the Constitution*. Further the 2nd Respondent denied being the claimant's employer and clarified that he has since ceased being the Governor of Embu County. As such it was contended that the 2nd Respondent cannot be sued in his personal capacity.
 5. The respondent further contended that the claimant absented himself from work from 20th July, 2018 to 16th October, 2019 but continued drawing salary. They averred that the claimant was accorded an opportunity via a show cause letter to prove that he was attending work but he failed to do so and consequently his contract was terminated. They denied the alleged violation of constitutional and the claim for Kshs.7,366,800.00.

Evidence

6. The claimant testified as CW1 and adopted his written statement dated 9th December 2019 and a bundle of 19 documents as exhibits. In brief he testified how he was employed as the Chief of Staff in the office of the Governor on 10th January 2018 and signed a contract. His salary was Kshs.153,170.00, House allowance of Kshs.52,000.00 and other allowances of Kshs.20,000.00. His main duties was to ensure that the office of the Governor ran smoothly.
7. He further testified how in the course of his duties he raised issue with some irregularities concerning some drivers in the Governor's office getting fake receipts from petrol stations and claiming money reimbursement but the Governor was not amused. Despite the office having lost a lot of money the Governor called him in the presence of his wife and gave him a dress down alleging that he (claimant) got the receipts and gave to the Anti-corruption Commission.
8. On 21st April, 2019 he was served with a show cause letter accusing him of absconding duty and he responded denying the accusation. His explanation that he was always in his office was ignored and



he was told to handover the project file to the County Executive Committee Member for lands. The project had Kshs.150,000,000.00 in the bank.

9. He continued reporting to work but he was not allocated any work until 4th December 2019 when he received a letter terminating his employment on account of absconding. As at that time his office had already been allocated to other people. He contended that he was not accorded any warning or hearing before the termination or suspension of his salary in October, 2019.
10. On cross-examination, he stated that after signing the appointment letter he returned to the Governor who also signed. His terms were as per SRC guidelines and his salary was paid to his bank account by the County Government. His appointment was subject to performance. He admitted that his appointment letter was signed by the Governor in his official capacity.
11. He further admitted that after the dismissal, he never appealed to the PSC and contended that he never accused the County Public Service Board of any wrong doing. He contended that he participated in negotiating Kshs.150,000,000.00 from World Bank put in place of Embu Municipality within 10 months and introduced the first Monitoring and Evaluation Unit. However, when challenged, he produced no evidence to support that allegation. Further, he could not produce evidence of the fuel fraud cartel which he busted. He also could not produce any evidence of the cronies who were putting pressure on him to change members of Embu Municipality Board.
12. On further cross-examination, he explained that he brought the idea of signing Attendance Register but it was discarded in 2018 because the staff were always away from the office with the Governor. However, he maintained that he filed evidence to prove that he was attending work in and outside the office including serving as a member of steering committee on Urban Support Programme. He further stated that he expected that his contract term was tied to that of the Governor, hence the claim for salary for the remainder of the term of 5 years.
13. On re-examination, he stated that by the letter dated 4th June, 2019, the staff there were moved from the front office due to repair works to his office adding to his frustrations. He further stated that he wrote the letter dated 19th October 2018 while in office telling the CEC member for lands to publish the Charter for Embu Municipal Board.
14. The respondent closed their case without calling any witnesses to give evidence but after the hearing both parties filed written submissions.

Submissions

15. The claimant submitted that under Article 162(2) of *the Constitution* and Section 12 of the Employment, this court has exclusive original and appellate jurisdiction over employment and labour relations disputes. For emphasis, reliance was placed on the case of Abdikadir Suleiman v County Government of Isiolo & Another (2016) eKLR and Kisumu County Public Service Board & another v Samuel Okuro & 7 others (2018) eKLR. The claimant contended that the exhaustion doctrine does not arise in this case because the 2nd respondents did not give him a chance or forum for determination of his case by the County Public Service Board which would entitle him to appeal under section 77 of the County Government Act and section 88 of *Public Service Commission Act*.
16. It was further submitted that the joinder of the Governor to the suit was because he is a necessary party to the proceedings. He is the one who signed the contract personally, the claimant was answerable to him, it was necessary to have him in the suit as it was in the case of Kisumu County PSB and another, supra, where Governor Professor Anyang Nyong'o was sued for breaching procedure. It was argued that the present case is on all fours with the said Kisumu case.



