Case Number:	Petition E007 of 2021
Date Delivered:	04 Apr 2022
Case Class:	Civil
Court:	Employment and Labour Relations Court at Malindi
Case Action:	Judgment
Judge:	Bernard Odongo Manani Matanga
Citation:	Joseph Kareko Gikonyo v County Government of Lamu & 2 others [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

PETITION NO. E007 OF 2021

IN THE MATTER OF ALLEGED THREAT AND CONTRAVENTION OF ARTICLES 10, 22, 23(1), 27(1) & (2), 30, 40, 41 47(1) & 232 OF THE CONSTITUTION

AND

IN THE MATTER OF CONSTITUTIONALISM, RULE OF LAW, NATURAL JUSTICE AND GOVERNANCE

BETWEEN

JOSEPH KAREKO GIKONYO…..…….... PETITIONER

VERSUS

COUNTY GOVERNMENT OF LAMU……. 1ST RESPONDENT

LAMU COUNTY PUBLIC SERVICE BOARD…...…...2ND RESPONDENT

COUNTY SECRETARY, LAMU COUNTY…..…… 3RD RESPONDENT

JUDGMENT

Introduction

1. This Petition relates to a dispute on termination of employment between the Petitioner on the one part and the 1st to 3rd Respondents on the other. The Petitioner contends that his contract of service with the 1st Respondent was terminated unlawfully in violation of the constitution and statute and hence his rights. Accordingly, he seeks redress from the court against these alleged violations.

2. The Respondents dispute the Petitioner's case. It is their position that the Petitioner was terminated during the probationary period of his engagement with the 1st Respondent. Accordingly, the termination was in line with the applicable law. Therefore, it is the Respondents' case that the Petition is without merit and should be dismissed with costs.

3. At the point of filing the Petition, the Petitioner also filed an application for temporary conservatory orders. Pursuant to the application, the court issued a temporary order forbidding the Respondents from filling the vacancy left following the Petitioner's removal pending the hearing and determination of the application inter-partes.

4. On 31st January 2022, the court issued directions that the application and Petition be heard jointly and by way of written submissions. The court was to deliver a consolidated decision on the combined application and Petition.

5. In view of the fact that the issues raised in the application and the Petition are in large part the same save that the application is for interim orders, I consider that the decision on the Petition will render unnecessary a pronouncement on the application for interim orders. Accordingly, this decision is on the Petition.

The Pleadings and Averments in Affidavits

6. The case by the Petitioner is premised on the Petition, verifying and supporting affidavits all dated 1st December 2021. It is the Petitioner's case that he was employed by the 1st Respondent on 14th September 2021 in the position of Chief Officer, department of water services. That the parties signed a contract evidenced in the letter of appointment dated 14th September 2021.

7. According to the letter of appointment, the engagement between the parties was to be for a fixed term of two (2) years. The Petitioner states that the parties signed the appointment letter thereby constituting a contract that bound them.

8. The Petitioner states that the initial letter of offer (also referred to as the letter of appointment or appointment letter) signed between the parties did not contain a clause on probation. However, this letter was later recalled by the 1st Respondent's agents who unilaterally inserted in it a clause indicating that the Petitioner was to serve on probation for a period of six (6) months in the first instance.

9. The Petitioner has attached to the supporting affidavit two documents marked JKG 4 and JKG 5 (a) both dated 14th September 2021. These documents evidence the two letters of offer that the Petitioner refers to. While JKG 4 does not contain a probationary clause, JKG 5(a) does contain the clause. The two documents were supposedly signed on 16th September 2021 by the parties to be bound by them.

10. The Petitioner states that shortly after his engagement, the 3rd Respondent issued him with a letter terminating his contract of employment. The termination was indicated to be on probationary grounds. The letter is dated 19th November 2021. It is attached to the Petitioner's supporting affidavit and marked JKG 8.

