



**Gitao & 3 others v Chief Registrar - Judicial Service Commission & 3 others  
(Cause 442 of 2013) [2017] KEELRC 1942 (KLR) (5 May 2017) (Judgment)**

*Mary M Gitao & 3 others v Chief Registrar – Judicial Service Commission & 3 others [2017] eKLR*

Neutral citation: [2017] KEELRC 1942 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE 442 OF 2013**

**MN NDUMA, J**

**MAY 5, 2017**

**BETWEEN**

**MARY M GITAO ..... 1<sup>ST</sup> CLAIMANT**  
**DAVID K SIELE ..... 2<sup>ND</sup> CLAIMANT**  
**JIMMY M KILONZO ..... 3<sup>RD</sup> CLAIMANT**  
**PAUL MOMANYI OSERO ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**CHIEF REGISTRAR - JUDICIAL SERVICE COMMISSION ... 1<sup>ST</sup> RESPONDENT**  
**REGISTRAR – INDUSTRIAL COURT ..... 2<sup>ND</sup> RESPONDENT**  
**THE PERMANENT SECRETARY MINISTRY OF LABOUR . 3<sup>RD</sup> RESPONDENT**  
**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The suit was brought vide memorandum of claim on 3<sup>rd</sup> April 2013 seeking payment of terminal benefits and damages for unlawful constructive dismissal by the respondents.

**Facts of the Case**

2. The claimants were appointed on diverse dates by the Ministry of Labour to the positions of Honourable members of the erstwhile Industrial Court for a period of three (3) years from their respective dates of appointment.
3. The claimants signed “Republic of Kenya, Local Agreement” and were duly gazetted in the Kenya Gazette.



4. The appointments were in terms of Section 17 of the Labour Institutions Act No. 12 of 2007.
5. In terms of the local agreement, the members were to be remunerated (including allowance) to be determined from time to time by the Minister for Labour and Human Resource Development with the approval of the Minister for the time being responsible for finance in accordance with Section 17 (4) of the Labour Institutions Act.
6. Furthermore, in terms of the local agreement

“The member shall be granted a gratuity of thirty one (31) per centum based on his/her retainer fee of Kshs.10,000/= per month during the term of his/her engagement under this agreement.”
7. From the pleadings, the claimants state that their average gross monthly salary was Kshs.94,000/=. It is not in dispute that the members received a daily sitting allowance of Kshs.1,000/=.
8. The claimants have set out particulars of constructive dismissal under paragraph 9 of the memorandum of claim as follows;
  - a) Making it impossible for the claimants to access their respective work stations, locking them out without any notice or written explanation for the same and instructing their respective Judges to proceed with sessions without the claimants’ presence to constitute the requisite quorum as provided.
  - b) Dispensing with their presence and services in the Industrial Court, by unlawfully encouraging the residing Honourable judges to preside alone in their respective courts, further humiliating them before the Judges whilst also making them objects of ridicule, sympathy and endless gossip by fellow junior staff members.
  - c) Deliberately humiliating the claimants and disrespecting their dignity by withholding from them crucial information regarding their imminent dismissal and instead employing innuendos to send an overt message that they were not required, neither needed at their respective work stations.
  - d) By constantly subjecting them to harassment, contempt, ridicule and humiliation from other staff within the circles of the Industrial Court who were unlawfully made privy to information regarding the claimants’ impending dismissal; which information was maliciously withheld from the concerned, claimants herein.
  - e) By callously without scruples asking them verbally to go home and “wait to be contacted” without committing this shocking communicate in writing, nor offering any coherent justifiable reasons for the same.
  - f) By vehemently refusing to remunerate and pay claimants’ dues in brazen breach and violation of the existing contract of service.
  - g) By abruptly changing their job content and terms without their consultation and involvement.
9. The claimants have also set out particulars of constitutional violations under paragraph 16 of the memorandum of claim as follows;
  - a) Disregarding the entire purport of Article 41 (1) of the new Constitution of Kenya 2010, with regard to the claimants’ right to fair labour practices by constructively dismissing them from their jobs and consequently terminating them unfairly.



