



REPUBLIC OF KENYA



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Kariuki v Governor, County Government of Nyandarua & 2 others (Cause 57 of 2019) [2022] KEELRC 13450 (KLR) (8 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13450 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 57 OF 2019
HS WASILWA, J
DECEMBER 8, 2022

BETWEEN

VENANSIO MBATARU KARIUKI CLAIMANT

AND

THE GOVERNOR, COUNTY GOVERNMENT OF NYANDARUA 1ST RESPONDENT

THE COUNTY GOVERNMENT OF NYANDARUA 2ND RESPONDENT

COUNTY ASSEMBLY OF NYANDARUA 3RD RESPONDENT

JUDGMENT

1. By a memorandum of claim dated August 22, 2019 and filed in court on August 23, 2019, the claimant sued the respondents for alleged unfair termination and to be compensated for the unfair termination. He prays for the following reliefs;
 - a) A declaration that the actions of the 1st respondent in relieving the claimant of his duties is a breach of the claimant's constitutional right under article 27(1), (2) &(3), 28, 41 and 50 of the Constitution and that the same is unlawful, illegal, unprocedural and therefore null and void for all intents and purposes.
 - b) A declaration that the removal and dismissal of the claimant as the county executive committee member in charge of the department of public administration and ICT was unconstitutional and unlawful on account of violation of sections 31(a) of the County Government Act, 2012 as read with articles 47 and 236 of the Constitution and section 41 of the Employment Act.
 - c) An order of certiorari quashing the decision of the 1st respondent, removing, sacking, firing and dismissing the claimant as the County Executive committee member in charge of the Department of Public Administration and ICT for being in contravention of section 31(a) of



the County Government Act as read with articles 47 and 236 of the Constitution as well as the provisions of the Employment Act.

- d) An orders of prohibition to remove into this honourable court and prohibit the 3rd respondent from vetting and approving any nominee for appointment as the County Executive committee member in charge of the department of Public Administration and ICT.
- e) A declaration that under article 236 of the Constitution, the claimant remain the holder of the position of the County Executive Committee member in charge of Department of Public Administration and ICT and to continue to hold the office immediately and with full benefits.
- f) The 1st respondent to permit the claimant resume his official duties with effect from the date of this judgement.
- g) In the alternative and without prejudice to the foregoing prayers above, an order of payment of salaries between the period of termination of contract and reinstatement, payment of dues to the claimant in the period he would have served up to the end of his expected five (5) year term together with general damages as pleaded in clause 20 above and;
- h) The 1st and 2nd respondents to pay the claimant's costs and interests of the suit.

claimant's case.

2. The facts of this case is that the claimant was nominated as the County Executive Committee member as per the list forwarded to the 3rd respondent on the October 17, 2017. He was vetted and approved by the 3rd respondent as County Executive Committee member in charge of Department of Public Administration and ICT.
3. The 1st respondent in exercise of its rights under article 179(2) (b) of the Constitution appointed him to the said post and the said appointment published in Kenya Gazette number 10933 of Vol. CXIX No. 166 dated November 8, 2017.
4. That he served the respondents diligently with a lot of professionalism in the way he discharged his duties to the people of Nyandarua till 20th August, 2019 when he was fired in the wee hours of the night vide a press release. That he learnt of the said termination through the media being the Star and the Standard newspaper which had captured is that "The Governor of Nyandarua County fires 4 County Executive members at midnight", "Governor Francis Kimemia sacks four CECs over poor performance" respectively.
5. He states that the way in which his termination was conducted was in violation of article 35 of the Constitution as the said decision was not communicated to him but first to the media, which act subjected him to degrading treatment and embarrassment in total violation of article 28 of the Constitution.
6. It was his case that, no reason was given to him for the said termination, neither was he accorded any opportunity to explain himself before the said public termination. He stated that the termination was unfair because the respondent failed to issue him notice or provide reasons for termination as per section 41 of the Employment Act, failing to conduct disciplinary hearing as provided for under article 50 of the Constitution as read with section 4(b) of the Fair Administrative Actions Act, relying on an invalid contract that the term of service was 2 years instead of 5 years provided under the law and failing to observe the provisions with regard to notice provided for under section 35 and 36 of the Employment Act.



7. He contends that his termination has been prejudicial and exposed him to financial constraints as he has loans with financial institutions which were running for the 5 years he expected to serve the respondents. He added that the said termination had also damaged his reputation when he is a registered engineer in good standing, the chairperson of Kenya Independent Petroleum Dealers Association and a renowned businessman and chairperson of Nairobi Friends of Nyahururu Catholic Diocese.
8. It is his case that he had legitimate expectation to work for the respondents for five years or during the term of the said Governor and on that basis he abandoned other commitments to serve his County in the said position. He thus prayed to be paid salary for the remainder of the said term, Leave allowance for 3 months and gratuity for the said period.
9. During hearing the claimant testified as CW-1 and adopted witness statement dated August 22, 2019 which basically reiterated the contents of the claim herein.
10. Upon cross examination, the witness testified that he served from October, 2017 to September, 2019 though the contract was to run for 5 years. It was his testimony that he was not informed the reasons for termination and only learnt through the media. He clarified that his employer was the County Government of Nyandarua and not the County assembly and that he sued the 3rd respondent to stop them from vetting any other person during the pendency of this suit. He affirmed that he no longer has any claim against the 3rd respondent.

