



Akubu v County Secretary, County Government of Meru & 4 others (Employment and Labour Relations Petition E008 of 2023) [2023] KEELRC 2863 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2863 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS PETITION E008 OF 2023
ON MAKAU, J
NOVEMBER 10, 2023**

BETWEEN

SILAS GITONGA AKUBU APPLICANT

AND

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MERU ... 1ST
RESPONDENT**

GOVERNOR, COUNTY GOVERNMENT OF MERU 2ND RESPONDENT

MERU COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

**MERU COUNTY ALCOHOLIC DRINKS CONTROL BOARD ... 4TH
RESPONDENT**

THE COUNTY GOVERNMENT OF MERU 5TH RESPONDENT

JUDGMENT

1. By a Petition dated 8th June 2023, the petitioner sued the respondents for alleged violation of his constitutional rights and unfair termination of his employment. The Petition is founded on Articles 2, 2(6), 3, 10, 19 (2), 20 (1 & 2), 22 (1), 27 (1, 2 & 3), 28, 27, 29 (d), 40, 47 (1 & 2), 50 (1), 73, 75, 165, 232 and 236 of *the Constitution* and section 76 of the County Government Act and Section 41,43, 44, 45, 46, 47 and 50 of the *Employment Act* and the Fair Administrative Actions Act. The Petition prays for the following reliefs: -
 - a. A declaration that the Respondent’s Notice of revocation of employment/appointment dated 10th May 2023 dismissing the Petitioner from employment infringed the Petitioner’s fundamental rights and the same is illegal, null and void ab initio for being in convention of Articles 25 (c), 28, 31, 41, 47, 48, 50, 10, 73, 232 and 236 of *Constitution of Kenya, 2010*.



- b. An order for judicial Review quashing and/or setting aside the decision of the Respondents to dismiss the Petitioner from employment as contained in the letter dated 10th May 2023 and any other consequential subsequent actions emanating there from.
- c. An order of prohibition and injunction to issue restraining the Respondents by themselves their servants, employees, agents or anyone acting on their behalf from terminating the Petitioner from employment based on the same allegations contained in the letter dated 10th May 2023.
- d. An order directing the Respondents to unconditionally reinstate the Petitioner back to his employment as a senior Licencing Officer without loss of status, benefit or rank.
- e. General damages, punitive and exemplary damages for dismissal for breach for breach of the Petitioner's rights guaranteed under Articles 25 (c), 28, 31, 41, 47, 48 and 50 of the Constitution of Kenya, 2010.
- f. Costs of the Petition and any other relief that the Honourable Court may deem fit and just to meet the ends of justice.

Factual background

2. The Petitioner was employed by the 3rd Respondent on 3rd January 2022 as a Senior Licencing and Compliance Officer. The employment was on permanent and pensionable terms. His starting salary was Kshs. 55,150/- per month, housing allowance, and commuter allowance. The employment was after a competitive recruitment where he presented his original academic certificates including KCPE, KCSE, Certificate from Meru Teachers College, diploma from Kiambu Institute of Business Studies (KIBS), and Bachelors Degree of Business Administration Degree from Mount Kenya university. He also brought satisfactory reports from his referees, initial declaration of income, assets and liabilities and a valid certificate of good conduct.
3. The Petitioner accepted the offer and began service from 4th January 2022 where he served in the position until his transfer to the Department of Environment, Natural Resources and Climate Change. However, his services were abruptly terminated vide a letter dated 10th May 2023 on grounds that he presented a fake diploma certificate from Kenya Institute of Professional Studies (KIPS) to procure employment from the county government.
4. It is the petitioner's case that dismissal was unjustified and it was done without prior notice, and without being heard on the alleged fake Diploma. Had he been given a chance, he would have shown that he was not a holder of the alleged Diploma Certificate from KIPS but KIBS
5. It is further Petitioner's case that the decision to terminate his employment was done by the 1st respondent without authority since there was no resolution of the County Public Service Board.
6. In the petitioner's view, the termination was illegal, unfair, injudicious, malicious and it has violated his fundamental rights to fair hearing, fair administrative action, right to dignity, freedom from degrading treatment, and economic rights. The actions by the respondents were illegal, irrational, unreasonable, arbitrary, oppressive and procedurally unfair. Hence the reliefs sought in the petition.
7. The Respondents objected to the Petition by the Notices of Preliminary Objection dated 14th June 2023 and 15th June 2023 but they were all dismissed vide a ruling rendered on 4th July 2023. Thereafter the Respondents filed Replying Affidavit sworn on 11th July 2023 by the Acting Secretary of the Board, Ms. Virginia Kawira.