- b) Flagrant breach of Article 47 (1) of the new Constitution of Kenya 2010, by the respondents herein with regard to the right of the claimants to reasonable and procedurally fair administrative action and their right to be afforded written reasons for any actions (s) that will affect their Fundamental Rights.
  - c) Failure by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendats to give the claimants written reasons of their constructive termination and eventual dismissal, (in spite of their collective valiant attempts at seeking answers from the respondents) contravened their constitutional right to fair administrative actions s enshrined under Article 47 (2) of the new Constitution of Kenya, 2010.
  - d) Manifest patent careless disregard by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> repsodents for due process with regard to the entire episode and enterprise relating to the claimants' constructive dismissal and eventual termination.
  - e) The actions and inactions on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respodents herein with regard to the claimants' and the process through which they were hauled through before being constructively dismissed from their work offended and grossly violated their inherent dignity against express Constitutional guarantee enshrined under Article 28 of the new Constitution of Kenya, 210 that stipulates that every person has inherent dignity and the right to have that dignity respected and protected.
  - f) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respdoents conduct towards the claimants, before and after their constructive dismissal smacks of capriciousness, evident malice, marked by passiveness and uncaring attitude towards their welfare and raised concerns all of which collectively served to put them through untold mental anguish and pain and greatly infringed on their inherent constitutional guarantee of freedom and security of a person as enshrined under Article 29 (d) of the new Constitution of Kenya, 2010.
  - g) Terminating the claimants' employment and consequently constructively dismissing them against the rules of natural justice in that they were not given any prior notice of termination, nor reasons for their dismissal neither were they accorded any opportunity for "hearing" whether written or oral.
  - h) Further, the reason for the termination and dismissal of the claimants were not made known and if so, the same were not valid or anchored in any piece of legislation whatsoever.
10. The claimants state that they served the respondents diligently and had no adverse record at all material times.
  11. That they suffered material loss and mental anguish pursuant to the unlawful and ill motivated conduct by the respondent.
  12. The claimants have set out the particulars of loss under paragraph 17 of the memorandum of claim as follows;
    - a) Loss of salary and benefits from date of termination up to the time the claimants' contract of employment would ordinarily have expired.
    - b) Claimants herein claim salary at the monthly rate of Kshs.94,000/= for the unexpired term of the their respective contracts of service in accordance with Section 49 (1) (b) of the Employment Act which amounts to Kshs.2,914,000/= for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants and Kshs.2,162,000/= for the 4<sup>th</sup> claimant.



- c) The claimants claim there, ((3) month's salary in lieu of notice herein amounting to Kshs.282,000/=
  - d) All claimants here claim gratuity of Kshs.111,600/=
  - e) The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> claimants claim for their cumulative unpaid leave amounting to Kshs.382,158/=, Kshs.764,316/= and Kshs.627,831/= from previous and current contracts respectively.
13. That they made pleas for compensation by the respondents in vain. Made demand for redress in vain hence the suit.
14. Reasons wherefore the claimants seek;
- (i) a. Kshs.3,307,600/=.
  - b. Kshs.3,689,759/=
  - c. Kshs.4,071,916/= and
  - d. Kshs.3,183,431/= respectively being terminal benefits for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> claimants.
  - (ii) General punitive and aggravated damages.
  - (iii) Declaration of rights
  - (iv) Compensation
  - (v) Certificate of service
  - (vi) Interest and costs of the suit.

## **Response**

15. The claims are opposed by a reply to memorandum of claim filed on 8<sup>th</sup> May 2013 as follows;
16. The respondents admit the employment of the claimants in terms of Section 17 of the Labour institutions however aver that the employment was subject to the law then in force and any other law enacted by the National Assembly in exercise of its powers under Article 95 (3) of the constitution of Kenya.
17. Respondent admits the terms of service of the claimants and the manner they served the Industrial Court as set out under paragraphs 4,5,6,7 and 8 of the memorandum of claim.
18. Respondents aver that following the enactment of the constitution of Kenya 2010 in pursuance of Article 162 (2) (a), parliament enacted the Industrial Court Act, No. 20 of 2011 which Act came into force on 30<sup>th</sup> August 2011.
19. That Section 31 of the Industrial Court Act, no. 20 of 2011, repealed Section 17 of the Labour Institutions Act and the entire part III of the Labour Institutions Act, thereby frustrating and terminating the claimants' appointment by operation of the law.
20. The respondents therefore deny that the termination of employment of the claimants was in breach of any statutory or constitutional law as alleged by the claimants or at all. The respondents further deny the particulars of loss set out by the claimants and puts them to strict proof thereof.



