Kenya County Governnment Workers Union, Uasin Gishu Branch v County Government of Uasin Gishu (Petition E004 of 2023) [2024] KEELRC 429 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 429 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

PETITION E004 OF 2023

MA ONYANGO, J

FEBRUARY 29, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 10,27,41,47 AND 235 OF THE CONSTITUTION OF KENYA,2010 AND IN THE MATTER OF END OF CASUAL /TEMPORARY APPOINTMENTS AND RELEASE OF STAFF BY THE COUNTY GOVERNMENT OF UASIN GISHU

BETWEEN

KENYA COUNTY GOVERNNMENT WORKERS UNION, UASIN GISHU BRANCH ..... PETITIONER

AND

THE COUNTY GOVERNMENT OF UASIN GISHU ..... RESPONDENT

JUDGMENT

1. The Petitioner is a duly registered trade union under the provisions of the *Labour Relations Act*, No. 14 of 2007.

2. The Respondent is a duly established County Government pursuant to Article 176 of *the Constitution* of Kenya.

3. The Petitioner filed the instant petition alleging violation of Articles 1, 10, 41 and 47 of *the Constitution*. The Petitioner also invoked Section 37 of the *Employment Act*, 2007 seeking for orders;

    i. That a declaration do issue pursuant to Article 2(4) of *the Constitution* of Kenya, 2010 that the acts and/or omissions of the Respondent in causing the termination of the casual/temporary employees contracts by issuing the memorandums dated 23rd June, 2023 reference numbers UGC/PSM/2023/768 and UGC/PSM/2023/763 dated the 23rd June, 2023 all by the Chief Officer of the Public Service Management; the memorandum dated 29th June, 2023 reference number UGC/COH-CL/6/23(3) by the Chief officer of Health Clinical Services and the memorandum dated the 3rd July 2023 by the Medical Superintendent/ Hospital Manager of

the Uasin Gishu County Hospital are a nullity and invalid for being in breach of Articles 1,10,41,47 and the Fourth Schedule of *the Constitution* of Kenya,2010.

ii. That an order of certiorari do issue to remove into this court and quash the decisions of the Respondent as made and communicated terminating the causal/temporary employees contracts embodied in the memorandums dated the 23rd June,2023 reference numbers UGC/PSM/2023/768 and UGC/PSM/2023/763 dated the 23rd June,2023 all by the Chief Officer of the Public Service Management ; the memorandum dated 29th June,2023 reference number UGC/COH-CL/6/23(3) by the Chief Officer of Health Clinical Services and the memorandum dated 3rd July 2023 by the Medical Superintendent/Hospital Manager of Uasin Gishu County Hospital.

iii. That a mandatory injunction do issue against the Respondent compelling it to take back into employment all the terminated casual/ temporary employees of the Respondent.

iv. That the costs of the Petition be awarded to the Petitioner.

v. That any other appropriate relief that the court may deem fit to grant

4. The Petition is supported by the affidavit of Isaac Kiptalam Chebet, the Chairman of the Petitioner herein.

5. The Petition is opposed. The Respondent filed the Replying Affidavit dated and filed on 10th November 2023.

6. As directed by the court on 8th November 2023, the Petition was disposed of by way written submissions.

The Petitioner's case

7. The Petitioner in the instant Petition avers that the Respondent has always had in its County Public Service establishment casual staff who are entitled to enjoy the rights to fair labour practice and fair administrative action by dint of Articles 41 and 47 of *the Constitution* and which fact is well acknowledged by the preamble to the Public Service Commission of Kenya (County Public Service) Human Resource Manual.

8. The Petitioner contends that the Office of the Chief Officer of Public Service Management on the 23rd June 2023 caused to be issued a blanket memorandum addressed to all the enforcement casual staff of the Respondent informing them that the temporary appointments under which they were serving would come to an end on 30th June 2023.

9. The Petitioner further avers that the Respondent through the Office of the Chief Officer of Public Service Management caused to be issued an internal memo dated 23rd June 2023 addressed to the Manager of the Municipality requiring the said office to notify all the old and new causals in the said Departments that their temporary appointments would come to an end on 30th June, 2023.

10. It is further averred that the Respondent through the office of the Chief Officer Public Service Management on 23rd June 2023 caused to be issued an internal memorandum to the Chief Officer Health Services requiring the said officer to notify all the old and new casual staff in the said Department that their temporary appointments would come to an end on 30th June, 2023.

