



**Kamba v Kitui County Assembly Service Board & 2 others; Mutambuki & another (Interested Parties) (Employment and Labour Relations Petition E126 of 2022) [2023] KEELRC 3341 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3341 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E126 OF 2022  
MN NDUMA, J  
DECEMBER 20, 2023**

**BETWEEN**

**ALEX KATABWA KAMBA ..... PETITIONER**

**AND**

**KITUI COUNTY ASSEMBLY SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY CLERK, COUNTY ASSEMBLY OF KITUI ..... 2<sup>ND</sup> RESPONDENT**

**SPEAKER, COUNTY ASSEMBLY OF KITUI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ELIJAH MUTAMBUKI ..... INTERESTED PARTY**

**GEORGE NDOTTO ..... INTERESTED PARTY**

**JUDGMENT**

1. The petitioner, Alex Katabwa Kamba, filed this petition on 19<sup>th</sup> July 2022 seeking an order in the following terms:-

1. Spent
2. Spent
3. That this Honourable Court be pleased to find and hold that in terms of Section 6 and 11 of the *Fair Administrative Action Act*, and on account of the failure of the respondents to supply documents requested and reasons for their decision, the decision to terminate the petitioner’s employment, taken on 3<sup>rd</sup> March, 2022 and all processes leading to or proceeding from that decision were taken without valid reasons, and the petitioner be reinstated to his employment forthwith, and all his benefits and salaries be restored with effect from 13<sup>th</sup> October, 2022.



4. That pending the hearing and determination of this application and the entire petition, the respondent and interested parties be barred from advertising, interviewing for or recruiting a replacement for the petitioner, or allowing any other person whether on temporary or permanent basis, to take up the petitioner's office.
  5. That pending the hearing and determination of this application and the petition, an order to issue barring the respondents and the interested parties whether by themselves, their servants or agents from changing or effecting any decision to alter the rate of interest on the petitioner's staff mortgage facility, from 18% per annum or any other rate other than 3% per annum.
  6. That pending hearing and determination of this application and the petitioner, the respondents and interested parties be compelled by an order of this court to supply to the petitioner the following information requested in the petitioner's letter dated 22<sup>nd</sup> March 2022.
    - a. Information on the tender number, details of the notice calling for bids or tenders, date of evaluation;
    - b. Information relating to the successful bidder, the supplier and the dates on which the items were supplied;
    - c. Information on the serial numbers of the ipads alleged to have been procured and stolen;
    - d. Number and serial numbers of the ipads lost by the members of the County Assembly and for which members of the County Assembly were surcharged. At least five ipads which had been issued to Members of the County Assembly (MCAs) never found their way back to the Assembly as required. These MCAs were surcharged for the loss;
    - e. Information on the amount surcharged for the lost ipads, and whether that money was used to procure replacement ipads;
    - f. Report of the Committee that inspected the delivery of the ipads; and
    - g. Report of the ipads returned to the supplier for reason of being faulty or for any other reason and whether they were replaced.
    - h. Minutes, correspondences and the Hansard record of the investigation by the Staff Advisory Committee;
    - i. Minutes, correspondences and the Hansard record from the sub-committee of the Board that further handled the investigations.
    - j. Minutes, correspondences and the Hansard record of the County Assembly Service Board culminating in the decision to terminate the petitioner's employment; and
    - k. Existing written policy on the management of the County Assembly stores, particularly, handling of its keys.
  7. That costs of this application be provided for.
2. WHICH APPLICATION is based on the following grounds:
1. That by a letter dated 3<sup>rd</sup> March 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent unfairly and wrongfully terminated the applicant from employment. The applicant was a procurement assistant at the Kitui County Assembly.



