



Kosgei v Nandi County Public Service Board (Employment and Labour Relations Cause 175 of 2018) [2023] KEELRC 2604 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2604 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 175 OF 2018
MA ONYANGO, J
OCTOBER 19, 2023**

BETWEEN

JOHN CHERUIYOT KOSGEI CLAIMANT

AND

NANDI COUNTY PUBLIC SERVICE BOARD RESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim filed in court on 14th May 2018, the Claimant sought compensation for unfair, unprocedural and unlawful termination of his employment.
2. The Claimant alleges that he was employed by the Respondent in the year 2014 as an assistant political advisor to the Governor for a fixed term of 4 years with effect from 1st July 2014.
3. He further avers that he carried out his duties well without fail from the time of appointment until 25th September 2017 when the Respondent without any lawful cause issued him with a termination letter.
4. According to the Claimant, he was not accorded a fair treatment as the termination was unlawful, unprocedural and it failed to take into consideration the terms of the employment contract dated 1st July 2014 by terminating him on grounds that he was a staff of the previous Governor. He contended that he was discriminated against by the Respondent on political grounds and that his employment contract was terminated without lawful cause against the provisions of Article 27(5) of *the Constitution* and section 5(2) of the *Employment Act*.
5. The Claimant further states that his right to proceed on leave was also violated the entire period he was in employment contrary to the provisions of the *Employment Act*.



6. The Claimant therefore seeks the following reliefs;
 - i. A declaration that the Claimant was unlawfully discriminated and terminated from employment
 - ii. Unpaid leave allowances for the contract period from 1st July 2014 to 31st June 2018
 - iii. An award of compensation for the unpaid and unexpired term from 1st November 2017 to 31st June 2018
 - iv. An award of General damages
 - v. Costs of this suit
 - vi. Any other appropriate relief as the court may deem fit to grant
7. The Respondent filed a Response to the Statement of claim on 15th August 2019 denying the averments in the Claim. It avers that the Claimant was appointed as an Assistant Political Advisor by the immediate past governor and ought to have been aware that his position would be rendered irrelevant thus he had no basis for having legitimate expectation that his employment at the County would continue once there was a change of guard.
8. The suit was heard on 15th March 2023, where the Claimant testified as CW1 in furtherance of his case. CW1 in his testimony basically reiterated the contents of his Statement of Claim.
9. On cross examination, CW1 stated that his contract was terminated after the new governor was elected. He denied that the incoming and the outgoing governors had different ideologies.
10. The Respondent witness, Timon Kigen Lel Testified on 19th April 2023 as RW1. He introduced himself as the Principal Legal Officer in the office of the County Attorney in Nandi County Government.
11. RW1 in his testimony stated that the Claimant was employed as an assistant political advisor to the former governor, Hon Cleophas Lagat who served between 2013 and 2017. He maintained that the role of the Claimant was subject to the term of the then Governor. It was his testimony that the sitting governor who was elected in office in 2017, scrapped the Claimant's position and retained the position of only one advisor. RW1 stated that the Claimant was given one month's notice before his contract was terminated as stipulated in his contract.
12. On cross examination, RW1 stated that the new governor came with his staff and that the Claimant's term ended when the term of the previous governor ended.
13. In re-examination, it was RW1's evidence that the position of assistant advisor was not retained by the incoming governor.
14. The Claimant's written submission were filed on 2nd May 2023 while the Respondent filed its submissions on 19th June 2023.

DETERMINATION

15. From the pleadings, the evidence before court, the submissions of the parties and the authorities cited therein, the issues for determination are;
 - i. Whether the Claimant's contract was unfairly terminated.



ii. Whether the Claimant is entitled to the reliefs sought.

