



**David & 293 others v Governor, County Government of Kilifi & another
(Petition E003 of 2023) [2024] KEELRC 13653 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13653 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
PETITION E003 OF 2023**

AK NZEI, J

MAY 9, 2024

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLES 41(1) OF THE CONSTITUTION 2010

AND

**IN THE MATTER OF: ARTICLES 22[1], 23[3], 258[1]
AND 259[1] [B] OF THE CONSTITUTION 2010**

AND

**IN THE MATTER OF: ENFORCEMENT OF FAIR LABOUR
PRACTICES WITHIN THE COUNTY GOVERNMENT OF KILIFI
IN RELATION TO EMPLOYEES ENGAGED AS CASUALS.**

BETWEEN

**EMMANUEL MAITHA DAVID 1ST PETITIONER
FESUTS BARAKA 2ND PETITIONER
EVE KAFKO MUNENE 3RD PETITIONER
GRAHAM KATANA MWERI 4TH PETITIONER
JONATHAN KITHI KAZUNGU 5TH PETITIONER
VICTOR KOMBE NZAI 6TH PETITIONER
SAMWEL MAITHA JONATHAN 7TH PETITIONER
MILLICENT NASIMIYU & 286 OTHERS & 286 OTHERS & 286
OTHERS 8TH PETITIONER**

AND

THE GOVERNOR, COUNTY GOVERNMENT OF KILIFI 1ST RESPONDENT



**THE COUNTY SERETARY – KILIFI COUNTY KILIFI COUNTY PUBLIC
SERVICE BOARD 2ND RESPONDENT**

RULING

1. The petition herein, styled as a constitutional petition, was filed on 25th April 2023, and is expressed to be founded on Articles 22(1), 23(1), 23(3), 258(1) and 259(1) (b) of *the Constitution* of Kenya 2010. In it the Petitioners pleaded:-
 - a. that the Petitioners are causal staff engaged by the 3rd Respondent (and) earning gross salaries of between 18,188 and ksh. 24,648 pursuant to contracts of employment, some commencing on 1st July 2013.
 - b. that a casual employee under the *Employment Act* is a person whose terms of engagement provide for payment at the end of each day, and who is not engaged for a period longer than 24 hours at a time.
 - c. that the Petitioners have been employed for periods longer than 24 hours at a time, and some have served for periods ranging from one (1) year to ten (10) years.
 - d. that Section 37 of the *Employment Act* provides a process of converting casual employment to term contract, and that the Petitioners have met the criteria for such conversion.
2. The Petitioners seek the following reliefs:-
 - a. a declaration that the Respondents herein have infringed the Petitioners' rights as provided under Article 41 (1) of *the Constitution* of Kenya 2010.
 - b. an order of compensation, to be assessed by the Court pursuant to grant of prayer (a) above.
 - c. an order of permanent injunction restraining the Respondents from jointly and severally, either through themselves, their agents or servants from terminating, advertising or conducting any recruitment process of the Petitioners' positions, and that the Respondents be restrained and prohibited from employing replacement labour or employees in the same positions to perform the same or similar work as the Petitioners.
 - d. a declaration that the terms of the Petitioners have converted to term contracts under Section 37 of the *Employment Act*.
 - e. that the Court varies the terms of service of casual employees in the service of the Respondents, and in so doing declare that the employees be employed on terms and conditions consistent with the *Employment Act*, and/or reinstate any of the Petitioners whose employment has been terminated.
 - f. that the Court be pleased to order the Respondents to issue the Petitioners with letters of appointment on permanent and pensionable terms, and to place them on the payroll.
 - g. costs of the suit and interest thereon at Court rates.
 - h. any other relief that the Court may deem fit to grant.
3. On 31st October 2023, the 2nd and 3rd Respondents filed an evenly dated preliminary objection to the hearing of the petition, and calling for it to be struck off on the following grounds:-



- a. that even though the Petitioners claim to have brought the petition under various Articles of the constitution, including Articles 41(1), 22(1), 23(1), 258(1) and 259(1)(b), there is nothing constitutional about the petition as all matters pleaded in the petition expressly point to, and amount to an ordinary employment suit.
 - b. that the Petitioners' claims are all expressly founded on the provisions of Sections 37 and 41-49 of the Employment Act.
 - c. that the Petitioners appear to be questioning the legal validity of an alleged decision by the Respondents to terminate their individual contracts of employment; and that the petition blatantly violates and offends the provisions of Sections 77(1) and 77(2) of the County Governments Act and Section 87(2) of the Public Service Commission Act.
 - d. that it is not permissible for a litigant to bypass clear provisions of the Employment Act and to found a cause of action directly on the provisions of Article 41 of the Constitution without seeking a declaration of invalidity of the cited provisions of the Employment Act, or without alleging that the remedies provided are inadequate.
 - e. that the petition blatantly violates and offends the doctrines of avoidance and ripeness.
 - f. that this Court is not, at this point in time, the appropriate forum to hear and to determine the dispute between the parties herein, and that the Petitioners should first submit their grievances/disputes to the Public Service Commission for hearing and determination prior to presenting it to this Court.
4. It was stated as follows in the case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] E.A. 696: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if urged as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

5. While the objection to the Court's jurisdiction at this stage of the dispute herein falls within the purview of matters that may be argued as a preliminary point, the submission that the suit ought to have been originated in one way or the other does not. Whether a memorandum of claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. It was stated as follows in the case of Francis Atonya Ayeka -vs- Kenya Police Service & Another [2017] eKLR:-

“...The cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the Respondent. Whether a Memorandum of Claim was filed or a Petition, the Cause of action does not change due to the name assigned to the pleadings.

A litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the Constitution on the right to fair labour practices. The purpose of the Constitution is that the right to fair labour practices is given effect in various statutes of which the Employment Act and the Labour Relations Act are primary.



The primary legislation should not be circumvented by seeking to rely directly on a Constitutional provision. Both the Employment Act and the Labour Relations Act give effect to Constitutional rights.”

6. It is quite clear from the Petitioners’ petition that theirs is a simple employment suit, founded on provisions of the Employment Act. The Employment Act is enacted pursuant to the Constitution, and is one of the primary legislations giving effect to the right to fair labour practices as enshrined in Article 41 of the Constitution of Kenya 2010. The Employment Act thus gives effect to constitutional rights. Whether presented by way of a petition or by way of a memorandum of claim, an employment suit remains just that, an employment suit; and will be heard and determined as such.
7. On the issue of this Court’s jurisdiction over the dispute herein, Section 77(1) of the County Governments Act provides as follows:-
 - “(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer, may appeal to the Public Service Commission (in this part referred to as the “commission”) against the decision.”
8. Section 87(2) of the Public Service Commission Act on the other hand provides as follows:-

“A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from County Government Public service unless the procedure provided for under this part has been exhausted.”
9. It is to be noted that in the instant suit, the Petitioners have not pleaded to any decision by the Respondents or any person exercising or purporting to exercise disciplinary control against them. No decision has been shown to have been made against the Petitioners regarding which they can appeal. The Petitioners are still in employment and are seeking orders aimed at enforcing their employment rights. They are also seeking injunctive orders and compensation. Section 77(1) of the County Governments Act and Section 87(2) of the Public Service Commission Act are not applicable in the present case.
10. The preliminary objection dated 31st October 2023 is without merit, and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH MAY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:



.....Petitioners

.....Respondent

