



Otieno & 3 others v Kenya Revenue Authority (Constitutional Petition E074 of 2023) [2023] KEELRC 2668 (KLR) (30 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2668 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E074 OF 2023**

B ONGAYA, J

OCTOBER 30, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 2, 10, 19, 20, 21, 22, 23, 27, 41, 47, 48, 50 (1), 75, 159, 160, 162 (2), 232, 243, 244, 246, 258, 259, 260 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF SECTIONS 3, 4, 7, 8, 9, 10, 11 AND
12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015;
ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

AND

IN THE MATTER OF SECTION 22 (4) OF THE KENYA REVENUE AUTHORITY ACT, 1995

BETWEEN

**VICTOR ODHIAMBO OTIENO 1ST PETITIONER
RONAH OMACHE 2ND PETITIONER
GUYO HALAKHE 3RD PETITIONER
MARGARET NJOKA 4TH PETITIONER**

AND

KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

1. The petitioners filed the petition on 18.04.2023 through the firm of Muma & Kanjama Advocates. The petitioners prayed for:
 - a. A declaration that the respondent's unilateral decision to summarily terminate the secondment of the petitioners and affected officers by various letters dated 31st January, 2023 which



resulted to reduction of their salaries and other work benefits was un-procedural, unlawful, unconstitutional, involved unfair or discriminatory treatments and amounted to unfair and unlawful termination from employment.

- b. An order to issue compelling the respondent to compensate the petitioners' and all affected officers' salaries that would have been earned in their respective positions at the respondent's offices for the remainder of their respective contractual term from the month of February 2023 without any deductions whatsoever and without any further delay.
- c. An order for general and aggravated damages as compensation for the remainder of the respective contract periods being for unlawful, unfair, discriminatory and un-procedural termination of the petitioners' and affected officers' secondment and termination of service; the anxiety and emotional suffering occasioned by the respondent's actions to unilaterally terminate the employment of the petitioners and affected officers without any reasonable cause.

Particulars of Damages:

- i. 12 months' pay as compensation.
 - ii. 3 months' notice pay.
 - iii. Health cover for one-year equivalent.
 - iv. Relocation costs equivalent to one month pay.
 - v. 30 working days accrued leave for the year 2023.
 - vi. General damages for loss of legitimate expectation equivalent to three months' pay.
- d. An order for general and aggravated, including exemplary damages for breach of the petitioners' and all affected officers' constitutional right to non-discrimination, fair administrative action, right to human dignity and self-worth.
 - e. Interest on the sums awarded in (c) and (d) at Court rates from the date of termination until payment in full.
 - f. That the costs of the petition be borne by the respondents.
 - g. That this Honourable Court be pleased to grant any further orders as it may deem fit to further the ends of justice.
2. The petition was supported by the annexed affidavit and further affidavit sworn by Victor Odhiambo Otieno, the 1st Petitioner herein, and the supplementary affidavit sworn by Margaret Njoka, the 4th petitioner herein, all on record. The petitioners' case is as follows:
- a. The respondent in liaison with the National Police Service invited qualified individuals to apply for vacant positions in its Investigations and Enforcement Department.
 - b. The petitioners and affected officers applied for the positions and were taken through a competitive recruitment exercise before their secondment to fill the positions for a period of three (3) years from the date of the contracts while others had their secondment contracts extended for a further period of two (2) years.



- c. That before the lapse of their contractual period, the petitioners and affected officers were issued with notices of termination of secondment dated 31st January, 2023 but delivered on 3rd February, 2023.
 - d. The petitioners and other affected officers termed their termination of secondment with the respondent as unlawful, unfair, irregular, unconstitutional, un-procedural and in gross violation to the provisions of Articles 10, 19, 27, 41, 47, 48, 50 (1), 232 (2) and 236 of the [Constitution of Kenya](#).
 - e. Further, that the respondent’s decision to summarily terminate their secondment was made without any justifiable notice, reason and is as such irregular and contrary to clause 8.6 and 8.7 of the KRA Code of Conduct and Ethics.
 - f. That following the illegal termination of their secondment by the respondent herein, the petitioners and other affected officers’ have had their salaries adversely reduced as they no longer enjoy the benefits they received upon their secondment to the respondent’s offices.
 - g. The petitioners maintain that all affected officers are aggrieved by the respondent’s actions and therefore urged the Honourable Court finds the petition filed with merit. The petitioners further urged this Honourable Court to allow their petition in terms of the reliefs sought therein.
3. The respondent opposed the petition by filing a replying affidavit dated 15.06.2023 and supplementary affidavit dated 29.06.2023 both sworn by Peter Kiambi, an officer appointed per section 13 of the [Kenya Revenue Authority Act](#) and working in the respondent’s Human Resource Division. The respondent’s case was urged as follows:
- a. The 1st to 4th petitioners and 60 other affected officers are members of the National Police Service who were seconded to the respondent’s Investigations and Enforcement Department for a period of three (3) years from the date of their individual contracts and others whose secondment contracts had been extended for a period of two (2) years after the lapse of their initial three (3) year contracts.
 - b. That the petitioners’ and other affected officers’ secondment contracts were subsequently terminated on 31st January, 2023. The termination was in line with the provisions of their secondment contracts that *inter alia* provided the secondment contract would be terminated on account of disciplinary or other grounds.
 - c. The respondent further states that the said termination was also done in line with the provisions of section 42 (3) of the [Public Service Commission Act](#), 2017, which provides thus,

