



Achuti & 28 others v County Government of Nakuru & another (Employment and Labour Relations Cause E039 of 2022) [2023] KEELRC 2676 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2676 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E039 OF 2022
HS WASILWA, J
OCTOBER 31, 2023**

BETWEEN
REBECCA BITENGO ACHUTI & 28 OTHERS CLAIMANT
AND
COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT
NAKURU COUNTY SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The claimants herein instituted this claim by undated memorandum of claim filed on 21st October, 2022, alleging unfair terminated and seeking for compensation under Section 49 of the [Employment Act](#). They sought for the following reliefs; -
 - a. A declaration be made to the effect that the claimant's termination was unlawful and unjustified as the same was not within the ambits of the [Employment Act](#), 2007, sections 61(3) and 62 of the County Government Act NO. 17 of 2012 and other employment laws.
 - b. The claimants herein be awarded 12 months' compensation for the unlawful and unjustified termination as provided for under section 49(c) of the [Employment Act](#).
 - c. The Respondents pay the claimants one month's gross pay in lieu of notice.
 - d. The court be pleased to order payment of dues emanating from the normal overtime which remain unpaid for the period of time the claimants (Grounds and garden assistants) worked for the respondent between 1st March, 2020 to 10th October, 2022(30 months) amounting to Kshs 484, 615.38.
 - e. The court be pleased to order for payment of dues emanating from off/rest days which remain unpaid for the period of time the claimants worked for the Respondents.



- f. The court be pleased to order for payments of dues emanating from public holidays which remain unpaid for the period of time the claimants worked for the Respondents.
- g. The Respondents herein pay the claimants all the dues for annual leave that was not taken for the years worked.
- h. The Respondents pay the claimants all their unpaid salaries till the termination of their contracts.
- i. The Respondent herein pay the claimants' gratuity at 31% of their basic salary as per the claimants' respective offer of employment.
- j. The Respondents to pay the costs and interest on all the claims listed.
- k. In the alternative, an order do issue of permanent injunction restraining the Respondents from removing the claimants' names from the payroll and to continue paying the claimants their full salaries and benefits.
- l. The Court may grant any other relief as it may deem necessary to grant.

Claimants' case

2. The summary of the claimants' case is that, at all material times, the claimants were employees of the Respondent having been retained on various dates into various position as follows;
 - i. The 4th, 13th, 15th, 21st and 24th claimants were all employed on 1st March, 2020 to the position of Chief Public Communication officer at a gross pay of Kshs 83,720 on a 3 years' renewable contracts.
 - ii. The 25th, 26th, 27th, 28th and 29th claimants were all employed on 1st March, 2020. The 25th claimants as chief driver and the rest as Senior drivers earning Kshs. 36, 200 for the Chief driver and Kshs 32,880 for the senior drivers. They were all retained on contracts for 3 years.
 - iii. The 14th, 15th and 16th Claimant were employed on 1st March, 2020 as cooks on contracts for three years, on gross salary of Kshs 32,800 for the 14th and 17th claimants and Kshs 31,800 for the 16th claimant.
 - iv. The 11th and 12th claimants were retained as cleaning supervisor effective 1st March, 2020, earning Kshs 32, 880 and Kshs. 31800 respectively. While the 10th, 18th and 20th claimants were employed on 1st March, 2020 as grounds and garden assistants for 3 years' contracts on gross pay of Kshs. 25,000.
 - v. The 2nd and 6th claimants were employed on 27th April, 2021 as Receptionist assistant and Senior receptionist respectively on contract of 2 years earning Kshs 31, 800 and 81,170 respectively.
 - vi. The 19th and 22nd claimants were employed on 27th April, 2021 as senior staticians on 2 years' contracts, earning Kshs. 81,170 and Kshs 87,170 respectively.
 - vii. The 1st and 5th claimants were employed on 1st March, 2020 as Chief Clerical officer for a renewable contract of 3 years at a salary of Kshs 44,070.
 - viii. The 3rd and 23rd claimants were employed on 27th April, 2021 and 1st March, 2020 respectively as office administrator assistant for a contract of three years, each earning Kshs 44,890.