17. It was further submitted that termination of his employment was unfair and unlawful. The duration of his contract was tied to the term of office for the appointing Governor as per the appointment letter but he was dismissed before the expiry of his contract term. It was further submitted that the reason for the termination was not valid as he was always on duty. It was argued that the rain started beating him when the claimant wrote a letter to the Governor on 25th March 2019. In response he received a show cause letter dated 12th April 2019 and he responded on 15th April 2019.
18. Thereafter he continued with his work until he received a termination letter dated 4th December 2019. It was therefore submitted that the respondents have failed to prove that the reason for his dismissal was valid as required by section 43 of the *Employment Act*.
19. As regards the procedure followed, it was submitted that section 41 of the *Employment Act* was not followed. He was not invited to any hearing and as such the termination was unfair within the meaning of section 45 of the Act. Further, that section 77 of the County Government Act does not apply to his case and the jurisdiction of the court is not ousted. Reliance was placed on the case of Kenfreight (E.A) Ltd v Benson K.Nguti (2016) eKLR.
20. Finally it was submitted that the claimant is entitled to the reliefs sought including the unpaid salary for October-December 2019 and salary for the remainder of his contract period. Further, it was submitted that the respondents have not tendered any evidence to rebut his evidence. For emphasis, reliance was placed on the case of Ruth Gathoni Ngotho Kariuki v Presbyterian Church of East Africa & another (2012) eKLR.
21. On the other hand, it was submitted for the respondents that the claimant's grievance herein concerning termination of his employment and under section 77(2) of the County Government Act, he should have appealed against the decision to the Public Service Commission. It was urged that the respondents filed a preliminary objection on 17th February 2020 against the suit adding that an objection can be raised at any stage of the proceedings.
22. It was further submitted that the claimant has not proved any case against the 3rd respondent and that he had even admitted as much in his testimony. Further the claim against the 2nd respondent cannot stand because there never existed any employment relationship between the claimant and the 2nd respondent in his personal capacity. Paragraph 4 and 5 of the statement of claim were cited as the claimant's confirmation that he was a public officer employed by the 1st respondent. Consequently, it was submitted that the joinder of the claimant was not necessary.
23. To fortify the foregoing, section 133 of the County Government Act was cited. The said section shields a public officer from personal liability for actions or omissions done in good faith in the execution of a duty. Further reliance was made in the case of Rodha Atemo Amukhuma & another v Executive Officer, Roads Bungoma County Government (2014) eKLR where the court held that Executive Committee members cannot be sued in their individual capacity.
24. It was further submitted that the claimant has tried to impute bad faith on the part of the 2nd respondent but during cross examination he admitted that he has no evidence to the allegations he made against the 2nd respondent in paragraph 7 and 9 of his witness statement.
25. It was submitted that there is no denial that the claimant was employed by the 1st respondent, however the terms of service have not been proved by the claimant. It was argued that the claimant has failed to produce a duly signed contract as it was required by clause 9 of the contract of employment. Reliance was placed in the Court of Appeal decision in William Muthee Muthami v Bank of Baroda (2014) eKLR.



26. As regards the claim for salary for 35 months before expiry of his contract it was submitted that the contract did not provide for a definite contract term. Besides the case of Ruth Gathoni Ngotho cited by the claimant was in fact overturned by the Court of Appeal in Registered Trustees of the Presbyterian church of East Africa & another v Ruth Gathoni Ngotho (2017) eKLR where the court held that the general rule is that the intention of the parties should be ascertained from the document.
27. Again in the case of Jamii Bora Bank Ltd v Minnie Mbue (2021) eKLR the court held that whether or not the employer should to pay salary for the remainder of the term of a fixed term contract, depends on the terms of the contract, and the burden of proof is on the employee.
28. Further reliance was placed on Jackson Maundu Munyao v Rolmill Ltd (2019) eKLR and Alphonce Maghanga Mwachanya v Operation 680 Ltd (2013) eKLR where the courts were in agreement that the Employment Act provided for a maximum compensation of 12 months gross salary for unfair termination.
29. On the other hand, it was submitted that the termination was fair because there are many correspondences showing that the claimant was given a hearing before the termination. The alleged violation of his constitutional rights were also denied.
30. Further, it was submitted that the reason for the termination was valid because the claimant admitted during cross examination that he never used to sign Attendance Register.
31. Finally, it was submitted that the suit must fail and be dismissed with costs because the claimant admitted that he had no complaint against the 3rd respondent. Further, he failed to substantiate his case against the 2nd respondent.

