



Lekoomet v County Government of Samburu (Employment and Labour Relations Cause E027 of 2021) [2023] KEELRC 1751 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1751 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E027 OF 2021**

ON MAKAU, J

JULY 14, 2023

BETWEEN

WILSON MAILI LEKOOMET CLAIMANT

AND

THE COUNTY GOVERNMENT OF SAMBURU RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed as the Chief Officer in charge of Water, Environment, Natural Resources and Energy County Government of Samburu vide a letter dated 21st March, 2018. The appointment was for four (4) years tied to the term of office of the appointing Governor. Later he was transferred to the department of Gender, Culture and Social Services. His salary was Kshs 250,110 but later it was enhanced to Kshs 267,170.
2. On 23rd April 2021, he received a termination letter from the Governor of Samburu County. The letter informed him that he had been removed from office under Section 45(b),(c) of the *County Government Act* (CGA) on ground of under performance after a review by the County Executive Committee. He was aggrieved and brought this suit alleging that the reason for the termination was not valid and he was denied a hearing. He further alleged that his rights to fair administrative action and fair hearing have been violated by the Governor's action. His right to equality and human dignity under Article 27 and 28 of the *Constitution* have also been violated. Finally he averred that his removal from office was invalid as it violated Articles 41, 47 and 236 of the *Constitution*. Therefore he prayed for the following reliefs:
 - a. A declaration that termination of the claimant's employment is unconstitutional and contrary to the provisions of the *Employment Act* 2007 and *Fair Administrative Actions Act* 2015.
 - b. A declaration that the respondent has violated the claimant's fundamental rights and freedoms as set out in the claim.



- c. General damages and compensation of the said violations under paragraph 16 herein and unlawful, unfair, unprocedural and arbitrary termination of the claimant's employment.
 - d. Payment of all dues the claimant is entitled to such as gratuity, salary in lieu of notice, and payment of all leave and off days not utilized and paid for to date.
 - e. Cost of the suit and interest.
3. The respondent admitted the employment relationship and the terms of service as pleaded in the statement of claim in paragraphs 2 to 8. However it denied that the removal of the claimant from office was unfair. It averred that after appraisal of the claimant's performance, it was found wanting, poor and unsatisfactory. It was further averred that the claimant was accorded a fair hearing by the County Public Service Board (PSB) before the termination was made.
 4. It is the respondent's case that the termination of claimant's employment was done in a manner consistent to public interest and therefore the suit ought to be dismissed with costs. Finally, it averred that the suit is incompetent, premature, defective, and the court lacks jurisdiction to entertain it.

Evidence

5. The claimant testified as CW1 and told the court that he is a Professional Engineer. As his evidence in chief, he adopted his written statements dated 10th May, 2021 and 8 documents. His case in brief is that his dismissal from employment came as a surprise because he had performed his duties with utmost professionalism as an Engineer and no warning letter was ever served on him. He was also never served with show cause notice or subjected to any performance review before the dismissal.
6. He contended that if there was any delay in projects under his docket, the same was not due to incompetence on his part but due to underfunding of the Department of Gender, Culture and Social Services. He further blamed the individuals in Procurement, Public Works, Treasury and Office of the Governor for corruption which sabotaged his department and its functions. Further some of the projects like Porro Social Hall construction could not proceed due to court order of injunction and not due to incompetence on his part.
7. In view of the above matters, he contended that his dismissal was unfair and unlawful because due process was not followed; that his constitutional rights to fair labour practices, fair administrative action, and fair hearing were denied; and that Article 236 of the Constitution was violated.
8. On cross-examination, he reiterated that he was appointed in 2018 as Chief Officer Water and after working for one year he was transferred to Gender, Culture and Social Services where he worked for one and half years. He was reporting to County Executive Committee (CEC) Member and his position was subject to performance. However, no review was ever done on his performance. Further no warning letter was ever served on him though the reason cited for the termination was incompetence and non-performance. Therefore he maintained that he performed his duties as required.
9. He admitted that he never appealed against the termination. He reiterated that the uncompleted projects were due to underfunding and a cartel of corrupt officials in the County but admitted that he never reported the alleged corruption.
10. On re-examination, he maintained that he was vetted by the County Assembly and he was found competent before his appointment. He stated that he was dismissed by the Governor without proof that he did not understand his duties.
11. The respondent closed its case without calling any witnesses to give evidence.



