



Njoroge v Nairobi City Water and Sewerage Company Limited (Petition E122 of 2022) [2024] KEELRC 1135 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1135 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E122 OF 2022**

SC RUTTO, J

MAY 17, 2024

N THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 3, 10, 20, 21 (1), 22, 23, 25(B), 28, 30, 41, 47, 162(2) AND 258 (1) OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

PENINAH KITHIA NJOROGE PETITIONER

AND

NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED RESPONDENT

JUDGMENT

1. It is not in dispute that the parties herein have a subsisting employment relationship. It is also common cause that the Petitioner was appointed to the position of Acting Customer Care Supervisor - Informal Settlements Region with effect from 26th September 2017. Through an advertisement issued on 17th November 2021, the Respondent invited interested applicants to put in their applications for consideration for the position of supervisors including Customer Care Supervisor-Informal Settlements Region. Vide a letter dated 24th June 2022, the Respondent appointed Mr. Francis Odanga Odwory to the position of Customer Care Supervisor-Informal Settlements Region.
2. The Petitioner contends that in view of her acting capacity, she is the substantive holder of the position of Customer Care Supervisor-Informal Settlements Region by dint of the law. According to her, the Respondent's action of recruiting and appointing another person to that position amounts to breach of her constitutional right to fair labour practices and fair administrative action.
3. Against this background, the Petitioner seeks the following reliefs:



- a. A declaration that keeping the Petitioner in an acting capacity for over five (5) years was unlawful and violated the Petitioner's right to fair labour practice.
- b. A declaration that the refusal by the Respondent to pay the Petitioner the full remuneration for Customer Care Supervisor (grade 6) - Informal Settlements Region (2017-2022), amounts to a violation of the Petitioner's right to equal remuneration for equal work or work of equal value, violation of her right to freedom from servitude and right to human dignity and self-worth.
- c. A declaration that causing the Petitioner to serve in the office of Customer Care Supervisor (grade 6) - Informal Settlements Region (2017-present) beyond the lawful acting period amounts to constructive confirmation of the Petitioner as the substantive holder of the office.
- d. A declaration that the Respondent has violated the Petitioner's right to legitimate expectation by not confirming or appointing her as its Customer Care Supervisor (grade 6) - Informal Settlements Region.
- e. An order for compensation of special damages amounting to loss of income currently at the rate of Kshs. 25,770/= and allowances of Kshs.3,500/= (total Kshs. 29,270/=) per month as at the date of filing this Petition and applied as per the salary schedule since the year 2017 and which sum shall keep increasing until payment in full and more particularized under paragraph 38 above.
- f. An Order for general damages for discrimination, violation of the Petitioner's right to human dignity and self-worth, fair labour practices, fair administrative action and freedom from servitude.
- g. A permanent injunction restraining the Respondent from taking the Petitioner back to a position which is lower than her current position of Customer Care Supervisor (grade 6) - Informal Settlements Region (Job Group 7) or victimizing or treating the Petitioner unfairly on account of this Petition.
- h. An order of Judicial Review in the form of CERTIORARI to bring into this Court and quash the decisions contained in the Respondent's Internal Advertisement dated 17th November 2021 and Circular dated 15th November 2021, to the extent that they deal with the position of Customer Care Supervisor (grade 6) - Informal Settlements Region.
 - i. Costs of the Petition.
- j. Interest at Court rates on the backdated underpayment from the date they fell due to the date of payment in full.
- k. Any other or further relief that this Honourable Court may deem appropriate to meet the ends of justice.

Petitioner's Case

4. The Petitioner avers that she was employed by the defunct Nairobi City Council on 5th July 1990 as a Manual Worker. On 2nd July 1998, vide a letter dated 3rd November 1998, she was promoted to the position of Clerical Officer III by the said City Council.
5. Sometimes in 2004, the Respondent herein was formed to address issues of water supply and sewerage systems and she was seconded from Nairobi City Council to the new outfit on her existing terms then as a Clerical Officer III with effect from 1st July 2005.