11. It is the Petitioner's case that although the termination was effected on 19th November 2021, this fact was not brought to his knowledge until about 23rd November 2021 when he visited the 3rd Respondent's office. Meanwhile, the Petitioner had in ignorance of the termination, continued to discharge his functions in line with his letter of appointment.

12. The Petitioner contends that the termination was callous and in violation of the law, his constitutional rights and the principles of natural justice. He contends that he was not afforded a right to be heard before the termination. That his right to fair administrative action protected under article 47 of the Constitution and several other rights were violated.

13. The Petitioner contends that the manner in which his termination was handled was dehumanizing and contrary to the constitutional protections guaranteed to him under article 28 of the Constitution. That on 23rd November 2021, he reported to work only to find his office locked. That the circumstances surrounding his termination implied a scheme to hound him out of office in total disregard of the status of his office.

14. It is the Petitioner's case that the 3rd Respondent had no statutory powers to terminate the Petitioner. Further, that the Respondents could not rely on the pleasure doctrine (also called the ''at will'' doctrine) to terminate the Petitioner's contract at will as they purported as this doctrine has no application in Kenya's employment law regime.

15. In the end, the Petitioner prays for several orders including the following: -

a) A declaration that the Respondents' decision to terminate the Petitioner's contract of service was unconstitutional, unlawful and therefore null and void.

b) An order of Judicial Review to remove and quash the offending decision by the Respondents.

c) An order of Judicial Review to prohibit the Respondents from appointing a replacement for the Petitioner.

d) A declaratory order that the Petitioner is entitled to continue serving in the 1st Respondent's establishment in the position of Chief Officer, water services.

e) An order directing the Respondents to allow the Petitioner to continue serving in the 1st Respondent's establishment as Chief Officer, water services without loss of benefits.

f) In the alternative, the court to order the Respondents to pay the Petitioner damages and or compensation as set out in the Petition.

g) An order that the Respondents pay the Petitioner gratuity as pleaded in the Petition.

h) An order for costs to the Petitioner.

16. On their part, the three Respondents filed a joint response to the Petition. It is their case that whilst it is true that the Petitioner was issued with a letter of appointment dated 14th September 2021 engaging his services as Chief Officer, water services for the 1st Respondent for a period of two years, the contract between the parties was subject to a probation period of six (6) months. It is the Respondents' case that this fact is captured in a clause in the letter of appointment between the parties.

17. The Respondents deny that the Petitioner was issued with a letter without a probationary clause. It is there case that the purported letter of appointment without a probationary clause that the Petitioner now relies on to advance his case is not the one the Petitioner was given.

18. Nevertheless, it is the Respondents' case that even if it is shown that the Petitioner's appointment letter was recalled by the Respondents and amended to insert the probationary clause in it, the Petitioner accepted the new terms by appending his signature on the amended letter. Therefore, the Petitioner is in any event estopped from relying on the issue of unilateral amendment of the letter of appointment to introduce a probation clause to challenge the Respondents' decision to terminate his services.

19. It is the Respondents' case that the Petitioner's contract was lawfully terminated since the law does not require an employer to justify the reasons for terminating a probationary contract of service. And neither is the employer required to follow the procedure for termination provided for under section 41 of the Employment Act in terminating such contracts.

20. It is the Respondents' case that the Petitioner's work output did not meet the expectations of the 1st Respondent. Accordingly, a decision was taken by the 1st Respondent to terminate his contract.

21. The Respondents state that the contract between the parties permitted either party to terminate it by either giving the other notice of one month to terminate or paying an amount equivalent to salary for one month in lieu of notice. That the Petitioner was offered salary for one month in lieu of notice in compliance with the aforesaid clause.

22. The Respondents further argue that the Governor of the 1st Respondent has powers to terminate employees of the County at will pursuant to the ''at pleasure'' doctrine. That these powers are reserved for Governors of Counties under the County Governments Act. That in terminating the Petitioner, the Governor of the 1st Respondent simply invoked this power. The termination of the Petitioner was therefore in order.