2. That the letter dated 3<sup>rd</sup> March, 2022, was preceded by an avalanche of invitations before the Staff Advisory Committee in which the applicant would be invited to “shed more light” on the alleged loss of ipads at the Kitui County Assembly. The letters or invitation, however, failed to give adequate notice to the petitioner and provide for concrete statements on the matters that would be up for discussion. More particularly, the invitations did not specify what matters had not been adequately addressed in the responses that the petitioner had already filed with the 1<sup>st</sup> respondent regarding the matter under investigation.
  3. That despite the applicant providing a comprehensive response to the allegations and also supplying all the relevant documents to prove that he was not involved in the alleged theft of ipads at the Kitui County Assembly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents went ahead to terminate the employment of the applicant.
  4. That in a letter dated 15<sup>th</sup> March, 2022, the 2<sup>nd</sup> respondent notified the petitioner of the commutation of his mortgage loan interest rate to commercial rates of 18%.
  5. That the 2<sup>nd</sup> respondent commuted the mortgage loan interest rate from 3% to 18% before the petitioner could explore his right of appeal or review.
  6. That the 2<sup>nd</sup> respondent did not tender any reasons as to why the interest rate was commuted to 18% and not any other rate.
  7. That the commutation of mortgage loan interest to 18% before the petitioner can challenge the decision to terminate his employment is arbitrary, disproportionate, unjust, unilateral, whimsical and unfair.
  8. That despite writing a letter of demand asking the 1<sup>st</sup> respondent to review its decision and to supply reasons and information, the respondents have failed and/or ignored and/or neglected to act. The respondents have particularly failed to provide all the critical information that the applicant needs in order to ventilate his claim against the respondents.
  9. That it is only fair and just that this application be heard expeditiously for the court to address itself to the question of the legitimacy of the respondents’ decision to terminate the petitioner’s employment.
3. The facts of the petition are that the petitioner is an employee of the 2<sup>nd</sup> respondent in the position of Procurement Assistant from 29<sup>th</sup> July 2015 until 3<sup>rd</sup> March, 2022 when he was dismissed from work. The petitioner was in job group 5, and his main duties as per the letter of appointment included management of Assembly Stores, receive and adequately record all procured goods; keep stock under safe custody, prepare and maintain up-to-date stores records and any items for requisition uses.
  4. As per the payslip for September 2021, the petitioner earned a gross salary of Kshs. 82,370/=.
  5. The petitioner also was paying a public service mortgage loan at Kshs. 27,824,000/= a month, a benefit granted to him at staff rates which are favourable than commercial rates.
  6. One Rose Ngoima, Procurement Assistant reported to the clerk of Assembly, through the Senior Procurement Officer II by a letter dated 22<sup>nd</sup> February 2021 that upon return from maternity leave, she had discovered that 21 ipads were missing in the store.
  7. Following the said report, one Erastus M. Ndelera, PHRO, Secretary, wrote to the petitioner a letter dated 11<sup>th</sup> May 2021, inviting the petitioner to appear before the Staff Advisory Committee on 7<sup>th</sup> May



