



**Kenya National Union of Nurses v Lamu County Public Service Board & 2 others  
(Cause E019 of 2021) [2024] KEELRC 1495 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1495 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI  
CAUSE E019 OF 2021  
M MBARŪ, J  
JANUARY 31, 2024**

**BETWEEN**

**KENYA NATIONAL UNION OF NURSES ..... CLAIMANT**

**AND**

**LAMU COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**KILIFI COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**MOMBASA COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. In these proceedings, the 1<sup>st</sup> respondent filed a response but failed to attend all hearings.
2. The claim against the 3<sup>rd</sup> respondent was settled.
3. The 2<sup>nd</sup> respondent filed a response and attended hearing.

**Claim**

4. The claimant is a registered trade union representing nurses. The respondents are established pursuant to Article 176 of *the Constitution*.
5. The claimant filed this claim on 19 February 2021 on the grounds that its members were participating in a nationwide strike following notice dated 23<sup>rd</sup> November 2020. The strike was not barred by a court Order or declared unprotected. There were conciliation meetings chaired by the Minister and a report was filed in court on 28 January 2021 in Nairobi ELRC Cause No. E6538 of 2020 which consolidated several other matters.
6. The chair of the Council of Governors through circular dated 22 January 2021 stated that county governments were ready to sign return to work agreements with the claimant and that the health

- workers participating in the strike and willing to resume work would not be victimised. The claimant forwarded a proposed return to work agreement to the respondents for purposes of negotiations.
7. The claimant's members were willing to resume work upon execution of the agreement. The issues for negotiations included monetary increment from the current Kshs. 3,850 to Kshs. 5,000 on the Risk Allowance as approved by Salaries and Remuneration Commission (SRC) and therefore the demands by the nurses were based on a binding recommendation dated 9 June 2017. The other demands by nurses and health workers was the provisions of Group Life Insurance, provision of PPEs and comprehensive medical cover as stated in the draft return to work agreement.
  8. Instead, the respondents victimised the nurses through attempts of constructive dismissal. The respondents stopped the salaries of the nurses on strike and later removed them from the payroll.
  9. Under Legal Notice No.160 of 2018, the Minister ordered the employers of claimant members to deduct and remit trade union dues.
  10. Section 14 of the Occupational and Safety Health Act allow an employee to leave a work place he believes presents eminent and serious danger to life and health and should not be dismissed or discriminated against or disadvantaged for such action. Article 41 of the Constitution provides that every employee has a right to go on strike and hence, members of the claimant who were on strike should not be victimised. Vide a strike notice dated 23 November 2020, the nurses on strike should not be prejudiced. The strike was not declared unprotected by the court under the Labour Relations Act, 2007 (LRA) and does not warrant disciplinary action.
  11. The claimant is seeking for orders that;
    - a. The respondents be stopped from victimising claimant's members on account of participating in the strike by way of withholding of salaries, issuance of show cause letters, termination letters and transfers.
    - b. The respondents be directed to implement the circular of the SRC dated 9 June 2017 with all accrued arrears effective June 2017 to date.
    - c. The respondents be directed to pay all the unpaid salaries and union dues that were not paid as a result of absence from work due to the strike vide strike notice dated 23 November 2020.
    - d. An order be issued quashing any show cause letters, transfers and termination letter of nurses as a result of absence from work due to the strike notice dated 23 November 2020.
    - e. Costs of the suit.
  12. In evidence, the claimant called Clevitus Kerindo Nyang'au a nurse at Kilifi County and in charge at Ganda Dispensary, department of medical services. He testified that he is the branch secretary of the claimant in Kilifi branch and conversant with issues herein. Due to non-payment of salaries for 421 nurses who missed January and February 2021 salaries and stoppage of deductions and remittances of trade union dues amounting to Kshs. 682,500 such action is not justified. The 2<sup>nd</sup> respondent failed to implement the SRC circular dated 9 June 2017 on enhanced risk allowances for nurses from Kshs. 3,850 to Kshs. 5,000 per month.
  13. From a total number of 525 nurses of the 2<sup>nd</sup> respondent, 104 nurses were paid and 421 were not paid their salaries. The decision to stop salary payments was unilateral and unlawful. The claimant had issued a strike notice through letter dated 20 November 2023 to commence on 7 December 2020 and the issues for such notice related to non-provision of standard personal protective equipment.

