



Kenya Union of Water and Sewerage Employees v Meru Water & Sewerage Services & 2 others (Petition E013 of 2023) [2024] KEELRC 1875 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1875 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E013 OF 2023
ON MAKAU, J
JULY 19, 2024

BETWEEN

KENYA UNION OF WATER AND SEWERAGE EMPLOYEES PETITIONER

AND

MERU WATER & SEWERAGE SERVICES 1ST RESPONDENT

JOSEPH MBERIA CHIEF EXECUTIVE OFFICER MEWASS .. 2ND RESPONDENT

BOARD OF MANAGEMENT MEWASS 3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner is a registered trade union and approached this Court vide Petition dated 11th December 2020 alleging that its 15 members (herein after called “the grievants”) were locked out of employment in January 2020 by the 1st respondent and informed them that they would be called or told when to report back to work. After waiting for a while, they made several follow-ups with their supervisors but all was in vain. Efforts to have the matter resolved through conciliation at the labour office failed hence this Petition is under Articles 19, 20, 21, 22, 23, 24, 25, 35, 41, 47, 49, 50, 159 (2) (d), 162 and 246 (1), (2) & (3) of *the Constitution*.
2. It is the petitioner’s case that the constitutional rights of the grievants were violated by the respondents but verbally locking them out the workplace; stopping their salaries and dismissing them unprocedurally. It is further petitioner’s case that the Respondents’ actions were contrary to rules of natural justice and *the constitution* because the grievants were denied a hearing and fair administrative action. Consequently, the Petitioner prays for the following reliefs:
 - a. A declaration that the purported termination of the employments of the petitioners members on 4th January 2020 ordering the petitioner’s members out of the 1st Respondents premises



on day of by the Respondents dismissing the petitioner's members from service was unconstitutional and in violation of the petitioner's rights under the Articles 41, 47, 50 and 159 of the constitution of Kenya, section 45 as read with section 35 (1) (c) 36 and 40 of Employment Act, 2007.

- b. Permanent order quashing the said termination of the petitioners and an order compelling the Respondents reinstate the petitioner's to their work which they held prior to the said termination without loss of their salaries and allowances from the month of January 2020 and salary increment as well as allowances which might accrue during the said termination and the existence of the ongoing and incoming CBA.
 - c. Costs and interest be provided for.
 - d. In the alternative the court do make an order for the payment of terminal benefits including salaries and allowances, full compensation for wrongful termination during and after the dismissal up to and including date the petitioner's members are supposed to attain retirement age.
 - e. Any other relief as this Honourable Court deems just and fit to grant.
 - f. In case the Honourable Court rules for payment of terminal benefits and compensation, an order of issuance of certificate of service be granted as well.
3. The Respondents opposed the petition vide the Replying Affidavit sworn by the 2nd respondent on 1st February 2021. In brief the affiant denied that the grievants were employees of the 1st respondent or that he ordered for their termination on account of redundancy. He clarified that the grievants were temporary piece rate labourers amongst a pool of many others who were hired on need basis whenever there was work like digging trenches, meter connection, water disconnection and other manual work upon requisition by sectional heads.
 4. He deposed that the grievants had no appointment letters or termination letters. They were also paid wages for the particular piece work on the same day they worked. Consequently, he maintained that the grievants were never employed by the respondents and prayed for the petition to be dismissed with costs for lack of merits.
 5. The petitioner files a further affidavit sworn on 5th march 2021 by its Secretary General Mr. Elijah Otieno Awach in which he denied that the grievants were piece rate employees hired on need basis. He deposed that the grievants worked for the respondents 15 years and under the Employment Act, they were required to issue the employees with letters of employment and contracts. The respondents were further required to keep the employment records which they have failed to produce to disprove the claims of employment relationship.
 6. He further deposed that some of the grievants were being paid monthly salary through the bank while the rest of the grievants who were casual, had their employment converted to employment for salary under section 37 of the Employment Act due to long service.
 7. The petition was first filed in Nairobi in 2020 and thereafter transferred to Nyeri on 2nd October 2023 and it was disposed of by written submissions.