11. The Petitioner states that by an internal memorandum dated 29th June 2023, the Respondent's Chief Officer of Health Clinical Services addressed all Directors, Deputy Directors of the Clinical Health Management Team, Programme Officers and Facility in Charges requiring them to release all causal

and temporary staff under their jurisdiction from 1st July 2023. The memo was copied to all Sub-County Health Coordinators requiring them to ensure that the directive was adhered to and a report submitted to his office by close of business on the 4th July 2023.

12. The Petitioner further avers that on the 3rd July 2023, the Respondent through its Medical Superintendent/Hospital Manager of the Uasin Gishu County Hospital caused to be issued an internal memo addressed to casual and temporary staff releasing them from duty with immediate effect.

13. It is the Petitioner's case that the actions by the Respondent are a nullity, unlawful and unconstitutional for reasons that:

    a. The Respondent is seeking to terminate employment engagements in an en-masse manner without regard to the individual contracts of the affected employees which is an improper exercise of the sovereign power of the people of Kenya contrary to Article 1 of *the Constitution* of Kenya as delegated to the Respondent.

    b. The Respondent in seeking to terminate the employment contracts en-masse without regard to the individual contracts of the employees is acting in breach of the national values and principles of governance under Article 10 of *the Constitution* which obligates it to uphold national values and principles of governance which include and not limited to devolution of power, the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, good governance , integrity, transparency and accountability.

    c. The actions of the Respondent in seeking to terminate the employment engagements of the employees is a breach of the right to fair labour practices guaranteed by Article 41 of *the Constitution*.

    d. The actions of the Respondent in terminating the employment engagements of the employees in a spurious manner is a clear and flagrant breach of the right to fair administrative action which is guaranteed by Article 47 of *the Constitution*.

    e. The actions of the Respondent of terminating all new and old casual employees' contracts is a blanket denial of entitlement of the employees to be considered for extension of the contracts which amounts to unfair labour practice which is guaranteed under Article 41 of *the Constitution* and is also a denial of the legitimate expectation and/or a reasonable expectation on the part of the employees to renewal of the contracts.

    f. The actions of the Respondent to terminate the casual contracts en-masse is breach of the right to fair administrative action and also amounts to an unfair labour practices under Article 47 and 41 of *the Constitution* respectively as the Respondent has not accorded any consideration as to whether the employment contracts have converted from casual to term employment by didn't of section 37 of the *Employment Act*.

    g. The en-masse termination of the casual employees contracts is a threat to the provision of security and health services to the public at large within the Uasin Gishu County; which function has been clearly delegated to be exercised by the Respondent by the people of Kenya under the Fourth schedule of *the Constitution*.

The Respondent's case

14. The Respondent in its reply to the Petition has explained that for it to carry out the various functions as set out in Schedule 4 of *the Constitution*, it depends on the funds it has raised internally and appropriations from the national exchequer.

15. It is the Respondent's case that from time to time, while undertaking its core Constitutional mandate, it requires extra support in terms of human resources to undertake specific tasks within a limited period. According to the Respondent, this support is normally seasonal and of a non-permanent nature and that the Respondent usually employs temporary staff on short or fixed term contracts to offer the said support within its departments.

16. The Respondent avers that in the financial year ending 30th June 2023, it determined that within the said financial year, the departments of revenue, health services, enforcement, agriculture and municipality would require extra human resource support but of a temporary nature. As a result, its Public Service Board recruited temporary staff on 3 months contracts running for diverse periods between 1st April 2023 and 30th June 2023. That as fate would have it, the lapse of the fixed term contracts of the temporary staff coincided with the lapse of the 2022/2023 Respondent's financial year.

17. It is the Respondent's case that its Annual Budget estimates for the financial year 2023/2024 did not include an appropriation for extension, and/or renewal of the fixed term contracts for the temporary staff because they had completed the work they were to perform, and further, the Respondnet had determined that it would not require their support in the next financial year, their contracts were therefore not renewed.

The Submissions

The Petitioner's submissions

18. In its submissions dated 8th December 2023 and filed on even date, the Petitioner submitted that the actions of the Respondent to terminate the causal contracts en-masse is a breach of the right to fair administrative action and also amounts to unfair labour practice under Articles 47 and 41 of *the Constitution* respectively as the Respondent has not accorded any consideration as to whether the employment contracts have converted from casual to term employment by dint of section 37 of the *Employment Act*. In support of this position, the Petitioner placed reliance in this court's judgement, Petition No. 20 of 2020, Joel Cheruiyot Bett & 27 Others vs County Government of Uasin Gishu & 2 Others and also the case of Nanyuki Water & Sewerage Company Limited vs Benson Mwiti & 4 Others (2018) eKLR.

