



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**PETITION NO. E003 OF 2021**

**IN THE MATTER OF ENFORCEMENT OF THE CONSTITUTION  
AND THE BILL OF RIGHTS UNDER ARTICLES 2, 3, 10, 22, 23, 47,  
50 AND 55(B) (C) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF PART VII AND PART VIII OF THE  
COUNTY GOVERNMENTS ACT NO 17 OF 2012**

**AND**

**IN THE MATTER OF THE RULES OF NATURAL JUSTICE**

**AND**

**IN THE MATTER OF THE HIGH COURT (ORGANIZATION  
AND ADMINISTRATION ACT NO 27 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LEGITIMATE EXPECTATION**

**BETWEEN**

**MR. SHEKUE KAHALE KOMBO.....PETITIONER**

**VERSUS**

**THE GOVERNOR LAMU COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY, LAMU COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF LAMU.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, a resident of Lamu County, was on 8<sup>th</sup> April 2019 appointed to serve as an Economic Advisor to the Governor, County Government of Lamu. It would appear that this contract was subsequently terminated by the 1<sup>st</sup> Respondent through a letter to the Petitioner dated 15<sup>th</sup> March 2021. It is this development that triggered the institution of the current case.

2. The Petition is opposed by all the Respondents. Through the Law Firm of Kilonzo & Aziz Advocates, the Respondents filed their response to the amended Petition on 1<sup>st</sup> November 2021. This was before M/S Nyongesa and Co, Advocates assumed the conduct of the defence on the Respondents' behalf in place of Kilonzo & Aziz Advocates.

### **The Pleadings**

3. The Petitioner's case as can be discerned from the amended Petition filed on 13<sup>th</sup> September 2021 is that he was appointed by the 1<sup>st</sup> Respondent into the office of Economic Advisor, Governor's office, County of Lamu. According to the letter of appointment dated 8<sup>th</sup> April 2019, the appointment was allegedly pursuant to section 31 of the County Governments Act. The appointment was for a fixed term of three (3) years or for the balance of the term of the Governor, Fahim Yasin Twaha whichever happened first. In terms of the letter of appointment, the Petitioner was entitled to draw a gross monthly pay of Ksh. 231,260/=.

4. In the Petitioner's view, all factors remaining constant, his term of office was to run until 7<sup>th</sup> April 2022. Some of the requirements of the engagement, in general required the total loyalty of the Petitioner to the sitting Governor and the government of the County to the extent that he would, inter alia, not express an opinion that was contrary to that of the County Government or advocate divergent policies from those of the Governor and his government.

5. It is the Petitioner's case that he undertook his duties diligently until 15<sup>th</sup> March 2021 when he received a letter signed by the 1<sup>st</sup> Respondent and dated the same day terminating his services. The termination was said to take effect with immediate effect.

6. The Petitioner states that the reason for his termination as discerned from the letter of termination is that he had engaged in early campaigns for one of the parliamentary seats in the County. It was indicated that this action violated the Petitioner's terms of engagement as it yielded a crisis of confidence in his ability to continue to discharge the functions of his office impartially.

7. The Petitioner states that he was not afforded an opportunity to respond to the allegations levelled against him prior to the decision to terminate his contract of service. He otherwise denies that he was engaged in early campaigns as asserted by the Respondents.

8. The Petitioner states that his termination was in violation of the tenets of the Constitution, statute and the principles of natural justice. Accordingly, he prays for, among other reliefs: a declaration that his termination was unconstitutional, unfair and or illegal; an order prohibiting the Respondents from appointing another person to replace the Petitioner as Economic Advisor; an order quashing the purported termination of the Petitioner; and in the alternate an order for compensation for wrongful termination.

9. In response to the Petition the Respondents state that contrary to the assertions by the Petitioner, the Petitioner did not discharge the mandate of his office diligently. That the Petitioner embarked on early campaigns for the parliamentary seat of Lamu East thereby diverting his attention from his duties as the economic advisor of the Governor.

10. It is the Respondents' case that the Petitioner abused his office by using his official position to advance his private political interests. That as a consequence, the Respondents were left with no option but to terminate his services.

11. The Respondents state that no recognizable constitutional rights of the Petitioner have been infringed contrary to the Petitioner's averments in the Petition. It is their case that the Petition is misconceived and an abuse of the court process. Consequently, they ask that the Petition be dismissed with costs to them.

12. The parties filed witness statements which were adopted during the trial. As well, some documentary and electronic evidence was tendered.

### **The Evidence**

13. From the record, the Petitioner adopted the affidavit he filed in support of the amended Petition as his evidence in chief. He also produced the annexures to the affidavits as his exhibits. Further, the Petitioner produced as exhibits documents introduced through a list of documents subsequently filed by him and as well some video recordings.

