



**Kitheka & another (Suing as the administrators of the Estate of the Late Florence Wairimu Ndung'u - Deceased) v County Government of Lamu & another (Cause 12 of 2021) [2023] KEELRC 2034 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2034 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**CAUSE 12 OF 2021**

**M MBARŪ, J**

**JULY 27, 2023**

**BETWEEN**

**BENSON MWANIKI KITHEKA ..... 1<sup>ST</sup> CLAIMANT**

**CHRISTINE MWIKALI KITHEKA ..... 2<sup>ND</sup> CLAIMANT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE  
FLORENCE WAIRIMU NDUNG'U - DECEASED**

**AND**

**COUNTY GOVERNMENT OF LAMU ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR LAMU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant, Florence Wairimu Ndung'u (now deceased) filed the claim herein on 6 September 2019. The claimant died on 30 August 2020. The Administrators of the claimant's Estate, Benson Mwaniki Kitheka and Christine Mwakali Kitheka obtained letters of Administration in Mpeketoni SPMCC No.7 of 2020 and filed application 24 June 2021 seeking to be substituted herein in place and instead of the claimant and to amend the Memorandum of Claim which was allowed vide ruling delivered on 24 September 2021.

The claimants filed Amended Memorandum of Claim on 15 October 2021.

2. The claim is that upon elections held on 8 August 2017 there were vacancies in the 1<sup>st</sup> respondent County Government for member of the County Executive Committee (CECM) and upon going through the required procedures and approval by the County Assembly of Lamu, the deceased was appointed as the County CECM for Agriculture and Water Development. In a letter dated 2 January 2018 by the 2<sup>nd</sup> respondent and Governor of Lamu County, the deceased was appointed as CECM



- on a contract of 5 years at a gross salary of Kshs. 259,879 plus a commuter allowance of Kshs. 20,000 per month.
3. Pursuant to Kenya Gazette Notice No.6518, the deceased was also entitled to a 31% gratuity based on the basic pay for every year.
  4. On 3 April 2018 the 2<sup>nd</sup> respondent without any cause terminated the deceased in her employment and she challenged the same through ELRC Petition No.1 of 2018 – Florence Wairimu Ndungu v County Government of Lamu & another and the court issued an order of reinstatement without loss of benefits through a judgment delivered on 20 September 2018.
  5. In a letter dated 24 September 2018, the claimant was served with letter of the County Assembly of Lamu on 26 September 2018 where the respondents reinstated her back to her employment as CECM with immediate effect in compliance with the Court Order. The claimant resumed duty immediately on 20 September 2018 but on Monday 24 September 2019 when the court order was served upon the respondents she was not allowed into her office or issued with the referenced letter until 26 September 2018 and simultaneously served with a letter of summary dismissal dated the same date, 26 September 2018.
  6. Between the letter of reinstatement, there was also the letter of summary dismissal and hence the claimant was not able to work upon her reinstatement.
  7. No grounds were given for the dismissal or reasons for removal from office as required under Section 40 of the County Government Act and under Article 236 of *the Constitution* she was entitled to be given notice and a hearing before removal from office. The claimant was not serving at the pleasure of the 2<sup>nd</sup> respondent and due process was required. The grounds given for summary dismissal were the same as in the matters addressed in ELRC Petition No. 1 of 2018.
  8. The claimant had been appointed for a term of 5 years and had legitimately expected to serve under the term and earn due salaries and gratuity and only served for a year. the claim is for balance of salaries due at Kshs. 13,358,740 for 4 years and service gratuity at 31% on the annual basic salary.
  9. The claim is also that the dismissal of the claimant was irregular and unlawful with a breach of contract, breach of contract, unconstitutional and breach of statutory duty on the part of the respondents. The respondents did not disclose any valid reasons for dismissing the claimant in violation of Article 10 of *the Constitution*, there was no notice, hearing of due process or the protection of the law contrary to Article 47(2), 50(1) and 27(1) of *the Constitution*. This resulted in discriminatory treatment given that the claimant was from the minority Kikuyu community in Lamu County and leading to unfair termination of her employment. By first reinstating the claimant and then simultaneously dismissing her from employment, the respondents treated her in degrading and were inhumane contrary to Article 28 of *the Constitution*.
  10. The respondents acted to circumvent a valid court Decree in Mombasa ELRC Petition No.1 of 2018 delivered on 20 September 2018 having reinstated the claimant on 26 September 2018 and then dismissing her on the same date. This denied the claimant the due process of the law.
  11. The claim is for a declaration that termination of employment by dismissal be found to be unfair, the respondents be found to have breached the claimant’s constitutional rights, compensation for loss of earnings, benefits for the remainder of the period of 5 years, net unpaid salary and allowances for the remainder of the term at Kshs. 13,358,740, punitive damages with 12 months’ compensation for unfair dismissal at Kshs. 3,358,548, payment of service gratuity at Kshs. 580,056, and costs.