“Where it is no longer necessary for a public officer on secondment to remain seconded and the secondment period has not lapsed, the public officer shall be entitled to revert to the public office held before secondment”.
 - d. The respondent stated that it is amenable to paying the petitioners and other affected officers’ salaries for three (3) working days for days worked (between 1st to 3rd February, 2023).
 - e. The respondent urged that the release of the 1st to 4th petitioners and other affected officers back to the National Police Service was fair and in line with policies and procedures. The respondent denies violating or breaching Articles 10, 19, 27, 41, 47, 48, 50 (1) of the [Constitution of Kenya](#) as alleged by the petitioners herein.



- f. The respondent states that the petitioners' and other affected officers' release back to their principal employer is not a removal from office and did not lead loss of gainful employment.
 - g. It is further the respondent's case that upon termination of the secondment contracts the petitioners and affected officers were to resume service with the National Police Service and would receive salaries as per their terms of employment with the National Police Service (the Principal Employer).
 - h. The secondment was governed by the Guidelines on Secondment in the Public Service duly exhibited on the respondent's supplementary affidavit and issued by the Public Service Commission in October 2016.
 - i. The respondent urged the petition be dismissed with costs to the respondent.
4. The petition was fixed for hearing on 21st June, 2023 and parties agreed to proceed by way of written submissions which were subsequently filed for the parties.
 5. To answer the 1st issue, there is no dispute that the petitioners and like affected officers were seconded to the respondent by the National Police Service Commission. The respondent issued each of the seconded officers a letter of secondment setting out the remuneration, other benefits and the terms and conditions of service. The secondment letter also stated thus,

“This appointment is subject to your acceptance of the terms and conditions of service as contained in this letter together with the Authority's Code of Conduct. The secondment is for a period of three (3) years unless otherwise terminated on disciplinary or other grounds.”

6. To answer the 2nd issue for determination, there is no dispute that the contracts of secondment were terminated by the letters addressed to each of the petitioners and other affected officers dated 31.02.2023 titled Notice of Termination of Secondment. Each of the termination letters stated as follows:

“This is to inform that you will be released back to the National Police Service with immediate effect. Please make arrangements to handover to the designated officer- as will be assigned by Commissioner – Investigations & Enforcement.

You will be paid salary and allowances up to and including 31st January 2023 being your last date of service.

Further and pursuant to Section 27(5) & (6) of the *Public Officer Ethics Act*, 2003, you are required to complete and submit a final Declaration of Income, Assets and Liabilities form for the period from 1st November 2021 to 31st January 2023 for onward transmission to Public Service Commission of Kenya. A Certificate of Service will be issued as provided for under Section 51(1) of the *Employment Act*, 2007 and upon surrender of the Staff Identification Card and Medical Smart Cards.

I take this opportunity to thank you on behalf of the Kenya Revenue Authority for the services you have rendered and wish you success in your future endeavors.

Yours sincerely,

Signed

Patience Njau – Nyaga (Mrs.)



7. The 3rd issue is whether the termination of the contract of secondment was unfair, unlawful and unconstitutional. The evidence per the secondment contract was that the secondment was for a period of three (3) years (or such other period as may have been extended) unless otherwise terminated on disciplinary or other grounds. Upon the material on record, the Court finds that there is no disciplinary process that was initiated and continued against the petitioners or other affected officers. Further, as submitted for the petitioners, there was no “other grounds” disclosed in the letter of termination of the secondments. While it is urged and submitted for the respondent that the termination was in line with the Guidelines on Secondment in the Public Service issued by the Public Service Commission in October 2016, both, the respective contracts of secondment and the letters of termination did not invoke or refer to the Guidelines on Secondment in the Public Service. The secondment contracts were silent as they did not incorporate the Guidelines and as well, the letters terminating the secondment did not state that the termination was in accordance with the Guidelines, generally or in any material provision. The Court finds that in any event, the respondent has not shown any provision of the Guidelines that may have been invoked in terminating the secondment contracts. It therefore appears to the Court that the respondent purported to invoke the Guidelines as a mere afterthought in circumstances that the secondment letter was complete in itself about the terms and conditions of the secondment. The parties were bound by the provisions of the secondment thus,

“... The secondment is for a period of three (3) years unless otherwise terminated on disciplinary or other grounds.”

