



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

CAUSE NO. 4 OF 2021

(FORMERLY ELRC CAUSE NO. 28 OF 2019 AT MOMBASA)

RAPHAEL MUNYUA NDUNG’U CLAIMANT

- VERSUS -

COUNTY GOVERNMENT OF LAMU.....1ST RESPONDENT

GOVERNOR, COUNTY GOVERNMENT OF LAMU.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 20.05.2019 through M/s Magare Musundi & Company Advocates. The claimant’s case as pleaded is as follows.

General elections were held on 08.08.2017 and vacancies in the offices of Member of the County Executive Committee (MCEC) became available. The claimant was appointed MCEC for Health Services and Environment. The appointment was by the 2nd respondent with approval of the County Assembly per the letter dated 12.10.2017. The benefits included a gross salary of Kshs. 259, 879.00 and commuter allowance of Kshs. 20, 000.00 per months. The claimant was also entitled to gratuity per Gazette Notice No. 6518 of 07.07.2017 at 31% of basic remuneration.

The claimant accepted the appointment on 12.10. 2017, took an oath of office and started working up to 26.09.2018 and it is his case that he is entitled to continue working for the remainder of 5 years’ term.

On 03.04.2018, the 2nd respondent terminated the claimant’s employment and the claimant filed ELRC Constitutional Petition 2 of 2018 at Mombasa. The claimant was reinstated by an order of the Court as per judgment given on 20.09.2018 for reinstatement of the claimant without loss of benefits.

By the letter dated 24.09.2018 and served upon the claimant and the County Assembly of Lamu on 26.09.2018, the respondents reinstated the claimant into employment as MCEC for Health Services and Environment with immediate effect without loss of benefits in compliance with the Court order in ELRC Constitutional Petition 2 of 2018 at Mombasa. After the judgment on 20.09.2018 the claimant resumed duty immediately on Monday 24.09.2018 upon the Court order being served upon the respondents. However, he was not allowed in the office nor given a reinstatement letter until 26.09.2018 when he received the reinstatement letter together with a letter of dismissal dated 26.09.2018. The dismissal letter stated as follows:

“Dear Raphael,

DISMISSAL AS A MEMBER OF THE COUNTY EXECUTIVE COMMITTEE

In exercise of the powers granted to me pursuant to section 31(a) of the County Government Act 2012, I wish to inform you that you are hereby dismissed as a member of the County Executive Committee with immediate effect.

On numerous occasions, I have received several complaints from the county health workers to the effect that you have subjected them to humiliation, threats, harassment, coercion and victimization. The health workers have further accused you of uncontrolled transfer of staff, stoppage and dissolution of the county health management team, inciting members of the

public against health workers and ignoring protocol in issuance of duties or directives. Health workers have petitioned me for your immediate dismissal as member of County Executive Committee for Health Services and Environment on account of incompetence, abuse of office and gross misconduct. The quality of service delivery at the Department is worsening each passing day.

As you are aware, I have summoned you on several occasions and prevailed upon you to take charge of your docket. Despite your assurances that you will address those concerns and complaints, the disquiet among the County health workers threatening a general strike which has the potential to completely paralyze the County health system. These turn of events that has severely affecting service delivery at the department. The resultant effect has been a major public outcry from wananchi who are the most affected from interruption of services at the department and this cannot be left to continue indefinitely.

In the circumstances, I have decided that the most appropriate action is to dismiss you under section 31(a) of the County Governments Act, 2012 with immediate effect in order to alleviate the suffering of the people of Lamu County, prevent a looming county health workers general strike, restore service delivery and bring stability to the industrial relations between management and county health workers at the department. This action is taken for the public good and for the benefit of the people of Lamu County.

By a copy hereof, the County Treasury is instructed to process payment of your dues together with one month's salary in lieu of notice.