16. The law on termination of contracts of service in Kenya is governed by sections 41,43,44,45 and 47 of the [Employment Act](#), 2007.
17. It is not in dispute that the Claimant herein was employed as an Assistant Political Advisor to the former governor on 1st July 2014 for a not exceeding term of (4) four years. It is the Claimant's case that he was not allowed to complete his contract term by the Respondent who issued him with a termination letter on 25th September 2017 without any lawful cause. The notice was to expire on 31st October 2017 when the Claimant's employment contract was to cease. He was expected to vacate office by the said date.
18. The Respondent on its part has argued that the political ideologies of the new governor who was elected in August 2017 were distinct from the outgoing governor and the position of the Claimant became untenable.
19. It is the Respondent's case that the Claimant's duties such as providing direction to the Governor and participating in the preparation of campaign material were frustrated as the incoming and outgoing governor had competing interests as they were political rivals.
20. The Claimant's appointment letter is reproduced hereunder:

Republic Of Kenya
County Government Of Nandi
Nandi County Public Service Board
Box 802-30300
Kapsabet
No.ncpsb1/app/69 1st July 2014
Cheruiyot Kosgei
Box 1052
Kapsabet.

Ref: Offer Of Appointment

Following the recommendation of H.E The Governor and subsequent approval by Nandi County Public Service Board Meeting, it has been decided that you be appointed to the post of Assistant Political Advisor at Job group 'Q' Nandi County Government.

The salary range attached to this post is: Kshs 89,748 p.m – Kshs 120,270 p.m

House allowance of Kshs 40,000

Commuter allowance of Kshs 14,000

You will enter this salary scale at minimum

This appointment will be on contract basis for a maximum term of four years and it takes effect from 1st July 2014.

The Responsibilities attached to this post include but not limited to the;

- i. Providing political direction to the Governor



- ii. Monitoring political trends both in the County and at the National level and advice the Governor accordingly
- iii. Ensuring separation of powers between the office of the Governor, County Assembly and other offices in the County
- iv. Promoting national unity, peace and stability in the county
- v. Conducting socio-political research to advice on policy
- vi. Monitoring and evaluating political trends in the county
- vii. Providing linkage between the office of the Governor, media and other stake holders
- viii. Appraising the Governor on matters of political interest
- ix. Assisting to develop procedures and strategies for addressing issues of political interest
- x. Participating in the preparation of campaign and electoral material and policy positions and papers as directed by the Governor

Signed

Esther Keter

Secretary

Nandi County Public Service Board

cc. County Secretary

Chief Officer- Finance

21. It is evident from the letter of appointment that the Claimant was employed on a fixed term contract of 4 years which was to lapse on 1st July 2018.
22. This court in the case of *Dan Caxton Chogo Undusu v Jubilee Insurance Company of Kenya Limited* [2020] eKLR observed;

“Fixed term contracts have a definite commencement and termination date. Thus should it not be terminated prior to expiry date thereof, it lapses by effluxion of time. In the instant case no notice was required to terminate the contract as the contract end date had reached and there was no agreement on its renewal.”
23. In the instant case the Claimant’s contract was for “a period of not less than 4 years”. This means that unless it was terminated for lawful cause it was to expire upon effluxion of its term of 4 years. The Respondent however terminated the same before its expiry date.
24. The Respondent’s reason for termination of the contract as stated in the letter of termination was that having been appointed by the immediate past governor the Claimant had to vacate office to allow the new governor to recruit his own staff. The letter of termination reads:

County Government Of Nandi

County Public Service Board



Ref:ncpsb/term/2917/vol.1/7 Date:25th Sept 2017

Mr John Cheruiyot Kosgei

Box 1052

Kapsabet

Dear Sir,

Re: Termination Of Service

As you are well aware, the post you serve in is that of a personal Staff of the previous Governor. Upon taking up office by the current Governor, the personal staff of the previous governor have to vacate office to allow the personal staff of the current governor to take up the said offices.

In this regard therefore, the Nandi County Public Service Board hereby notifies you of its decision to issue you with a month notice to terminate your contract of service.

Consequently, your service to the County Government of Nandi shall be deemed terminated on 31st October, 2017, close of business as per section 35 of the [Employment Act](#) 2007

Further, take note that your contract shall be deemed to have terminated effective 31st October 2017, and you will be expected to have vacated Office by the said date.