23. The Respondents take the view that no rights of the Petitioner have been violated. That further, the Petition as crafted does not disclose any of the Petitioner's rights that have allegedly been infringed by the Respondents. The Respondents thus pray that the Petition be dismissed with costs to the Respondents.

Analysis

24. First, I wish to consider whether the Petition as presented raises recognizable constitutional questions with a reasonable degree of particularity. In their pleadings, the Respondents make quite an issue out of this. It is their case that the Petition is devoid of constitutional issues worth of being considered by this court. In their view, the Petition is an abuse of the court process and should be dismissed with costs.

25. The decision that has often been quoted to provide grounding for the Respondents' position on the matter is perhaps the celebrated case of ***Anarita Karimi Njeru v Republic [1979] eKLR***. In the case, the court expressed itself on the need for a party alleging violation of the Constitution to provide reasonably clear particulars of the alleged breaches in order to aid the court identify the issues for determination in the dispute. It stated as follows: -

''We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.''

26. I have looked at the Petition. It sets out the various articles of the Constitution that the Petitioner alleges have been infringed. Further, it provides particulars of the alleged breaches. At the very least therefore, I consider the Petition as compliant (see ***County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020] eKLR***).

27. The second (2nd) issue that falls for consideration relates to the powers of the Governor of the 1st Respondent to terminate the Petitioner. The law that governs the appointment of Chief Officers of Counties is entrenched in the County Governments Act (CGA) as read with the Constitution of Kenya 2010. Under section 45 of the CGA, these officers are nominated by the sitting Governor from a list of individuals that have been competitively sourced and recommended for appointment by the County Public Service Board (CPSB). The Governor forwards the names of the nominees to the County Assembly for approval before he/she finally appoints them into office.

28. Unlike section 31 of the CGA which expressly empowers a sitting Governor to remove members of the County Executive Committee (CEC), no similar provision under the Act empowers the Governor to remove County Chief Officers. In the face of this lacuna, the Respondents' Advocates have relied on section 51 of the Interpretation and General Provisions Act to advance the argument that because he is the appointing authority of Chief Officers, the Governor by implication, has power to terminate them. The relevant part of section 51 of the Interpretation and General Provisions Act is reproduced in the judgment as here below: -

''Where, by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.''

29. As pointed out earlier in the judgment, the process of appointing Chief Officers of a County Government involves more than the Governor of a County. The CPSB has to first source and recommend to the Governor individuals for appointment into this position. Second, the Governor has to forward the names so recommended to the County Assembly for approval. It is only after this procedure is completed that the Governor can make a valid appointment of a Chief Officer.

30. It must be noted that County Chief Officers are part of the public service of a County Government. Section 2 of the CGA defines **"county public service"** to mean the collectivity of all individuals performing functions within any department of the county government or its agency, but does not include the governor, deputy governor, members of the county executive committee and the members of the county assembly. Undoubtedly therefore, Chief Officers fall in the wider category of personnel in a County Government that comprises the county public service.

31. Under section 5(2)(f) of the CGA, one of the functions of a County Government is to establish and staff its public service as contemplated under Article 235 of the Constitution. Clearly, the power to staff county public service vests in the County Government comprising of the County Executive and County Assembly. This power is not the preserve of the County Executive or indeed the sitting Governor. This should inform the reason why section 45 of the CGA is couched in the manner it is in relation to appointment of County Chief Officers. It is intended to ensure that both the County Executive and County Assembly, the two key organs of a County Government jointly exercise the powers conferred upon a County Government under section 5 (2) (f) of the CGA as read with article 235 of the Constitution.

32. Because it is not always feasible for a County Government to directly undertake all the activities that relate to management of its human resource, the law has established an independent agency to manage this critical function on its behalf: the CPSB. Under section 59 of the CGA, the CPSB is mandated to, inter alia, do the following on behalf of the County Government it serves: establish and abolish offices in public service; appoint officers to serve in those offices; and exercise disciplinary control over, and remove, persons holding or acting in those offices.