21. That by fact of repeal of Section 17, the claimants became redundant and were no longer required to sit as members of the court in that Section 21 of the Industrial Court Act, No. 20 of 2011 provides that the Industrial Court shall be properly constituted for the purposes of its proceedings by a single judge or an uneven number of judges being not less than three assigned by the Chief Justice for matters falling within the provisions of Article 165 (7) (b) of the constitution of Kenya.
22. That though Section 32 (3) of the Industrial Court, Act, saves the appointment of members of the court, the appointment was to be done by the Judicial Service Commission in accordance with Article 172 (1) (c) of the Constitution of Kenya, Section 32 of the Judicial Service Act, No. 1 of 2011 and Section 3 (2) (b) of the sixth schedule to the Constitution of Kenya.
23. The respondent avers that Section 32 (3) of the Industrial Court Act, N. 20 of 2011 is in conflict with the constitution and to the extent of this conflict, the provisions of the constitution are deemed to have been frustrated and terminated by the operation of the law.
24. The respondents, also deny that the claimants average gross monthly salary was Kshs.94,000/= as stated in paragraph 15 of the memorandum of claim.
25. The respondents equally deny the claims made by the claimants based on allegations of mental anguish, suffering, statutory or constitutional breaches and put the claimants to strict proof thereof.
26. Respondents aver that upon termination of contracts of the claimants by operation of the law, the claims were paid all their terminal benefits and their claims be dismissed.
27. The respondents admit having received a notice of intention to sue.

### **Oral Testimony**

28. CW1, Paul Momanyi Osero testified on behalf of all the claimants on the material particulars of claim and was subjected to very close cross examination by counsel for the respondents.
29. The respondent called RW1, Tabitha Muduya, the Human Resource Officer at the Ministry of Labour who testified in support of the matters averred in the memorandum of response.
30. Both parties filed written submissions upon close of the respondents' case.
31. RW1 told the court that the terms of the claimants were as follows;
  - a) 1<sup>st</sup> claimant was appointed for 3 years term from 25<sup>th</sup> March 2011.
  - b) 2<sup>nd</sup> claimant was appointed for 3 years term from 25<sup>th</sup> March 2011.
  - c) The 3<sup>rd</sup> claimant was appointed for 3 years term from 25<sup>th</sup> March 2011 and
  - d) 4<sup>th</sup> claimant was appointed for 3 years term from 2<sup>nd</sup> August 2010.
32. That the contracts were renewable after 3 years. That the claimants earned a retainer fee of Kshs.10,000/= per month and a sitting allowance of Kshs.1,000/= per day.
33. That the members did not earn a salary strictly speaking.
34. That the contracts of members were frustrated by the Industrial Court Act, 2011 pursuant to Article 162 (2) of the Constitution of Kenya 2010 which elevated the Industrial Court to a Superior Court of record and judges no longer were required to sit with members. That this made the job of members superfluous and their positions therefore redundant by operation of the law.



