



**Mwangi v County Government of Kisii & 2 others (Petition
E030 of 2023) [2024] KEELRC 1059 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1059 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E030 OF 2023
CN BAARI, J
APRIL 25, 2024**

BETWEEN

CHARLES MWANGI PETITIONER

AND

COUNTY GOVERNMENT OF KISII 1ST RESPONDENT

KISII COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

COUNTY SECRETARY, KISII COUNTY 3RD RESPONDENT

JUDGMENT

Introduction

1. Dr. Charles Mwangi, the Petitioner herein, lodged a petition dated 6th November, 2023, against the Respondents seeking the following reliefs:
 - i. A declaration that the failure by the Respondents to remit the Petitioner's monthly salary from 29th July, 2022 to date is discriminatory on account of his ethnic origin contrary to the provisions of Article 27 of the *Constitution* of Kenya.
 - ii. That the Respondents conduct, acts or omissions are unlawful, illegal and unfair, and the same violate the provisions of Articles 27, 28, 41 and 47 of the *Constitution* of Kenya.
 - iii. An order compelling the Respondents to compute and release the Petitioner's salary and allowances from 29th July, 2022 to date, together with interest at 12% p.a from 29th August, 2022 until payment in full.
 - iv. General damages for discrimination
 - v. Costs of this Petition



2. The Respondents did not file a reply to the petition nor in any way defend the petition. The suit thus proceeded undefended.
3. The petition was heard on 27th February, 2024, when the Petitioner testified in support of his case. He sought to have his supporting affidavit dated 6th November, 2023, and a further affidavit dated 18th January, 2024, adopted as his evidence in the matter and which were adopted.
4. The Petitioner filed submissions. The Respondents did not.

The Petition

5. The Petitioner contends that on 14th April, 2022, he was appointed by the Respondents into their department of Health Services as a medical officer, in Job group M for an initial probationary period of 6 months, at a starting salary of Kshs 49,000, and which sum was exclusive of house allowance.
6. He avers further that on 10th June, 2022, the 1st Respondent through the Office of the Chief Officer deployed him to Nduru Sub-County Hospital, and was expected to report on 13th June, 2022. The Petitioner states that the Respondents made a request to the Ministry of health to share his payroll data for purposes of processing his salary vide their letter of 12th August, 2022.
7. It is the Petitioner's assertion that despite undertaking his duties diligently, the Respondents have refused to fulfil their obligations under the employment contract, by refusing and/or declining to release his salary and allowances which become due at the end of every month and have become due for the past 15 months to date.
8. It is his case that since he reported to work over 15 months ago, and specifically on 29th July, 2022, the Petitioner has never received his salary and allowances for any single month, yet the Respondents have employed other personnel in the same position as the Petitioner, who have received their salaries and allowances timeously and there is no other justification for the blatant failure by the Respondents to facilitate the Petitioner's receipt of full salary, aside from the fact that the Respondents have singled him out for purposes of frustrating him since he is from a different ethnic origin from the rest of the employees working within the Respondents premises in their capacity as doctors.
9. That his exclusion is purely anchored on his ethnicity and has impaired equality of opportunity and treatment in employment, which is not only discriminatory, but also degrading and dehumanizing, and contrary to the strict provisions of the law.
10. That being aggrieved with the Respondents' inaction, the Petitioner instructed his advocates to write a demand letter to the Respondents seeking the prompt release of his salary and other benefits, but the Respondents have declined and refused to release the said sum without any justification.
11. That the Respondents are in open violation of Articles 27 and 41 (1) of the Constitution of Kenya entitling him to fair labour practices.
12. That the law under Sections 3 and 4 of the National Cohesion and Integration Act, as read with Section 5 of the Employment Act, place a burden on the Respondents to promote diversity and ensure the fair treatment of all persons without unreasonable distinction between those favoured and those not favoured.
13. That the Respondents have failed to exercise their duty to ensure that the Petitioner's Constitutional right to dignity and fair labour practices as guaranteed under Article 28 and 41 (1) (2) of the Constitution are protected and upheld.