33. If the foregoing analysis is correct, then section 51 of the Interpretation and General Provisions Act cannot be said to donate

exclusive power to a sitting Governor to terminate a County Chief Officer. It will perhaps be correct to argue that the totality of those involved in the appointment of a Chief Officer under section 45 of the CGA and not just the Governor, must then, invoking the provisions of section 51 of the Interpretation and General Provisions Act, be involved in his removal. And as indicated above, this power now vests in the CPSB to be exercised jointly for the County Government: not merely the County Executive or Governor.

34. The office of the County Secretary is established under section 44 of the CGA. The occupier of the office serves as the secretary to the CEC, the Executive wing of a County Government. Although he/she is the head of the public service in a County, the County Secretary is neither a member of nor secretary to the CPSB as can be discerned from sections 58 and 58A of the CGA. Therefore, he/she cannot purport to discharge functions that are the preserve of the CPSB.

35. The letter dated 19th November 2021 terminating the services of the Petitioner is signed by the 3rd Respondent in his capacity as the County Secretary, Lamu County. From the letter, it is apparent that the 3rd Respondent was communicating a decision by a third party to terminate the Petitioner. It is however not obvious from the letter whose decision this was.

36. What is clear though is that neither the County Assembly nor the 2nd Respondent (CPSB) is mentioned in the letter of 19th November 2021 as the originator of the impugned decision. Nevertheless, what can be deduced from the communication is that the decision to terminate the Petitioner was taken pursuant to the powers of the CEC to reorganize departments under the 1st Respondent.

37. At paragraph 21 of the 3rd Respondent's replying affidavit dated 26th January 2022, the 3rd Respondent indicates that the decision to terminate the Petitioner was by the Governor of the 1st Respondent. This is repeated in the submissions by counsel for the Respondents.

38. It is clear to me that neither 3rd Respondent nor the CEC nor the Governor had legal authority to terminate the Petitioner. And the position does not change merely because the Petitioner was on probation. The only County organ that could lawfully initiate the removal of the Petitioner whichever way was the 2nd Respondent.

39. In view of the various provisions of law mentioned above, the Respondents cannot rely on section 51 of the Interpretation and General Provisions Act to justify the 1st Respondent's Governor's usurpation of the 2nd Respondent's powers to manage the human resource of the 1st Respondent. This position has helpfully and extensively been discussed by the Court of Appeal in ***Kisumu County Public Service Board & another v Samuel Okuro & 7 others [2018] eKLR.*** Accordingly, I fault the decision by the Governor of the 1st Respondent to terminate the Petitioner on this ground.

40. The third (3rd) issue for consideration relates to the legal position in Kenya regarding termination of contracts of service that have a probationary clause where the probationary period is still running. Section 42 (1) of the Employment Act provides that the protections offered under section 41 of the Act to employees facing termination and or other disciplinary action do not apply to probationary contracts. Unlike their counterparts who are not on probation, the section insinuates that employees on probation may be terminated without disclosing the reason for the decision to terminate to them. Further, it suggests that the employer has no obligation to accord these employees a hearing before relieving them of their employment.

41. In terms of the foretasted provision, all that the employer is required to do in order not to run afoul the law is to give the employee notice of at least seven (7) days of the intention to terminate his contract or in lieu thereof pay such employee an amount equivalent to seven (7) days' salary.

42. It is worth noting that the Employment Act predates the Constitution of Kenya 2010, the former having come into force in 2007. Section 7 (1) of the sixth schedule to the Constitution 2010 provides as follows: -

''All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.''

43. The Petitioner has cited several articles of the Constitution that he contends have been infringed by the Respondents' decision to terminate him. These include article 27 against differential treatment on prohibited grounds; article 41 on fair labour practices; article 47 on the right to fair administrative action; article 50 on the right to fair hearing; and article 236 that, inter alia requires that

public servants that are subject to disciplinary action be accorded due process.