35. That the members were paid gratuity calculated at 31% of the retainer earned during the served term.
36. That members had already received gratuity for the previously served terms.
37. That the members were also paid a monthly retainer fees in lieu of notice. The money was deposited in their accounts. RW1 did not know the claimants personally and did not know how many terms they had served but testified in respect of the last 3 year term in respect of each claimant.
38. RW1 admitted that the claimants were not given written notices prior to termination nor were they given any hearing adding that this was unnecessary because the terms came to an end by operation of the law but not for any disciplinary reason.
39. RW1 was not certain the actual date the claimants left their stations of work.
40. RW1 added that members were entitled to 30 days leave per year as per public service regulation. That the claimants were pain in lieu of leave days not taken.
41. RW1, was aware of correspondence between the Ministry of Labour, Ministry of Justice and Attorney General's office on the issue of the claimants.
42. RW1 insisted that the claimants were treated fairly and were paid what was due to them upon termination.
43. RW2, was Mr. Lucas Nyangweso, a retired accounting officer in the Ministry of Labour. He testified that he procured the payment vouchers for the claimant including payment of gratuity and one month salary in lieu of notice and for leave days not taken. Payment was made via the Central Bank of Kenya. He procured the payment vouchers dated 27<sup>th</sup> August 2013.
44. RW2 stated that since the office of member was abolished by virtue of the new constitution and the new Industrial Court Act, 2011, the claimants were not entitled to any further payment.
45. RW2 stated that the claimants received a retainer fee of Kshs.10,000/= every month, while they worked and they used to receive sitting allowance daily and night out allowances whenever they served outside their station.
46. RW2, stated that the claimants were paid Kshs.23,618/=:, Kshs.23,618/=:, Kshs.23,618/=: and Kshs.48,209/= terminal benefits respectively and gratuity was calculated at 31% of the retainer fees of the served term as follows (10,000 x 5 x ).
47. RW2 denied that the claimants were entitled to payment of the full, unexpired term of office. RW2 also said that he was unaware of the alleged average payment of Kshs.94,000/= per month.
48. The respondents pray that the suit be dismissed with costs.

### **Determination**

49. The issues that stand to be determined are as follows;
  - (i) Was the termination of the employment of the claimants unlawful, unfair and in contravention of statutory and constitutional law?
  - (ii) Are the claimants entitled to the remedies sought:



## Issue I

50. It is undeniable that the office of member of Industrial Court, now Employment and Labour Relations Court was made superfluous once the court was elevated to a superior court of record with a single judge or a bench of three or more judges constituting quorum of the court without any member(s) sitting.
51. This is the position notwithstanding that the position of member was retained in the Industrial Court Act, no. 20 of 2011.
52. The position of member of Industrial Court was no longer tenable by operation of the law and the respondents had no choice but to terminate the employment of the sitting members.
53. What is in question is the terminal benefits that the members ought to have been paid upon termination? This leads us to the question whether the sitting members had legitimate expectation to serve their 3 year term and therefore are entitled to the full pay for the unexpired term of 3 years and gratuity at 31% of gratuity for the unexpired term.
54. According to Wikipedia,
- “The doctrine of legitimate expectation was first developed in English law as a ground of judicial review in administrative law to protect a procedural or substantive interest when a public authority rescinds from a representation made to a person. It is based on the principle of natural justice and fairness and seeks to prevent authority from abusing power.
55. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken, while a substantive legitimate expectation arises where an authority makes a lawful representation that an individual will receive or continue to receive some kind of substantive benefit.
56. In determining a claim for an alleged breach of a legitimate expectation a court will deliberate over three key considerations;
- (1) Whether a legitimate expectation has arisen
  - (2) Whether it would be unlawful for the authority to frustrate such an expectation and
  - (3) If it is found that the authority has done so, what remedies are available to the aggrieved person.”
57. This court has had opportunity to discuss the doctrine of legitimate expectation in Industrial Court of Kenya at Nairobi Cause No. 1168 of 2012. Pravin Bowry –vs– Ethics and Anti-Commission {2013} eKLR. In this case, the five year contract of the claimant was terminated by operation of the law. The court found that there was no express provision in the new legislation that abolished the office of the Deputy Direct held by the claimant and stated;
- “Accordingly, the court finds that the office of the claimant was unaffected by the new legislation and any termination of his employment should have been done if at all strictly in accordance with his contract of employment and the relevant law including the Employment Act, 2007.”



58. The court went ahead to hold;

“However, the principle of legitimate expectation coupled with the finding by the court on the issue of discrimination entitles the claimant to the net amount due at the rate of Kshs.750,000/= for the period of forty-six months from 1<sup>st</sup> September, 2011 to 30<sup>th</sup> June, 2015 as set out under prayer 30 (b) in the statement of claim being net salary and allowances agreed upon on a monthly basis in the sum of Kshs.34,684,000/=.”

59. In the present case, the claimants had legitimate expectation that they would serve as members of the Industrial Court for a period of three years from date of appointment. The Industrial Court Act, No. 20 of 2011 under Section 31, repealed part III of the Labour Institutions Act, no. 12 of 2007, including Section 17 under which the members of the court had been appointed.

