



**Murimi v County Governemnt of Kirinyaga & 2 others; Public Service Commission  
& another (Interested Parties) (Employment and Labour Relations Petition  
E003 of 2022) [2023] KEELRC 3354 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3354 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E003 OF 2022  
ON MAKAU, J  
DECEMBER 20, 2023**

**BETWEEN**

**NAHASHON MURIMI ..... PETITIONER**

**AND**

**THE COUNTY GOVERNEMNT OF KIRINYAGA ..... 1<sup>ST</sup> RESPONDENT**

**THE CHAIRMAN COUNTY PUBLIC SERVICE BOARD  
KIRINYAGA ..... 2<sup>ND</sup> RESPONDENT**

**THE SECRETARY COUNTY GOVERNEMENT OF KIRINYAGA .... 3<sup>RD</sup>  
RESPONDENT**

**AND**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**KULE DIDO ..... INTERESTED PARTY**

**JUDGMENT**

1. The Petitioner filed a Petition dated 16<sup>th</sup> May 2022 seeking judgement against the Respondent for orders that:
  - a. A declaration that the Petitioner’s enjoyment of his rights and fundamental freedoms secured in the Bill of Rights under Articles 25, 27, 28, 41, 47, 50 and 51 of *Constitution* have been threatened and infringed or are threatened by the Respondent by failing, neglecting, and refusing to consider his appeal for payment of wages and other allowances as they fell due and his appeal relating to the unfair termination of his appointment.



- b. A declaration that the termination of the appointment of the Petitioner as a clinical officer by the Respondent and all processes flowing from the said termination were unprocedural, illegal and null and void.
  - c. An order that the Petitioner be reinstated as a Clinical Officer and for the purpose, the Petitioner reports to the County and perform all those functions and duties allocated to him pursuant to the letter of appointment to resume in the service of the County in accordance with the law.
  - d. An order directing the Respondents to pay the Petitioner all unpaid salaries, dues, terminal benefits and allowances from the date of illegal termination up to date.
  - e. The Court do find that the Petitioner is entitled to damages for violation of his constitutional rights.
  - f. An order of *Mandamus* does issue compelling the Respondents jointly and severally, either acting on their own and/or through their agents, employees, servants and/or any other person acting on or purporting to act under their instructions and/or orders to implement and enforce the Parliamentary Service Commission Decisions.
  - g. The Respondents be condemned to pay the costs of the Petitioner.
  - h. Any other orders, writs and/or directions this Honourable Court deems fit and just to grant.
2. The Petition is premised on the provisions of Articles 2, 3, 10, 19(2), 20, 22, 23, 27, 28, 41(1) and 47 of *Constitution* of Kenya, section 4 of the *Fair Administrative Actions Act* 2015, sections 35, 36, 45(2) (a) & (b), and 49 of the *Employment Act* 2007, sections 57, 58 and 59 of the *County Governments Act* 2012, and section 89 of the *Public Service Commission Act*.
  3. The Petition was accompanied by Notice of Motion Application under certificate of urgency and a bundle of documents in support of the Petition.

### **Factual background**

4. In a nutshell, the Petitioner's case is that he was appointed as a Clinical Officer by the 2<sup>nd</sup> Respondent on 26<sup>th</sup> August 2014 and he started his employment on 1<sup>st</sup> September 2014. In May 2019 there was a Health workers' strike in Kirinyaga County which was called off on 4<sup>th</sup> July 2019 following a Court Order that declared it illegal and directed all workers to return to work.
5. The petitioner's case is that he never participated in the strike as he was the officer in charge Kang'aru Health Center at the time and thus he was at the hospital for the entire period of the strike. After the strike, the County Director of Health (CDH) was mandated to compile a list of the workers that had resumed work, which he did by inviting the workers via WhatsApp to sign proof of return back to work on 8<sup>th</sup> July 2019.
6. He claimed that a majority of the workers did not get the WhatsApp messages and thus did not sign the proof of return to work and as a consequence they were deemed to have defied the directive to resume duty. Those who claimed to have not received the communication but reported to duty station were required to produce proof of workload. The petitioner complied with the directive but he was left while some of colleagues were reinstated despite tendering the evidence of duty attendance.