44. Section 42 (1) of the Employment Act, in so far as it sanctions differential treatment between employees on probation and those not on probation on matters such as: the right to know the grounds for termination; the right to be heard in response to the grounds; and the right to fair administrative action in the process infringes on most of the articles of the Constitution cited in **paragraph 43** of this judgment. In my view, whilst the reasons for placing employees on probation are compelling, this cannot be a reason to deny such employees the right to be told why it is proposed to terminate them and to deny them the opportunity to explain themselves in response to the charges against them.

45. It is for the foregoing reason that I construe the ouster of section 41 protections to probationary contracts under section 42 of the Employment Act as invalidated by section seven (7) of the sixth schedule to the Constitution 2010. All employees, whether or not on probation, have the right to know the reason for their termination and to be afforded a chance to respond to the accusations against them in this respect.

46. Helpfully, this court (differently constituted) has recently restated this position in the case of ***Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR.*** In a three bench decision, the court declared as follows: -

''To the extent that Section 42(1) of the Employment Act, 2007 excludes employees having probationary contracts from the provisions of Section 41, it is inconsistent with articles 24, 41 and 47 of the Constitution.''

47. I have considered the position of the Respondents on this question. They suggest that in terms of section 42(1) of the Employment Act, the 1st Respondent's Governor had lawful authority to terminate the Petitioner as he did without hearing him or indicating the reasons for his termination. Indeed, a look at the letter of termination dated 19th November 2021 demonstrates that it does not offer the Petitioner the reason for his termination save for mentioning that the decision was taken pursuant to the 1st Respondent's powers to reorganize the County under section 46(1) of the CGA. It was only when this litigation was filed that the Respondents in their affidavit and submissions disclosed that the reason for terminating the Petitioner was his apparent failure to meet their performance expectations.

48. As I have demonstrated above, the literal interpretation of section 42(1) of the Employment Act adopted by the Respondents would put the section in direct conflict with the Constitution of Kenya 2010. Therefore, in terms of section seven (7) of the sixth schedule to the Constitution, section 42(1) of the Employment Act must be read with the necessary exclusion of the constraints placed on it in relation to the application of section 41 protections to probationary contracts.

49. I have considered the decisions of ***Rustus Odhiambo Otieno v Style Industries Limited [2019] eKLR, Danish Jalang'o & another v Amicabre Travel Services Limited [2014] eKLR and Lawrence Musyimi Ngao v Liquid Telecom Kenya Ltd [2019] eKLR*** relied on by the Respondents in support of their argument on this issue. It is noteworthy that all these cases are only of persuasive value to this court. Besides, the latter three Judge Bench decision in the ***Monica Munira*** case appears to interpret the law in a manner that is more persuasive to this court.

50. Consequently, even if the letter by the 1st Respondent's Governor dated 14th September 2021 contained a probationary clause, it is declared that such clause could not mandate the Governor of the 1st Respondent to terminate the Petitioner without providing reasons for his decision and hearing the Petitioner. To that extent, the impugned termination was unlawful and in violation of the Petitioner's rights under articles 27, 41, 47, 50 and 236 of the Constitution.

51. In view of the foregoing, it is perhaps not necessary for me to interrogate the issue of whether the Respondents recalled the Petitioner's letter of appointment in order to insert a clause on probation in it. I say so because in my view in considering how the contract between the parties ought to have been terminated, it does not matter that the letter of 14th September 2021 contained a probationary clause. Whether or not it had the clause, the Petitioner was entitled to be furnished with the reasons for termination and to be offered an opportunity to be heard in response to those reasons.