12. The claimants testified to support the claim. Benson Mwaniki Kitheka testified that he was the husband to the late Florence Wairimu Ndungu and upon her demise on 30 August 2020 he obtained Letter of Administration together with Christine Mwikali Kitheka to represent the Estate in these proceedings. The deceased was employed by the respondents as CECM but the 2<sup>nd</sup> respondent unfairly terminated her employment leading to these proceedings and the claims made should be awarded. Initially the claimant filed ELRC Petition No.1 of 2018 and was issued with an order of reinstatement on 20 September 2018 and she reported to work on 24 September 2018 but on Monday 2018 the respondents dismissed her again. There was no notice, hearing or any disciplinary hearing. No terminal dues were paid. the respondents' case is that the claimant (deceased) deserted duty which is not true. There is no evidence that she was summoned to work and failed to attend.
13. The claim is also supported by the evidence of Raphael Munyua Ndungu former colleague to the deceased.
14. The claimants also called Raphael Munyua Ndungu who testified that he knew the deceased and was a CECM in the 1<sup>st</sup> respondent together. He was appointed by the respondents together with the deceased as CECM in January 2018 and they hailed from the same place in Mpeketoni, Lamu County. The salary paid was Ksh.259,875 and commuter allowance of Ksh.20,000 per month. On 3 April 2018 the 2<sup>nd</sup> respondent removed him together with the deceased from office without good cause forcing them to file petitions before this court and judgment was delivered on 20 September 2018 which was on a Thursday. The court issued an order of reinstatement without loss of benefits. They obtained the court Decree and served the respondents immediately and on Monday 26 September 2018 the respondents issued them with letters of reinstatement and simultaneously issued them with letters of dismissal.
15. Mr Kinyua also testified that together with the deceased they served the Decree and court Order upon the respondents from ELRC Petitions No. 1 and 2 of 2018, however, they could not find any office since the respondents had replaced them with other CECM. The letters for reinstatement were to the Lamu County Assembly and not to the deceased and the witness and they only learnt of this fact from the Assembly proceedings. The letters of dismissal were also served through the County Assembly and not through the respondents.
16. The 2<sup>nd</sup> respondent dismissed both of them and he filed Mombasa ELRC Petition No.2 of 2018 and judgment was delivered on 20 September 2018 and the respondents, acting in accordance with the court Order reinstated him and the deceased through letter dated 24 September 2018. However, the same was not executed since upon reporting back on duty in terms of the Court Order, they were issued with a letters terminating employment dated 26 September 2018. Both were not aware of any grounds which would necessitate removal from office as required under Section 40 of the County Government Act and no other matter had been brought to their attention. This was in breach of Section 43(1) of the [Employment Act](#) as there were no reasons to justify termination of employment which was unfair.
17. Mr Munyua also testified that the deceased filed Mombasa ELRC No.1 of 2018 following termination of employment on grounds similar to what the respondents stated in the letter dated 16 September 2018.
18. In Lamu County, the Kikuyu community forms the minority and the deceased was appointed as CECM in that capacity and termination of her employment was discriminatory, unfair and contrary to the due process of the law. This was targeting the minority community in Lamu County. Of all the CEEM, only the two who were Kikuyu were targeted for dismissal which is discriminatory.



19. The respondents acted with impunity by issuing the letters of reinstatement and dismissal simultaneously in abuse of court process. The use of the same reasons to dismiss him and the deceased from their positions was meant to deny the justice. The deceased was not paid her terminal dues.
20. In response, the respondents' case is that the deceased claimant was employed as CECM of Agriculture and Water Development of the 1<sup>st</sup> respondent. Terms of appointment were set out in a letter dated 1<sup>st</sup> January 2018 but she failed to discharge her duties diligently and which affected service delivery. Her employment was terminated by the 2<sup>nd</sup> respondent on 3 April 2018 and later reinstated on 24 September 2018.
21. The 2<sup>nd</sup> respondent terminated the deceased claimant's appointment and employment on 3 April 2018 for good cause. This was occasioned by the fact that the deceased proved to be incompetent to advance the interests of the respondents in so far as her department was concerned thereby grossly affecting service delivery.
22. The deceased was later reinstated to work by the 2<sup>nd</sup> respondent and was not issued with dismissal letter until her death. After employment was terminated on 3 April 2018 the deceased filed Mombasa ELRC Petition No.1 of 2018 and judgment was delivered on 20 September 2018 with an order of reinstatement. Upon being served with the Order and Decree of the court, the 2<sup>nd</sup> respondent complied and reinstated the deceased vide letter dated 24 September 2018.
23. The claim that the deceased was on 26 September 2018 dismissed is without evidence. Upon reinstatement on 24 September 2018 the deceased was allowed back to her office but was unable to discharge her duties and never returned back to work until her death. Effectively she absconded duty upon reinstatement.
24. The particulars of breach of contract, alleged constitutional and legal violations are denied and are without evidence. The alleged discrimination on the deceased on the grounds that she was from the Kikuyu community is not true because her appointment was not on this basis but due to the fact of being Kenyan. Termination of employment was due to absconding duty after 24 September 2018.