7. After back and forth, the County Director of Health (CDH) verbally informed the petitioner to continue his duties at Kang'aru Health Centre. On 20<sup>th</sup> November 2019 he got transferred to Kerugoya County Referral Hospital under posting letter reference number cgk/co/moh/he/007/vol.xii (22). Upon arrival at Kerugoya, he was issued with an arrival letter reference no. ID. No. 26004431. He was then enlisted in the duty roster and instructed to commence duty on same day due to shortage of workers.
8. The Petitioner was not paid any salary forcing him to write several letters to CDH and one to CEC Health on 7<sup>th</sup> August 2020 over the nonpayment of salary. He was not paid until 17<sup>th</sup> August 2020 when the 4<sup>th</sup> Respondent, verbally informed him not to report back to work as he was under strict instructions to remove him from duty. As such, he appealed his termination to PSC on 10<sup>th</sup> October 2020. It is the Petitioner's case that by the time of appeal he had been without salary for 15 months and NHIF Card had been deactivated due to nonpayment.
9. It is further Petitioner's case that the Respondents were notified of the appeal but never filed a response or participated in the same. The 1<sup>st</sup> Interested Party then rendered a decision on 14<sup>th</sup> April 2021 whereby it allowed the Appeal on merits and directed the County Public Service Board to reinstate the Petitioner. However, the direction has been ignored by the Board to date. Hence the instant petition.
10. The Petitioner contends that he has been struggling to survive without an income which has taken a toll on him to the extent of being put under medication due to clinical anxiety. He also states that the Respondents deducted money from his pay slip since 2014 for pension but the same never reflected nor can be proved in the scheme's records. The Petitioner urges the Court to implement the decision by the Public Service Commission, (PSC).
11. The petition was opposed by the respondents vide the replying affidavit sworn 31<sup>st</sup> May 2022 by one Newton Njenga. In brief, the respondents' case is that the petitioner was dismissed for participating in an unprotected strike and after following a fair procedure; that he was served with two show cause letters but failed to show up for disciplinary hearing; that they were never served with the appeal before the PSC which in their view was an exercise in futility because the dismissal was lawful; and that there is a similar matter pending before this court being ELRC Misc. Application No. E002 of 2021 filed by the Union of Clinical Officers against the respondents.

### **Petitioner's submissions**

12. The Petitioner framed the following issues for determination by this Court as follows:
  - a. Whether the Petitioner's dismissal was unlawful, wrongful, and/or unfair therefore rendering it null and void.
  - b. Whether the Respondents acted unlawfully and without due regard to the procedure for dismissal of the Petitioner.
  - c. Whether the Petitioner is entitled to compensation for blatant violation of his constitutional rights.
  - d. Whether the Petitioner is entitled to the prayer sought.
13. From the onset, it was submitted for the Petitioner that the dismissal was wrongful, unlawful and unfair since he diligently rendered his services during the strike. First his salary was stopped March 2019 followed by a dismissal in July 2019 effective from 28<sup>th</sup> May 2019.



14. Service of the Show Cause letter dated 31<sup>st</sup> May 2019, which allegedly invited him to disciplinary hearing on 6<sup>th</sup> June 2019, was denied. It was submitted that the said letter presented before the Court was unsigned and lacked any indication of receipt by the Petitioner. Further, that the second show cause letter dated 7<sup>th</sup> June 2019 inviting him for disciplinary hearing of 10<sup>th</sup> June 2019 was sent via EMS courier services but it was impossible for him to make it to the hearing as EMS services take 72 hours. Consequently, it was submitted that he was not granted a fair hearing as the said letters never got to him in time to attend the hearing.
15. The Petitioner submitted that the Respondents were in blatant breach of his right to fair trial, fair administration and fair labour practices as it is evident from the Petitioner's bundle of documents that he never absconded duty. Further, he was entitled to the olive branch that was issued on 4<sup>th</sup> July 2019 to all the other employees that had participated in the strike.
16. Reliance was placed on the provisions of Article 41, 47(1) and the case of *Joseph Maina Theuri v Gitonga Kabugi & 3 Others* [2017] eKLR and *Kenya County Government Workers' Union v County Government of Nyeri & Another* [2015] eKLR to buttress his submissions.
17. It was reiterated that the petitioner appealed the decision to dismiss him and his appeal was allowed but the Respondents have refused to reinstate him without any justification. Reliance was placed on the provisions of section 43 and 45 of the *Employment Act* 2007.
18. Finally, it was submitted that the Petitioner has demonstrated that the Respondents denied him his right to fair labour practices, hearing, trial and fair administrative action as enshrined in *Constitution*, the Fair Administrative Actions Act and the *Employment Act*.