Issues and Analysis

32. There is no dispute that claimant was employed by the 1st respondent as the Chief of Staff and Head of the Governor's Delivery Unit Embu County Government. The appointment letter dated 10th January 2018 states clearly that the appointment was on contract based on the term of the Governor in office. The terms and conditions of service were to be in accordance with those set by the SRC. The job description attached to the appointment letter termed the claimant as the Chief Executive Officer in office of the Governor.
33. The contract was terminated vide the letter dated 4th December 2019 signed by Governor Embu County. The issues for determination are:-
 - a. Whether the court has jurisdiction to determine the suit.
 - b. Whether the reason for the termination of the claimant's contract was valid and fair.
 - c. Whether the procedure followed was fair.
 - d. Whether the claimant's constitutional rights were violated by the respondents.
 - e. Whether the reliefs sought are merited.

Jurisdiction



34. The respondents contend that the court lacks jurisdiction over the suit because section 77 (1) and (2) of the County Government Act provides that a person dissatisfied with the decision of the respondents should appeal to the Public Service Commission. The said section provides that:-

- “(1) (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission(in this part referred to as the “Commission”) against the decision.
- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of-
- a. recruitment, selection, appointment and qualifications attached to any office;
 - b. remuneration and terms of service;
 - c. disciplinary control;
 - d. national values and principles of governance under Article 10, and values and principles of public service under Article 232 of *the Constitution*;
 - e. retirement and other removal from office;
 - f. pension benefits, gratuity and any other terminal benefits; or
 - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.”

35. The claimant is however being a public officer of the County the Governor had no mandate to exercise disciplinary power of him without the involvement of the County Public Service Board. I agree with the claimant’s case that the Governor in this case acted ultra vires by terminating the claimant’s contract of service.

36. I gather support from the Court of Appeal decision in the case of Kisumu County Public Service Board & another v Samuel Okuro & 7 others (2018) eKLR where the court held as follows:-

“(47)...moreover, the court cannot uphold an action of the Governor that is clearly ultra vires his constitutional and statutory mandate.

(48) We have come to the conclusion that the Governor initiated the removal of the respondents without following the appropriate machinery. The respondents being County Public Officers, the Governor could not terminate their services without involving the County Board and the County assembly. In sending the respondents on compulsory leave and terminating the respondents’ contract, the Governor usurped the role of the County Board. This denied the respondents their rights under section 77 of the County Government Act that allows any County Public officer that is dissatisfied with the decision of



the County Board in a disciplinary process to appeal to the public service commission.

Further, the respondents' constitutional fundamental rights were violated.

- (49) In that regard the learned Judge acted within her constitutional jurisdiction in reviewing the appellants' action and granting the order of certiorari to protect the respondents from violation of their fundamental rights and to prevent the appellants from acting in a manner that contravenes the constitution and the statute."

37. The above precedent is on all fours with the instant case. Consequently, I reject the objection by the respondents that this court lacks jurisdiction to determine the dispute in it. What I gather from the said decision by the Court of Appeal is that where the termination of employment is done by a person acting ultra vires (without legal mandate) the decision is not appealable to the Public service commission and therefore this court has jurisdiction to quash the unlawful termination.

Reason for the termination

38. The termination letter dated 4th December 2019 stated that:-

Johnson Mwaniki Nyagah

O Box 68245-00200

Nairobi.