14. It was the Petitioner's evidence that the letter by the 1<sup>st</sup> Respondent that terminated him on grounds of engaging in early campaigns did not disclose who the complainant was. However, he later learned that the complaint had been lodged by a Mr. Ali Shebwana. It was the Petitioner's case that this complaint was without basis as he had not engaged in early campaigns as asserted by the Respondents.

15. The Petitioner stated that the Respondents did not attempt to verify the allegation by Ali Shebwana before the 1<sup>st</sup> Respondent terminated the Petitioner. The Petitioner further stated that the Respondents never talked to him about the issue before acting against him. It was the Petitioner's case that the Respondents did not formally process the complaint through issuance of a Notice to Show Cause against him as would be expected in any pre-termination administrative process. They never sought his defence in the matter.

16. The Petitioner presented flash drives containing video clips of the alleged campaign meetings. The clips were played in open court after the defence indicated their non-objection to the request to play some of them. Objections by the defence to some of the clips were overruled by the court. It was the Petitioner's case that from the video clips, it was evident that he did not utter a word in furtherance of political campaigns.

17. In cross examination, the Petitioner stated that the 3<sup>rd</sup> Respondent was his employer. He stated that he was advised that his engagement was done under section 31 of the County Governments Act.

18. The Petitioner was shown a video clip by the defence of the alleged campaign meetings with his name inscribed at the bottom. The inscription read 'Mwalati for Lamu East'. He denied that he was campaigning for the seat. He also denied that he inscribed the suggestive words on the clip. The Petitioner indicated that the inscription at the bottom of the clip must have been by a person who manipulated the clip with the intention to fix the Petitioner.
19. The Petitioner conceded that in one of the meetings in the video clips, some locals are heard urging him to run for a political seat. However, he denies that he personally made any utterances in this regard.
20. The Petitioner stated that his initial basic monthly salary was approximately Ksh. 119,290/=. However, in his pleadings, he had pleaded that his gross monthly salary had risen to approximately Ksh. 231,000/=. He confirmed that on exit, he was paid salary in lieu of notice.
21. The Petitioner stated that he personally knows Ali Shebwana, the person who allegedly lodged the complaint about the Petitioner engaging in early campaigns. It was the testimony of the Petitioner that he did not see Mr. Ali Shebwana in the meetings where the said Ali Shebwana accused the Petitioner of engaging in early campaigns.
22. The Petitioner called CW2, Sombwana Sobwana Shahib. This witness said that his work involves shooting and editing of videos. The witness stated that he was with the Petitioner in the meeting at Kizingitini, one of the venues where the Petitioner is said to have been campaigning. The witness said that he recorded a video of the event. This video was produced in evidence after it was played out for the parties and the court. He stated that as the video demonstrates, the Petitioner never engaged in a political campaign at the event as asserted by the Respondents. The witness stated that he personally did not hear the Petitioner campaign for a political seat.
23. The witness said that the words inscribed at the bottom of the video sought to be relied on by the Respondents to allege that the Petitioner was campaigning could be the product of editing. He stated that from his knowledge, it was possible for someone to edit a video clip to infuse unrelated literature into it.
24. In cross examination, the witness conceded that the video he produced in evidence in support of the Petitioner's case did not have a date inscribed on it. As a result, there was no way of confirming when and where it was taken. However, he insisted that he recorded the video at the event where the Petitioner had a public drive involving the National Hospital Insurance Fund. When shown still photographs proposed for production by the Respondents, the witness said they had similar features as those in his video recording. That they must therefore relate to the same event.
25. The Petitioner also called CW3, one Mohamed Abanur Mohamed. This witness stated that he recorded videos of one of the events at Ishakani attended by the Petitioner on 15<sup>th</sup> February 2021 and at which the Respondents allege the Petitioner also engaged in early campaigns. Although Ishakani is not mentioned in the letter of complaint by Ali Shebwana dated 5<sup>th</sup> March 2021, it is nevertheless mentioned in a certificate he later filed under oath on 3<sup>rd</sup> December 2021. Unfortunately, this individual was never called to testify.
26. CW3 stated that it is him who recorded the video clip that Ali Shebwana purports to have recorded at Ishakani. CW3, stated that after recording the clip, he uploaded it on his face-book and WhatsApp platforms. That when he uploaded the clip, it did not have the inscriptions in the clip now in possession of the Respondents. He further stated that he believes that the clip in possession of the Respondents must have been picked from one of CW3's online platforms before being manipulated.
27. The witness stated that although he was not sure of the exact number of attendees at the Ishakani meeting, the event had a small population of about fifty (50) people. Thus, if there was any other person recording it, CW3 would have easily noticed such person. He denied that Ali Shebwana was at the Ishakani meeting.
28. On their part, the Respondents called one witness, John Mburu. He stated that he is the county secretary of the 3<sup>rd</sup> Respondent. He is also sued as the 2<sup>nd</sup> Respondent in the cause. He indicated that he had the authority of the other Respondents to testify on their behalf. I will variously refer to this defence witness as either "2<sup>nd</sup> Respondent" or "RW1".
29. RW1 adopted his statement but also gave oral testimony. He also produced the several documents appearing in the Respondents' list of documents as defence exhibits.
30. RW1 stated that he was not directly involved in the production of the photographs that the Respondents relied on to arrive at the decision to terminate the Petitioner. It was his evidence that these photographs were forwarded to the 1<sup>st</sup> Respondent by Ali Shebwana, the individual who lodged the complaint on early campaigns against the Petitioner.
31. RW1 confirmed that the Petitioner was no-longer in the service of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. That he had been terminated following a complaint by a member of the public that he was engaged in early campaigns for the seat of Member of Parliament, Lamu East.
32. RW1 stated that early campaigns by the Petitioner breached the terms of his engagement with the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. He indicated that he had seen a video clip with inscriptions of the Petitioner's stage name. That the Petitioner had been using this name to campaign for a political seat.
33. In cross examination, RW1 stated that even though the Petitioner never uttered words suggesting that he was campaigning, the fact that he was on a campaign trail could be construed from the context and content of the video proposed for production by the defence and those produced by the Petitioner. The 2<sup>nd</sup> Respondent stated that in the videos, those with the Petitioner appeared to be urging him to go for the political seat in question. Further, the Petitioner could be seen dishing out gifts to the crowd that was cheering him on. In RW1's view, all these provide sufficient circumstantial evidence of a man who was on a campaign trail.