- ix. The 7th, 8th and 9th claimants were employed on 1st March, 2020 as senior security warden for a period of 3 years, each earning Kshs. 32,880.
 - x. Jacob Karani, was not listed as a claimant, however, it is stated that he was employed on 1st March, 2020 as senior Public Communication officer, for period of 3 years at a gross pay of Kshs 74, 890.
3. The claimants aver that, save for the drivers that commence their duties at 3am to 11pm and Grounds and Garden assistant who work from 6am to 6pm, all the other cadres clock in at 8am and clock out at 5am. That they would all be allowed a one-hour lunch break. Accordingly, that the Grounds and Garden assistant worked for 11 hours a day without receiving overtime pay.
 4. The claimants state that they were all required to work on public holidays without any supplementary remuneration from the Respondents.
 5. It is the claimants case that, during the pendency of their employment, save for the drivers, they were not allowed to go for annual leave as such they ought to be compensated for the said unutilized leave.
 6. The claimants also state that save for the office administrators, the rest of them used to work 7 days a week without any off/rest day as required under the employment Act.
 7. It is averred that the claimants worked diligently for the Respondents and on 7th October, 2022, they were invited for a consultative meeting to be held on 11th October, 2022. That on the due date, the claimants were all served with termination letters dated 7th October, 2022.
 8. The claimants state that the Respondents terminated their contracts before the expiry date, without any reason or due process. Moreover, that the termination process was in breach of sections 41, 43 and 45 of the Employment Act and Section 61(3) of the County Government Act.
 9. It is stated that the abrupt termination has embarrassed the claimants financially as most of them had secured loans from various financial institutions and Sacco's, with their payslips as the only security.
 10. The claimants reiterate that their termination was unfair and unlawful and urged this Court to allow the claim as prayed.
 11. During hearing the 1st Claimant, Rebecca Bitengo Achuti, testified as CW-1 on her behalf and on behalf of the other claimants as evidence by the letter of authority marked as Exhibit 1. She testified that they were employed by the Respondent on either 2 or 3 years contract as evidenced by their contracts of employment marked as exhibit-2. She stated that she used to report to work at 8am and worked overtime but that she was not paid the said overtime.
 12. CW-1 testified that they were attached to the Governor's officer as such they used to work even on public holidays. Also that they worked 7 days a week and were not granted leave or pay in lieu.
 13. With regard to their termination, she stated that on 7th October, 2022, they were invited for a consultative meeting at Iman ACK Guest house on 11th October at 8am. That they all assembled at Iman Guest house but were not addressed until 1pm when a staff came to the meeting and handed them their termination letters, which took effect on 7th October, 2022, when their contracts were to expire in March and April, 2023. That the letters did not give the reason for termination of their contracts and also that they were not subjected to any disciplinary hearing.
 14. The witness told this Court that they tried negotiating with the Respondent in vain. She maintained that their termination was unfair as it was done abruptly. She produced the claimants' documents as exhibits 6 and urged this Court to allow the claim as prayed.



15. Upon cross examination by Chege Advocate, she testified that the vacancies were advertised and upon application, the Respondent issued offer letters which they accepted and surrendered the letters of acceptance to the CPSB. She however admitted that she had not supplied a copy of her employment file and application letter to the court. she stated that they worked in the Governor's office under the directorship of the Chief of staff and that they always worked on public holidays. She testified that they used to fill overtime forms but are unable to produce the said forms.
16. On further cross examination, she stated that she attended the ACK guest house meeting on 11th October, 2022, where they were served with termination letter. She admitted that they did not appeal the decision to Public Service Board.
17. On re-examination, she clarified that the application letters and other documents evidencing their employment is with CPSB. she reiterated that they met qualification for the said positions. On the need to Appeal to PSC, she stated that the Respondent had already raised the issue in a preliminary objection which was dismissed by this Court. she also clarified that they were deployed to various department and could work whether the governor was there or not. She maintained that the termination was unfair.

Respondents' case.