8. In a nutshell the respondents' case is that the Petitioner made an application for employment dated 27th November 2019 in which he stated that he held a Diploma in Business Management. He enclosed a Curriculum Vitae indicating that he had a Diploma in Business Management from KIPS obtained in 2009. He then enclosed his testimonials including a Diploma in Business Management from KIPS endorsed with the EACC stamp on 26th November 2019.
9. It is further respondent's case that the Petitioner's contract of employment was subject to production of the original certificates for verification. Further, under section 75 of the County Governments Act (CGA), the employer reserved the right to revoke the employment in the event of fraudulent misrepresentation of the academic qualification by the employee.
10. The 3rd respondent sought authentication of the said Diploma Certificate vide its letter dated 4th May 2023 to KIPS. The Academic Registrar KIPS responded to the request for authentication vide an email dated 9th May 2023 and letter dated 18th May 2023 stating that the document did not originate from the institution as the features of the certificate and the serialization did not resemble those of the institution.
11. As a result of the said response, the 3rd Respondent revoked the petitioner's appointment on 10th May 2023, for securing employment using forged academic documents. He was then required him to hand over and register his exit to his immediate supervisor. According to the respondents there was no termination of employment, but a revocation of appointment.
12. It is the respondents' case that by passing off fake academic certificate meant that the petitioner lacked capacity to enter into the employment contract and that there was fraudulent misrepresentation. As such, the employer was entitled to revoke the appointment. Consequently, the petitioner was deemed to have failed integrity test and to have breached the doctrine of utmost good faith by presenting fake academic certificate.
13. The academic certificates annexed to the petition as Annexure SGA2 (iii) –(v) are allegedly strange to the 3rd Respondent. Therefore, the court was urged to dismiss the petition with costs.

Submissions

14. The petition was argued orally in open court by the counsel for both sides. Mr. Maranya advocate for the petitioner adopted facts set out in the petition and the supporting affidavit. He then submitted that the Petitioner was appointed in job group N whose minimum requirement was a degree but the Petitioner has a masters degree and a Diploma.
15. He argued that the manner of dismissal was unfair as the Petitioner's first encounter with the allegations was in the dismissal letter. He submitted that the allegation was false as the Petitioner never attended KIPS as his diploma was from Kiambu Institute of Business Studies (KIBS). He further submitted that the dismissal letter was written by the Secretary/ CEO of the Board without authority as no minutes of the Board have been produced.
16. He further submitted that the termination was unfair, unequitable, injudicious and draconian and against the principle of fair administrative action. He relied on the case of Mercy Njoki Karingithi v Emerald Hotels Resorts & Lodges Ltd [2014] eKLR where the Court held that, where an employment relationship has started, legal obligations arise on the side of each of the parties.
17. He contended that section 76 (1) (g) of the CGA mandates the Board to observe the principles of natural justice, more so the right to be heard. He further contended that subsection 2 of the said section prohibits the punishment of public officer in any manner contrary to the Constitution and statute. He



- reiterated that the alleged forgery ought to have been investigated and the petitioner heard before the dismissal. He thus urged the Court to find that there was violation of fundamental rights and remedy appropriately.
18. He relied on the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR where the Court held that an officer cannot be dismissed without giving him a fair hearing. He therefore prayed the court to exercise its jurisdiction under Article 23 of [the constitution](#) to undo the illegal action and uphold the Petitioner's constitutional rights.
 19. Kaumbi for the 3rd Respondent adopted the facts in the Replying Affidavit and submitted that the Petitioner was employed on the basis of the documents he presented including his Curriculum Vitae and academic certificates. He further submitted that the Petitioner indicated in his CV that he had acquired a Diploma in Business Administration from KIPS between 2006- 2009 and attached a copy. He reiterated that the respondent confirmed from the KIPS that the said diploma certificate was fake and revoked the petitioner's appointment as mandated by section 75 of the CGA.
 20. He argued that the Petitioner declared to the EACC that the information presented was true and correct. He further argued that the Petitioner intentionally misled the Board to believe that he had the qualification for the job in breach of the doctrine of utmost good faith. He also argued that an employer is entitled by section 44 of the [Employment Act](#) to summarily dismiss an employee for gross misconduct. He submitted that the presentation of fake academic certificates to secure employment amounted to gross misconduct. He relied on this Court's decision in the case of *Janet Melly Otieno v Kenya Ports Authority* [2018] eKLR where the Court declined to reinstate the employee or award damages because that the employer had proved on a balance the employee had forged the KCSE certificate in order to secure employment and/ or promotion.
 21. He further submitted that the 3rd Respondent sufficiently complied with the provisions of section 43 of the [Employment Act](#) in revoking the petitioner's appointment. He contended that the Petitioner has not produced any verification of the certificate from KIBS to verify the certificate placed before the Court. He relied on the case of *John Kisaka Masoni v Nzoia Sugar Co. Limited* [2016] eKLR where the Court found that the dismissal of the Claimant was unprocedural and unfair for failure to comply with section 41 of the [Employment Act](#) but declined to award any damages to the Claimant because he had forged a certificate.
 22. He submitted that the dismissal was not termination but revocation due to misrepresentation, and as such there was no valid contract formed. Consequently, he prayed that the Petition be dismissed with costs.
 23. Mr Mwirigi Advocate for the 1st and 2nd Respondents submitted that equity requires that he who comes to equity comes with clean hands. He submitted that the Petitioner's allegation that the requirement for the job was only a degree was not correct and contended that a diploma was also required in order to get the job. He argued that the Petitioner never produced the alleged certificate from KIBS. He also argued that there was no evidence to counter the fact that the revocation was a decision by the Board.
 24. Mr. Ashaba for the 4th and 5th Respondents submitted that the Petitioner did not show how the 4th and the 5th Respondents breached his rights. He also urged the Court to note that the Petitioner was not terminated but the appointment was revoked under section 75 g of the CGA. Finally, he associated himself with the submissions by Mr. Kaumbi for the 3rd Respondent and prayed that the petition as against the 4th and 5th Respondents be dismissed with costs.
 25. In a brief rejoinder, Mr. Maranya submitted that the revocation of the petitioner's appointment was not grounded on the verification letter from KIPS. He observed that the Respondents wrote to KIPS



on 4th May 2023 and a response was sent on 18th May 2023 after the revocation was on 10th May 2023. He also contended that the Respondents avoided the question on denial of right to fair hearing in their submissions. He also argued that they did not produce any documents to prove that any criminal case was commenced against the Petitioner for fraud.

26. He maintained that section 76 of CGA brings in the issue of rules of natural justice and constitutional principles before any action by the County Board and maintained that the dismissal of the petitioner was unlawful and unfair.
27. In order to verify the alleged forgery, the Court directed the Respondents to produce the original application for employment as presented by the petitioner when he applied for the job. Mr. Wilson Munene, an advocate of this court and the ECM Legal Affairs Public Service Management Meru County appeared in court and he was led by Mr. Kaumbi Advocate to produce the complete job application by the petitioner dated 27th November, 2019. The application comprised his application letter dated 27th November 2019, CV and testimonials. He stated that his roles included keeping custody of the employee records.
28. Upon cross examination by Mr. Maranya advocate, he stated that the County Board receives the employees' documents on behalf of the County Government but he is the one who keeps custody of the same. He stated that the copy of the Petitioner's application filed herein by the respondents, was a photocopy of what he had just produced before the Court. However, he admitted that page 9 of the photocopy was highlighted while the original he produced was not highlighted. He explained that the photocopy could have been copied from another photocopy which was highlighted before being photocopied. He denied that the documents were tampered with.

Issues for determination and analysis

29. Having considered the Petition, affidavits and the submissions by parties, it is clear that the petitioner was still working for the county government before he made the application for the position of Senior Licensing and Compliance Officer on 27th November 2019. The letter indicated that he possessed a University degree in Business Management and a diploma in Business Management. The application letter was accompanied by his CV and academic certificates. The petitioner was appointed to the position on permanent and pensionable terms with effect from 3rd January 2022. However, vide the letter dated 10th May 2023, the 3rd respondent allegedly revoked the petitioner's appointment for the reason that he presented a fake diploma certificate from KIPS to procure the appointment.
30. The following main issues fall for determination:
 - a. Whether the petitioner sought the appointment using a fake Diploma Certificate.
 - b. Whether the revocation of the Petitioner's appointment violated his constitutional rights and rules of natural justice,
 - c. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petitioner presented a fake diploma.

31. The respondents contended that the petitioner presented a CV which indicated that he studied in KIPS between 2006 and 2009 and attained a Diploma in Business Management. Further that, the petitioner attached the CV and copy of Diploma certificate to the application letter dated 27th November 2019. However, the petitioner disowned the Diploma Certificate from KIPS and maintained that he



- presented a Diploma Certificate from KIBS. He further denied the entry in his CV which indicates that he attended KIPS in 2006-2009 and accused the respondents for forgery.
32. The burden of proving that the disputed entry was made by the petitioner lies with the respondents who are alleging that the document was presented by the petitioner. I have carefully considered the documents presented by the two sides. It is true that the copies of the petitioner's CV produced by the respondents indicate on page three that he attended KIPS from 2006 to 2009 and attained a Diploma Certificate. A copy of Diploma Certificate from KIPS is also attached to each copy of the CV.
 33. There are, however some discrepancies notable on both the CV and the Diploma Certificate produced through the Replying Affidavit and the ones produced by Mr. Munene, the Custodian of the original letter. The indication that the petitioner attended KIPS from 2006 to 2009 and obtained Diploma Certificate is highlighted on the copy annexed to the supporting Affidavit but the original produced by Mr. Munene is not highlighted. It means that the former was not photocopied from the original copy.
 34. On the other hand, the copy of the Diploma Certificate annexed to the Replying affidavit sworn on 11th July 2023 does bear receiving stamp from the EACC while the copy produced by Mr. Munene bears a receiving stamp from the EACC. It also means that the former was not photocopied from the latter.
 35. The question that begs for answer is, where did the CV and the KIPS Diploma Certificate annexed to the replying affidavit come from since they differ from the ones produced by Mr. Munene, custodian of the original? The second question is why is it that the discrepancies only relate to the Diploma Certificate?
 36. The answer to the first question fairly simple. The CV and the Diploma Certificate annexed to the Replying Affidavit were not photocopies from the ones produced by Mr. Munene. If they were, they would look alike in every aspect. Therefore Mr. Munene should explain where he got the copy of the CV and KIPS Diploma Certificate from ,since they differ from the ones filed in court by the County Board two months before he produced his.
 37. As regards the second question, the answer is that the respondents tampered with the documents to fortify their defence. They tampered with the documents produced by the County Board by having it stamped with a backdated receiving stamp from the EACC. Having considered the evidence before the court I find that the respondents have failed prove on a balance of probability that the petitioner procured employment using a fake Diploma certificate from KIPS.

Whether the revocation of appointment violated the Petitioner's constitutional.

38. The Respondents argued that the dismissal was not a termination per se but a revocation of appointment as per section 75 of the CGA. The said section states as follows:

Action on irregularity of process.

75. If it comes to the attention of the County Public Service Board that there is reason to believe that any process or decision under this Part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may—

- (a) revoke the decision;
- (b) direct the concerned head of department or lawful authority to commence the process afresh;
or
- (c) take any corrective action including disciplinary action.”



39. The above provision contemplates that before any administrative action can be taken by County Board regarding a suspected irregularity or fraud, investigations must be undertaken conducted. The Petitioner contended that no investigations were conducted and that the decision was arbitrary made by the 3rd respondent's Secretary. He was not given any hearing and no minutes of the County Board was produced before the court, to prove that the decision to revoke the appointment was made by the Board. The respondents contended that it wrote to KIPS to verify the disputed Diploma Certificate before revoking the same. They further argued that the revocation of the appointment was not equal to termination of employment and therefore the petitioner cannot seek protection under the employment and labour laws.

40. Logically, revocation of an appointment by the employer amounts to termination of the petitioner's employment. It is an administrative action by the employer with detrimental effects on the petitioner. Article 47 (1) (2) and (3) of *the Constitution* provide that: -

- “(1) (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (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.
- (3) Parliament shall enact legislation to give effect to the rights in Clause (1) and that legislation shall-
- a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal, and
- b. Promote efficient administration.”