34. The 1<sup>st</sup> Respondent conceded that it was not possible for him to state who recorded the video with inscriptions appearing to incriminate the Petitioner. And neither was he able to verify whether Ali Shebwana, the complainant, was actually at the event where the video was recorded.

35. RW1 stated that the notice to terminate the Petitioner was issued by the 1<sup>st</sup> Respondent. Further, he stated that he was not aware of any internal disciplinary process that the Petitioner was subjected to by the Respondents before he was terminated.

### **The Issues, Analysis of the Evidence**

36. Before the main trial, the parties were heard on an interim application for interim conservatory orders. In a ruling delivered on 16<sup>th</sup> July 2021, this court (differently constituted) made preliminary findings that may appear to indirectly touch on the main dispute that I now have to determine. I would like at this stage to indicate that those preliminary findings will not be the basis of my final decision. They were made on the basis of the preliminary evidence tendered at the time the application was heard. In contrast, this judgment has had the benefit of analysing the entire evidence tendered at the full trial against the applicable law.

37. At the close of the case, the Respondents filed written submissions. I have considered these submissions together with all the evidence on record in reaching this decision.

38. In my view, the case raises two main issues of determination. These are: -

***a) Whether the Petitioner's termination was contrary to the Constitution, the applicable statutes and the principles of natural justice and therefore unlawful.***

***b) Whether the Petitioner is entitled to the reliefs sought in the Petition.***

39. On the first (1<sup>st</sup>) issue, I would like to begin by considering the power of the 1<sup>st</sup> Respondent to terminate employees of the 3<sup>rd</sup> Respondent generally. It is noted that the letter dated 15<sup>th</sup> March 2021 terminating the Petitioner was issued by the 1<sup>st</sup> Respondent in his official capacity as Governor of the 3<sup>rd</sup> Respondent.

40. The law that governs management of human resource in County Governments is in part, set out under the County Governments Act, 2012 (CGA). The power of the Governor to terminate contracts of service of persons in the service of a County Government appears limited to the power to remove those serving as members of the County Executive Committee in terms of section 31 of the CGA.

41. Under article 179 of the Constitution, the County Executive Committee holds and exercises the executive authority of a County Government. Appointment of persons to serve on this committee must be approved by the County Assembly in terms of section 35 of the CGA.

42. The Petitioner was appointed to serve in the office of the 1<sup>st</sup> Respondent as an Economic Advisor. There is no evidence that he was appointed as a member of the 3<sup>rd</sup> Respondent's County Executive Committee. His appointment was not processed in the same way as that of a member of a County Executive Committee. Consequently, and as pointed out by Justice Ongaya in his ruling dated 16<sup>th</sup> July 2021, the 1<sup>st</sup> Respondent could not lawfully invoke the powers bestowed on him under section 31 of the CGA to terminate the Petitioner.