6. After one year on 16th September 2005, the Respondent offered her the position of Dispatch Clerk grade 8, which was the lowest grade in the Respondent's Employment structure. No reasons were given for the said demoralizing demotion.
7. The Petitioner further avers that she was thereafter transferred from the Billing Section to the Customer Care Section. Immediately after her transfer, her colleagues at the Billing Section were upgraded to a new salary scale, but she could not be upgraded since the employees in her Job group in her new department had already been upgraded. However, despite several letters from the Regional Manager Northern Region who was her boss, the Respondent failed and refused to upgrade her.
8. She further avers that in the year 2014 - 2015, she attained a Diploma in Marketing and Communication.
9. That on 26th September 2017, the Respondent appointed her as Acting Customer Care Supervisor (grade 6) - Informal Settlements Region. The said appointment Memo did not indicate the duration of her Acting Appointment.
10. Subsequently, the Respondent extended her appointment purportedly on an acting role on ten (10) further occasions, with the last extension running from 26th April 2022 to 25th October 2022. She held the position in an acting capacity, for nearly five (5) years.
11. On 16th September 2021, the Respondent invited her for a Suitability Interview to be conducted on 23rd September 2021 in order to ascertain her suitability to hold the role she was holding on a substantive basis.
12. She attended the interview on 23rd September 2021. However, although there was no communication from the Respondent about the outcome of the said interview, the Respondent thereafter did extend her appointment on an acting capacity from 26th April 2022 to 25th October 2022.
13. The Petitioner further avers that even after having attended the interview, the Respondent vide a Circular dated 15th November 2021 canceled the said suitability exercise giving no reasons, and instead indicated that it would be advertising her position internally.
14. She is advised by her advocates on record, which advice she verily believes to be true, that the Respondent's action of causing her to serve in the office of Customer Care Supervisor - Informal Settlements Region in an acting capacity beyond the lawful period amounts to her constructive confirmation as the substantive holder of the office.
15. The Petitioner further contends that the Respondent's actions of advertising for the said position and even shortlisting potential employees for interviews, conducting interviews and appointment to the said position amount to an infringement of her Constitutional and Employment Rights.
16. It is the Petitioner's assertion that all employees in her job group earn similar salaries but her salary and allowances have been less than that of other persons in her job group since she was serving in acting capacity which has never been confirmed since 26th September 2017.
17. According to the Petitioner, she has been treated unfairly and discriminated against by the Respondent whose actions are geared towards illegally dismissing her from the position she held, despite being fully qualified for the said position and having held it for nearly five (5) years.
18. That she has further been discriminated and unfairly treated by the Respondent as it fails to pay her allowances and remuneration commensurate with the position she held and for many years paid her less than remuneration and allowances paid to her colleagues in the same job group.



Respondent's Case

19. The Respondent countered the Petition through a Replying Affidavit sworn on 9th August 2023, by Titus Tuitoek, its Human Resource Manager.
20. In his Affidavit, Mr. Tuitoek confirms that vide an internal memo dated 24th July 2014, the Petitioner was reassigned from her previous position as Data Entry Clerk to Customer Care Assistant.
21. He deposes that the Petitioner's previous and new appointment were within the same remuneration grade (Job Grade 8) and she was paid in accordance with the company's pay structure.
22. That the Petitioner continued to work in the aforementioned position until she was appointed as the Acting Customer Care Supervisor- Informal Settlements Region vide an internal memo dated 26th September 2017.
23. He further avers that the said appointment was made in accordance with the Respondent's Human Resource Policy and Procedures Manual which provides that an employee may be appointed in an acting capacity for a period of six (6) months or such other period as the appointing authority may deem fit.
24. The Petitioner immediately took up the position and started drawing a Special Duty Allowance in accordance with clause 6.3 of the Respondent's Human Resource Policy and Procedures Manual (HR Manual).
25. Mr. Tuitoek further avers that the Petitioner was drawing a Special Duty Allowance, which is payable where an employee is not qualified to be appointed to act on a higher post but is nevertheless called upon to perform the duties on the higher post as opposed to the normal Acting Duty Allowance.
26. That contrary to the Petitioner's averments, she was appointed to the position of Acting Customer Service Supervisor without being subjected to a competitive recruitment process and as such, she can never be confirmed to be the substantive holder of the said position without a recruitment process.
27. Mr. Tuitoek avers that it is a mandatory requirement under Clause 4.2 of the Respondent's Human Resources Policy and Procedures Manual that any recruitment for a substantive position must be done through a selection process involving advertising, shortlisting and conducting interviews.
28. That it is on the above basis that the Respondent issued an advertisement on 17th November 2021, inviting interested applicants to put in their applications for consideration for the position of Supervisors including the Customer Care Supervisor- Informal Settlements Region.
29. The requirements indicated in the said advertisement were arrived at on the basis of the competence requirements for the said position and the Respondent's analysis of the key responsibilities and skills required for the said job.
30. It is Mr. Tuitoek's assertion that the Petitioner did not protest the said advertisement and instead put in her application for the said position. However, despite being shortlisted, the Petitioner was not selected as there was a more suitable candidate for the position.
31. Vide a letter dated 24th June 2022, the Respondent confirmed that another candidate had been appointed to the position, and the role was subsequently filed by the same candidate.
32. He is advised by the Respondent's advocates on record, which advise he verily believes to be true, that in view of the subject position having already been filed, the prayer for confirmation as the substantive office holder has been overtaken by events, and the same should be declined.