52. Having said that, I think it is important to restate the law with regard to the power of the parties to an employment contract to unilaterally amend it. Section 10(5) of the Employment Act implies that the employer cannot unilaterally amend a contract of service once it is concluded. Any amendments to the contract must be undertaken in consultation with the affected employee where-

after all such changes must be notified to the employee in writing.

53. Any alteration by an employer to a contract of service without consultation with the affected employee is considered a nullity. This position has been made in a couple of decisions by this court. For instance, in ***Elizabeth Kwamboka Khaemba v Bog Cardinal Otunga High School Mosocho & 2 others [2014] eKLR*** the court said this on the matter: -

"The key position is that the employer cannot alter the employees employment contract without consulting the employee. The wording of the section is couched in mandatory terms, an indication that the employer cannot unilaterally revise the contract unless there is consultation.''

54. It is perhaps important to note the overall design of section 10(5) of the Employment Act. It is directed at the employer more than it is to the employee, an indication of the appreciation the law has of the power imbalance that exists between these two social partners. Therefore, if the 1st Respondent sought to unilaterally amend the Petitioner's contract as asserted by the Petitioner, such action will be unlawful.

55. It is also to be noted that because of the power imbalance between the employer and the employee, courts are often reluctant to accept the employer's general assertion that the employee acceded to the unilateral changes. There must be cogent evidence by the employer that the employee voluntarily consented to the alterations to the contract (see ***Kenya County Government Workers Union v Wajir County Government & another [2020] eKLR***).

56. Absent cogent evidence of concurrence by the employee to the alterations, the fact that he has continued to discharge his duties under the amended contract does not extinguish his right to sue for the breaches. Indeed, the employee's contract is often considered as repudiated by the unilateral alterations and if he continues in service, the employee is usually considered as serving under a new contract. And hence the preservation of the right to sue for the unilateral breaches under the repudiated contract. For this reason, it does not help the Respondents' case to argue that since the Petitioner continued to work under the allegedly amended contract, he thereby consented to the new terms. For this, see ***Hogg vs. Dover College [1990] ICR 39*** and ***Alram Extrusions vs. Yates & Others [2996] IRLR 327*** **quoted in the** ***County Government Workers Union v Wajir County*** **case and** ***James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR*** **where the courts variously observe as follows: -**

"Where a contract is fundamentally varied and the employee continues to serve the employer, they are entitled to bring an action for breach of the previous contract.''

"And as to the options available to the employee, the Employment Appeal Tribunal (UK) held in Hogg v Dover College (1990) ICR 39 that where an employer fundamentally varies a contract and the employee continues to serve, the employee may be taken to be serving a fresh contract and it is open to such an employee to bring an action for breach of contract in respect to the earlier contract while serving the new contract (see also Alcan Extrusions v Yates & others (1996) IRLR 327.''

57. The fourth (4th) issue I would like to consider is the applicability of the ''at will'' doctrine to the dispute at hand. From my earlier observations in this judgment, it is clear that the applicability of the doctrine in Kenya is doubtful. And if it applies, then its application is severely limited.

58. The current constitutional and statutory design on employment law in Kenya plainly renders redundant the ''at will'' doctrine in the country. Examples of this include article 236 (b) of the Constitution which forbids the dismissal, removal from office, demotion in rank of a public officer without observing due process of the law; article 41 of the Constitution on the right to fair labour practice which encompasses the rights covered under section 41 of the Employment Act; article 47 of the Constitution on the right to fair administrative action which guarantees employees the right to be informed of the reasons for their termination and the right to be heard in answer to the reasons; and article 27 of the Constitution outlawing differential treatment which renders inoperative the ouster clause in section 42(1) of the Employment Act.

59. Even in instances where the law appears to expressly empower an individual to terminate at will, courts have stated that the exercise of such powers must have regard for the rights of an employee to be told why he is being terminated and to be afforded a chance to answer to the charges. A good example of this is the power of a sitting Governor to terminate a member of the CEC under section 31 of the CGA. Notwithstanding that the Governor has these powers, he/she must nevertheless ensure due process is accorded to the affected employee (see ***County Government of Garissa & another v Idriss Aden Mukhtar & 2 others [2020]***

eKLR). Having regard to the foregoing, it is plain that the Respondents' position that the 1st Respondent's Governor had the power to terminate the Petitioner at his whim is misplaced.