60. The Section reads

“17 The Minister, shall on the advice of the Board appoint members of the  
(1), Industrial Court or such other additional members as may be advised by the board for a term of not more than three years.

17 A member of the Industrial Court is eligible for reappointment for a further  
(2). term of three years.”

61. It was argued for the claimants that Section 32 (3) of the Industrial Court Act, 2011, titled “Transitional provisions” which reads; “32 (3) The persons who at commencement of this Act are members of the Industrial Court shall be deemed to have been appointed by the Act.” saved the position of members.

62. However this position is untenable because Section 21 of the same Act, provided; “21 (1) The court shall be properly constituted for the purposes of its proceedings by a single judge.” hence obviating the need to have the position of members, two of whom constituted quorum sitting with a single judge hitherto.

63. It is the court’s considered view that it would be unlawful, to frustrate the expectation of the members to complete their three year term without making full compensation for the substantive remuneration, they expected to get during the three (3) year tenure of the contract.

64. The court finds that the respondents frustrated the legitimate expectation of the members to substantive benefits without fully compensating them for the loss and to that extend the termination of the contracts of the claimants was unlawful.

65. The question that follows, is the remedy available to the members for the loss they incurred consequent on the curtailment of the substantive legitimate expectation.

66. Following the decision of the court in Pravin Bowry’s case, (supra) the court is of the considered view that the monthly remuneration for the members based on a 26 days working month and the definition of remuneration under Section 2 of the Employment Act, No. 11 of 2007 as follows;

67. “Remuneration means the total value of all payments in money or in kind, made or owing to an employee arising from the employment of that employee;” constituted a daily sitting allowance of Kshs.1,000/= which is not in dispute, plus a retainer fee of Kshs.10,000/= per month, making a gross monthly pay of Kshs.36,000/= excluding other allowances paid occasionally for different purposes



- (a) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants had only served five (5) months from 25<sup>th</sup> March 2011, the date of their appointment to the 2<sup>nd</sup> September 2011, the date of termination. They were yet to serve 31 months of their three year term. The court awards each one of them the gross monthly remuneration of kshs.36,000/= for 31 months in the sum of Kshs.1,116,000/=.
- (b) The 4<sup>th</sup> claimant was appointed on 2<sup>nd</sup> August 2010 and had served 11 months at the time of termination on 2<sup>nd</sup> September 2011. The 4<sup>th</sup> claimant had 25 months remaining on his contract and the court awards him Kshs.900,000/= based on a monthly gross pay of Kshs.36,000/= per month.
- (c) The claimants were paid Kshs.10,000/= in lieu of one month's notice. From the foregoing decision on the gross monthly pay, the members were entitled to payment of Kss.36,000/= in lieu of notice. The court awards each one of them the balance of Kshs.26,000/= in lieu of notice.
- (d) The claimants were paid gratuity based on Ksh.10,000/= retainer fee, per month. Based on the decision of the court on the gross pay, the clause in the local agreement on gratuity was void for violating the provisions of Employment Act on remuneration. Members of the court could not earn gross remuneration of Kshs.10,000/= a month. The claimants were entitled to payment of gratuity based on the gross monthly salary of Kshs.36,000/= each.
- (e) Accordingly, the court awards the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimants gratuity of Kshs.55,800/= each calculated at (36,000 x 31% x 5) and to the 4<sup>th</sup> claimant Kshs.122,760/= calculated at (36,000 x 31% x 11). Gratuity is not payable for the unserved term of the contract based on express provision of the applicable public service regulation.
- (f) The termination of the employment of the claimants was by operation of the law and the court does not read any ill will or malice on the part of the respondents in effecting what was already a fait accompli.
- (g) Accordingly, the claims for general, punitive and aggravated damages including the claim for compensation are not well founded and are dismissed.
- (h) The respondents to provide each of the claimants with certificate of service for the period each one of them had served the respondents within 30 days of this judgment.

68. The final order of the court is as follows;

- (a) The court awards the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> claimant Kshs.1,197,800/= each and
- (b) The 4<sup>th</sup> claimant Kshs.1,048,760/=
- (c) Interest at court rates for date of filing suit till payment in full.
- (d) Certificate of service within 30 days
- (e) Costs to follow the outcome.

**DATED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**