Dear Johnson,

RE: termination of contract on account of desertion of duty

Reference is hereby made to letter Ref.No. EB/C/GVT/GVNR/STAFF VOL.1/93 dated 12th April, 2019 from this office.

Following your continuous absence from duty which was communicated to you vide the above quoted letter and further to letter ref.NO.2017043307/26 dated 15th November 2019. I wish to inform you that you did not give any convincing reasons for your absence and reinstatement of your salary and neither have you bothered to resume duty.

Further you continued drawing salary and allowances in absentia from 20th July, 2018 up to 16th October, 2019 a period of 14 months against existing government regulations. In view of this you are deemed to owe the Embu County Government a total of Khs.2,515,142.60 including salary and allowances which you must reimburse failure to which legal action will be taken against you.

I wish to remind you of the terms and conditions of the contract you signed, which states in part; "This appointment takes effect from 10th January, 2018 and is subject to satisfactory No.EBU/C.GVN/GVNR/staff/VOL.1/78 dated 10th January, 2018.

On the strength of the above, it has therefore been decided that your contract be and is hereby terminated with effect from 20th July, 2018 being the date you absconded duty.

On termination you lose all your benefits other than the NSSF contributions in the event that you were a contributor.

H.E Hon.Martin Nyaga Wambora, E.G.H

Governor,



Embu County

Copies to:

1. Head Human Resource
2. Chairman-County Public Service Board
3. County Secretary

39. The letter suggests that the claimant absented himself from duty from July 2018 up to 16th October, 2019 despite being paid salary. The claimant denied the alleged absence and produced documentary evidence to prove that he never absented himself from work. The said documents includes a concept paper on Dairy and fruits product processing plant dated August 2018 and signed by the Governor on 12th October 2018; letter dated 19th October, 2018 which he wrote to the CEC member for lands seeking for payment to the Government printer for publication of the Embu Municipal Charter; letter dated 25th March 2019 which he wrote to the Governor complaining about the frustrations he was facing on the ground in executing his roles; internal memo to the CO Lands dated 4th April 2019 by which he handed over the original file for the Embu Municipal Board; and letter dated 4th June 2019 by the County secretary moving the front office staff to that of the chief of staff until renovation in front office were completed.
40. The claimant testified that he wrote and received the said correspondences while in his office. He contended that despite frustrations at the work place and being not allocated work to do, he continued to report to work until he was served with a termination letter. The claimant's evidence has not been rebutted by the respondents as no witnesses were called to give evidence.
41. Section 45 of the *Employment Act* provides that:-
- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a) That the reason for the termination is valid;
- b) That the reason for the termination is a fair reason -
- i) Related to the employee's conduct, capacity or compatibility, or
- ii) Based on the operational requirements of the employer; and
- c) That the employment was terminated in accordance with fair procedure.”
42. Since the respondents tendered no evidence to prove that in deed the claimant absented himself from duty from 20th July 2018 to 16th October 2019, the court finds that they have failed to establish that the termination was grounded on a valid and fair reason as required by the law.



Procedure followed

43. Section 41 of the *Employment Act* provides that:-

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

44. The above mandatory procedure was not followed before terminating the claimant’s contract of service. He was not accorded any hearing by the County Public Service Board or a committee established under its authority. He was only served with a show cause letter and after his response, he was not called for any oral hearing in the company of another employee. He was also not given a certificate of service.

45. The importance of hearing an employee before termination was emphasized by the Court of Appeal in the case of *Kenfreight (E.A) Ltd v Benson K.Nguti* where the Court held that:-

“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided) an employer is duty bound to explain to the employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition the employee is entitled to be heard and his representations if any, considered by an employer before the decision to terminate his contract of service is taken.”

Violation of claimant’s fundamental rights

46. The claimant contends that his fundamental rights to human dignity, fair hearing and fair labour practices as envisioned under Article 28, 50 and 41 of *the Constitution* were violated. The basis of the said allegation being that the claimant’s salary was stopped from October 2019 and subsequently his services were terminated without following fair procedure.