Determination

60. I find and declare as follows: -

a) That the decision by the 1st Respondent's Governor to terminate the Petitioner's contract of service contravened the protections afforded to the Petitioner under the Constitution of Kenya 2010, the relevant statutes and the principles of natural justice. The impugned decision violated the Petitioner's constitutional rights to equal treatment before the law, fair hearing, fair administrative action and fair labour practices.

b) Accordingly, the decision to terminate the Petitioner's contract of service as communicated by the 3rd Respondent in his letter dated 19th November 2021 is declared null and void and is hereby quashed.

c) Since the Respondents assert that the Petitioner's position was removed following the restructuring that is alluded to in the letter of termination dated 19th November 2021 and in view of the guidelines set out under section 49 of the Employment Act that an order for reinstatement should be granted only as a last remedy, I find that ordering reinstatement of the Petitioner to his previous position may not be a suitable remedy in the cause. Accordingly, I decline to issue orders of prohibition and reinstatement as prayed for in the Petition.

*d) The Petitioner has prayed for the alternative remedy of payment of compensation that is equal to the balance of his term of service. This is not permissible in law. First, the principal guide on award of compensation for wrongful termination in Kenya is section 49 of the Employment Act. This section caps the award of compensation for wrongful termination to the equivalent of the aggrieved employee's twelve (12) months' salary. It does not contemplate the award of the damages that are equivalent to the unexpired term of the aggrieved employee (see **Alphonse Maghanga Mwachanya v Oeration 680 Limited [2013] eKLR**). Second, as is the case with any other contract, employment contracts, whether for an indefinite or fixed term can be lawfully terminated before term so long as this is done in accordance with the law. There is therefore no guarantee that an employee would serve the full term of the contract. With this reality in mind, it does not appear proper to award an employee who is improperly terminated damages equivalent to the balance of the term of his contract (see **D K Njagi Marete v Teachers Service Commission [2020] eKLR**). Having regard to the foregoing, I award the Petitioner compensation for unfair termination equivalent to his gross monthly salary for six (6) months totaling Ksh. 803,220/=. In making this award, I have considered the possibility of the Petitioner getting the same job as he lost. Positions of Chief Officer are seldom. It may not be possible for the Petitioner to get the same employment immediately.*

*e) In view of the constitutional breaches arising from the decision to terminate the Petitioner, his constitutional rights to: equal protection by the law; fair hearing; fair administrative action; and fair labour practice were violated. Accordingly, and in exercise of the powers granted to the court under section 12 (3) (Viii) of the Employment and Labour Relations Court Act, I award the Petitioner Ksh. 600,000/= as compensation for these violations. In making this award I have considered the views of the Court of Appeal in **Standard Group Limited v Jenny Luesby [2018] eKLR** that where a litigant is able to prove other breaches that entitle him to additional compensation outside the capping under section 49 of the Employment Act, the court may grant such damages subject to having at the back of its mind the caution that the function of award of damages in employment matters is not to punish the employer but to recompense an aggrieved employee for the injury suffered following the unfair termination.*

f) I decline to award the Petitioner gratuity as this benefit is premised on the Petitioner having been in actual service of the 1st Respondent for the duration of the contract.

g) The compensation under paragraph (d) above is subject to the applicable statutory deductions under section 49 of the Employment Act.

h) I award costs of this Petition to the Petitioner.

i) I award the Petitioner interest on the sums awarded under paragraphs (d) and (e) at court rates from the date of this judgment till payment in full.

Dated, signed and delivered on the 4th day of April, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Magare for the Petitioner

Mbura 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 15th 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