18. The Respondents filed a joint defence dated 27th January, 2023, denying the entire claim and in particular stated that the claimants herein were irregularly employed by the county Secretary in excess of the powers granted to the county secretary at section 44 of the County Government Act.
19. It is averred that the claimants herein were not competitively sourced but nominated to serve the office of the Governor as personal staff and as such were to serve at the pleasure of the Governor and not on permanent and pensionable terms.
20. The Respondent denied the claim for overtime sought by the Grounds and garden assistant and maintained that all the Respondent's employee works for a maximum of 8 hours a day with one-hour lunch break. In any event that the Garden assistants only worked on availability of work and not throughout the day.
21. The Respondent also denied the allegations that the claimants herein worked on public Holiday and stated that, the county being a public office does not open on public holidays.
22. On leave claim, the Respondent maintained that the claimants utilized their leave days.
23. The Respondent also stated that it fully adhered to its administrative framework and accorded the claimants an opportunity to make their representation, making the procedure lawful and proper. Therefore, the claimants are not entitled to the reliefs sought.
24. The Respondents state that they invited 69 personal staff, including the 29 claimants herein who were serving at the pleasure of the Governor, to a consultative meeting to inform them of the transition in government and the fate of their employment. It is contended that through that meeting the claimants were given an opportunity for hearing.
25. The Respondent maintained that they paid the claimants all their lawful dues as such nothing is owing to them. They urged this court to dismiss the claim with costs.
26. The Respondents summoned the Secretary to CPSB, Ms. Joyce Ndegwa, to testify as RW-1. The witness adopted her statement of 23.2.2023 and highlighted the same that the claimants herein were not competently sourced by the County government but identified and handpicked by the former



- Governor to work as his personal staff in his office. She stated that the claimants were employed on contractual terms which would lapse upon expiry of the governor's term.
27. Contrary to the position fronted by the claimants, the witness herein stated that the claimants were summoned and informed that the tenure of the former governor had ended as such they were required to leave and thus they were not ambushed. She stated that 33 employees did not object to the termination as they understood their term expired upon exit of the former governor.
 28. RW-1 stated that the claimants were all paid their terminal dues being; One-month notice pay and gratuity for the period worked.
 29. Upon cross examination by Gitau Advocate, the witness testified that CPSB establishes and abolishes offices in the County. She admitted that the claimants contract period was for 2 and 3 years and most of the contract had not lapsed. However, that since the Governor's terms had come to an end, the contract were inevitably cut short. She added that had the governor continued in office, the claimants could have been retained till the end of term of the said Governor. She confirmed that the employment contract did not indicate that the said claimants were personal staff of the Governor.
 30. Upon further cross examination, the witness testified that they invited the claimant to a consultative meeting on 11th October, 2023, which agenda was not shared in advance. That the claimants were only informed of the fate of their contract on the said meeting. She admitted that the decision to terminate the claimant was made prior to the consultative meeting because the termination letters were all dated 7th October, 2022. She admitted that the Respondent did not indicate the reason for termination or subjected them to any disciplinary process. She also admitted that she is the custodian of the records of employment of all the claimants and that none of the records are in court.
 31. On re-examination the witness testified that the regulations governing the office of the President also govern the office of the Governor. On that basis that the claimants were employed by the Governor to serve him and that they were aware they were serving at the pleasure of the governor and during the tenure of the said governor.

Claimants' Submissions.

32. It was submitted for the claimants that, it is not in contention that the claimants were employed by the Respondents on various dates in the year 2020 and 2021 on contractual terms of 2 and 3 years and that the said contract had not yet expired. That the point of contention arise on how the claimants were employed.
33. On whether the claimants were personal staff in the office of the Governor, it was submitted that the employment letters adduced as evidence before this Court did not allude to that fact, in fact that it only gave the designation of each employee and the duration of the contract. It was argued that since the basis of the termination was on allegations that the claimant was serving at the pleasure of the Governor, the Respondent was duty bound to give evidence as required under Section 107 of the Evidence Act, that indeed the claimants were serving as personal staff of the Governor. Furthermore, that if the Respondent desired to have the contracts lapse with the term of the former governor, they ought to have issued contracts within the remainder term of the Governor and not rely on the pleasure doctrine which ceased to operate upon promulgation of the constitution in 2020. To support the argument that the pleasure doctrine is no longer good law, the Claimants relied on the case of



Richard Bwogo Birir V Narok County Government and 2 others [2014] eKLR where the Court held that :-

“What are the implications of *the Constitution* of Kenya, 2010 on the application of the pleasure doctrine in Kenya? The court considers that the following provisions of *the Constitution* of Kenya 2010 are relevant; Article 1(1) provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with *the Constitution*... The court further finds that the string that flows through the constitutional provisions is that removal from public or state office is constitutionally chained with due process of law. In the opinion of the court, at the heart of due process are the rules of natural justice. Thus, the court finds that the pleasure doctrine for removal from a state or public office has been replaced with the doctrine of due process of law. Article 236 is particularly clear on the demise of the pleasure doctrine in Kenya’s public or state service.”