14. The claimant called off the strike on 24 February 2021. The Covid pandemic had been declared an occupational health hazard and the directorate of occupational safety and health services issued a return to work advisory dated 29 June 2020. This was in accordance with Section 6(3) and (4) of the [\*Occupational Safety and Health Act\*](#) but the 2<sup>nd</sup> respondent did not adopt the advisory.
15. Kerindo testified that the claimant moved the court to secure protective orders and in complete disobedience, on 14 April 2021 the 2<sup>nd</sup> respondent refused to negotiate a return to work agreement. No meeting was held to address the issues raised in the strike notice dated 23 November 2020 but the respondent went ahead to stop the salaries of 421 nurses and failed to remit trade union dues for January and February 2021 without justification.
16. The claimant filed Nairobi ELRC Cause No. E041 of 2021 against the Minister for Health & 43 others where the 2<sup>nd</sup> respondent was not a party. There were conciliations ongoing with other counties with recommendations that nurses be paid their withheld salaries as they were on a lawful strike. Some of the counties who remitted withheld salaries and union dues are Kisumu, Migori, Siaya, Kiambu and Makueni. However, in this case, the conciliator upheld the decision of the 2<sup>nd</sup> respondent not to pay nurses salaries for January and February 2021. This is discriminatory as their counterparts in other counties have been paid.
17. The claimant appealed the decision of the conciliator to the Public Service Commission (PSC) but the PSC held that it had no jurisdiction over such matter.
18. Upon cross-examination, Kerindo testified that the list of the 421 nurses whose salaries were not paid by the 2<sup>nd</sup> respondent has not been attached to the claim herein. There is no evidence of those who were at work and those who remained on strike.
19. The 2<sup>nd</sup> respondent was not a party in Nairobi ELRC Cause No. E041 of 2021 and hence not bound by the orders therefrom. The dispute between the claimant and the 2<sup>nd</sup> respondent went for conciliation and the conciliator made recommendations that the nurses should not be paid the PSC declined jurisdiction on appeal. The conciliator's recommendations have not been set aside.
20. The claimant also called Erick Otieno Ouma a nurse at Lamu County who testified that the claimant's members who were on strike following a strike notice dated 23 November 2020 were not paid their January and February 2021 salaries. From December 2020 he was on duty for 7 days only and on 7 December 2020 to 24 February 2021 together with other nurses they were on a strike. The reasons necessitating such action was due to Covid pandemic when the 1<sup>st</sup> respondent refused to provide PPEs. The strike had been called by the general secretary of the claimant. The respondent did not justify the non-payment of salaries to some of the nurses. There was no hearing before the stoppage of payment of salaries and the remittances of trade union dues to the claimant.

## **Responses**

21. In response, the 1<sup>st</sup> respondent admitted that it employs members of the claimant who went on strike following notice dated 23 November 2020. The strike was suspended by the court on 22 February 2021 and the nurses went back to work on 24 February 2021. The strike that commenced on 7 December 2020 was illegal and unprotected hence the nurses on strike should not be paid for the months they failed to provide services to the 1<sup>st</sup> respondent.
22. The right under Article 41 of [\*the Constitution\*](#) to go on strike is not absolute in terms of Section 82 of the LRA which prohibits strikes in essential services. Article 24 of [\*the Constitution\*](#) provides for

- limitation of rights whenever there is need to ensure that the enjoyment of rights does not prejudice the rights of others.
23. The claimant engaged in an unprotected strike in violation of *the constitution* particularly the right to life, the right to the highest standards of health and the right to emergency treatment protected under Article 26 and 43 of *the Constitution* and the orders sought should be dismissed with costs.
  24. No witness was called as noted above. The 1<sup>st</sup> respondent did not attend at the hearing.
  25. The 2<sup>nd</sup> respondent also admitted the employment of the claimant members who proceeded on an unprotected strike following notice dated 23 November 2020. The claimant filed Nairobi ELRC No. E6538 of 2020 and this claim is sub judice. The 2<sup>nd</sup> respondent did not receive any return to work formula agreement as alleged and was not a party in Nairobi ELRC No. E041 of 2021 as admitted by the claimant.
  26. The demands by the claimant are unreasonable in the circumstances of this case. The 2<sup>nd</sup> respondent was in the process of addressing the concerns of its health workers and what as pending was a policy issue being handled by the National Government through the Ministry of Health and the SRC. There was no victimisation of any member of the claimant. Despite holding various meetings with the claimant for resumption of duty, there was no compliance. Some of the claimant officials at the county level said they had no authority to call off the strike hence from 7 December 2020 to February 2021 they remained on an unprotected strike. There were no valid reasons for such action.
  27. In ELRC Cause No. E041 of 2021, the court on 22 February 2021 directed all nurses to resume work and to be paid salaries from the date of resuming duty which was done on 24 February 2021. The 2<sup>nd</sup> respondent restored the striking members of the claimant back on the payroll from such date. There was no victimisation as alleged and the claims herein should be dismissed with costs.
  28. The claimant admits that its members in the employment of the respondents went on strike demanding an increment to the Risk Allowance, provision of a Group Life Insurance and PPEs. There were ongoing negotiations and the claimant sent a draft return to work agreement to the Council of governors but before execution, its members in the employment of the respondents, those who remained on strike were removed from the payroll.
  29. Indeed, as the claimant submitted, Article 41 of *the Constitution* allow every employee to go on strike. However, the modalities of taking such action is regulated in law. Section 81 of the *Labour Relations Act*, 2007 (the LRA) defines an essential service as a service, the interruption of which would probably endanger the life of a person or health of the population or any part of the population. Under the Fourth Schedule to the Act, hospital services have been listed as an essential service and in this case, the members of the claimant are nurses serving in hospitals and other health facilities. They fall under essential services.
  30. Article 24 of *the Constitution*, 2010 states that;