### **Respondent's submissions**

19. The Respondents framed the following issues for determination by the court:
  - a. Whether the Respondents had valid reasons to terminate the Petitioner's employment.
  - b. Whether fair procedure was followed in terminating the Petitioner's employment.
  - c. Whether the Petitioner is entitled to the reliefs sought.
20. The Respondents relied on section 80 (1) of the *Labour Relations Act* in support of their defence that they terminated the Petitioner's employment for participating in an unprotected strike that was called by her trade union, Kenya Union of Clinical Officers vide strike Notice of 20<sup>th</sup> May 2019.
21. The Respondents submits that the said strike notice was suspended by the Court vide Court Order of 24<sup>th</sup> May 2019 in Nairobi ELRC 340 of 2019 *County Government of Kirinyaga v Kenya Medical practitioners Pharmacists and Dentist Union & 2 others and Cabinet Secretary Labour & Social Protection & Another* and as such the Petitioner was required to go back to work.
22. The Respondents argued that they issued a public notice on 28<sup>th</sup> May 2019 warning the Petitioner and the other workers from participating in the strike and thus urged them to return to work immediately but the Petitioner defied the same.
23. According to the Respondents, the Petitioner absconded duty from 24<sup>th</sup> May 2019 when the Court suspended the strike to 8<sup>th</sup> July 2019 when the Petitioner's employment was suspended. The Respondents argued that the Petitioner has not produced any credible evidence to prove that he attended work during the strike that led to his termination. The Respondents contended that the Petitioner had not produced any record of attendance of duty for the abovementioned period.



- Respondents contended that the police bond produced didn't prove attendance to duty and the WhatsApp messages annexed to his affidavit were not admissible as there were not accompanied by a certificate of electronic evidence as required under section 106 B of the *Evidence Act*. The Respondents argued that the only evidence that could suffice in support of the Petitioner's assertion that he attended work would be an attendance record which he did not produce and thus it was apparent that the Petitioner absconded duty.
24. The Respondents submitted that by dint of the Petitioner's participation in an unprotected strike, his termination was valid. They submitted that the court declared the strike illegal since it involved workers in essential service sector. For emphasis, the Respondents relied on the decisions of the Court in *Joash Alubale Jacob v Mega Pack Limited* [2019] eKLR and *David Sirenge Kiganane v Mega Pack Limited* [2019] eKLR.
  25. The Respondents submitted that they acted in compliance with the law mandating an employer to serve notice of disciplinary hearing and offer the employee an opportunity to be heard before termination of employment as provided under section 41 of the *Employment Act*. The Respondent argued that they issued the Petitioner with two show cause letters where the first was dated 31<sup>st</sup> May 2019 inviting the Petitioner for hearing, on 6<sup>th</sup> June 2019 but the Petitioner never picked the letter nor neither responded to it. He also never attended the hearing despite knowledge of the same.
  26. The Respondents further submitted that they furnished the Petitioner with a second show cause letter dated 7<sup>th</sup> June 2019 in accordance with Article 43 and 47 of *Constitution* and section 44 of the *Employment Act*. The Respondents stated that they posted the letter to the Petitioner's personal postal address provided in his personal file and the postage was acknowledged by an EMS stamp dated 10<sup>th</sup> June 2019 embedded on a schedule of entries of other clinical officers whose letters were postage in the same instance.
  27. It is the Respondents' argument that by reason that the Petitioner did not dispute the postal address to be his, he could not deny receipt of the second notice. The Respondent acknowledged that the notice as short but faulted the Petitioner for failing to respond and attend the hearing. They argued that irrespective of the short notice, the Petitioner ought to have appeared at the hearing and sought more time to respond. In that regard, they relied on the case of *Mary Wagikuyu Komu v The Kenya Hospital Association T/A The Nairobi Hospital* [2016] eKLR and *Jackson Butiya v Eastern Produce Limited* (Industrial Court Cause No 335 of 2011).
  28. The Respondent indicated that the reason for the short notice was because the Petitioner was an essential service provider and which services had been paralyzed by the strike and therefore the Respondents had to take urgent measures to salvage the failing health sector in the County. For this reason, the Respondents contended that the Petitioner cannot complain of not being granted a fair hearing due to short notice since he never sought extension of time. They relied on the case of *David Njeka v Lavage Dry Cleaners Limited* [2013] eKLR and *Mathew Lucy Cherusa v Povel Sisters of Belgamo t/a Blessed Lois Palazzalo Health Centre* [2013] eKLR and the case of *Jennifer Osodo v Teachers Service Commission* [2013] eKLR.
  29. In addition, the Respondents argued that they were not granted a fair chance to present their case before the PSC and hence the decision to reinstate the Petitioner was reached in a procedurally unfair manner. They also argued that there is no proof of receipt of the two appeals by the Board.
  30. The Respondents therefore urged the Court to dismiss the Petitioner's claim with costs since there were valid and sufficient reasons to terminate the Petitioner and also the procedure followed was fair.