14. That by singling out the Petitioner who is from a different ethnic origin from the rest of the employees within the County Government of Kisii, the Respondents have directly and openly discriminated against him on account of his ethnic background by their open failure to compensate him for work done for more than 15 months, and have further interfered with his right to be protected from discrimination on account of his ethnic background.

Provisions of the Constitution Alleged to Have Been Violated/Infringed Upon or Threatened with Violation

15. The Petitioner lists the following provisions of the Constitution as having been violated or threatened with violation
- i. Article 2(1) of the Constitution on the supremacy of the Constitution.
 - ii. Article 3(1) on the obligation to uphold and defend the Constitution.
 - iii. Article 10 of the Constitution on national values and principle of governance.
 - iv. His entitlement to rights guaranteed under Chapter IV of the Constitution.
 - v. Article 27 of the Constitution as read with Section 5 of the Employment Act, and Sections 3 and 7 of the National Cohesion and Integration Act, which prohibit unfair treatment on any ground, including ethnic origin.
 - vi. Article 47 of the Constitution as read with Sections 3, 4 and 5 of the Fair Administrative Actions Act, on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair

The Petitioner's submissions

16. It is submitted for the Petitioner that Article 41 of the Constitution grants all employees, including the Petitioner, the right to fair labour practices, which includes reasonable working conditions, and payment of wages as and when they fall due. It is submitted further that the Respondents have failed their duty to uphold the national values espoused in Article 10 of the Constitution which include non discrimination, good governance, accountability and rule of law, and it must be held accountable by this court.
17. It is his submission that the Respondents have no intention of meeting their obligations under the contract by timeously making payments of his salary and other allowances to him and which omission has continued to subject the Petitioner to difficult working conditions
18. In buttressing the foregoing position, the Petitioner placed reliance in Jason Mogaka Otlso v Shadrack Obuge Mukanda [2016] eKLR, for the holding that: -
- “Wages are a legal entitlement. Such is regulated under section 18 of the Employment Act... Why this provisions above are relevant to state is because of the penalty attached to it at section 25 of the Employment Act thus;...”
19. The Petitioner further submits that his assertion of non-receipt of salary is undisputed, having pleaded that he has never received his salary and produced letters to show that the payroll system ought to have been processed for his benefit. He submits that he has produced a daily attendance sheet and a theatre register which shows that he reports to work, and discharges his duties.



20. It is his submission that he served the Respondents with the Petition accompanied with the application which was determined by this court, but which they have not bothered to file any response to, or appear in court, making it then easy for this court to rule in his favour.
21. It is the Petitioner's position that the Respondents have discriminated against him on account of his ethnic origin, being Kikuyu and his employment being amongst natives of the Kisii community.
22. He submits further that the exclusion effected by the Respondents is forbidden under Article 27(4) as read with Article 41 of the Constitution which states as follows;
 - “(4) The State shall not discriminate directly or Indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
 - (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)”
23. The Petitioner further submits that the conduct of the Respondents is in open violation of his right to human dignity, demonstrated by their don't care attitude towards his plight.
24. It is submitted that by refusing to release the Petitioner's salary despite him meeting his obligations under the employment contract, the Respondents have exposed the Petitioner to unfair administrative action contrary to the spirit of Article 47. He submits that the conduct of the Respondents is inefficient, unlawful, unreasonable and procedurally improper for failing to meet their core obligation in the contract of employment.
25. It is the Petitioner's assertion that the conduct of the Respondents towards him is discriminatory on the basis of his tribe, and which entitles him to damages amounting to Kshs 10,000,000. He had reliance in the case of Pejeta Ranching Limited v David Wanjai Muhoro (2017) eKLR to support this position.
26. It is the Petitioner's prayer that this court grants him the orders sought.

Analysis and Determination.

27. I have carefully considered the pleadings, the witness' oral testimony and the submissions by the Petitioner. Two issues present for determination: -
 - i. Whether the Respondents violated the Petitioner's rights under Articles 27, 28, 41 and 47 of the Constitution.
 - ii. Whether the Petitioner is entitled to the reliefs sought.