The Court returns that the parties were bound accordingly and the petitioners and other affected officers were entitled to serve for the entirety of the initial 3-years or the extended 2-years of secondment tenure unless earlier terminated on disciplinary or other grounds. The Court returns that the respondent flagrantly violated that contractual provision and as submitted for the petitioners. The respondent relies on section 42(3) of the *Public Service Commission Act*, 2017 which states that where it is no longer necessary for a public officer on secondment to remain seconded and the secondment period has not lapsed, the public officer shall be entitled to revert to the public office held before the secondment. While the petitioners and other affected officers reverted to the positions or ranks held in the National Police Service, there is no material evidence before the Court showing that it was no longer necessary for the petitioners and other affected officers to continue on the secondment contracts.

8. As submitted for the petitioners, they had no expectation of such sudden termination of their respective secondment contracts. The Court considers that they are entitled to lament that their salaries were significantly reduced and they were no longer entitled to the enhanced remuneration and other benefits under the secondment contracts.
9. As submitted for the petitioners the respondent has admitted the unfairness and the unlawfulness in the manner the secondment was terminated when it was stated at paragraph 9 of the replying affidavit dated 15.06.2023 thus,

“9. That the respondent is amenable to pay the Petitioners and affected officers’ salary for three (3) working days (1st, 2nd, and 3rd February 2023) since it is evidenced that they were in office.”

The Court finds it was grossly unfair to terminate the secondment contracts without notice, without due reason, and in the manner that the terminations were retrospective by three days during which the petitioners and other affected officers were working – and the decision conveyed belatedly by three days



during which the termination had taken effect without petitioners' knowledge and who at material time continued to diligently work with full loyalty.

10. The Court finds that the flagrant breach of the secondment contracts amounted to actual violation of Article 10 of the constitutional national values and principles of governance including, as submitted for the petitioners, the rule of law, social justice, equity, non-discrimination and fair administrative action. The respondent violated Article 41 of the Constitution on fair labour practices which entitled the petitioners and the like affected officers the right to reasonable working conditions. As well, it is established that the respondent, in the manner the secondment contracts were terminated, violated Article 47 on fair administrative action that every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. While it was contractual that a reason be given, Article 47 (2) is imperative thus,

“(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

The Court finds that the respondent acted unreasonably by failing to comply with the fair contractual provision that the secondment could only be terminated upon disciplinary or other grounds. Further, the respondent failed to take into account that the sudden termination violated the petitioners' and like affected officers' right to fair terms and conditions of service per Article 41 of the Constitution and within their lamentations that they were suddenly faced with deteriorating life circumstances and financial difficulties squarely attributable to the termination. The Court finds for the petitioners and the other affected officers that the termination of the secondment contracts by the respondent amounted to violation of Articles 10, 41 and 47 of the Constitution. While making that finding the Court is alert that ILO Convention NO. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its Article 4 and in particular imposes the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal. Further, Committee on Economic, Social and Cultural Rights Thirty-fifth session Geneva, 7-25 November 2005 Item 3 of the provisional agenda, on the right to work, General comment No. 18 adopted on 24 November 2005 about Article 6 of the International Covenant on Economic, Social and Cultural Rights at the introduction stated thus,

“1. The right to work is a fundamental right, recognized in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as laid down in article 6, deals more comprehensively than any other instrument with this right. The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community”

In that consideration, it appears to the Court that the petitioners and other like officers affected were adversely impacted financially and their wellbeing and that of their families as per their lamentations in the manner that the respondent suddenly terminated the secondment contracts. As submitted for the petitioners, there was no established reason for termination per the contractual provision or as envisaged in sections 43 and 45 of the Employment Act, 2007 that the reason exists as genuine and is a fair reason. It was unfair and unconstitutional as it was in violation of their rights as already found.