Petitioner's submissions

8. The petitioner raised the following issues for determination:



- a. Whether the termination of the grievants' employment on 13th January 2019 was for a valid reason and or procedurally fair.
 - b. Whether the petitioner's members are entitled to the remedies as prayed for in the main petition.
9. On the first issue, it was submitted that section 40 (1) of the *Employment Act* prohibited an employer on account of redundancy without notifying the employees' union and the local labour officer. It was also submitted that the Respondents failed to consider seniority, skill, ability and reliability of each employee, pay pending leave in cash, pay one months' wages in lieu of notice and severance pay. The Court was urged to find in favour of the petition on grounds that the proper procedure was not followed and for want of valid reason.
 10. For emphasis, it relied on Article 13 of Recommendation No. 166ILO Convention No.158 - Termination of Employment Convention, 1982 contending that, as a State Party of ILO, Kenya is bound by the said Article.
 11. As regards the second issue, it was submitted that it was not in dispute that the grievants were employed by the respondents, were unprocedurally declared redundant on 13th January 2019 and were earning Kshs. 15,000/=. It was further submitted that the grievants had worked for the respondents for long periods until 2nd January 2020 when their employment was terminated on account of redundancy without notice. Reliance was placed on the case of Janet Nyandoro versus Kenya Commercial Bank Limited [2017] eKLR where the court held that termination of employment is unfair under section 45 of the *Employment Act* if it is not grounded on valid reason and fair procedure is not followed.
 12. Accordingly, the petitioner argued that the respondent failed to issue the grievants termination notice or redundancy notice and urged the court to award Kshs. 22,462.00 as salary in lieu of notice to each of the grievant. It was submitted that page 116 under clause 14 of the CBA, the respondents were required to pay Kshs. 11,000.00 as leave allowance. The Court was also urged to grant severance pay in accordance with clause 29 of the CBA and section 40 of the *Employment Act*. It was argued that the respondent never paid the grievants house allowance for the entire duration of their employment and thus the court was urged to award the same in line with clause 13 of the CBA. It was submitted that the pay slips filed showed that only basic salary was paid to the grievants.
 13. It was submitted further that the grievants were entitled to compensation for loss of employment as they legitimately expected to continue working and receive pay until retirement. It was contended that the grievants have not been able to secure any gainful employment since the dismissal and as such they are entitled to 12 months' pay as compensation. The court was also urged to grant pay for rest days, overtime and public holidays.
 14. For emphasis, reliance was placed on Nairobi SC Petition No. 37 of 2018 Kenfreight (E.A.) Limited versus Benson K. Nguti where the court held that once the court held that an employer has terminated employment of an employee unlawfully, the remedy is the one provided under section 49 of the *Employment Act*. Accordingly, the Petitioner submitted that since it has proved a case for unfair and unlawful termination on account of redundancy, the Court should enter judgement for Kshs. 2,067,408 plus cost and interest. Further the grievants be issued with certificate of service within 14 days of the judgment.

Respondent's submissions

15. The Respondent raised the following issues for determination:



- a. Whether there was a contract of employment between the Applicants and the Respondents.
 - b. Whether the alleged dismissal is a violation of the Applicant's rights.
 - c. Whether the reinstatement of the Applicant is a viable option.
 - d. Whether the payment of terminal benefits as an alternative to reinstatement is proper.
16. On the first issue, it was argued that the grievants did not produce any documentation to prove that they were the respondents' employees. It was argued that reporting the dispute to the Cabinet Secretary, letters appointing a conciliator and a certificate referring the dispute to court and the CBA dated 10th August 2020 cannot be proof of employment as they are dated after the dispute arose.
 17. Further, it was argued that a CBA only binds the Union and the employer and thus, any employee claiming to benefit from it must prove that he/she is members of the union. For emphasis, reliance was placed on the case of Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited [2013] eKLR where the court held that the claimant must prove existence of an employment relationship.
 18. It was submitted that the respondents did not deny the existence of a relationship between itself and the grievants, but clarified that the relationship was not an employer-employee relationship. It was further clarified that the grievants were piece rate workers on day to day wages and their work included digging trenches for clients on a need basis and upon approval by the various section heads. A register of attendance for the labourers who turned on various days was kept but the payment was not fixed as it depended on the nature and intensity of work done. Consequently, it was submitted that the grievants were not full-time employees and the alleged redundancy or violation of constitutional rights does not arise.
 19. On the second issue, it was submitted that the grievants did not produce any termination notice and neither did they claim constructive dismissal in support of their claim for unfair dismissal. It was contended that the grievants could not fault the respondents for lack of work since they already knew that the same was only available on a need basis. Consequently, it was submitted that the substantive procedures and fairness contemplated under sections 35,40,41 and 45 were inapplicable to the grievants, and that there was no unfair termination or any rights that were violated.
 20. On the third issue, it was submitted that the grievants did not prove that there were exceptional circumstances warranting their reinstatement, and that the relief was practicable as required under section 49(4)(c) and (d) of the *Employment Act*. It was further submitted that section 12(3)(vii) of the *Employment and Labour Relations Court Act* provides that an order for reinstatement may only be made within 3 years of termination. For emphasis, reliance was placed on the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others [2019] eKLR.
 21. It was further argued that the employer - employee relationship has now irretrievably broken down, thus reinstatement is impractical and the court could not force parties into a relationship. Reliance was also placed on the case of Kenya Airways Limited v Allied Workers Union Kenya & 3 others [2014] eKLR.
 22. On the fourth issue, it was submitted that the grievant could not claim for compensation or terminal benefits up to retirement as the same was only applicable to persons under employment. It was further submitted that the exact amount of unpaid salaries and allowances sought has not been pleaded and proved. It was argued that the specific damages sought ought to flow from the pleadings, which is not



the case in this petition. Therefore, the court was urged to dismiss the petition since the grievants have failed to prove how their rights were infringed by the respondents.