Yours Sincerely,

Signed

H. E. Hon. Fahim Yasin Twaha

GOVERNOR, LAMU COUNTY

Copy to:

County Executive Committee Member for Finance, Strategy and Economic Planning

LAMU COUNTY"

The claimant's case is that the reinstatement and the dismissal was at the same time and by dismissal time, he had never worked consequential to the reinstatement. Prior to the termination the claimant states that he had not been aware of any grounds for removal as envisaged in section 40 of the Act. Further the grounds in the dismissal letter had been litigated upon in ELRC Constitutional Petition 2 of 2018 at Mombasa between the same parties and dismissed in favour of the claimant. Further his appointment was for a contractual term of 5 years or for the Governor's term of service. His gross annual pay was Kshs. 3, 358, 548.00 and therefore Kshs. 16, 792, 740.00 for the whole term of 5 years from 12.10.2017 till the end of 5 years. He had earned salaries and allowances only up to September 2018 for a period of one year leaving cumulative period of 4 out of the 5 years of the contract of service. The claimant therefore claimed for pay for the 4 years Kshs. 13, 358, 740.00 plus service gratuity at 31% of the basic remuneration per Gazette Notice No. 6518 Vol. CXIX No. 89 page 3987 of 07.07.2017 being applicable to the claimant's terms of service.

The claimant's further case is that the dismissal was irregular, illegal and unlawful upon the following grounds and particulars:

- a. The reasons for dismissal were not valid and values and principles in Articles 10 and 236 of the Constitution were violated.
- b. The respondents failed to accord the claimant a fair administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair and contrary to Article 47(1) of the Constitution and the right to fair hearing per Article 47(2) of the Constitution.
- c. The claimant was discriminated on account of his Kikuyu ethnic and social background contrary to Article 27(1) and (2) of the Constitution.
- d. The termination was contrary to Article 41(1) of the Constitution as read with section 40 of the County Government Act. Further Articles 10(1) (a), (b) and (c) and Articles 10(2) (a), (b) and (c) of the Constitution were violated in the manner the respondents thrashed the decree in ELRC Constitutional Petition 2 of 2018 at Mombasa.
- e. The due process in section 40 (1) of the County Governments Act and Article 236 of the Constitution were not followed and the claimant is entitled to institute the suit per Articles 22(1), 23(1), 165(3) (b) and Article 258 (1) of the Constitution.

The claimant's further case is that his dismissal on 26.09.2018 from a state office as MCEC was unfair, unlawful, unconstitutional, arbitrary, and against the rules of natural justice and he was condemned unheard contrary to Articles 47 and 50 (1) of the Constitution. The dismissal also breached the contract of employment signed on 12.10.2017.

The claimant's further case is that by the doctrine of servants of the people and doctrine of due process the respondents had no power to dismiss the claimant as a state officer at their pleasure, arbitrarily, capriciously or whimsically with absolute and unfettered discretion

contrary to public good and the claimant's fundamental rights and freedoms and contrary to Article 236 of the Constitution.

The claimant prayed for judgment against the respondents for:

- a. A declaration that the termination of the claimant's employment as a state officer, being a member of the County Executive Committee of the County Government of Lamu in charge of Health and Sanitation on 26.09.2018 was irregular, unlawful, unfair, wrongful, unfair and capricious, are unreasonable and untenable in law and contrary to the tenets of Chapter 6 of the Constitution by failing to give valid and compelling reasons for exercise of their power and for the benefit of the people of County of Lamu in particular and the people of Kenya in general.
- b. A declaration that the act of the respondents in relieving the claimant his duties was breach of the claimant's constitutional rights under Articles 27(1) (2) and (3), 28, 41, 47, and 50, 200 and 236 of the Constitution of Kenya and that the same is null and void for all intent and purposes and in breach of the contract in force between the claimant and the respondents.
- c. Compensation for loss of privileges and other benefits for the remainder of the period in the claimant's 5-year contract.
- d. Net unpaid salary and allowances for the remainder of the claimant's term of 5 years or 60 months from 26.09.2018 by the unconstitutional conduct of the respondents amounting to a loss of a gross of Kshs. 13, 358, 740.00.
- e. A further sum of Kshs. 3, 358, 548.00 being punitive damages of 12 months' gross salary for unfair dismissal.
- f. Service gratuity for a term of 12 months being Kshs. 580, 056.00.
- g. Costs and interest of the claim.