The Respondents also stated that the position sought by the Petitioner no longer exists as they had already hired new staff to occupy the same.

### **Issues for determination & analysis**

31. I have considered the Petition and the supporting documents, Replying Affidavit and the submissions by counsel for the parties. There is no dispute that the Petitioner was indeed an employee of the 1<sup>st</sup> Respondent until his dismissal for alleged participation in an illegal strike. There is also no dispute that the issue of the said dismissal was litigated upon before the PSC by way of an appeal and a decision was rendered on 14<sup>th</sup> April 2021. The said decision has not been set aside and the petitioner prays for the same to be implemented by this court. The issues that fall for determination are as follows:
- a. Whether the petition is properly before the court.
  - b. Whether the termination of the Petitioner's employment was grounded on a valid and fair reason.
  - c. Whether fair procedure was followed before terminating the Petitioner's employment.
  - d. Whether the respondents have violated petitioner's constitutional rights as alleged.
  - e. Whether the Petitioner is entitled to the relief sought.

### **Whether the petition is properly before the court**

32. The reason why the petition is before the court is essentially because the respondents have failed to comply with the decision of the PSC rendered on 14<sup>th</sup> April 2021. Had the respondents implemented the said decision, the petition would not have been filed. I say so because paragraph 66 of the petition states that:

“That despite the board being served with the decision of the Public Service Commission, they have decided to ignore, refuse and/or neglect the said Ruling. Section 89 of the Public Service Commission[sic] gives this Honourable Court jurisdiction to implement the Public Service Commission's Decisions.”

33. The petitioner was fully aware of the procedure set out by section 89 of the PSC Act but chose to file a fresh suit to re-litigate the same dispute on merits. The said section provides that:

“(1) Any person who is affected by the decision of the Commission made under this part may file the decision for enforcement by the Employment and Labour Relations Court provided for under Article 162 (2) (a) of Constitution.

(2) Any person who refuses, fails or neglects to implement the Commission's decision is liable to disciplinary action in accordance with the applicable law including removal from office.”

34. In view of the foregoing clear provision of the law, I am of the opinion that the petition before the court is not proper to the extent that it invites this court to consider the merits of the petitioner's dismissal from employment. That matter was conclusively heard and determined by the Commission and all that the petitioner ought to do is to ask the court to adopt the Commission's decision and enforce the same against the respondents as per the law.



35. The practice of this court in such cases has been to entertain a miscellaneous application for adoption of a decision of Commission as judgment and then enforce it. The same position obtains in work injury claims with respect to decisions by the Director of the Occupational Safety and Health. The court is never allowed to try the dispute afresh but only to adopt the decision as its judgment and enforce it. It is a summary and non-litigious process.
36. Having found that the petitioner has not invoked the jurisdiction of this court properly, I decline to determine the petition on merits and direct the petitioner to move the court properly. The petition here is therefore struck out. I award no costs since this court appreciates the lack of clear provision in the *ELRC Procedure Rules* to guide litigants.

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