- 2021 to shed more light on what he knew on the disappearance and/or loss of ipads from the Assembly stores.
8. Meanwhile on 4<sup>th</sup> May 2021, the petitioner responded to a notice to show cause dated 29<sup>th</sup> April 2021 to explain the loss of the ipads denying that he was responsible for the loss of the ipads from the store during the period from mid-September 2018 to early February 2019 while the in-charge of the store was indicated to have been on maternity leave.
  9. The petitioner stated that he was a person of integrity and no property of the respondents had gotten lost through his fault. That he was not the sole procurement officer, in-charge of the store during the said period when the in-charge of the store was away on maternity leave.
  10. The petitioner stated that although he assisted in the duties of the in-charge while she was on maternity leave from 17<sup>th</sup> September 2018 to early February 2019, any other procurement officer had access to the store at all material times as per the stores issue notes which showed different people issued out items to people during the period. That the keys to the store were easily accessible to all procurement officers which keys are kept at the procurement office and in an open registry upon locking up of the stores.
  11. That the petitioner was on off days for various reasons including sick-off and leave days during the period as indicated on various forms he had filled.
  12. That the issue of loss of ipads was inquired upon more than 3 years and 8 months after it was raised by the in-charge of the store after the officer had returned from maternity leave.
  13. That no handing over report was made between the in-charge and the petitioner and/or all other procurement officers and any other relevant office including the Human Resource Officer indicating the items at the store at the time she left for maternity leave.
  14. That it was not possible to ascertain the time period of the alleged loss if it happened at all.
  15. That indeed the quarterly store stocks done at different dates and by different appointed committees indicated that there were variances on ipads missing from the store since a stock take dated 3<sup>rd</sup> July 2018 showed all the ipads were at the store and the report of 15<sup>th</sup> October, 2018, showed 9 ipads were missing at the store.
  16. The petitioner objects to being asked to explain the loss of ipads that were reported lost four (4) years down the line without any evidence showing his direct involvement or negligence in the alleged loss.
  17. In conclusion the petitioner states that the termination of his employment was for no valid reason and was a violation of the right to administrative action and same was also discriminatory and amounted to unfair labour practice.
  18. The petitioner challenged the reversion of his mortgage terms to commercial rates before this matter had been determined by the court.
  19. The petitioner said that the decision to terminate his employment was baseless and violated the test of proportionality since there was no prove that he had directly caused the loss of any ipad and in any event, if it was a collective responsibility of all procurement officers who had access to the stores, then they ought to have been treated equally and at worst invoke Clause 8.13 of the Human Resource Policy and procedure manual to cause the officers to replace the lost items in the absence of any satisfactory explanation to exculpate the officers.

DIVISION - Replying Affidavit to the Petition



20. The Clerk of the County Assembly of Kitui, Elijah Mutembuk deposed to a replying affidavit to the petition sworn on 17<sup>th</sup> November 2022 in which he admits that the petitioner was employed by the 1<sup>st</sup> respondent on 17<sup>th</sup> November 2014 as a Procurement Assistant and his detailed job description was issued to him on 29<sup>th</sup> July 2015.
21. That on diverse dates between July 2018 and March 2019 the County Assembly of Kitui lost 18 ipads and the matter was not officially reported until the 6<sup>th</sup> March 2021 when one Ms. Rose Kevithe reported to him the loss of the said ipads.
22. That on 17<sup>th</sup> April 2021, the Clerk summoned the petitioner and one Simon Syengo to a meeting and requested them to write personal statements regarding the reported loss of ipads from the county Assembly which they did on 7<sup>th</sup> April 2021.
23. That the 1<sup>st</sup> respondent resolved on 26<sup>th</sup> April 2021, that notice to show cause be issued to Ms. Rose Kevithe and the petitioner to show cause why severe disciplinary action should not be taken against them for the loss of the ipads for the reason that the two of them were in charge of the Assembly store and were issuing items during the period which the ipads disappeared. The notice to show cause was dated 29<sup>th</sup> April, 2021. The petitioner responded to the notice to show cause by a letter dated 4<sup>th</sup> May 2021, that the petitioner admitted to being in-charge of the stores from the 17<sup>th</sup> September 2018 to February 2019 when he was called upon to relive Rose Kabithe from her duties as she proceeded for a maternity leave (emphasis added).
24. That the matter was referred to the Staff Advisory Committee to conduct investigation on the loss by the 1<sup>st</sup> respondent. That on 2<sup>nd</sup> July 2021, the Staff Advisory Committee considered the matter and resolved to have all the officers in the procurement department appear before them to shed light on what they knew about the loss of ipads. The petitioner was one of them.
25. The Clerk denied that the petitioner had requested for any specific particulars regarding the 18 ipads found not to be available which was not available to him as a procurement officer in-charge of stores during the disciplinary hearing. That the petitioner was supplied with adequate information to respond to the allegations against him and this is evident from the letters he wrote giving information about the ipads and showing cause why he should not be dismissed.
26. That after the Staff Advisory Committee's investigation, the committee came to a conclusion that 17 ipads were lost during the period July 2018 and March 2019 and one ipad got lost in June 2021 while in the custody of the Senior ICT Officer I. The committee concluded that it was unable to trace 17 ipads and recommended further investigations by the Directorate of Criminal Investigations of the procurement officers being Ms. Rose Kathitha, Mr. Alex Kambe (petitioner) and Simon Syenge for the reasons that the petitioner and Rose were in-charge of stores issuance within the period that the ipads got lost and Simon Syengo had a supervisory role. The report was presented by the committee to 1<sup>st</sup> respondent (emphasis added).
27. The Clerk stated that the petitioner and his colleagues were fully in-charge of the store and were not to sub-delegate the roles to non-authorised persons which means that the stores should have had restricted access to the persons responsible for issuing requisitioned items as periodic per the contract of the employment of procurement officers and were to take stock in order to protect property of the County Assembly.
28. That the petitioner was not singled out randomly as he alleged or at all to be responsible for the loss of ipads. That the petitioner and Rose Kabithe told the disciplinary hearing that they were the two responsible officers for the safety of the store and its keys at the time of the loss of the ipads and as