The respondents filed the statement of defence on 22.07.2019 through M/s Kilonzo & Aziz Company Advocates. The respondents admitted employing the claimant as pleaded for the claimant. The terms of service were set out in the letter of appointment dated 12.10.2017 and the respondent's case is that the claimant breached the terms and conditions of service leading to his termination by the 2nd respondent. His termination related to numerous complaints by health workers about the claimant's performance and leading to the claimant's termination by the 2nd respondent's letter dated 03.04.2018. That termination was subject of litigation between the parties herein in ELRC Constitutional Petition 2 of 2018 at Mombasa. The decree was served and the 2nd respondent complied by reinstating the claimant per the decree and by the letter dated 24.09.2018. On 26.09.2018 he was issued with a dismissal letter. The dismissal was under section 31(a) of the County Governments Act and it was lawful and regular and he is not entitled to any benefits flowing from the contract of service. Further the dismissal letter set out the reasons for termination. While admitting the Constitutional provisions cited for the claimant, the respondents alleged that the constitutional provisions do not afford the claimant the right to challenge the dismissal. Further the dismissal was in line with sections 8, 9 and 10 of the Public Officer Ethics Act, 2003 and sections 7, 8, 9, 10, 11, 13(b) and 34 of the Leadership and integrity Act, 2012. The termination was procedurally fair, reasonable and necessary and the claimant is not entitled as claimed and prayed for.

The respondents prayed that the memorandum of claim dated 25.04.2019 be dismissed with costs to the respondents.

The claimant testified to support his case. The respondent filed the witness statement of the County Secretary one John Mburu but despite an opportunity to attend Court to testify, he failed to do so. The Court is guided, in the circumstances, by the submission made for the claimant that in **John Chumia Nganga –Versus- Attorney General & Another [2019]eKLR** the Court held, **“Although the Defendant filed a defence, it did not adduce evidence in support of its claim. This therefore means that the Plaintiff's evidence remains uncontroverted and all averments in the defence remain just mere allegations as averments in pleadings are not evidence.”**

Parties filed their respective final submissions. The Court has considered all the material on record including the pleadings, the evidence, and the final submissions. The Court makes pertinent findings as follows.

To answer the **1st issue** for determination the Court finds that there is no dispute that the parties were in a contract of employment. The letter of appointment was dated 12.10.2017. The payable monthly remuneration was gross salary of Kshs. 259, 875.00 and commuter allowance of Kshs. 20, 000.00.

To answer the **2nd issue** for determination the Court finds that the claimant had sued the respondents in ELRC Constitutional Petition 2 of 2018 at Mombasa (Reported as **Raphael Munyua Ndung'u –Versus - County Government of Lamu [2018] eKLR**). The Court (Ndolo J) delivered the judgment on 20.09.2018. The Court found thus, **“36. The Petitioner's dismissal letter dated 3rd April 2018, which I have reproduced in the foregoing parts of this judgment, discloses no reason for the dismissal. It is therefore safe to conclude that at the time of his dismissal, the petitioner did not know the reason for dismissal. The accusations of incompetence, abuse of office and gross misconduct were in the replying affidavit in response to the petition. 17. To my mind, disclosure of the reason(s) for dismissal which has a bearing on the reasonableness of the decision to dismiss is for the benefit of the affected Member of County Executive committee. It is not for the benefit of the Court sitting to review the decision by the Governor. It follows therefore that if no reason is disclosed at the time of dismissal, the decision to dismiss cannot be said to be reasonable, appropriate or necessary. 38. In the circumstances of the case, it would appear that the Governor made the decision to dismiss the petitioner without any known reason. The attempt to introduce reasons in pleadings could not cure this irregularity and the Court finds that the Petitioner's dismissal was unlawful, null and void.”** The Court ordered reinstatement of the claimant without loss of benefits. The respondents reinstated the claimant by the letter dated 24.09.2018 and thereafter dismissed him by the letter dated 26.09.2018. The Court finds that those circumstances of the dismissal are not in dispute.