34. Accordingly, that the pleasure doctrine alluded to is no longer applicable and in fact is bad law. He added that even if the claimants were to be terminated upon lapse of the Governor’s term, due process has to be followed.
35. Counsel submitted that some of the offices the claimants held were created under section 45(1) of the County Government Act, which does not have any clause of its abolition on expiry of the term of the Governor. He argued that the only officers that leave with the Governor is the County Executive Committee as stipulated under Article 179(7) of *the Constitution* of Kenya. To support this position they relied on the case of David Ogega Kebiro & Another V Kisii County Public Service Board & Another [2017] eKLR where the Court held that:-

“As I have already pointed out above, the governor does not have powers to dismiss county chief officers. He can therefore only exercise the powers under section 45(1) when such offices are vacant. Mr. Wanyama submitted that the office of the county chief officers become vacant by operation of the law and by virtue of appointment by governor they leave office with the governor. No provision of the law was referred to in support of this position. Section 45 does not state that the powers to appoint chief officers therein must be exercised by the governor upon taking office even if the positions are not vacant. The only positions that leave office with the governor are those which are either provided for by law or those appointments made at the discretion of the governor. For example, Article 179(7) ...No similar provision has been provided with respect of county chief office... It is my finding that the term of office of a county chief officer does not come to an end when the governor vacates office but in accordance with the terms of engagement as read with terms of service of other public officer.”

36. Accordingly, that since the claimants were not appointed by the the Governor but merely nominated, the 2nd Respondent is the employing body as such their terms can only be terminated in accordance with their terms of engagement which is the expiry of their contracts.
37. To emphasize on their argument, they relied on the case of Samuel Okuru & 7 others V Kisumu County Public Service Board and another [2017] eKLR where it was held that; -

“Foregoing means that the term of office of a county chief officer does not come to an end upon the expiry of the term of office of the governor. It is also clear that the *County Governments Act* does not provide for removal of chief officer from office by the governor and that a county chief officer can only be removed from office after following due process



in a manner applicable to all other county public officers...I therefore find that the term of office of the petitioners are not dependent on and did not expire with the term of office of the Governor who appointed them following the general elections of August 2017.”

38. On whether due process was followed, Counsel submitted that the claimants’ contracts were for a fixed term which cannot be terminated without following due process as reinstated in the case of Samuel Okuru & 7 others(Supra).
39. It is based on the above analysis, that it was argued that the termination was unfair for want of procedural and substantive justification as elaborated in the case of Walter Ogal Anuro V Teachers Service Commission [2013] eKLR. Furthermore, that since the claimants were not subjected to any disciplinary process, the termination was in breach of section 76(1) of the County Government Act, sections 41 and 45 of the Employment Act and Article 47 of the Constitution.
40. To support this they relied on the case of David Ogega Kebiro & Another (Supra) where the Court held that:-

“The Respondents can therefore only terminate the employment of the Claimants in compliance with the provisions of the Constitution. The Claimants are further protected by Article 41 of the Constitution which prohibits unfair labour practices, Article 47 which provides for a fair hearing and sections 41, 43 and 45 of the Employment Act. This means that their contracts can only be terminated for valid grounds as set out in the said provisions or upon effluxion of time when their contract terms lapse. Any other termination would be unlawful.”
41. On the reliefs sought, the claimants submitted that they have proved their case on a balance of probability and therefore this Court has powers to grant them the orders sought as provided for under section 49 of the Employment Act.

Respondents’ Submissions.

42. The Respondent submitted on three issues; whether the claimants were the Respondents’ employees or personal staff of the Governor, whether the claimants’ employment was unfairly and unlawfully terminated and whether the claimants are entitled to the other remedies as pleaded in the memorandum of claim.
43. On the first issue, Counsel for the Respondent submitted that section 37(1) of the Public Service Act as read with section 66 of the County Government Act, makes it mandatory for any vacancy in the public office to be recruited through competitive recruitment commencing with advertising. It was argued that the claimants have alleged to have been competitively recruited but failed to adduce evidence of the purported advertisement or their respective application letters to ascertain that fact. It was submitted that the ‘offer of appointment’ letters dated 1.3.2020 cannot be sufficient proof to ascertain legal employment because the said letters were mere offer letters that needed to be accepted by the claimant before the employment contract is issued. In totality, the Respondent submitted that the entire recruitment of the claimant was shrouded with illegality as such this Court should find that the claimants were not Public officers as defined under the Public Service Commission Act but appointees of the former governor serving at his pleasure.
44. Counsel submitted that the ‘offer of appointment’ letters, were issued by the County secretary in excess of her powers provided for under section 44(3) of the County Government Act. He argued the County Public Service Board has exclusive mandate under Section 58 of the County Government Act to employ staff of the County. Section 59 of the County Government Act expands the role of