47. In the case of *Kisumu County Public Service Board & another, supra*, the Court of Appeal was categorical that the failure to follow the machinery established under section 57 of the County Government Act, violated the fundamental rights of the officers of County Public Service. The said machinery is County Public service Board which has the mandate to exercise disciplinary control and remove persons from the County Public Service. I agree with the Court of Appeal in the said precedent and add that the Governor’s action done ultra vires amount to an illegality and violation of fundamental rights of the Public officer. Denying an employee salary without any justification or prior hearing amounts to inhuman and degrading treatment and fair labour practices. Further terminating the employment of the employee without a valid reason and without following the procedure expressly provided in a statute amounts to violation of the right to unfair labour practices and fair administrative action under Article 41 and 47 of *the Constitution*.



Reliefs

48. Having found that the respondents have failed to prove the reason for termination of the claimant's employment and to prove that fair procedure was followed, I now hold that the termination was unfair and unlawful within the meaning of section 45 of the *Employment Act*.
49. The claimant prayed for salary for 35 months he would have served before his contract lapsed including the withheld salary from October 2019. There is no doubt that the claimant was under a fixed term contract tied to the Governor's term of office. The court takes judicial notice that the Governor served through his term till August 2022 General Elections. Consequently, I hold that the claimant's contract was to end in August, 2022.
50. The emerging jurisprudence from this court and the Court of appeal is that payment of salary for the remainder of term in a fixed term contract depends on the intention of the parties in each respective case. There is therefore no straight jacket to fit all. If there is no clear stipulation, the court ought to be guided by the maximum 12 months gross pay provided under section 49 of the *Employment Act*. (See Alphonse Maghanga Mwachanya case and Jackson Maundu Munyao case, supra).
51. In the instant case the letter of appointment did not provide that the claimant was entitled to the salary for the unserved contract term in the event of a premature termination. The burden of proof is upon the employee who alleges that he is entitled to salary for the unserved contract period. In this case the claimant has not discharged the said burden by evidence and therefore he will only get compensation under section 49 of the *Employment Act*.
52. Section 49 of the *Employment Act* entitles an employee to payment of salary in lieu of notice plus compensation for unfair termination. The contract of employment did not provide for termination before the end of the Governor's term in office. I will therefore be guided by section 35 (1) (c) of the *Employment Act* which provides that where an employee receives salary on monthly intervals, the termination notice for his services shall be 28 working days. I therefore award the claimant one month salary in lieu of notice Kshs.199,110.00.
53. I will also award him 12 months gross salary being Kshs.2,389,320.00 considering that he did not contribute to the termination through misconduct. Further, although he served for about 2 years, he had the legitimate expectation to continue serving and earning salary for further three years before the lapse of his contract service.
54. The claimant has also prayed for his salary for October to December 2019 when his services were terminated. There is evidence that the salary was stopped by the County secretary vide the letter dated 15th October, 2019. The claimant responded to the said letter denying the alleged absence from work but the salary was never reinstated until 4th December 2019 when his employment was officially terminated. Consequently, I award him the salary for October, November and the 4 days worked in December 2019 being Kshs.424,768.00.
55. The claimant further prays for service gratuity at 31% of the annual gross salary up to the end of his contract. The appointment letter entitled him to gratuity at the end of term at the rate of 31% his annual basic pay for every year served. His basic pay was Kshs.127,110.00 and he served for only one complete year before the termination and therefore I award him Kshs.127,110.00 as gratuity because his job was unfairly terminated.
56. The claim for the leave lacks particulars and supporting evidence. Consequently, it is declined.



57. In conclusion I enter judgment for the claimant declaring that his employment contract was terminated unfairly and condemn the 1st respondent to pay him the following:-

Notice.....Kshs.199,110.00

Compensation.....Kshs.2,389,320.00

Unpaid salary.....Kshs.424,768.00

Gratuity.....Kshs.127,110.00

Total Kshs.3,140,308.00

The award is subject to statutory deductions but the claimant will have costs and interest at the court rate. The claim against the 2nd respondent is dismissed because he acted in his official capacity and no bad faith has been shown. Likewise the claim against the 3rd Respondent is dismissed because it was not involved in the termination of the claimant's employment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF JUNE, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