To answer the **3rd issue** for determination the Court finds that the dismissal was unfair, unlawful and unconstitutional as urged for the

claimant. The Court considers that it should be clear that there are two parallel statutory paths for removal of a member of the County Executive Committee from office. The Governor may remove the member under section 31 (a) of the County Governments Act which states that the Governor may, despite section 40, dismiss a county executive committee member at any time, if the Governor considers it appropriate or necessary to do so. The other path is under section 40 of the Act and which involves the County Assembly making a resolution requiring the Governor to dismiss such member and thus, section 31 (b) of the Act provides that the Governor shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40. The Court finds that in the instant case the dismissal letter stated that the 2nd respondent was dismissing the claimant in exercise of the powers under section 31(a) of the Act. The Court finds that the dismissal was unfair and unlawful as pleaded, urged and submitted for the claimant because the reasons in the dismissal letter had already been canvassed in **Raphael Munyua Ndung'u –Versus - County Government of Lamu [2018] eKLR** and the Court found that despite the issues as urged for the respondents, the claimant had to be reinstated. The issues are the same issues the Court found were being introduced by way of replying affidavit rather than by way of the administrative due process between the parties as at the time of the consideration of the dismissal – and the Court adds as per the constitutional and statutory provisions as pleaded, urged and submitted for the claimant. For avoidance of doubt, all the allegations in the dismissal letter of 26.09.2016 are the same issues before the Court as enumerated in paragraphs 15 to 24 of the judgment in the earlier decided case of **Raphael Munyua Ndung'u –Versus - County Government of Lamu [2018] eKLR**. The Court finds that the respondents had not, in that earlier case put a cross-petition and urged and prayed for an order to recommence the process and may be dismiss the petitioner upon the same reasons. The Court finds that the doctrine of *res judicata* and finality of litigation applied and the dismissal upon reasons that had been litigated upon with finality amounted to double jeopardy and it was unfair. The Court further finds that the respondents failed to afford the claimant due process upon the statutory and constitutional provisions as pleaded and urged for him. It could be that had the respondents followed principles of natural justice or due process, it would have come out that the proposed reasons for the dismissal were subject of litigation with finality and the suit may not have been filed.

For avoidance of doubt and in the latest decision on the subject, in **County Government of Garissa & Another –Versus – Idriss Aden Mukhtar & 2 Others [2020]eKLR** the Court of Appeal (W.Karanja, H. Okwengu & F. Sichale JJA) held thus, “ **50. In our view, the Governor misinterpreted his powers under Section 31(a) of the CGA, as giving him a free hand to dismiss the respondents at his pleasure, and therefore did not give them any hearing before termination of their employment. This was a clear breach of the respondent’s rights to fair labour practices under Article 41(2) of the Constitution and right to a fair administrative action under Article 47 of the Constitution. It was also a breach of natural justice and therefore, the respondents’ dismissal was unfair termination.**”

To answer the 4th issue for determination, the Court finds on remedies prayed for as follows:

- a. The claimant prayed for a declaration that the termination of the claimant’s employment as a state officer, being a member of the County Executive Committee of the County Government of Lamu in charge of Health and Sanitation on 26.09.2018 was irregular, unlawful, unfair, wrongful, unfair and capricious, are unreasonable and untenable in law and contrary to the tenets of Chapter 6 of the Constitution by failing to give valid and compelling reasons for exercise of their power and for the benefit of the people of County of Lamu in particular and the people of Kenya in general. The Court has already found that the claimant is entitled as prayed for.
- b. He prayed for a declaration that the act of the respondents in relieving the claimant his duties was breach of the claimant’s constitutional rights under Articles 27(1) (2) and (3), 28, 41, 47, and 50, 200 and 236 of the Constitution of Kenya and that the same is null and void for all intent and purposes and in breach of the contract in force between the claimant and the respondents. The Court has found that the claimant has established violations as prayed for and the declaration will issue as prayed for but further for Article 200, only confined to 200(2) (c). For avoidance of doubt and by way of repetition, in **County Government of Garissa & Another –Versus – Idriss Aden Mukhtar & 2 Others [2020]eKLR** the Court of Appeal held that under section 31(a) of the County Government Act, the Governor was obligated to afford the County Executive Member a hearing prior to the termination of the employment and failing, it amounted to a clear breach of the member’s rights to fair labour practices under Article 41(2) of the Constitution and right to a fair administrative action under Article 47 of the Constitution. Further it was also a breach of natural justice and therefore, the dismissal would be unfair termination.
- c. The claimant prayed for compensation for loss of privileges and other benefits for the remainder of the period in the claimant’s 5-year contract. Further he prayed for net unpaid salary and allowances for the remainder of the claimant’s term of 5 years or 60 months from 26.09.2018 by the unconstitutional conduct of the respondents amounting to a loss of a gross of Kshs. 13, 358, 740.00. The Court considers that the claimant has not established a reason attributable to the respondents that might have made it impossible for him to engage in alternative gainful activities after the termination. The Court therefore considers that the prayers will fail as unjustified and in any event, compensation for the unfair and unlawful dismissal should be sufficient compensation.
- d. The claimant prays for a further sum of **Kshs. 3, 358, 548.00** being punitive damages of 12 months’ gross salary for unfair dismissal. The Court considers that award if made, would be based on the statutory capping of compensation for unfair termination under section 49 of the Employment Act, 2007 and not awarded as punitive damages. The Court has considered the factors in section 49 of the Employment Act, 2007. The claimant desired to continue in the respondent’s service. He had served only for 12 months and had over 4 years of contractual tenure as employed. The aggravating factors are that the respondent disregarded the clear guidance of the Court in the judgment in the earlier litigation between the parties. The claimant has been pushed to re-litigate a matter which had essentially been decided by the Court as between the parties. Further, while promising terminal dues in the dismissal letter, it appears that the respondents failed to honour and implement the same. Upon those considerations the claimant is awarded s prayed for.