33. He further deposes that despite Clause 6.3 of the HR Manual speaking to the duration of 'Acting Appointment', this clause should not be read in isolation as the same continues as follows "or as determined by the appointing authority".
34. Mr. Tuitoek further avers that the assertion that the Respondent breached the Petitioner's right to fair labour practices and fair administrative action under Articles 3(1),41(1) and (2), 47(1) and (2) of *the Constitution* is unfounded and has not been pleaded with the reasonable precision demanded in *Anarita Karimi Njeru vs Republic (No. 1) (1979) eKLR*.
35. According to him, the suit herein does not raise any constitutional issues and has been filed as a petition only to circumvent limitation.
36. He is also aware that throughout the Petitioner's service period as Acting Customer Care Supervisor in Charge of Informal Settlements, she has always been adequately remunerated by being paid a Special Duty Allowance. That the Petitioner is then estopped from seeking a pay equivalent to that of the Customer Care Supervisor in Charge of Informal Settlements, a position that she does not currently serve in.
37. That further, the Petitioner has neglected, failed and/or refused to demonstrate that the administrative decision of the Respondent to advertise the position is tainted with illegality, irrationality and procedural impropriety.
38. Mr. Tuitoek further denies that there was discrimination or differential treatment of the Petitioner.
39. He further avers that the Petitioner cannot claim to have had a legitimate expectation that she would have been confirmed without a recruitment process being conducted as required by Clause 4.2 of the HR Manual as no promise had been made to her, either expressly or impliedly that she would be appointed to the substantive office.
40. In Mr. Tuitoek's view, an appointment into an acting capacity cannot rouse legitimate expectation as claimed by the Petitioner since it is clear from inception that an officer can either be confirmed or reverted to their original position.

Submissions

41. The Petitioner's submissions were not duly filed as the same were merely uploaded on the online portal but not paid for.
42. In its submissions, the Respondent posits that there has been no violation of the Petitioner's right to fair labour practices as set out in Article 41 of *the Constitution*. That throughout her tenure, the Petitioner as Acting Customer Service Supervisor has always been adequately remunerated and compensated by being paid a Special Duty Allowance.
43. It is the Respondent's further submission that Clause 6.3 of its HR Manual places a wide discretionary authority on the appointing authority to decide for how long an employee may serve in an acting capacity after the initial six (6) months.
44. The Respondent has further submitted that the appointment and subsequent extension have always been on the basis that the same is subject to the position being filled competitively/substantively. That further, the Respondent's HR Manual does not unearth any provision for automatic confirmation where an employee has acted beyond the acting period.
45. It is further submitted that the manner in which the alleged violations were committed and to what extent must be shown by way of evidence based on the pleadings. It is the Respondent's contention



that although the Petitioner has pleaded violations of *the Constitution*, she has not demonstrated to the required standard how her rights to fair labour practices and fair administrative actions were violated, infringed or threatened by the Respondent. In support of this argument, the case of Leonard Otieno vs Airtel Kenya Limited (2018) eKLR has been cited.