The claims made should be dismissed with costs.

No witness was called by the respondents.

25. At the close of the hearing, both parties filed detailed written submissions which are analysed and put into account and the issues which emerge for determination are;
26. The deceased (claimant's) employment was terminated wrongfully and unfairly;  
Whether there was discrimination against the claimant;
27. Whether the respondent should pay salary for the entire term contract;  
Whether the remedies sought should issue.

### **Determination**

28. It is common cause that the deceased, Florence Wairimu Ndungu represented in these proceedings by the Administrators of her Estate, Benson Mwaniki Kitheka and Christine Mwikali Kitheka was appointed by the respondents as the CECM via letter dated 1<sup>st</sup> January 2018. She served until 3 April 2018 when her employment was terminated and she filed Mombasa ELRC Petition No.1 of 2018. Judgment was delivered on 20 September 2018 with an order of reinstatement without loss of benefits.



- She extracted the Decree thereof and served the respondents on 24 September 2018 and who issued her with letter of reinstatement dated the same day, 24 September 2018.
29. The events of 3 April 2018 related to the deceased and Raphael Munyua Ndung'u, the CECM for Health Services and Environment. Each filed a separate petition leading to the reinstatement.
  30. The claimants' case is that simultaneously to the letter of reinstatement on 24 September 2018 the respondents issued letter of dismissal dated 26 September 2018. But, the respondents case is that they complied with the court order and decree of 20 September 2018 and reinstated the claimant but who absconded duty after reinstatement and was never seen until her demise.
  31. The 2<sup>nd</sup> respondent has not in any material way challenged the authenticity of the letter dated 26 September 2018 dismissing the claimant from employment. The reasons given are that the claimant had been summoned to the office on several occasions to take charge over her docket but had failed to address. That on 24 September 2018 the 2<sup>nd</sup> respondent reinstated the claimant but she absconded duty.
  32. The due process of the law in termination of employment is a statutory requirement under Section 41 of the *Employment Act, 2007* (the Act). The due process of the law with regard to termination of appointment of a CECM position as the claimant held is also regulated under Section 40 of the County Government Act (CGA). On the one hand, termination of employment must be for the reason of misconduct, poor performance or incapacity and on the other hand, on the grounds of incompetence, abuse of office, gross misconduct or failure meetings of the County executive committee.
  33. The 2<sup>nd</sup> respondent as the Governor, Lamu County then had a duty to demonstrate these aspects before terminating the claimant in her appointment and employment. the reasons given in the letter of dismissal dated 26 September 2018 that the claimant absconded duty, it at all, there is no evidence of notice or hearing of the claimant as to the events that took place soon after the Order of reinstatement on 20 September 2018 and until 26 September 2018 to justify the dismissal from employment.
  34. The Court of Appeal in addressing the role of a Governor such as the 2<sup>nd</sup> respondent in terminating appointment and employment of a CECM in the case of County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR held that;
 

Originally the doctrine of pleasure was a prerogative power which was unfettered. A holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. However, with the passage of time and evolution of democracy this doctrine has undergone a series of modification ...

The evolution of the doctrine of pleasure has been on the basis of firstly, putting to an end arbitrary action by a public authority and secondly, ensuring that such a power is exercised reasonably and for the public good.
  35. The respondents cannot act in an arbitrary manner or unreasonably. Good cause must be established with regard to termination of appointment and employment of the claimant which is lacking here. The discretion given to the office of the 2<sup>nd</sup> respondent must be exercised reasonably.
  36. In the case of County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020] eKLR the court gave emphasis that a Governor, when dealing with a CECM cannot be acting at his own pleasure, when he must have a reasonable ground to do so, and when he must act for the public good. This is because, there must be a process to confirm that, there are valid and compelling reasons. This threshold has to be met and which is lacking in this case.