Submissions

12. The claimant submitted on whether the termination was unfair, unlawful and in breach of his constitutional rights; and whether he is entitled to the reliefs sought by the suit. On the first issue, he submitted in the affirmative. He contended that the termination was in breach of Section 41 of the *Employment Act*, Article 27, 41, 47 and 50 of the *Constitution*, and Section 4 of the *Fair Administrative Actions (FAA) Act*, because he was denied a chance to defend himself before the dismissal.
13. He further submitted that the termination was for no valid reason and the respondent failed to prove the same as required under Section 43 and 45 of the *Employment Act*. For emphasis, reliance was placed on the decision of the High Court in *Chrispine Otieno Caleb v Attorney General* [2014] eKLR that without evidence by the defendant, the plaintiff's evidence remains unrebutted and the statement of defence remains mere allegations.
14. The claimant submitted that as a person with disability, and registered as such, he was discriminated contrary to Article 27(4) of the *Constitution*. He cited the case of *Duncan Otieno Owanga v Attorney General* [2014] eKLR; *Simon Gitau Gichuru v Package Insurance Brokers Ltd* (2021) KESC 12 (KLR) 22 October 2021; *Mary Kerubo Osoro v Public Service Commission* [2017] eKLR and *Stephen Kariuki Kamau & 5 others v Kenya Ports Authority & 6 others* to urge the court to award damages for discrimination on account of disability.
15. He further maintained that he is entitled to the damages sought in the statement of claim including compensation for the premature termination of his employment, unpaid salary for April 2021, salary in lieu of notice and gratuity.
16. Finally the claimant submitted that the suit herein is not governed by Section 77 of the *County Government Act* as it is based on violation of his constitutional rights. For emphasis he cited the case of *James Orre v Office of the Governor, County Government of Marsabit & another* [2021] eKLR where the court held that petition was outside the limits of Section 77 of the *County Government Act*.
17. The respondent on the other hand submitted on whether the termination of the claimant's employment contract was lawful and fair; whether the claimant was discriminated against; and who should bear the costs of the suit.
18. As regards the first question, it was submitted that the claimant's services were terminated in accordance with Section 45(6) (c) of the CGA after performance review showed that he was grossly underperforming. The review was done in the spirit of Section 55 of the CGA which envisages that the County Public Service shall provide for organization, staffing and functioning of the County Public Service in ways that ensure efficient, quality and productive services for the people of the County. Accordingly, it was submitted that the termination of the claimant's services was to ensure that the people of the County of Samburu get sufficient, quality and productive services.
19. It was further submitted that pursuant to Section 41 of the *Employment Act*, the claimant was invited to appear before a disciplinary committee to explain the reason for his dismal performance and his response was as elucidated at paragraph 12 of his statement of claim where he admits that there was delay in projects within his department of Gender, Culture and Social Services allegedly due to underfunding and delay in procurement, Public Works, and Treasury departments. He repeated the said explanation in a letter dated 28th April, 2021 which he produced as an exhibit. The letter further explained that the delay was caused by procurement, inappropriate supervision of construction works, and gaps in the budgets for different projects.



20. In view of the job description for a Chief Officer, it was submitted that the buck stopped with the claimant to ensure that proper supervision and procurement was efficient in his docket. In the upshot it was contended that the reason for the termination was valid, and that a fair procedure was followed as required under Section 41 and 45 of the *Employment Act*. Consequently it was submitted that the claimant has failed to discharge the burden of proving unfair termination as required under Section 47(5) of the Act as was held by the Court of Appeal in *Kenya Revenue Authority v Remuel Waitbaka & 2 others* [2019] eKLR.
21. As regards the alleged discrimination, it was submitted that the respondent has at all times abided by the dictates of the law and has at no time discriminated against any person in the County. It was submitted that no evidence of the alleged discrimination has been tendered. It cited Section 108 and 109 of the *Evidence Act* to submit that the burden of proof of the alleged discrimination was on the claimant but he has not discharged it.
22. The definition of discrimination in the *Black's Law Dictionary*, 11th Edition was cited to support the submission that the claimant was not discriminated since all the County employees were subjected to performance reviews. Consequently, the respondent urged the court to dismiss the suit with costs.

Issues for Determination

23. There is no dispute that the claimant was employed by the respondent from 2018 till he was dismissed for underperformance by the letter dated 23rd April, 2021. The issues for determination are:
 - a. Whether the termination was unfair and unlawful.
 - b. Whether the termination violated claimant's constitutional rights under Article 27, 41, 47, and 50 of the *Constitution*.
 - c. Whether the reliefs sought are merited.
24. Section 45(1) of the *Employment Act* bars employer from terminating the employment of his employee unfairly. Sub-section (2) then provides that:

“(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.”