1st and 2nd respondents case

11. The respondents herein stated from the onset that the *Employment Act*, which has been heavily relied upon by the claimant is not applicable to his claim as County Executive Committee members are Public officers by dint of article 260 of the *Constitution* as such not subject of the *Employment Act*.
12. It is stated that section 31 of the *County Government Act, 2012*, gives the Governor wide discretion to dismiss any County Executive Committee members when they consider appropriate or necessary. On that basis it is stated that the Governor needed to re-invigorate his cabinet as such a basis for the said dismissal and in any case that a governor may terminate services of a CEC unilaterally without any consultations.
13. It is averred that as much as section 40 of the *County Government Act*, requires for the County assembly resolution before such dismissal under section 31 of the said *Act*, the same does not take away the power of the Governor to dismiss the said CEC. Either way, that the *Employment Act* does not apply in either way of termination.
14. It is the respondents case that articles 41, 47, 50 and 236 of the *Constitution* were not infringed because the concept of due process does not strictly apply where an employee is serving under the pleasure doctrine.
15. The respondent state that the claim by the claimant that he was exposed to financial constraints are unfounded because any employment can be stopped by an employer at any time. Also that the said claimant ought not be paid for the remainder of the term because he never rendered any services to the respondent to deserve such pay. They added that as much as article 236 is to protect public officer against arbitral termination, the same does not take away the power of the Governor to hire and fire their CECs.



16. It is the respondent case that the claimant as a former CECs is under the special category of employee called "Status" under section 3 of the Employment Act, whose terms of services are not generally a matter of contract.
17. On the violation of constitutional provisions, the respondent stated that the claimant has failed to demonstrate how the said articles of the Constitution have been violated by the respondent.
18. During hearing the respondents herein summoned Muigai Wainaina, the Chief officer, economic planning and Development and the acting County Secretary, as RW-1. He adopted the witness statement dated 8.7.22 and added that the claimant was employed on a two-year contract that lapsed in 2019 and at the time of the said termination he was earning Kshs 284,000 per month. That he was paid all his entitlements upon the said termination. It was his testimony that the Governor is the one that hires and fires CECs and that the Governor followed due procedure in the said termination.
19. Upon cross examination, the witness testified that the claimant was terminated by the Governor through the pleasure doctrine as such due process is not necessary in the circumstances. He stated that the claimant was issued with a termination letter. Also that during the said period, he was facing impeachment motion by the county assembly but none is on record before this court.

3rd respondent's case

20. The Third respondent distanced itself from the actions of the 1st and 2nd respondent and stated that it was not aware of the said termination and that they also learned in the press released that was circulated in the media. It avers that it was not consulted before the said terminations were carried out by the 1st respondent, neither did they take part in the said termination as such it is a strange to the claim before court.
21. It is stated that the 3rd respondent was in the dark in the entire process leading to the termination as such the particulars of unfair termination against it are vehemently denied.
22. It is the 3rd respondent's case that there is no cause of action raised by the claimant as against it as such they have been wrongfully sued and their name ought to be struck out. Nonetheless that, the claim in as far as reinstatement is sought has been overtaken by events as the interim orders which had been issued to preserve status quo were discharge by Justice Mbaru on the October 9, 2019 and the court gave the respondent go ahead to replace the said CECs which they did.
23. The parties upon close of their cases filed submissions with the claimant filing on August 17, 2022 1st & 2nd respondent filing joint submissions on August 26, 2022 and the 3rd respondent filing on the October 6, 2022.

claimant's Submissions.

24. The claimant submitted on three issue; whether the termination was unfair, whether the reliefs sought should be granted and who should bear costs of this claim.
25. On the first issue it was submitted that, the claimant was terminated without notice or disciplinary hearing contrary to the law. He argued that the excuse by the 1st respondent that the Governor can hire and fire at his own pleasure is erroneous by dint of article 179(2)(b) of the Constitution, which require the Governor to seek approval of the County assembly in constituting its cabinet as such that the powers of the Governor are not absolute. He added that the pleasure doctrine even when is applicable



cannot be used whimsically or arbitrary. To support his argument he relied on the case of County Government of *Nyeri and another v Cecilia Wangechi Ndungu* [2015] eKLR where the court held that;

“A state officer’s terms and conditions of services are regulated by the constitution or relevant statute, fair administrative action and rules of natural justice.”