37. Even in a case where the claimant is alleged to have absconded duty after the letter of 24 September 2018 on her reinstatement, an employee or officer of the respondents cannot terminate own employment. Absconding duty on the given facts is not given any logic by the respondents.
38. The claimant had been in court seeking justice as evidenced in the judgment delivered on 20 September 2018. The decree thereof was served on the respondents on 24 September 2018. This speaks of a diligent officer. The petition was filed in Mombasa ELRC Petition No.1 of 2018 and immediately judgment issued, the decree was extracted and served at Lamu County. The judgment was delivered on a Thursday and by Monday 24<sup>th</sup>, the claimant had managed to serve the respondents. That was vigilance to secure the fruits of her judgment.
39. The assertion by the respondents that the deceased absconded duty until her demise is left bare.
40. In the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR the court in dealing with a similar matter held that;

The law regulating the processing of release from duty of an employee who has absconded duty is now fairly settled. It is not open to the employer to simply plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail. The employer must where possible demonstrate that he has addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels.

...

Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to a close until the employer acts on it. In *James Okeyo v Maskant Flower Limited* [2015] eKLR, the court observed as follows on the issue: -

“.....the employee who deserts employment does not dismiss himself, so to speak. The decision to formally end the employment relationship should come from the innocent party.”

41. And in the case of *Kenneth Onialo v Majlis Resort Lamu t/aMajlis Lamu Ltd* [2022] eKLR the court held that an employer who claims that there is abandonment of employment must prove what steps were taken to report the matter to the labour officer. Absence must be accompanied by overt acts pointing to the fact that the employee simply does not want to work any more and the burden of proof for the unjustified refusal to go to work rests on the employer.
42. In this regard, the court finds the respondents conduct led to unfair termination of appointment and employment of the deceased claimant. This was not justified.
43. On the claim that there was discrimination against the deceased on the basis that she was from the Kikuyu community and which led to the termination of her appointment, the burden of proof with regard to employment and labour relations rests on the employer to demonstrate and proof that there was no discrimination against the employee who has claimed such matter.

Section 5(6) of the *Employment Act* 2007, which states;

In any proceedings where a contravention of Section 5 (3) is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act or omission is not based on any grounds specified in this Section.



44. In *G M V v Bank of Africa Kenya Limited* [2013] eKLR the court held that;

This law places the burden of proof on the employer, not the employee. This position has adequate support in Section 43 of the Act, which requires the employer to prove the reason for termination. Section 5(3) states that no employer shall discriminate directly, or indirectly, against an employee, or prospective employee, on the ground of pregnancy, among other grounds.

In the case of *Benedict Abonyo Omolo v Judicial service Commission & another Cause No.47 of 2015* the court held that it is direct discrimination against a person where her ethnicity is used to deny her a right. Article 27(4) of *the Constitution* directs that;

- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. [Underline added].

In this case, the court finds no justification by the respondents to separate the claimant from other CECM on the basis of her ethnicity as a minority member of the Kikuyu in Lamu County appointed to that office to represent such diversity and target her for termination of appointment and employment. the court finds direct discrimination against the deceased claimant. Such is unconstitutional and unlawful.

On the findings that appointment and employment terminated unfairly, the claimants are seeking payment for the remainder of the term of 5 years. the deceased only served for a year and her demise was on 30 August 2020. Had the respondents allowed the deceased back into office, she should have had the opportunity to serve in her position until her demise. The contract salary last paid was Ksh. 259,879 and Ksh. 20,000 commuter allowance, he gross being Ksh. 279,879 per month. for the unfair termination of appointment and employment, an award of 6 months gross salary is hereby found appropriate all at Ksh.1,679,274.

45. On the finding that there was discrimination against the deceased, in assessing damages on a finding that there was discriminatory treatment against the employee, the Supreme Court in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) made an award of Ksh.2,000,000. The Court of Appeal in *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR awarded a sum of Ksh.7, 500,000. The court in *Mary Mwaki Masinde v County Government of Vihiga & 2 Others* (2015) eKLR awarded Ksh.3, 000,000. In this case, an award of Ksh.2,000,000 in general damages is hereby found appropriate.

46. The deceased had the benefit of service gratuity under her appointment and employment. For each year served, the benefit of 31% basic salary was due. For the period served and based on the findings above, the claim for gratuity for the contract term is not justified but for the year served, the sum of Ksh.86,762.49 is due.

47. On the claim for a Certificate of Service, such is due at the end of appointment and employment. The Estate of the deceased should not be denied of this record.

The claim successful, the claimants are justified in claiming costs.



48. Accordingly, judgment is hereby entered for the claimants against the respondents in the following terms;

49.

- a. A declaration that the claimant (deceased) employment terminated unfairly;
- b. A declaration is hereby issued that the claimant (deceased) was discriminated against by the respondents;
- c. General damages awarded at Ksh.2,000,000;
- d. Compensation awarded at Ksh.1,679,274;
- e. Service gratuity Ksh.86,762.49;
- f. Certificate of Service shall issue unconditionally; and
- g. Costs of the suit.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

**Court Assistant: Japhet Muthaine**

..... and .....