25. In this case the claimant testified that his contract of service was unfairly terminated by the respondent vide a letter signed by the Governor dated 23rd April, 2021. The letter stated that:

“Dear Sir.

Re: Termination Of Contract



Reference is made to your Letter of Appointment and further to section 45(6)(c) of the County Government Act, 2012 which provides for the removal of County Chief Officer from office.

You are hereby removed from office based on your performance as reviewed by the County Executive Committee. This entails a nil development record reported for the past financial year as observed in several meetings held by the County Executive on review of projects undertaken by the department. To that extent, this amounts to incompetence and inability from your end to execute the mandated functions leading to compromised service delivery to the citizens of Samburu.

In view of the above, your contract is hereby terminated as the County Chief Officer for Gender, Culture and Social Services with effect from 26th April, 2021 and you're directed to immediately hand over all County Government assets and liabilities to the County Secretary and Head of Public Service who is required to transmit the same to my office not later than 3rd May, 2021.

We wish you well in your future endeavors.

H.E. Moses K. Lenolkulal

Governor

Samburu County”

26. The reason for the termination was non-performance as the Chief Officer Gender, Culture and Social Services. The said non-performance was noted by the County Executive Committee when it allegedly reviewed claimant's performance. The claimant denied the alleged nonperformance and testified that the alleged nonperformance was not due to his incompetence but due to court orders, underfunding, and lack of support by other departments including corrupt officials in the Governor's office. He further contended that he was dismissed without any hearing and therefore due process was not followed.
27. The respondent did not adduce any evidence to support its defence. It is obvious that where the respondent fails to adduce evidence in support of his defence, the defence filed remains mere allegations and the evidence by the claimant is unrebutted. In this case the claimant's evidence has not been rebutted and therefore I must hold that he has discharged his burden of proof of unfair termination of employment as required under Section 47(5) of the *Employment Act*.
28. Further, the respondent has failed to justify the reason cited for the termination in the termination letter and it has not proved that it accorded the claimant a fair hearing before the termination. Consequently, the termination was unfair within the meaning of Section 45 of the Act and the removal from office offended Article 236 of the *Constitution* which bars removal of a public officer from office without following due process of law.
29. The respondent pleaded that this court lacks jurisdiction over the suit. The claimant was of a contrary view I agree with the claimant that the court has jurisdiction. I gather support from the case of *Kisumu County Public Service Board & another v Samuel Okuro & 7 others* (2018) eKLR the Court of Appeal held that:-

“(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."

Violation of Constitutional Rights

30. The claimant has placed before the court the un rebutted evidence that he was dismissed for alleged poor performance of his duties without being accorded any hearing. The said evidence is prove that he was denied his right to fair labour practices, right to fair administrative action and right not to be removed from office without the due process of law. There is however no evidence to prove that he was discriminated on account of physical disability through the said termination. It was incumbent upon the claimant to adduce evidence to prove that he was targeted for removal due to his physical incapacity. The letter of termination cited poor performance as the only reason for the termination.

Reliefs

31. Having found that the respondent has not proved a valid reason for the termination and that fair procedure was followed, I make declaration that the termination of the claimant's employment was unfair, unlawful, and unconstitutional. For the reason of the unfair termination, I hold that he is entitled to salary in lieu of notice and compensation for unfair termination pursuant to Section 49(1) of the *Employment Act*.

32. Considering that he served for a short period, his physical incapacity, and that he had more than a year before the expiry of his contract, I award him six months gross salary as compensation for the unfair termination. I have further awarded him one month salary in lieu of notice.

33. In addition the claimant is awarded salary for the 26 days worked in the month of April 2021. The claim for gratuity for the 3 years served is not supported by the appointment letter. It is therefore declined for lack of evidence.

34. The claim for leave and off days also lack proper particulars and supporting evidence. It is also dismissed.

Conclusion

35. I have found that the termination of the claimant's employment was unfair, unlawful and unconstitutional. I have also found that the claimant is entitled to the damages highlighted above.



Consequently, I enter judgment for the claimant declaring his dismissal unfair, unlawful and unconstitutional, and I award him the following:

Notice Kshs 267,170.00

Compensation Kshs 1,603,020.00

Salary for April 2021 Kshs 231,547.33

Total Kshs 2,101,737.33

The above award is subject to statutory deductions but the claimant will have costs and interest at court rate from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF JULY, 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.