19. The Petitioner has also submitted that the actions of the Respondent of terminating all new and old casual employees contracts is a blanket denial of entitlement of the employees to be considered for extension of the contracts which amounts to an unfair labour practice which is guaranteed under Article 41 of *the Constitution* and is also a denial of a legitimate expectation on the part of the employees to renewal of the contracts.

20. According to the Petitioner, the en-masse termination of the casual employees' contracts is a threat to the provision of security and health services to the public at large within the Uasin Gishu County which function has been clearly delegated to be exercised by the Respondnet by the People of Kenya under the Fourth Schedule Part 2 of *the Constitution*.

21. The Petitioner therefore urged the court to allow the Petition as prayed.

The Respondent's submissions

22. The Respondent on its part filed its submissions dated 8th December 2023 on 11th December 2023. In those submissions, Counsel for the Respondent identified the issues for determination to be;

    i. Whether the Petitioner has locus standi to institute the instant Petition

ii. Whether the temporary employees' contracts were lawfully terminated

iii. Whether the temporary employees' constitutional rights were infringed upon, and

iv. Whether the Petitioner is entitled to the reliefs sought.

23. On the first issue, the Respondent submitted that the Petitioner has no locus standi to file the instant suit for and on behalf of the temporary employees whose contracts were terminated by the Respondent. It is the Respondent's case that the alleged breach or the threated breach of the temporary employees' contracts of service is not a public act or a matter of public law notwithstanding the fact that the Respondent is a public body. The case in Communication Workers Union & another vs Communication Authority of Kenya (2015) eKLR was cited to buttress this point.

24. According to the Respondent, employment relationships are governed by the employment law and that any grievance that a contract of employment has been breached contrary to the *Employment Act* can only be raised by the parties to that contract. The Respondent contends that the Petitioner was not a party to the temporary contracts that were terminated by the Respondent.

25. It is further submitted by the Respondent that labour rights are granted to both employee and employer and *the Constitution* in no way contemplated that a trade union can enforce the private constitutional rights of any employee it wishes. In citing Justice Nambuye in the case of Kenya Plantation & Agricultural Institute vs Kenya Agricultural Research Institute(Kari) & Another(2007)eKLR, the Respondent stated that the court in the matter analysed section 21 of the *Labour Relations Act* that gives a trade union the capacity to sue and be sued in its own name and that the court observed that this capacity does not extend to suing in its own name to enforce contractual rights of employees between the employer and the employees even when the said employees are its members unless they are expressly authorised to do so.

26. The Respondent has also submitted that the Petitioner has not presented any evidence in the form of names of the temporary employees and whether the said employees are its members. According to the Respondent, trade unions exist for a very specific purpose; to protect and further the interests of their members. It is therefore the Respondent's case that neither the Court nor itself knows who exactly the Petitioner is representing.

27. The Respondent has maintained that it submitted the list marked EB-198 which identifies the employees in its database that are unionized and whose union dues were deducted during the relevant period. The Respondent avers that the temporary employees are not members of any union let alone members of the Petitioner as it has never deducted any membership fees from for temporary employees so affected.

28. It is therefore the Respondent's case that courts have time and again held that an employee can only be represented by a union if they are registered members of the union and if their membership fees are collected regularly. The Respondent cited the following cases to buttress this position; Kenya County Government Workers Union v Busia County Public Service Board & 10 others (2018) eKLR, Kenya Private Universities Workers Union v Agha Khan University Hospital (2019) eKLR, Kenya Private Universities Workers Union v Don Bosco Utume Salesian Theological College (2019) eKLR and Kenya Shipping, clearing and warehouses union v Africair Management & Logistics Ltd (2019) eKLR.