Yours faithfully,

Signed

Esther Keter

Secretary

Nandi County Public Service Board

cc. County Secretary

Chief Officer- Finance

25. It is evident from the letter that the Claimant was removed from office on grounds of his presumed political affiliation. I say presumed as he was never given an opportunity to state whether or not he was unable to work with the new governor in the same or other position.
26. The letter of termination clearly states that was removed from office to give way to the governor to appoint his own person to the position. He was therefore discriminated in favour of a person to be appointed by the new governor. Section 5 of the [Employment act](#) prohibits discrimination on grounds of among others, political or other opinion. Section 5(2) and (3) provide as follows:
 - (2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
 - (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
 - (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social



origin, disability, pregnancy, mental status or HIV status;

- (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

27. Section 46 of the Act provides for reasons which would automatically constitute unfair termination as follows:

46. Reasons for termination or discipline

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

- a. female employee's pregnancy, or any reason connected with her pregnancy;
- b. the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;
- c. an employee's membership or proposed membership of a trade union;
- d. the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
- e. an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;
- f. an employee's refusal or proposed refusal to join or withdraw from a trade union;
- g. an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;
- h. an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresolvable and without foundation; or (i) an employee's participation in a lawful strike.



28. The above provisions are reinforced by Article 27 of *the Constitution* which prohibits discrimination. Article 27 provides:

27. Equality and freedom from discrimination

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
3. Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
5. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
6. To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
7. Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.
8. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than twothirds of the members of elective or appointive bodies shall be of the same gender.

29. Besides the foregoing, the Respondent failed to comply with section 41 of the *Employment Act* which provides for the procedure for termination. The letter of termination selectively applied employed the Act by making reference to section 35 thereof but ignoring the other provisions of the Act that the applicable in the event of termination of employment. Section 45 specifically prohibits unfair termination. The section provides:

45. Unfair termination

1. No employer shall terminate the employment of an employee unfairly.
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.
- 3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- 4. A termination of employment shall be unfair for the purposes of this Part where—
 - a. the termination is for one of the reasons specified in section 46; or
 - b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- 5. In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
 - a. the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
 - b. the conduct and capability of the employee up to the date of termination;
 - c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51



and the procedural requirements set out in section 41;

- d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- e. the existence of any previous warning letters issued to the employee.

30. It is therefore my finding that the termination of the Claimant's contract was not only unfair in terms of section 45 of the Employment Act but also discriminatory and therefore a violation of his rights under article 27 of the Constitution and a violation of section 5 of the Employment Act.

31. Having found that the termination of the Claimant's contract was unfair, I now consider if he is entitled to the remedies sought. In his Statement of Claim, the Claimant sought;

- a. A declaration that the Claimant was unlawfully discriminated and terminated from employment

I have already made a finding that the termination of the Claimant's contract was both unfair and discriminatory.

- b. Unpaid leave allowances for the contract period from 1st July 2014 to 31st June 2018

32. The Claimant testified that he did not take leave for the period he worked for the Respondent. The Respondent did not deny that the Claimant did not take leave. I award the Claimant leave for the period he worked being 3 years and 4 months. At the statutory rate of 1.75 days per month, the Claimant is entitled to 70 days leave which I award him at Kshs. 335,412

- c. An award of compensation for the unpaid and unexpired term from 1st November 2017 to 31st June 2018

33. The Claimant's contract was terminated with effect from 31st October 2017. From his contract of employment, his contract was to expire on 31st June 2018. The prayer for unexpired term of contract is not supported by the law and since the Claimant's contract did not provide for the same, it is not payable and is declined.

- d. Award of General Damages

34. The Claimant is however entitled to compensation for the unfair termination of his contract as well as damages for discrimination. Taking into account all relevant circumstances including the factors set out in section 49(4) of the Employment Act I award the Claimant 12 months salary in the sum of Kshs. 1,724,976 to cover both compensation for unfair termination and general damages for discrimination.

35. The Respondent shall pay the Claimant's costs of the suit

36. Interest shall accrue at court rates from date of judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19TH DAY OF OCTOBER, 2023

M. ONYANGO



JUDGE