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...
  31. Concomitantly, not all rights under the Bill of Rights are absolute. In fact, a good majority of these rights are not and so they must be limited for a number of reasons, including, public policy, national security and common good being at the top of the list.

32. Therefore, in application of Article 24(1) of *the Constitution*, the right to industrial action is not absolute and hence, subject to limitation;
1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, ...
    - a) The nature of the right or fundamental freedom;
    - b) The importance of the purpose of the limitation
    - c) The nature and extent of the limitation;
    - d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;
    - e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
33. The court in addressing the import of employees in essential services going on strike in the case of *Joseph Otieno Oruoch v Kenya Medical Practitioners Pharmacists & Dentists Union & another* [2021] eKLR held that there must be a balance to protect all fundamental rights. The right to go on strike for nurses and other health care workers is qualified and is therefore contingent upon retention of 'minimum service' at the affected facilities to ensure that there is no danger to life or health of members of the public.
34. On the admission by the claimant that its members in the service of the respondents that they went on strike from 7 December 2020 to 24 February 2021 when they resumed duty, such action was not protected. The action by the respondents in withholding due salaries and wages is lawful. This is in terms of Section 79(6) of the LRA which provides in mandatory terms that;
- An employer is not obligated to remunerate an employee for services that the employee does not render during a protected strike or lockout.
35. Equally, under Section 19(1) (c) of the *Employment Act*, 2007 the law allows an employer to effect salary deduction for each day the employee is absent from work without lawful cause;
- (c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;
36. In the case of *Erick Mutembei Mbaya v Medivet Products Limited* [2021] eKLR the court held that an employee who engages in an unprotected strike or industrial action is in breach of his employment contract and subject to summary dismissal. An industrial action must therefore be protected pursuant to section 79 of the LRA for the employee to justify a claim for wages due over such period. See also *Red Lands Roses Limited v Kenya Plantations and Agricultural Workers Union* [2020] eKLR that a strike that is not protected under the LRA cannot accrue a benefit.
37. The claimant has confirmed that the 2<sup>nd</sup> respondent was not party to Nairobi ELRC Cause No. E041 of 2021 so as to claim under the Orders therefrom. Even in a case where such Orders had a direct impact on the members of the claimant, the ongoing industrial action was not protected to justify a claim for withheld salaries for January and February 2021.
38. The claim that the claimant's members were treated differently from other nurses serving in other counties, on the findings above, particularly that the industrial action leading to these proceedings

being unprotected, the claimant cannot justify a claim that there was discriminatory treatment of its members.

39. On costs, the claimant lodged a dispute with the Minister. The Conciliator made recommendations. The claimant opted to file an appeal with the PSC which had no jurisdiction. To further file these proceedings on the given background, costs are due to the respondents. The 1<sup>st</sup> respondent only filed a response and did not attend the hearing and shall bear own costs. The 2<sup>nd</sup> respondent shall be paid full costs.
40. Accordingly, the claim herein is found without merits in its entirety. The 1<sup>st</sup> respondent to bear own costs. The 2<sup>nd</sup> respondent shall be paid full costs.

**DELIVERED IN OPEN COURT AT MALINDI THIS 31ST DAY OF JANUARY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Nasra

..... and .....