29. In respect of the second issue, the Respondent submitted that the temporary contracts were validly and procedurally terminated and as such, the temporary employees' constitutional rights were not violated. According to the Respondent, the temporary employees executed contracts that were effective from the date at which each of them signed the contracts to 30th June 2023 and that the contracts stipulated

that the employees would be paid on a daily basis. It is the Respondent's case that the employees were therefore casual employees engaged in short term contracts of service which contracts lapsed by reason of effluxion of time. The Respondent placed reliance on the cases in Dan Caxton Undusu v Jubilee Insurance Company of Kenya Limited (2020) eKLR, Sipeti v Label Converters Limited (Cause 155 of 2017) (2022) KEELRC 13481 (KLR) and Kenya Building Construction Timber and Furniture Industries Employees Union v Ekotech Company Limited (2021) eKLR.

30. On whether the employees' constitutional rights were infringed, the Respondent submits that the rights under Article 41 and 47 were not violated as alleged by the Petitioner. According to the Respondent, the type of contractual engagement the employees had did not need to be accorded any reasons for extinguishment of the contract and no procedure was required to be followed. Further, it was maintained that the employees' contracts lapsed by effluxion of time and the Respondent was not obligated by any law to give reasons for its action of releasing the temporary employees. In support of this position, the Respondent cited the case in Amatsi Water Services Company Limited v Francis Shire Chachi (2018) eKLR.

31. On the allegation by the Petitioner that the employees had legitimate expectation and that in releasing the temporary employees the Respondent denied them the entitlement to an extension of their contracts, the Respondent submitted that an extension of a fixed term contract is not automatic or guaranteed. It is the Respondent's case that a contract whose end date is definite and known cannot create a legitimate expectation.

32. Lastly, on the issue whether the Petitioner is entitled to costs, the Respondent maintained that the Petitioner had no locus to represent the temporary employees and that as such, it is not entitled to any of the prayers it is seeking. It is further submitted that the temporary employees' contracts terminated by effluxion of time and that as such, the Respondent's actions were valid and lawful.

33. In the end, the Respondent urged the Court to strike out the instant petition with costs to the Respondent.

Determination

34. I have considered the Petition before me, the rival affidavits, the opposing submissions as well as the authorities cited. In my view the issues that fall for determination by this court are;

    a. Whether the Petitioner has locus to file the instant suit on behalf of the Respondent's employees

    b. Whether the Respondent's employees were employed on a fixed term contract and if so, whether their rights were violated by the Respondent

    c. Whether the remedies sought by the Petitioner lie in law

35. On the first issue, as mentioned earlier, the Petitioner is a trade union. The Respondent has raised the issue that the Petitioner had no locus to institute the instant Petition on behalf of the Grievants.

36. A Trade Union's locus to represent its members in Court in work related grievances flows from the membership of the employee to the Trade Union. This was the position that was taken by the court in Kenya Shipping, Clearing, and Warehouses Workers Union v Africair Management & Logistics Limited [2016] eKLR where the Court held:

> "The obligation of the Trade Union to represent its Members in and out of Court, and the right to the Members to representation, in work related grievances and disputes, flows

from the membership of the Employee to the Trade Union. These are obligations and rights created by membership. Recognition is between the Trade Union and the Employer. Membership creates a relationship between the Trade Union and its Members. The two relationships are not the same thing, and do not have the same legal effect. Trade Unions collect regular membership fees from Employees, and the Employees in return, enjoy the representation and protection of the Trade Union under the Union Constitution and the law. Membership allows the Employees to have the Trade Union's legal representation in Court, while Recognition allows the Union to collectively bargain with the Employers, for the benefit of Members, and all Unionisable Employees."

37. This court in Eldoret ELRC Cause No. E018 OF 2022, Kenya National Private Security Workers Union vs Berdma Security Services Limited observed,

> " Where the Claimant is a trade union like in the instant case, it must in addition prove that it has locus standi to represent the grievant.
>
> Proof of mandate by a Trade union to represent an employee can be by way of a recognition agreement or check-off forms signed by employees. The union may also produce receipts of either membership fees or subscriptions paid directly to the union by members, or membership cards. Section 52 of the *Labour Relations Act* permits an employee to make direct payments to the union. The Section provides as follows:
>
> Nothing in this Part prevents a member of a trade union from paying any dues, levies, subscriptions or other payments authorised by *the constitution* of the trade union directly to the trade union."

38. In the instant Petition, the Petitioner has not submitted any evidence to prove that it recruited the Grievants into its membership to authorize it to represent the said workers in this case.