43. Not being a member of the County Executive Committee, the Petitioner was in law and fact part of the broader workforce that comprises the public service in a County Government outside the County Executive Committee as set out under Part VII of the CGA. As such, matters relating to the Petitioner's discipline and removal from office lay with the 3<sup>rd</sup> Respondent's County Public Service Board as contemplated under section 59 of the CGA. To the extent that the Petitioner's contract of service was terminated by an entity other than the 3<sup>rd</sup> Respondent's Public Service Board, it was contrary to law and therefore illegal.

44. This point is underscored in *Kisumu County Public Service Board & another v Samuel Okuro & 7 others [2018] eKLR* which addressed the power of a sitting Governor to remove a Chief Officer. Although the office of Chief Officer may be different from that of an advisor of whatever kind to the Governor, these two are nevertheless county public servants other than County Executive Officers. Thus, the decision provides a useful guide in the current dispute.

45. In the case, the Court of Appeal held that although a County Government has powers to inter alia, terminate public officers within its rank and file pursuant to article 235 of the Constitution, this power is, in law and where it is not specifically donated to the Governor, delegated to the County Public Service Boards under section 59 of the CGA. Under section 31 of the CGA, the only public servants that a sitting Governor may remove from office are members of the County Executive Committee. As such, all other officers may only be terminated at the instance of the County Public Service Board of a respective County.

46. The other matter for consideration under issue one (1) is whether the Respondents had a substantive justification to terminate the Petitioner in terms of section 41 of the Employment Act. The main reason for terminating the Petitioner as appears from the evidence on record is that he was involved in early campaigns for the parliamentary seat of Lamu East. The evidence tendered on this issue was the letter dated 5<sup>th</sup> March 2021 by one Ali Shebwana, the still photographs of the Petitioner addressing a group of people and a number of video recordings of the events in question.

47. I have carefully reviewed the video clips produced in evidence. In none of them is the Petitioner recorded campaigning for a political seat. While it is true that in some of the clips, the individuals at the functions in question are heard asking the Petitioner to run for a political seat, the Petitioner never uttered words suggesting that he was canvassing for the seat.

48. In my view, the Respondents seem to have punished the Petitioner for views expressed by third parties about whether he should run for the political seat in question. I do not think that this was logical. And neither is it sensible to imagine that the Petitioner had the power to stop the said third parties from making these political utterances.

49. Ali Shebwana, the author of the accusation against the Petitioner never appeared in court to support the allegation he had levelled against the Petitioner. Only the 2<sup>nd</sup> Respondent who was not at the functions where the Petitioner is said to have been campaigning testified.

50. It is important to note that the 2<sup>nd</sup> Respondent stated in cross examination that he was not in a position to tell where Ali Shebwana got the video recordings from. And neither could he tell whether the clips had been manipulated. In the face of this evidence, it would have been sensible for the Respondents to call the said Ali Shebwana to own his accusations against the Petitioner. Unfortunately, this was not done.

51. To fight off the assertions of engaging in early campaigns against him, the Petitioner called two witnesses. One gave evidence about the event attended by the Petitioner at Kizingitini. The other testified about the event at Ishakani. The two witnesses indicated that they were in attendance of the respective meetings and never heard the Petitioner campaign for a political seat. That all the Petitioner engaged in were promotional activities involving the National Insurance Hospital Fund.

52. Importantly, CW3 recognized the video recording that Mr. Ali Shebwana had relied on to advance his case against the Petitioner. CW3 stated that the clip was in fact the one he had recorded at Ishakani and uploaded on his social media platforms. That apparently, the video had been downloaded and manipulated by inscribing in it words to suggest that the Petitioner was campaigning for a political seat. In the court's view, the Respondents never quite appropriately challenged this evidence.

53. During cross examination of the 2<sup>nd</sup> Respondent, he insisted that the Petitioner had been involved in early campaigns. He said that he relied on the video clips and the report by Ali Shebwana as evidence in support of his position on the matter in dispute.

54. When asked if the Petitioner had uttered any words to suggest he was campaigning for the parliamentary seat, the 2<sup>nd</sup> Respondent said the Petitioner had not. However, the 2<sup>nd</sup> Respondent stated that his position on the matter was informed by his inferences from the happenings at the events as displayed in the videos. For example, he said one could see and hear the crowd around the Petitioner urging him to run for the seat. Further, one could see that in response, the Petitioner appeared to be showering the crowd with gifts.