26. It was further argued that article 47 guaranteed all persons right to fair administrative action regardless of their employment. Additionally that section 40 of the *County Government Act* provides for the procedure of the removal of the County Executive Committee member, with sub-section 1 giving some of the reasons that a CECs may be removed, while sub-section 4 provide for right to appear before select committee and defend their removal, a clear indication that the drafters of the statute envisioned the need to give CECs fair administrative action.

27. Contrary to the provisions of section 40 of the *County Government Act*, section 31 of the said Act gives the Governor immense powers to dismiss a CECs at his own pleasure. This pleasure doctrine was discussed at length in the case of *Richard Bwogo Birir v Narok County Government and 2 others* [2014] eKLR where the court observed that:-

“To answer the 1st issue for determination being whether the pleasure doctrine applies in Kenya’s public service and particularly in this case, the court finds that the pleasure doctrine and the related doctrine of the servants of the crown does not apply in public and state service of the new Republic under the Constitution of Kenya, 2010. The court further finds that the pleasure doctrine and the doctrine of servants of the crown did not apply and could not be legitimately invoked in the dismissal of the petitioner by the 2nd respondent as was purportedly advanced for the respondents. Finally, the court holds that it is the doctrine of servants of the people and the doctrine of due process that apply to public and state officers in Kenya. The court further holds that it is through the application of the doctrine of servants of the people and the doctrine of due process of law that public and state officers in Kenya are subordinated by the people who are the holders of sovereign power in the new Republic.”

28. The claimant also cited the decision by Supreme Court in Canada in *David Dunsmuir v New Brunswick* [1963] 2 ALL ER 66, where the court held with regard to pleasure doctrine that:-

“The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority... The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who “fulfill constitutionally defined state roles” (Wells, at para. 31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office “at pleasure” Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.”

29. Accordingly, that the constitution provides for powers to be vested in the people and not on individuals as such that all laws should be read to give effect to the articles of the Constitution. On that note the



claimant submitted that his termination was unfair in the circumstances and urged the court to allow the claim as prayed.

1st and 2nd respondent's Submissions.

30. The respondent herein submitted on four issues: whether the *Employment Act* is applicable in this case, whether the termination was unfair, whether the reliefs sought should be granted and who should bear costs of this suit.
31. On the first issue it was submitted that the claimant was a state officer by dint of article 260 of the *Constitution* as such his employment is governed by the Constitution and the County Government Act and not the *Employment Act*. He supported this argument by citing the case of *County Government of Nyeri and another v Cecilia Wangechi Ndungu* [2015] /eklr, where the Court of Appeal observed that *Employment Act* does not apply to state officer.
32. Accordingly, that the claimant erred in pegging his suit and prayers in the *employment Act*, therefore that the claimant for compensation sought as pegged under the *Employment Act* is not tenable on that basis.
33. On whether the termination was unfair, the respondents submitted that as much as section 40 of the *County Government Act* provide for procedure of removal from office of a CECs, section 31 of the same *Act*, grants immense powers upon the Governor to fire any CECs on his own will. To support this, they cited the case of *County Government of Nyeri and another v Cecilia wangechi Ndungu* (Supra) and argued that the Governor does not need to subject any CECs to any disciplinary hearing before termination. In the word of the Court of Appeal, the court held that;

“Section 31 (a) of the *County Governments Act* does not require the Governor to hold a disciplinary hearing in respect of the said member before dismissal; he can only dismiss if he considers it appropriate or necessary. Appropriateness or necessity is not arbitrariness or whimsical. Appropriateness or necessity imports the requirement that there must be reasons that make the dismissal appropriate or necessary. It is these reasons that determine whether the discretionary power exercised under section 31(a) of the *County Governments Act* is reasonable or not.”

34. It was argued further that the termination of the claimant was purely a political process, which cannot therefore be subjected to the provisions of the *Employment Act*.
35. On the reliefs sought, the respondents argued that the same were not justified and the allegation that the claimant's constitutional right were infringed in not demonstrated or supported by any evidence as such the entire claim should fail. They urged this court to disallow the entire claim with costs for lacking merit.

3rd Respondent's Submissions.

36. The 3rd respondent argued on four points; whether there exists employer-employee relationship between it and the claimant, whether the 3rd respondent could be held liable for the alleged termination, whether the reliefs sought should be enforced as against the 3rd respondent and who should bear costs of this suit.