a consequence of their negligence, both of them had their employment terminated. Further, Simon Syengo also faced disciplinary proceedings as he was charged with the duty of supervising the petitioner and Rose and was demoted. The respondent prayed that the petition be dismissed with costs.

29. The petitioner filed supplementary affidavits sworn on 23<sup>rd</sup> March 2023 in which he traversed the deposition by the Clerk of the Assembly in the replying affidavit; reiterated his case as presented in the petition and in the supporting affidavit and joined issues with the respondents thereto. The petitioner prays that the court finds the petition to have merit and to award the petitioner as prayed in the petition.

### **Determination**

30. The parties filed written submissions which the court has carefully considered together with the depositions and documentary evidence presented by the parties and has delineated the following issues for determination:

- i. Whether the employment of the petitioner was terminated for a valid reason following a fair procedure.
- ii. Whether the petitioner ought to have filed a normal claim for unfair dismissal.
- iii. Whether the petitioner is entitled to the reliefs sought.

31. At the outset the court notes that this is a mundane case of termination of employment contract for alleged negligence of the petitioner and others leading to loss of 17 ipads at the Assembly store where the petitioner worked. The petitioner does not present any tangible constitutional issues for determination by this court and the petitioner ought to have filed a memorandum of claim in terms of the of The Employment and Labour Relations Court, (Procedure) Rules 2016.

32. The resort to petitions which are perceived to be concluded faster on the papers filed without adducing oral evidence is often as in this case, an abuse of the court process aimed at jumping the queue of persons who have been patiently awaiting the resolution of their claims properly filed before this court.

33. Having said that, the depositions filed in this case by the petitioner and the respondent have sufficiently brought out the contractual dispute between the petitioner and the respondents to enable the court to determine the matter. Litigants should however be cautioned that their petitions stand to be dismissed if brought to this court for convenience purpose only in violation of the rules of the court.

34. In the present matter, the 1<sup>st</sup> respondent has the onus in terms of Section 43 of the Employment Act 2007, to demonstrate that it had a valid reason to terminate the employment of the petitioner and that it followed fair procedure in terminating the employment in terms of Section 41 of the Act. See the case of Walter Ogal Anuro versus Teachers Service Commission [2013] eKLR “For termination of employment to pass the fairness test there must be both substantive justification and procedural fairness.”

35. From the replying affidavit of the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent operated under a misconception that the petitioner had admitted the offence as follows:-

The petitioner responded to the notice to show cause letter vide a letter dated 4<sup>th</sup> May 2021 and delivered on 5<sup>th</sup> of May, 2021, in which he admitted to being in charge of the stores from the 17<sup>th</sup> of September 2018 to February 2019.”

36. A careful reading of the response by the petitioner dated 4<sup>th</sup> May, 2021 shows the contrary and in particular that the petitioner denied having been solely in-charge of the store during the 17<sup>th</sup> of September 2018 to February 2019.