41. The rights under Article 47 of *the Constitution* are illuminated by the Fair Administrative Actions Act (FAAA). Section 2 of the Act defines administrative action as –

- “(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

42. Section 4(3) of the Act then provides that –

- “where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision –
- a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and make representations in that regard;
- c. Notice of a right to a review internal appeal against an administrative decision, where applicable;
- d. A statement of reasons pursuant to section 6;
- e. Notice of the right to legal representation, where applicable;



- f. Notice of the right to cross-examine; where applicable; or
- g. Information, materials and evidence to be relied upon in Making the administrative action”

43. The above provisions basically codify the rules of natural justice which requires that a person shall not be condemned unheard. Respondent herein admitted that they condemned the petitioner unheard. In this case the petitioner was never accorded any chance to defend himself whether in writing or verbally before the revocation of his appointment. The said action also amounted to removal from office or dismissal of a public officer from employment without due process of law. Article 236 of the constitution provides that: -

“ A public officer shall not be –

- (a) ...
- (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

44. The above provision is given effect by section 41 and 45 of the Employment Act which provides that: -

“ 45.

- (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.”

“ 41 (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.”



45. Without belabouring the point, it is clear that the petitioner has proved on a balance of probability that his right to fair labour practices and fair administrative action have been violated by the respondents through the letter date 10th May 2023, which revoked his appointment. He has proved and the respondents have admitted that he was condemned unheard contrary to the mandatory provision of *the constitution* and the said statutes.
46. I gather support from *Kenfreight (EA) Limited v Benson K. Nguti* [2016] eKLR, where the Court of Appeal held that: -
- “It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...
- Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.
47. As regards the reason for the revocation, I have already made a finding of fact that the respondent did prove on a balance of probability that the disputed Diploma certificate was presented to the 3rd respondent by the petitioner. Consequently, I am satisfied that the petitioner has proved on a balance of probability that the revocation of his appointment was not justified. His Diploma certificate from KIBS has not been challenged.
48. In addition to the foregoing, the revocation of the appointment was done on 10th May 2023 before receipt of the letter dated 18th May 2023 from KIPS. It seems like it was done on the basis of an email dated 9th May 2023 and without any further investigation to verify whether it is the petitioner who presented. The petitioner’s side of the story had not been heard. No minutes or record of the County Board during the interview or shortlisting were produced to prove that the fake Diploma certificate was presented it by the petitioner. Therefore, I further find that the respondent has failed to prove on balance of probability that the revocation was grounded on a valid and fair reason.
49. Without proper and satisfactory reason to justify the revocation of the petitioner’s appointment the administrative action taken was irrational. It was meant to create vacancy by dismissing the petitioner. I say so because the 3rd Respondent’s letter dated 4th May 2023, Paragraph 2 stated as follows:
- “The Meru County Public Service Board is in the process of recruiting officers for various positions within the county establishment...”
50. There was no vacancy in the petitioner’s position as at 4th May 2023 and therefore one wonders which various positions were being filled by the recruitment process then. The letter itself is misleading since the petitioner had already been appointed and served for over one year.
51. From the foregoing matters, I find that the revocation of the petitioner’s appointment was capricious, and unfair both procedurally and substantively. Further, it violated the petitioner’s constitutional rights to fair labour practices and fair administrative action as enshrined under Article 41 and 47 of *the constitution*.



Whether the Petitioner is entitled to the reliefs sought?

52. Having established that the Petitioner's employment was unfairly terminated through revocation of his appointment, I find that the petitioner is entitled to the orders herein below:
- a. A declaration that the Respondent's Notice of Revocation of Appointment is illegal, null and void ab initio.
 - b. An order of certiorari quashing the Respondents' decision contained in the letter dated 10th May 2023, revoking/ terminating the Petitioner's appointment.
 - c. A declaration that the revocation/termination of the Petitioner's appointment was unfair, unlawful and without valid reason.
 - d. An order of prohibition is hereby issued restraining the Respondents by themselves their servants, employees, agents or anyone acting on their behalf from terminating the Petitioner's employment based on the same allegations contained in the letter dated 10th May 2023 without due process of law.
 - e. An order re-instating him (Petitioner) immediately to his position before the unlawful revocation or termination of appointment, without any loss of previous status or benefits.
 - f. In view of the order for reinstatement without loss of benefits, the claim for salary as compensation for unfair termination is declined. For the same reason, the prayer for one-month salary in lieu of notice is also declined.
 - g. Award the petitioner costs of the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 10TH DAY OF NOVEMBER, 2023

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