CPSB to include creating and abolition of office, appointment of persons to fill public offices, carry out disciplinary control over county staff and develop comprehensive Human Resource Planning. It is however stated that the County Secretary can only carry out CPSB function upon delegation in writing which is not the case herein. To support this argument they relied on the case of Erick Otieno Oricho & 6 others V County Public Service Boards & 2 others [2019] eKLR where the Court held that:-

“Further, the Governor, or County Secretary have no powers to appoint officers in the public service unless such powers have been delegated under Section 86. Section 63 of the Act gives the County Public Service powers to appoint officers to all offices either on its own motion or at the request of a county Chief Officer or Clerk of the County Assembly. Whenever there is any irregularity in appointment it is the County Public Service that is vested with the power to take action on the irregularity as provided under Section 75 by revoking the decision, directing the Head of Department concerned to take corrective measure or taking the corrective measure by itself.”

45. Accordingly, that since the contract were entered following an irregularity, this Court ought to refrain from enforcing them
46. Counsel submitted that there are guidelines that this Court should put into consideration when determining the rights and obligations of parties where one party had pleaded illegality of contract and relied on the case of Five Forty Aviation Limited V Erwan Lanoe[2019] eKLR which court of appeal relied on the case of Kenya Airways Limited versus Satwant Singh Flora , which set out the guidelines when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract:-
 - i. No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.
 - ii. If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.
 - iii. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”
 - iv. No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.
 - v. In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contact.”
47. It was submitted that the sole reason the claimants’ contract were terminated was because their recruitment from the get go was marred with illegality and that the Respondent were taking corrective measures as empowered under section 75 of the County Government Act to revoke the illegal



recruitments. To support this position they relied on the case of E Erick Otieno Oricho & 6 others (Supra) where the Court held that;-

“Whenever there is any irregularity in appointment it is the County Public Service that is vested with the power to take action on the irregularity as provided under Section 75 by revoking the decision, directing the Head of Department concerned to take corrective measure or taking the corrective measure by itself.”

48. On whether the termination was unfair, it was submitted that the procedure to be followed in raising issues of unfair termination is provided for under section 47(5) of the *Employment Act*. Section 43 on the other hand provide for substantive justification, while Section 41 of the *Employment Act* provides for procedural justification. He argued that based on the law, the burden of proof lies with the claimant to prove their case as required under section 107 of the *Evidence Act* and reiterated in the case of Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others [2019] eKLR.
49. It was argued that since the appointments were irregular, a fact which came to the attention of the County on transition of the new Government, the termination on that basis was justified and need not required any other justification.
50. Counsel submitted that regardless of the process in which the said claimants were appointed to office, the Respondent accorded them a cordial and above-reproach process in termination because they were invited to a meeting, their grievances heard and a decision was made to terminate their service and a departing package of one-month salary, together with gratuity was given to each claimant.
51. On the remedies sought, it was submitted that the claimants have been paid one-month salary in lieu of notice, together with gratuity pay. Further that the claimants were issued with certificate of service upon clearance.
52. With regard to Public Holidays pay, Counsel maintained that the County is a public Office that is not open on public office and therefore could not be possible to have the claimants work during public holiday. Similar submissions were made for off/rest days, that the Respondent does not open its offices on Sundays and on Saturdays it opens its office for half day, as such that the claim for holidays and res/off days is unfounded. It is added that the CW-1 alleged that they normally sign overtime forms but did not produce the same in court when requested.
53. On Annual leave claim, the Respondent maintained that all claimants utilized their leave. On Unpaid salaries, the Respondent reiterated that the claimants were paid their salaries till date of termination, together with Notice pay and Gratuity as such no terminal dues is owing to the claimants.
54. In conclusion, Counsel cited the case of Caliph Properties Limited V Barbel Sharma & Another [2015] eKLR that relied with authority on the case of Patrick Waweru Mwangi & Another v. Housing Finance Co. of Kenya Ltd (2013) eKLR at page 145 stated:

“Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies... He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently, he has not done equity.”