37. The petitioner stated that there was no formal hand over of stock and the store to him by the in-charge, when she took maternity leave; that there were other officers who had free access to the store and he provided evidence that other persons issued store items to others during the material period.
38. Furthermore the petitioner stated that there was no evidence indicating during which time, and period of the year the alleged 17 ipads got lost. That the in-charge did not raise the issue until 3 years and 8 months after and this left a lot of gap to attribute the loss of the ipads to the petitioner while the in-charge was in maternity leave.
39. The court finds that the conclusion by the 1<sup>st</sup> respondent that the petitioners was responsible for the loss of the 17 ipads during the stated period was based on no evidence at all adduced at the disciplinary hearing or before this court.
40. The court finds that the 1<sup>st</sup> respondent had no valid reason to terminate the employment of the petitioner. That the 1<sup>st</sup> respondent violated Section 43 and 45 of the Employment Act 2007 in that respect.
41. The termination of the employment was therefore unlawful and unfair.
42. The court finds that the only prayers amenable for consideration in the circumstances of this matter is an award for compensation to the petitioner for the unlawful and unfair termination of his employment and the prayer for reinstatement to his previous employment in terms of Section 49 of the Employment Act 2007.
43. Reinstatement of an employee who has been found to have been unlawfully terminated from employment is considered in terms of Section 49(3) (a) which provides:-
- “Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend the employer to:
- a. Reinstatement the employee and that the employee in all respect as if the employee’s employment had not been terminated or
  - b. Re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal or other reasonably suitable work at the same wage.
44. In Kenya Airways Limited versus Aviation Allied Workers Union Kenya & 3 others Civil Appeal No 46 of 2013, the Court of Appeal held that:
- “The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factor s stipulated in section 49 (4) of the Employment Act 2007 which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employee with the interest of the employer...”
- See also Ruth Wairagu versus Elite Travel Services Limited [2021] eKLR.
45. In determining whether a case is suitable for reinstatement or re-engagement, the court is guided by the provisions of Section 49(4) and the considerations include the wishes of the employee. In this case, the petitioner has expressed the wish to be reinstated; the circumstances in which the termination took place including the extent, if any, to which the employee contributed to the termination. In the present



case, there is no evidence at all that the petitioner was involved in the loss of the ipads directly or through negligence.

46. Indeed there is no evidence at all that the petitioner was involved in the loss of the ipads at all. This case was purely based on conjecture and speculations. It is peculiar that the supervisor of the petitioner who had the overall responsibility to ensure that systems were in place to ensure proper tracking of stores to avoid theft, loss, or wrongful allocation was spared from termination and was only demoted.
47. The termination was solely based on an erroneous conclusion that the petitioner had made an admission of the offence, which allegation is not supported by any evidence. The court concludes that the petitioner did not contribute to the termination at all but was a victim of circumstances.
48. The 1<sup>st</sup> respondent is a public body and is able to absorb officers in different capacities and departments. The court finds that it is practicable to reinstate or re-engage the petitioner differently there being no personal relationships involved which may be an impediment in the work environment.
49. The petitioner had served the 1<sup>st</sup> respondent since 2014 without any adverse record. The court finds no reason why he cannot be rein-stated or re-engaged given that it is not easy to get alternative employment in Kenya today and especially if one has bad references from previous employment.
50. The petitioner is a relatively young man and had good career growth prospects with the 1<sup>st</sup> respondent.
- 51.. The petitioner was not paid any compensation or reasonable severance pay for the unlawful termination. To the contrary, the petitioner has a mortgage granted him on favourable staff terms which he will be unable to service should he not be reinstated to his employment. The loss to the petitioner is likely to be immense.
52. Accordingly, the court finds this a suitable case to order that:
  - a. The 1<sup>st</sup> and 2<sup>nd</sup> respondents reinstate the petitioner to the position he held without loss of rank and remuneration with immediate effect and in the alternative.
  - b. Re-engage the petitioner to a position equal in rank and remuneration to the position he held from the date of termination.
  - c. Revert the mortgage terms to staff rates.
  - d. Interest on the unpaid remuneration at court rates from date of judgment till payment in full
  - e. Costs of the suit

**MATHEWS N. NDUMA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023**

**Appearances**

**Ms. Mutune for petitioner/applicant**

**Ms. Navulelele for respondents**

**Ekale Court Assistant**