39. It is however my view that the authorities cited by the Respondent are distinguishable from the circumstances of this case. None of the authorities cited by the Respondents' had issues in dispute similar to the present petition. In this petition the Petitioner has filed a dispute relating to a class of employees. No copy of the Recognition agreement between the Respondent and the Petitioner has been filed in court for the court to ascertain that the same does not provide for the union to represent general interests of employees of the Respondent. Also no provision in the Recognition agreement or CBA has been referred to that would disentitle the petitioner to represent the Grievants.

40. Article 20 of *the Constitution* of Kenya protects the rights and fundamental freedoms in the Bill of Rights of all persons to the greatest extent consistent with the nature of the right or fundamental freedom and enjoins the courts to develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

41. Article 22 enjoins every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

42. Article 22(2) provides that in addition to a person acting in their own interest, court proceedings under clause may be instituted by—

    (a) a person acting on behalf of another person who cannot act in their own name;

    (b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

43. It is my view that the Petitioner herein has a right under Article 22 of *the Constitution* to institute the instant proceedings and cannot be excluded on grounds that it does not have membership amongst the employees of the Respondent. It indeed has an interest to protect all the employees of the Respondent under Article 22 as it draws its membership and therefore its income from the employees of the Respondent.

44. In my view, the arguments of the Respondents about locus standi would only hold sway if the Petitioner filed a suit in respect of specific named employees as was the case in the decisions cited by the Respondent.

45. I therefore find that the Petitioner has locus standi to institute the instant petition.

46. On the second issue whether the Grievants rights were violated after the memorandums dated 23rd June 2023, 29th June 2023 and 3rd July 2020 were issued by the Chief Officer of the Public Service Management, the Chief Officer of Health Clinical Services and the Medical Superintendent/Hospital Manager of Uasin Gishu County Hospital respectively, the Respondents have produced contracts of the Grievants which demonstrate that they were all on fixed term contracts which were lapsing on 30th June, 2023..

47. The appointment letters which were annexed to the Respondent's replying affidavit clearly demonstrate the terms of contract of the Grievants. I here below reproduce one such appointment letter as a sample since all the contracts are in the same in form and bear the same content.

Republic Of Kenya

County Government Of Uasin Gishu

Office Of The County Executive

Public Service Management

Our Ref: UGC/PSM/2023/529 DATE; 1st April, 2023

Felix Kiprop Letting

ID NO: xxxx

Re: Offer For Temporary Appointment-revenue Officer

We are pleased to offer you a temporary appointment with Uasin Gishu County Government under the following terms and conditions of service

You have been appointed as a Revenue Officer on temporary basis.

1. Job Description

You will assist in carrying out the following duties;

-Collection of revenue

-Issuance of receipts to customers

-Banking of revenue money

-Preparation of reports and targets

-Bringing receipt books to accountable document office

2. Hours of work

The working hours will be accordance with the *Employment Act* Guidelines 8am to 5pm, although sometimes you may be required to work outside the normal working hours.

3. Remuneration

You will be paid Kshs 1,384.30 /= per day

4. Date of Engagement

Your employment will commence on 1st April 2023 to 30th June 2023, a period of three (3) months subject to renewal based on need

5. Place of Employment

You will be based at Uasin Gishu (Soy Ward) or any place that you may be required from time to time.

6. Other Terms

This contract will be on a temporary basis and will be governed by the Terms and Conditions of service as set by the Salaries and Remuneration Commission and the provision of the *Employment Act*,2007

7. Agreement

If you accept the offer please sign the acceptance form and return the signed in Duplicate copy within seven days from the date of this letter.

Signed

Marion Birgen

Chief Officer

Public Service Management

48. The ordinary meaning of the terms therein is that the Grievants were employed on fixed term contracts which were effective from 1st April 2023 to 30th June 2023. In the case of Samuel Chacha Mwita v Kenya Medical Research Institute [2014] eKLR, held:

> "Once there is a written contract, the court will seek to give meaning to such a written contract based on its terms in determining any issue that may arise especially any dispute. The court as guided by the provisions of section 10 of the *Employment Act* will give the ordinary meaning to any written agreement between parties unless there is proof that there is ambiguity on the face of the contract."

49. Flowing from the above, it follows that since the Respondent had employed the Grievants on fixed term contracts, their employment contracts expired on 30th June 2023 hence bringing the relationship between the Respondent and the Grievants to an end.

50. The final issue is whether the Petitioner is entitled to the orders sought. Having found that the fixed term contracts of the Grievants ended by effluxion of time, the court finds that the orders sought are not merited. I thus dismiss the Petition with orders that each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE