



**Mwangemi v County Government of Taita Taveta & 2 others (Cause 32 of 2020) [2023] KEELRC 1925 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1925 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**CAUSE 32 OF 2020**  
**M MBARŪ, J**  
**JULY 13, 2023**

**BETWEEN**

**FRANK JOSEPH MWANGEMI ..... CLAIMANT**

**AND**

**THE COUNTY GOVERNMENT OF TAITA TAVETA ..... 1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR COUNTY GOVERNMENT OF TAITA TAVETA ..... 2<sup>ND</sup> RESPONDENT**

**THE PUBLIC SERVICE BOARD TAITA TAVETA COUNTY ... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The claimant is an adult. The 1<sup>st</sup> respondent is established under Article 176(1) of the *Constitution*. The 2<sup>nd</sup> respondent is the Governor of the 1<sup>st</sup> respondent and 3<sup>rd</sup> respondent is established under Section 57 of the *County Government Act* (the CGA).
2. The claim is that the 1st respondent nominated the claimant and was vetted by the County Assembly and engaged for employment on 7 November 2017 as a County Executive Committee Member (CECM) for health on a 5 year contract earning a gross salary of Ksh. 269,875 per month.
3. On 30 October 2019 the 2<sup>nd</sup> respondent through letter dated 25 October 2019 prematurely terminated the claimant in his employment without notice or justification and in a manner that was most disrespectful without a hearing. He was not paid his terminal dues.
4. At the time employment was terminated, the claimant had 30 leave days pending and these were not paid. The premature termination of employment was unfair and contrary to Sections 41, 43, 44 and 45 of the *Employment Act* read together with Section 40 of the *CGA* and Section 4 of the *Fair Administrative Actions Act*. the claimant is seeking the following dues;
  - a. Unpaid leave for November 2018 to 30 October 2019 at Ksh. 311,394.30;



- b. Unpaid public holidays for the same period Ksh. 207,596.20;
  - c. Compensation for unfair termination of employment at 12 months gross salary at Ksh. 3,796,948;
  - d. Unspent contract term for 3 years at Ksh. 9,715,500; and
  - e. Costs.
5. The claimant testified in support of his case that early 2017 he was working at the acting CEO at African Comprehensive HIV/AIDS partnership, Gaborone Botswana where he was living and working. He applied for the position of CECM in August 2017 and was nominated and taken through a rigorous vetting process and was appointed by the 1<sup>st</sup> respondent on 7 November 2017.
  6. The claim is that on 30 October 2019 the 2nd respondent terminated the claimant in his employment through a letter dated 25 October 2019 and at the time he had earned 30 leave days and had expected to serve under his 5 years contract which had 3 month years to completion and the balance should be paid.
  7. Upon cross-examination, the claimant testified that his letter of appointment was signed by the Governor, the 2nd respondent and the contract was subject to the term of the governor. The contract of employment provided for termination of contract upon one month notice or payment in lieu thereof which the respondents failed to do or pay. There was no issue raised with regard to performance or work requirements and the termination of employment shocked the claimant since he was not given any reason or allowed a hearing which resulted in unfair termination of his employment. He had seen a communication through a WhatsApp group from the communications director that his employment had been terminated and this was confirmed through the letter he received on 30 October 2019 dated 25 October 2019. The governor told him not to report to work from 26 October 2019. These letters were issued through emails and he knew the email from the governor was authentic.
  8. The claimant testified that he did not resign from his employment as alleged by the respondents. The respondents are the custodians of the work records and did not file the same.
  9. In reply, the respondents case is that the claimant was appointed by the 2nd respondent on 13 November 2017 as the CECM for Health Services for a fixed monthly remuneration of Ksh. 259,875 and the appointment was subject to the claimant's performance reviews and regular appraisals and he was not to directly or indirectly without the consent of the governor to engage in any other service or business or to receive any reward, commission or profit by virtue of his office or position.
  10. The response is also that it was a term of contract that parties would terminate employment by giving one month notice in writing or payment in lieu of one month salary.
  11. The 1<sup>st</sup> and 2nd respondents case is that the claimant discharged his duties until some time towards the end of the year 2018 and early 2019 when the 2nd respondent received complaints of conflict of interest by the claimant. It was alleged that the claimant was supplying food, toiletries and other items to hospitals in the County and proceeded to direct the 1<sup>st</sup> respondent's and hospital accounts departments to pay him funds. This was in conflict of interest.
  12. The respondents' case is also that claimant's performance during his tenure was poor and was in several cabinet meetings advised to improve his performance or risk having his contract terminated.
  13. The respondents always kept the claimant abreast of all the complaints received against him about his performance and allegation of conflict of interest. The claimant was required to respond during cabinet meetings and as a result of many complaints and failure to provide satisfactory explanations,



- the 2nd respondent on 25 October 2019 invoked clause 6(a) of the contract and letter of appointment and terminated his employment by paying one months notice. The letter terminating employment was also to the effect that the claimant was to process his terminal dues through the 1<sup>st</sup> respondent's County Secretary and since such communication he has failed to visit the respondents to clear and have his terminal dues processed as required.
14. In response, the respondent's case is also that the claimant's employment was terminated lawfully in terms of clause 6(a) of the letter of appointment and the reasons for termination of employment were addressed at 3 cabinet meetings ranging from conflict of interest and under performance and even in a case of summary dismissal, the claimant was informed and given a chance to respond and the notice issued on 25 October 2019 was procedural. The claims made should be dismissed with costs.
  15. No evidence was called by the respondents.
  16. At the end of hearing, parties were directed to file written submissions.
  17. Only the claimant complied and filed his written submissions.
  18. The claimant submitted that he was employed by the respondent under a written contract for 5 years to run with the term of the governor but on 30 October 2019 he received an email with letter dated 25 October 2019 terminating his employment without notice or being given any reasons which was unfair and without payment in lieu of notice or for the remainder of the term of the contract was wrongful and unlawful as held in *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR. The response that the tenure of the claimant was marred by complaints on conflict of interest and poor performance is without proof. There is no complaint filed in this regard. No evidence was called to support such assertions. Notice before employment terminated was not issued or a hearing as required under Section 41, 43, 44 and 45 of the *Employment Act*.
  19. The allegation that the claimant resigned from his employment is without proof. The letter produced is not authentic and the respondent admitted that through notice dated 25 October 2019 they dismissed the claimant from his employment on the grounds of acts of irregularities, under performance and conflict of interests. The case of a resignation does not hold. The respondents cannot act at will without a hearing and the pleasure doctrine addressed by the court in the case of *Narok County Government & another v Richard Bwogo Birir & another* [2015] eKLR that this is no longer applicable in our jurisdiction.
  20. The claimant is entitled to notice pay, pay in lieu of untaken leave days, unfinished term of contract and compensation for unfair termination of employment with costs.

### **Determination**

21. In employment and labour relations in Kenya, the shift in employment relations is that, an employer cannot solely rely on a contract that allow termination of employment upon notice only. A reason leading to termination of employment must be given. Employment cannot terminate at will.
22. An employment contract is now subject to the law, the *Employment Act*, 2007 (the Act). The employer must give reasons leading to termination of employment even where notice is due under the employment contract. The right to issue notice under Section 35 of the *Act* must be read together with Section 43 and 45 of the *Act* which are mandatory in nature calling for reasons leading to termination of employment.



23. The intention to pay in lieu of notice is not sufficient. Reason leading to termination of employment must issue as otherwise, this results in unfair termination of employment in terms of Section 45 of the *Act*.

24. The Court of Appeal in *Naima Khamis v Oxford University Press (EA) Limited* [2017] eKLR in giving emphasis that before an employer can dismiss an employer reasons must be given held that;

On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, section 45(2)(c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.

25. Even where the employee is found to be of gross misconduct, notice however short and brief must issue and the employee given a chance to defend himself over any allegations made against him in terms of Section 41 of the *Act* which requires that;

(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.

26. The respondents' response is that the claimant was found to have committed various irregularities, there was conflict of interest and that there was underperformance. That the claimant was made to explain his conduct during 3 cabinet meetings.

27. However, the motions of a cabinet meeting is not similar to the rights secured under Section 41(1) of the *Act* where the employer alleges an employee to have committed acts of misconduct, is under performing or has committed various irregularities.

28. Notice to the subject employee must issue and a hearing allowed in the presence of another employee chosen by the subject employee. Section 41(1) of the *Act* and the motions that go into it have been very well defined by the Court of Appeal in the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR that;

Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the Kenya Revenue Authority case where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made. We believe that is still good law, but not in respect of a hearing before termination as envisaged under Section 41 of the Act. It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply



with. The section provides for "Notification and hearing before termination on grounds of misconduct" in the following manner:- ...

29. With regard to procedural elements that should go into termination of employment, the Court of Appeal in the case of *Oyombe v Eco Bank Limited* (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR) (13 May 2022) (Judgment) gave the following steps;

..... four elements must thus be satisfied for summary dismissal procedure to be said to be fair, being: -

- a. An explanation of the grounds of termination in a language understood by the employee;
- b. The reason for which the employer is considering termination;
- c. Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made;
- d. Hearing and considering any representation made by the employee and the representative chosen by the employee.

30. The cabinet meetings cited by the respondents to be the forum under which the case of conflict of interest and underperformance were allegedly addressed, if at all, cannot meet the threshold of the law and it was incumbent on the respondents, where the claimant was found to be of any misconduct, to subject him to the due process under the *Act*.

31. The case of underperformance of an employee is also addressed under Section 41(1) of the *Act*. This is not a matter to be casually treated. It goes deep into the employee's core functions. The claimant was employed upon being vetted and found suitable to serve. To discharge him from duty over alleged underperformance, the *Act* requires proof of such matter and what measures were put in place by the employer to support an employee alleged to be under performing.

32. In the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR the court in addressing a similar matter as herein held that;

.... the employer has the duty to demonstrate that upon the appraisal of the employee and there was a finding of poor performance, measures were taken to give the alleged poor performing employee training and timelines within which to show improvement. Even though the assessment of an employee is the prerogative of the employer as held in *Alfred Nyungu Kimungui*, cited above, a matter regulated in law such as the case of a poor performing employee and such has become the subject of litigation before this Court, must be assessed and analysed on its merit and a finding made.

33. The employer must appraise the employee said to be under performing and demonstrate what support systems were put in place to ensure there was improvement. It is not sufficient to cite poor performance or underperformance.

34. In this case, the action taken by the respondents to dismiss the employee through notice dated 25 October 2019 was devoid of any due process, no substantive reasons were given under the assumption or presumption that at the cabinet, the claimant had been made aware of his conduct. This resulted in unfair termination of employment contrary to Section 41, 43 and 45 of the *Act*.

35. The letter terminating employment advised the claimant that he would be paid in lieu of notice and to attend for clearance so as to be paid his terminal dues.



36. As a best practice, such clearance is imperative to ensure proper exit from employment and issuance of certificate of service. Where the claimant had any work tools issued by the respondents, to clear his record and his owed leave days be paid accordingly.
37. With regard to a claim for payment for the unspent 3 years of the contract, the employment contract envisaged termination, though with due process which is lacking in this case. The claimant is a medical doctor and has worked for several other organisations before and is not expected to stay idle with his skills. He should mitigate his circumstances with securing new employment.
38. For the unfair termination of employment which is devoid of both procedural and substantive fairness, a compensation of 10 months gross wage of Ksh. 259,875 all at Ksh. 2,598,750 is hereby found appropriate in compensation.
39. On the claims for work during public holidays, the claimant was not a general worker with a minimum wage.
40. Under clause 4(a) of the employment contract, the claimant had various benefits of a daily subsistence allowance while out on duty, airtime every month which in service, medical cover and for such, to claim for work during public holidays is not justified.
41. The claim successful, costs are due.
42. Accordingly, judgment is hereby entered for the claimant against the respondents in the following terms;
  - a. A declaration that employment terminated unfairly;
  - b. Compensation Ksh. 2,598,750;
  - c. The claimant shall attend and clear with the respondents for payment of his terminal dues including untaken leave days;
  - d. A certificate of service shall be issued in terms of Section 51 of the *Employment Act*, 2007;
  - e. The claimant is awarded costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.**

**M. MBARŪ**

**JUDGE**