Issues for determination and analysis

23. The issues for determination by this court are as follows:
- a. Whether the grievants were employees of the 1st respondent.
 - b. If (a) is affirmed, whether the grievants' employment was unfairly terminated.
 - c. Whether the grievants are entitled to reliefs sought.

Relationship between the grievants and the 1st respondent

24. The petitioner contends that the grievants were employed by the 1st respondent for a long time. The respondents have denied the existence of the alleged employer-employee relationship and maintained that the grievants were hired to provide piece rate labour on need basis, and wages paid depended on the work done.
25. In order to determine this issue whether the grievants are employees of the Respondents, it is necessary to first establish who an employee is. Section 2 of the [Employment Act](#) defines an employee and employer as follows:

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;”

26. From the foregoing, a person claiming to be an employee, must show that he is engaged by another person to offer labour in return for a wage or salary. On the other hand, for one to be considered an employer, it must be shown that he/she has entered into a contract of service to employ an individual. A contract of service is defined by section 2 of the Act as follows:

“an agreement, whether oral or in writing, and whether express or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured leadership.”

27. Section 9 of the Act requires some contracts of service to be in writing and places on the employer the duty to prepare the contract. It provides as follows:

- “(1) A contract of service——
- a. for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
 - b. which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months;



shall be in writing.

- (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).
- (3) For the purpose of signifying his consent to a written contract of service an employee may—
 - a. sign his name thereof, or
 - b. imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.”

28. The petitioner has not produced copies of appointment letters or written contracts as proof of employment relationship. It has also not pleaded the terms of engagement between the grievants and the respondent including the job titles and salary for each grievant. There is also no indication of when they commenced their employment. I have considered the Bank statements, NSSF and NHIF statements filed and noted that they were not employees on continuous service. The bank statements also indicate varying amounts paid on account of salary from the 1st respondent to the grievants. The petitioner has also produced letter dated 13th August 2019 introducing the Simon Kimathi Muccheke to Equity Bank as follows:

“Re: Letter of introduction

We wish to confirm that Simon Kimathi Muccheke ID No. 20671962 is an employee of Meru Water and Sewerage Services (MEWASS), employed on piece rate basis,”

29. A similar letter was issued in respect of James Karangu. Having carefully considered the evidence on record, I find that the petitioner has failed to prove on a balance of probability that the grievants were in continuous employment by the 1st respondent for a long time. The evidence by the petitioner corroborates the averments by the respondents that the grievants were employed intermittently on piece rate basis and their wages depended on the work done.
30. The petitioner has not filed any schedule of the grievants’ claim and the grievants have not filed any statements or affidavits to prove their case or fill in the gaps in the evidence by the petitioner’s affidavits. It follows that the claim that the grievants casual employment converted to regular term contract under section 37 of the [Employment Act](#) is not tenable in the absence of continuous service.
31. Section 37 of the Act settles the issue on who cannot be considered a casual employee as follows:

“37. Conversion of causal employment to term contract

1. Notwithstanding any provisions of this Act, where a casual employee-
 - a. works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
 - b. performs work which cannot reasonably be expected to be completed within a period, or



a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.

- (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.
- (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
- (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
- (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.”

32. I have already made a finding of fact that the grievants served intermittently and even where they worked every month, the wages paid were varying. The petitioner did not give any explanation for the variation but the respondents have explained that the wages were not for daily work but depended on the piece rate jobs done. I am persuaded by that explanation by the respondents to hold that the grievants were not regular employees of the 1st respondent within the meaning of section 2 of the [Employment Act](#). They were temporary or seasonal employees on piece rate basis.

Whether the grievants were unfairly terminated

33. Section 45 (1) & (2) of the [Employment Act](#) provides as follows:

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—



- i. related to the employee’s conduct, capacity or compatibility; or
- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

34. For an employee to enjoy the protection of the above provision, he must be an employee within the meaning of section 2 of the *Employment Act* or has converted due to continuous employment as a casual employee. In this case the petitioner has not tendered sufficient evidence to prove existence of a contract of service capable of being protected under section 35 or 45 of the *Employment Act*. Section 35 protects an employee who is paid in intervals of one month or more, from termination without prior notice of 28 days.

35. Accordingly, I find and hold that the alleged unlawful termination has not been established. I must also observe that the petitioner has not been consistent in its case because in the petition and the supporting affidavit, it complained of lock-out and unlawful termination, while in the Notice of Motion the complaint was redundancy contrary to section 40 of the *Employment Act* and the Collective Bargaining Agreement.

Whether the grievants are entitled to reliefs sought

36. I have found that the petitioner has not proved that the grievants were employed by the 1st respondent under a contract of service, or on casual basis for a continuous period that has converted them to employees under section 37 of the *Employment Act*. Consequently, my conclusion is that the reliefs sought by the petition are not merited and the suit is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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.

ONESMUS N MAKAU

JUDGE