11. To answer the 4th issue, the Court returns that the petition does not violate the doctrine of constitutional avoidance as urged for the respondent. The respondent invokes section 12 (2) of the *Employment and Labour Relations Court Act*, 2011 as entitling the petitioners to a statutory remedy. The cited provision is about jurisdiction of the Court and which the petitioners have invoked by way of the instant petition. The respondent has not shown a statutory remedy that is being avoided by the petitioners. To the contrary, the Court has found that the petitioners have established violation of their constitutional rights.
12. The 5th issue is on remedies. The Court finds as follows:
 - a. The petitioners have shown that they are entitled to the declaration that the respondent's unilateral decision to summarily terminate the secondment of the petitioners and affected officers by various letters dated 31st January, 2023 which resulted to reduction of their salaries and other work benefits was un-procedural, unlawful, unconstitutional as found by the Court, involved unfair or discriminatory treatments and amounted to unfair and unlawful termination from employment.
 - b. The petitioners prayed for an order to issue compelling the respondent to compensate the petitioners' and all affected officers' salaries that would have been earned in their respective positions at the respondent's offices for the remainder of their respective contractual term from the month of February 2023 without any deductions whatsoever and without any further delay. The Court has considered that after the secondment contracts were suddenly terminated, all the petitioners and other like affected officers reverted to their ranks in the National Police Service. Granting the order as prayed for would not be equitable but would be oppressive to the respondent and in particular the tax payers who fund both the National Police Service and the respondent. The prayer is declined.
 - c. The petitioners prayed for an order for general and aggravated damages as compensation for the remainder of the respective contract periods being for unlawful, unfair, discriminatory and un-procedural termination of the petitioners' and affected officers' secondment and termination of service; the anxiety and emotional suffering occasioned by the respondent's actions to unilaterally terminate the employment of the petitioners and affected officers without any reasonable cause. This was particularized as follows:
 - i. 12 months' pay as compensation.
 - ii. 3 months' notice pay.
 - iii. Health cover for one-year equivalent.
 - iv. Relocation costs equivalent to one month pay.
 - v. 30 working days accrued leave for the year 2023.
 - vi. General damages for loss of legitimate expectation equivalent to three months' pay.

The Court has already found that the claimants reverted to their service in the National Police Service. The Court finds that the petitioners have not made out a case for aggravated damages. Elaborate submissions have been made on the limb of compensation. The Court has considered section 3(2) (b) of the *Employment Act* which provides that the Act does not apply to the Kenya Police, the Kenya Prisons Service or the Administration Police Service. The Court considers exclusion is to those services with respect to persons in employment of the enumerated services. The Court finds that the termination of the secondment contracts



was with respect to service of the respondent and not the National Police Service. The Court returns that the service of the petitioners and the like affected officers while being police officers in the respondent's service was free from the inapplicability of the *Employment Act*, 2007 as envisaged in the said section 3. The Court will therefore apply the factors in section 49 in awarding compensation to the petitioners and like affected officers. First, the termination was sudden with serious financial stress upon the affected officers as they lost the enhanced remuneration and other benefits like the superior insurance health covers. Second the respondent imposed a termination taking effect retrospectively while the officers continued to work for three days long after termination took effect. Third, the respondent failed, deliberately or unfairly so, to pay for the work done after the termination. Fourth, the respondent violated the constitutional provisions and rights as already found. All these are aggravating factors which would entitle the officers to maximum compensation of 12 months' gross salaries. However, the Court has considered a mitigating factor that they reverted back to their ranks in the National Police Service. Accordingly, the Court considers 9 months gross salary for the unfair unconstitutional and unlawful termination of the secondment contract plus one-month salary in lieu of due termination notice will meet ends of justice. Thus, each petitioner is awarded 10 months' gross monthly salaries at the rate as at termination (Less PAYE). A sweeping prayer for each officer to be awarded 30-days pay in lieu of annual leave for 2023 is declined as the leave as claimed has not been shown to have accrued and been earned. It should also be obvious that each petitioner or affected officer needed to strictly prove the claim but which was not done at all. The other headings under the prayer are deemed abandoned for want of due submissions or are unjustified as not based on secondment contract or another basis.

- d. The petitioners prayed for an order for general and aggravated, including exemplary damages for breach of the petitioners' and all affected officers' constitutional right to non-discrimination, fair administrative action, right to human dignity and self-worth. The breach of rights and the constitution has been considered as an aggravating factor in awarding 9 months compensation under section 49 of the *Act*. There appears no submissions and justification for award of aggravated or exemplary damages beyond the compensatory award already given and as per the known applicable principles. Thus, the prayer will collapse as declined.
- e. The petitioners have succeeded and the respondent will pay their costs of the petition.

In conclusion, judgment is hereby entered for the petitioners and the 37 other affected officers, against the respondent for:

1. The declaration that the respondent's unilateral decision to summarily terminate the secondment of the petitioners and affected officers by various letters dated 31st January, 2023 which resulted to sudden reduction of their salaries and other work benefits was unprocedural, unlawful, and unconstitutional as found herein by the Court; as it involved unfair or discriminatory treatments and amounted to unfair and unlawful termination from employment.
2. The respondent to pay each of the petitioners and the 37 other affected officers 10 months' gross monthly salaries at the last monthly rate prior to the termination of the secondment contracts (Less PAYE) and the amount due to each be computed as part of the decree.
3. The amount in (2) above be paid by 31.12.2023 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.



4. The respondent to pay costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
MONDAY 30TH OCTOBER, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