46. It is the Respondent's further submission that the Petitioner has failed to demonstrate in her pleadings how her constitutional rights have been violated by the Respondent under the specific constitutional provisions that she has cited.
47. In the Respondent's view, there is no constitutional violation disclosed in the pleadings of the Petitioner, and that this is a pure employment dispute that the Petitioner has elevated to the constitutional pedestal.
48. Referencing the case of Communication Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (2014) eKLR, the Respondent has further submitted that the Petitioner's claim for the right to legitimate expectation does not arise. That the Petitioner cannot claim to have a legitimate expectation that she would have been confirmed without a recruitment process being conducted as required by Clause 4.2 of the HR Manual as no promise had been made to the Petitioner either expressly or impliedly that she would be appointed to the substantive office.
49. It is the Respondent's further position that it did not in any way promise the Petitioner that she would be appointed to the substantive office. The Petitioner knew that the position would be filled competitively/substantively by the Respondent at some point.
50. Placing reliance on the case of Teresa Carlo Omondi vs Transparency International Kenya (2017) eKLR, the Respondent has further submitted that the Petitioner's purported legitimate expectation cannot override the legal requirement that the position needs to be filled in a competitive, fair and transparent process.

Analysis and Determination

51. I have considered the pleadings by both parties, the evidentiary material on record as well as the Respondent's submissions and isolated the following issues for determination: -
 - i. Whether the Respondent violated the Petitioner's constitutional right to fair labour practices by retaining her in an acting capacity for five (5) years;
 - ii. Whether the Court should grant the reliefs sought in the Petition.

Constitutional violation?

52. It is the Petitioner's case that the Respondent violated her constitutional right to fair labour practices under Article 41(1) of *the Constitution*. The gist of the Petitioner's case is that she served in an acting capacity in the position of Customer Care Supervisor-Informal Settlements Region for a period of five (5) years, which is beyond the lawful period. According to her, the action of the Respondent of appointing another person to the said position amounts to infringement of her constitutional right to fair labour practices.
53. On its part, the Respondent avers that the Petitioner was appointed to the position of Acting Customer Care Supervisor-Informal Settlements Region without being subjected to a competitive recruitment process and hence could not be confirmed to the said position without a recruitment process.



54. Clause 6.3 of the Respondent’s HR Manual provides that “an employee who is appointed by the MD/DHRAS to act upon a vacant post will be required to act upon such a post for maximum period of six (6) months or as determined by the appointing authority.”
55. In this case, the Petitioner was appointed to serve in an acting capacity as Customer Case Supervisor- Informal Settlement Region from 26th June 2017 until 24th June 2022 when a substantive holder was appointed to the said position. This translates to a period of five (5) years.
56. The question that springs to the fore is whether the Respondent violated the Petitioner’s constitutional right to fair labour practices as guaranteed under Article 41(1), by retaining her in an acting capacity for five (5) years.
57. A careful reading of Clause 6.3 of the Respondent’s HR Manual reveals that in as much as an acting period of six (6) months is prescribed, the appointing authority can determine a different acting duration.
58. In light of the provisions of Clause 6.3 of the Respondent’s HR Manual, it is this Court’s view that the period to be determined by the appointing authority, if beyond the prescribed six (6) months, ought to be reasonable. Indeed, an employee cannot serve in an acting capacity in perpetuity.
59. Therefore, to have the Petitioner serve in an acting capacity for a period of five (5) years which is way beyond the prescribed period of six (6) months, was not reasonable in my view.
60. This is more so noting that the Petitioner was performing tasks for the position for which she was acting but drawing less benefits than those attendant to that position. A perfect example is the remuneration attached to the said position. That is to say, for the entire duration of five (5) years, the Petitioner performed the tasks of a Customer Care Supervisor-Informal Settlements Region but earned less remuneration than that assigned to the said position.
61. Needless to say, this amounted to an unfair labour practice by the Respondent against the Petitioner.
62. On this score, I will follow the determination in the case of *Kenya Shoe & Leather Workers Union vs Slapper Shoe Industries* [2015] eKLR where the Court reckoned thus:

“17. The Court agrees with the Conciliator that by using the Grievants for prolonged periods of time in acting capacities, while paying them acting allowances, the Respondent engaged in unfair labour practices.”

63. And further, in the case of *Oyatsi vs Judicial Service Commission (Petition E111 of 2021)* [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment), the learned Judge renders himself as follows:

“The respondent has by its acts of commission and omission grossly violated the petitioner’s right to fair labour practices ordained by article 41(1) of *the Constitution* and has exacerbated the situation by denying the petitioner her right to fair remuneration payable to a holder of the position of Director of Finance of the Judiciary and in violation of article 41(2) (a) of *the Constitution* and in violation of its own judiciary establishment for the position of Director Finance, and section B 20 (iii) and(iv) of the Human Resource Policies and Procedures Manual... It is the court’s considered finding that the omission by the respondent for an inordinate period of more than six (6) years not only perpetrated violation of the petitioners right to fair Labour practices and the right to fair remuneration under article 41.”