55. For me, I think that the Respondents' case against the Petitioner is in the circumstances, built on conjecture. Without tacit evidence showing that the Petitioner was campaigning and in the absence of testimony by the originator of the complaint on the issue, there is no basis upon which the court can find the Petitioner was engaged in early campaigns in violation of the terms of his contract.

56. The other aspect on issue number one (1) that I would like to consider relates to the right to procedural fairness in the process leading to termination of an employee's contract of service. Section 41 of the Employment Act requires that before an employer terminates an employee, he/she ought to indicate to the employee the accusations against him/her and afford the employee an opportunity to be heard in response to the accusations. Indeed, this requirement is anchored on the constitutional rights to fair labour practise and fair administrative action as enshrined under articles 41 and 47 of the Constitution of Kenya 2010.

57. From the evidence on record, the Petitioner was not afforded these rights. As he stated, all that happened was that he was served with the letter of termination. The Respondents did not allow him the opportunity to offer his defence. No administrative inquiry was conducted into the matter before the Petitioner was terminated.

58. The failure to hear the Petitioner on the accusations against him is confirmed by the 2<sup>nd</sup> Respondent. In cross examination, the 2<sup>nd</sup> Respondent confirmed that there was no disciplinary session conducted to inquire into the accusations levelled against the Petitioner before he was terminated. On the basis of this evidence, it is not difficult to discern that the Respondents disregarded the Petitioner's right to a fair hearing before he was terminated. This conduct by the Respondents undoubtedly trampled on the Petitioner's constitutional rights to fair labour practise and fair administrative action.

59. But even assuming that the Petitioner fell in the category of officers whose employment could be terminated by the 1<sup>st</sup> Respondent under section 31 of the CGA, was he lawfully terminated as the Respondents appear to contend? I am afraid that answer to this question would still be the negative.

60. Unfortunately, some county Governors continue to perceive section 31 of the CGA as perpetuating "the master-servant" labour relation between them and members of their County Executive Committees. As a result, they hold the view that they can dismiss these individuals at will.

61. However, the accepted position is that under the current constitutional dispensation, County Executive Committee members, though susceptible to removal by a sitting Governor under section 31 of the CGA, must nevertheless be accorded procedural fairness in the process of their removal. This includes the County Governor granting the affected officer a right to be heard in response to the accusations levelled against him/her. Absent observance of this procedural guarantee, the resultant termination will be unlawful (see *County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020] eKLR*). Therefore, whichever way one looks at this case, the finding that the Respondents violated the procedural safeguards afforded to the Petitioner before he was terminated appears inevitable.

### **Determination**

62. From the foregoing, it is the finding of the court that the Respondents terminated the Petitioner in a manner that was contrary to the Constitution, the applicable statutes and the principles of natural justice. Accordingly, the Petitioner's termination is declared wrongful.

63. As the court had declined to bar the Respondents from filling the vacancy left by the Petitioner before the full hearing of the Petition, I do not think that an order for the Petitioner to resume duty would be appropriate as there is every probability that the position is no longer available. In any event, all factors remaining constant, the Petitioner's contract with the Respondents would presently be drawing to a close. In my view and having regard to the foregoing, this is a suitable case for award of compensation as opposed to any other reliefs sought by the Petitioner.

64. In awarding compensation to the Petitioner, I have considered the parameters set out under section 49 of the Employment Act. The manner of termination of the Petitioner without hearing him in his defence must have been quite traumatic considering the position he held. Before this event, there is no evidence that the Petitioner had a poor record at work. Taking these factors into account, I award the Petitioner compensation equivalent to six (6) months of his gross salary.

65. I note from the letter of appointment of the Petitioner that his gross salary was to gradually get to Ksh 231,260/= as his contract drew to a close. The Petitioner states that he was earning this amount at the time of termination. Absent evidence to the contrary and having regard to the letter of appointment dated 8<sup>th</sup> April 2019, I accept the evidence by the Petitioner that his gross monthly pay on exit was Ksh. 231,260/=. I therefore award him Ksh. 1,387,560/= being the sum equivalent to the gross pay for six (6) months.

66. I award the Petitioner interest on the aforesaid sum at court rates from the date of institution of the case till payment in full.

67. I order that this award be subject to the statutory deductions contemplated under section 49 of the Employment Act.

68. Costs of the Petition are awarded to the Petitioner.

**DATED, SIGNED AND DELIVERED ON THE 31<sup>ST</sup> DAY OF MARCH, 2022**

**B. O. M. MANANI**

JUDGE

In the presence of:

No appearance for the Petitioner

Mulwa for the Respondents

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties 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.**

**B. O. M. MANANI**

JUDGE