37. On the first issue, the respondent relied on the decision by Justice Nzioka in the case of *Samuel Wambugu Ndirangu v 2NK Sacco Society Limited* [2019] eKLR which gave a detailed definition on who is an employee and held that;

“Applying the control test, which is as to whether the employer controls or has the right to control the employee, not only as to the result of the work to be done but also as to the method and means by which the said task is to be accomplished, the question of whether or not there is an employer-employee relationship for purposes of this matter would therefore depend on whether the ‘employer’ has control over the ‘employee’. Put another way, where the element of control is lacking and where the person who works for another does so more or less at his own pleasure and is not subject to definite conditions of work or hours of work, the relationship of employer-employee does not exist. The indicia of this relationship of employer-employee is largely absent in the case before me. A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee’s conduct (this is what gives the test the nom de guerre – control test). In my considered view, there is insufficient indicia for the assumption of the relationship the claimant asserts and having failed to discharge the evidentiary burden the claimant’s case is only fit for dismissal.”

38. Consequently, that there is no employer-employee relationship between the 3rd respondent and the claimant as such the claim as against it is without any basis.

39. On costs, the respondent cited the decision by justice *Gikonyo in Haraf Traders Limited v Narok County Government* [2022] eKLR where the court quoted the book by Retire Justice Richard Kuloba’s; Judicial Hints on *Civil Procedure, 2nd Edition* at page 94 that;

“costs are awarded at the unfettered discretion of the court subject to such conditions and limitation as may be prescribed and to the provisions of any law for the time being in force but they must follow the events unless the court has good reason to order otherwise...”

40. On that basis the respondent herein urged this court to grant them cost for defending this suit.

41. I have examined all evidence and submissions of the parties herein. The issues for this court’s determination are as follows;-

1. Whether the claimant was terminated fairly or unfairly and for justified reasons.
2. Whether the claimant’s rights under the constitution and the law were breached.
3. Whether the claimant is entitled to the remedies sought.

Issue No 1

42. The claimant was indeed appointed as CEC member in-charge Public Administration and ICT of the 2nd respondent and gazetted as such on November 7, 2017. This appointment was made under section 30 (1) (d) & (m) and 44 of the *County Government Act*. As per the gazette notice of course section 30 (1) (d) & (m) is non-existent.

43. Section 44 of the *County Government Act* deals with appointment of county secretary.



44. Section 35 is what deals with appointment of County Executive members.
45. The gazette notice never mentioned the period under which the claimant was to serve but in tandem with the law and practice CEC members serve during the tenure of the sitting governor unless lawfully removed.
46. The submission by the respondent that the claimant was to serve for 2 years is not backed by any evidence.
47. That notwithstanding, section 31 (a) provides as follows;-
- “The Governor – may, despite section 40, dismiss a County Executive Committee member at any time, if the Governor considers that it is appropriate or necessary to do so”.
48. The respondents have submitted that they proceeded to dismiss the claimant in order to reorganize the government for better services and they didn’t need to accord the claimant any opportunity to be heard.
49. In relation to this issue however, the matter of whether the governor can dismiss a CEC member at his will has been discussed in various case law see *Governor of Nyeri & another v Cecilia Wangechi Ndungu* (2015) eKLR (Supra) where the court of Appeal held that “A State Officer’s terms and conditions of service are regulated by the constitution or relevant statute, fair administrative action and rules of natural justice”.
50. It is also true that article 47 of the constitution provides as follows;
47. “Fair administrative action
- (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.”
51. The term used here in all persons and there is no exception to CEC members.
52. In *Richard Bwogo Birir v Narok County Government & 2 Others* (2014) Eklr (Supra) the court also observed that the pleasure doctrine no longer applies to Kenya’s public service and state service of the Republic of Kenya under the *Constitution of Kenya 2010*.
53. The court further observed that pleasure doctrine cannot be legitimately invoked in dismissal of the petitioner who was also a CEC member as in the instant case.
54. As submitted by the claimant herein the pleasure doctrine is archaic and not applicable to a democratic republic like Kenya and the action of the 2nd respondent in purporting to dismiss the claimant at his whim without due process was unfair and unjustified.



Issue No. 2

55. As submitted above, the claimant was dismissed without following due process and in so doing, the respondent breached the claimant's rights under article 27, 41, 47 and 50 of the constitution.
56. The claimant was indeed condemned unheard and the action by the 2nd respondent was illegal, null and void.

Issue No.3

57. Having found as above, I find that the claimant is entitled to various remedies and I order as follows:-
1. The claimant be paid all his salary withheld at time of unfair and unjustified dismissal to the time his 5 year contract was to end which translates to 36 months x 284,000/= 10,224,000/=
 2. The 1st & 2nd respondents will pay the claimant kshs.5million as damages for the unfair and unlawful dismissal
Total Awarded = 15,224,000/
Less statutory deductions
 3. The 1st & 2nd respondents to pay costs of this claim plus interest at court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ms. Mwaluko holding brief for Kunini for claimant – present

Kinuthia holding brief for Abuya for 3rd respondent – present

Osongo holding brief for Maina for 1st & 2nd respondents – present

Court Assistant – Fred