64. My position is further buttressed by the decision in the case of Silas Kaumbuthu Mbutura vs Meru Central Dairy Co-Operative Union Limited [2015] eKLR

“The court finds that the claimant was subjected to unfair labour practice by constantly being held on acting capacity in the post of the production supervisor....While making that finding, the court finds that for over 18 years of service the claimant was required by the respondent to serve in an acting capacity for unexplained reasons of failure to be appointed substantively as a production supervisor or any other suitable position in the respondent’s establishment. Such conduct on the part of the respondent, in the opinion of the court, was a gross violation of the claimant’s entitlement to fair labour practices as provided for in Article 41 of *the Constitution*.”

65. In as much as the Respondent had a right to fill the position of Customer Care Supervisor-Informal Settlements Region through a competitive recruitment process, it was only fair and just that it undertakes the said process expeditiously without inordinate delay. In this case, the delay in filling the said position substantively was not explained at all. The net effect of the Respondent’s inaction was that the Petitioner continued rendering her services in an acting capacity for a period of five (5) years while drawing less benefits, only to be replaced and relegated to her erstwhile position.
66. In view of the foregoing observations and findings, I am persuaded that the Petitioner has proved to the requisite standard that her retention as Acting Customer Care Supervisor-Informal Settlements Region for a period of five (5) years was inordinate and amounted to unfair labour practices on the part of the Respondent.
67. In so doing, the Respondent violated the Petitioner’s right to fair labour practices as guaranteed under Article 41(1) of *the Constitution*.

Reliefs?

68. Flowing from the findings of the Court, the Petitioner is entitled to a declaration that her right to fair labour practices as guaranteed under Article 41(1) of *the Constitution* of Kenya was violated by the Respondent.
69. The Court further finds that the Petitioner is entitled to compensation for violation of her constitutional right to fair labour practices. This being the case, the Petitioner is entitled to general damages which the court assesses at Kshs 750,000.00. In arriving at this award, I have considered the fact that the Petitioner is still an employee of the Respondent as well as a number of authorities. Case in point County Government Workers Union vs Narok County Government & another [2021] eKLR, where the Court awarded the sum of Kshs 1,000,000.00 for violation of the Petitioner’s member’s rights to fair labour practices. Further, in James Ang’awa Atanda & 10 others v Judicial Service Commission [2017] eKLR, the Petitioners were each awarded the sum of Kshs 750,000.00 as damages for unfair labour practice(s)/breach of contract(s). And further, in the case of Silas Kaumbuthu Mbutura vs Meru Central Dairy Co-Operative Union Limited [supra], the Claimant was awarded compensation of Kshs.300,000.00 on account of violation of his right to fair labour practice.
70. The Court will decline to grant an order confirming the Petitioner to the position of Customer Care Representative – Informal Settlements Region as the Respondent has proved that one Mr. Francis Odanga Odwory was appointed as a substantive holder in that position on 24th June 2022. Equally, the claim for special damages as well as an order of permanent injunction and certiorari are declined as there has been no order of the Petitioner’s confirmation to the position of Customer Care Representative – Informal Settlements Region.



Orders

71. In the end, I enter judgment in favour of the Petitioner in the following terms:-
- a. A declaration is hereby issued that by retaining the Petitioner in an acting capacity for over five (5) years, the Respondent violated the Petitioner's rights to fair labour practices enshrined under Article 41 (1) of *the Constitution*.
 - b. The Petitioner is awarded the sum of Kshs 750,000.00 for violation of her constitutional rights.
 - c. Interest on the amount in (b) at court rates from the date of Judgment until payment in full.
72. As the Petition has succeeded, I would have awarded costs to the Petitioner but since there was no diligence in filing of submissions from her end, I will order that each party bears their own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of May, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Muyunga instructed by Mr. Kimamo for the Petitioner

Ms. Yala instructed by Mr. Kivuva for the Respondent

Millicent Kibet Court Assistant

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

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