While making that award the Court has considered the submission for the respondents that in **County Government of Nyeri & Another –Versus - Cecilia Wangechi Ndungu [2015]eKLR** the Court of Appeal (Visram, Koome & Odek JJA) held thus, “ **46. We are of the considered view that the Employment Act does not apply to State Officers. A State Officer’s terms and conditions of service are regulated by the Constitution or the relevant Statute, principles of full fair administrative action and rules of natural justice. It therefore follows that a member of the County Executive Committee being a State Officer is not subject to provisions of the**

Employment Act.” The Court has by itself drawn its attention to the Court of Appeal latest decision which reconsidered that holding being in **County Government of Garissa & Another –Versus – Idriss Aden Mukhtar & 2 Others [2020]eKLR** . The Court of Appeal held thus, (with reference to the Cecilia decision) **“53. With due respect to our sister bench, while we are in agreement that a state officer’s terms and conditions are regulated by the Constitution and relevant statutes, we are of a different view in regard to the application of the Employment Act. Section 3 of the Employment Act states as follows: “...54. Section 3 of the Employment Act is clear that other than the categories stated therein, the Employment Act applies to all employees employed under a contract of service and provides minimum terms and conditions of employment. Therefore, although the employment of state officers is regulated by the Constitution and relevant statutes, the Employment Act applies to them and they are entitled to rights under the Employment Act, unless the Constitution, or relevant statute, or their contract of service provide better terms. Given the relationship between the appellants and the respondents, and the matter having been filed in the Employment & Labour Relations Court, we find nothing wrong with the learned Judge being guided by Section 49 (1) of the Employment Act in awarding damages.”**

e. The claimant has established that he was contractually entitled to the service gratuity for a term of 12 months of service being **Kshs. 580, 056.00** as prayed for.

f. The claimant has succeeded and is awarded costs of the petition.

In conclusion judgment is hereby entered for the claimant against the respondents for:

1. The declaration that the termination of the claimant’s employment as a state officer, being a member of the County Executive Committee of the County Government of Lamu in charge of Health and Sanitation on 26.09.2018 was irregular, unlawful, unfair, wrongful, and capricious, was unreasonable and untenable in law and contrary to the tenets of Chapter 6 of the Constitution by failing to give valid and compelling reasons for exercise of their power and for the benefit of the people of County of Lamu in particular and the people of Kenya in general.

2. The declaration that the act of the respondents in relieving the claimant his duties was in breach of the claimant’s constitutional rights under Articles 27(1) (2) and (3), 28, 41, 47, and 50 (1), 200(2) (c) and 236 of the Constitution of Kenya and that the same is null and void for all intent and purposes and in breach of the contract in force between the claimant and the respondents.

3. The respondents to pay the claimant a sum of **Kshs. 3, 938, 604.00** (less PAYE) by 01.12.2021 failing interest to be payable thereon at Court rates from the date of this judgment till the date of full payment.

4. The respondents to pay the claimant costs of the petition.

5. The Deputy Registrar to cause transfer of the Court file to the Court’s Sub- Registry at Malindi within 7 days from the date of this judgment.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021

BYRAM ONGAYA

JUDGE