55. They also relied on the case of Virginia Ciamati Murage & another V Stanley Advane Kirimi [2021] eKLR where the Court held that:-
- “Equity is not statute law. equity follows the law and not vice versa...”
56. Accordingly, it was submitted that the claimants herein cannot be seen to benefit from an illegality based on the illegal contracts. That if the court allowed the claim herein it will set a precedent that would stain the system of justice. On that basis, the Respondents urged this court to dismiss the suit with costs.
57. I have examined all evidence and submissions of the parties herein.
58. From the documents supplied by the claimants herein, they were individually employed through letters addressed to them by the County Public Service Board (CPSB).
59. The letters dated as indicated in the pleadings herein were all signed by the one Joyce N. Ndegwa, the Secretary to the County Public Service Board.
60. In the body of the letters of offer, the claimants were employed on contract terms ranging between 2 to 3 years.
61. The salary payable to each claimant was indicated.
62. It is also evident from the appointment letters produced by the claimants that they were each entitled to gratuity payable at 31% of their basic salary at the evidence of each contract period. They were also entitled to payment of 30 days annual leave.
63. Vide letters dated 7.10.2022 the claimants were each invited to a meeting by the same Joyce N. Ndegwa to attend on 11th October, 2022 at 8.30am at ACK Imani Guest House.
64. The claimants have submitted that on this 11th day of October 2022 they were each served with their termination letters dated 7th October 2022 with effect from 11th October, 2022.
65. The termination letters indicated that their services were being terminated in accordance with regulation 28(3), effective 11th October 2022.
66. They were also informed that they would be paid their gratuity for the period served.
67. The claimant's contention is that their contracts were terminated before expiry period and without due process hence this claim.
68. The respondents on their part indicate that the claimants were all irregularly employed by the county secretary in excess of powers granted to her under Section 44 of the County Government Act.
69. They aver that these claimants were not competently sourced but were nominated to serve the office of the governor as personal staff as such were to serve at the pleasure of the governor and not permanent staff.
70. The respondents aver that they followed due process and accorded the claimants an opportunity to be heard and also paid them all their dues.
71. I have looked at the appointment letters issued to the claimants however, none of the letters indicated that the claimants were being hired as personal staff to the governor.



72. The letters were also written by the secretary CPSB – which is the body mandated to establish and abolish office in the county. The contention by the respondents that they were hired irregularly does not therefore add up.
73. The RW1’s indicated that they summoned the claimants to a consultative meeting on 11th October, 2022 but that the decision to terminate their services had already been made prior to this date and all their termination letters were dated 7th October, 2022.
74. The respondents in essence admitted terminating the services of the claimants without according them any due process or having valid reasons.
75. Section 41 of the *Employment Act* indicate as follows;-

41. Notification and hearing before termination on grounds of misconduct

- (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.

76. Section 45 (2) of the *Employment Act* also state as follows;-

“45.

- (1)
- (2) A termination of employment 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”.

77. Having found that the claimants were employed by the CPSB and that being the body with mandate to employ public officers the in county Government, it follows that the claimants were unfairly and unlawfully terminated.
78. In terms of remedies, the claimants sought various relief including overtime, notice pay e.t.c.



79. In relation to notice pay, it is evident that the claimants were terminated without being accorded notice and I find that each of them is entitled to notice pay of 1 month.
80. As relates to overtime pay, no claimant established the period within which they served on overtime. No schedule of work nor demand to produce indicating the clocking time was availed to this court. There is therefore no evidence to warrant the claimant being paid any overtime amount. This is also the position in relation to rest and off days and public holidays.
81. As relates to annual leave, the evidence adduced by the claimants even show that they were paid leave travel evidence (see payslip of August 2022 of one Beatrice Nyokatsi Kara, one of September 2022 for Miss Catherine Waithera September 2022, for Jacob Odudo August 2022, of Douglas Ndungu, amongst many others). This in my view is an indication that the claimants proceeded for leave and were paid accordingly. The claim for leave cannot therefore hold. In any case, the claimants have not established with finality the periods within which they didn't proceed on leave to warrant being awarded this prayer.
82. The claimants are however entitled to payment of gratuity as per their respective contracts of employment and compensation equivalent to 3 months salary for the unlawful termination.
83. In essence I find for each claimant and order payment as follows;
1. 1 months salary in lieu of notice.
 2. Gratuity at 31% as per their contract of employment.
 3. Compensation equivalent to 3 months salary for unfair termination.
 4. The claimants will also be paid costs of this suit by the respondents.
 5. The amounts so awarded will be computed and will form part of this judgment.

DATED AND DELIVERED IN OPEN COURT THIS 31ST DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kipruto holding brief for Gitau for Claimants – present

Achieng holding brief for Chege for Respondents – present

Court Assistant – Fred