Whether Respondents violated the Petitioner's rights under Articles 27, 28, 41 and 47 of the Constitution

28. The Petitioner's position is that the Respondents have discriminated against him on account of his ethnic origin, being himself Kikuyu and his employment being amongst natives of Kisii community. In his oral testimony, the Petitioner told this court that another doctor (name withheld) was employed after him, and being a native of Kisii, he received his full salary despite being employed after him.
29. It is his assertion that his rights under Articles 27, 28, 41 and 47 were, and continue to be violated by the Respondents. He asserts that he was and continues to be subjected to acts of discrimination by dint of non-payment of his salaries.



30. The *Black's Law Dictionary* defines discrimination as the "failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
31. By a letter dated 19th October, 2023 produced in evidence, the firm of Messrs Mauwa & Company Advocates were instructed by the Kenya Medical Practitioners and Dentists Union to raise the issue of discrimination of the Petitioner on account of his ethnic origin. This letter lends credence to the Petitioner's assertion of discrimination on account of ethnic origin,
32. Indeed, as submitted by the Petitioner, the court cannot fathom any other basis for the Respondents' failure to pay the Petitioner his dues, other than for his ethnic background/origin. The Petitioner has further shown that other doctors from the majority ethnic group at the County of Kisii were employed after the Petitioner, and the uncontroverted evidence is that they received their monthly pay when due.
33. Discrimination on account of ethnic origin is a violation of Article 27(4) & (5) of the *Constitution* and the Respondents' failure to pay the Petitioner on account of his ethnic origin, is a gross violation of his right not to be discriminated against and by extension his right to human dignity protected under Article 28 of the *Constitution*.
34. The Court in the South African case of *S v Makwanyane* pronounced the value of human dignity in the following terms: -
- "The importance of dignity as a founding value of the *Constitution* cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in chapter 3."
35. Further, the letters enquiring on why the Petitioner's salary was not being remitted did not attract a response, and it is not surprising that this petition similarly did not prove worthy of the Respondents' reply.
36. Section 5 of *Employment Act*, 2007, obligates employers to address acts of discrimination in employment as follows: -
- “(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
- a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
- b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.
37. The Respondents handling of the Petitioner is no doubt a tramp on his Constitutional rights. In the final analysis, this court is satisfied that the Petitioner has proved a case of violation of his rights enshrined in Articles 27, 28 and 41 of the *Constitution*.



Whether the Petitioner is entitled to the reliefs sought

38. The Petitioner has through his uncontroverted evidence, to wit a letter of deployment dated 12th May, 2022, a posting letter dated 10th June, 2022, a daily work attendance sheet and a theatre attendance register showing that he indeed is an employee of the Respondents.

39. Sections 17 and 18 of the [Employment Act](#), 2007, states as follows on payment of employee wages:

“ 17

(1) Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya-

- a. in cash;
- b. into an account at a bank, or building society, designated by the employee;
- c. by cheque, postal order or money order in favour of the employee;

18. When wages or salaries due

(1) Subject to subsection (1), wages or salaries shall be deemed to be due

- (a) in the case of a casual employee, at the end of the day;
- (b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;
- (c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;

40. Payment of salaries/wages is so central to an employment contract, that the [Employment Act](#) under Section 25, attaches an offence and a heavy penalty upon an employer who fails to pay an employee's salary.

41. In the Ugandan case of [Nakafuma v Parambot Breweries Ltd](#) (Labour Dispute Reference No 38 of 2015) [2019] UGIC 41 (3 August 2019) the court had occasion to consider a similar dispute where the employee had not received her salary for a period of 10 months. The court pronounced itself as follows:

“By exhibit “S” the claimant was appointed by the respondent as sales assistant at a monthly a net pay of Ug. 500,000/= per month. The claimant as already discussed, in the absence of evidence to the contrary, performed her duties as sales assistant. Accordingly, she was entitled to be paid her wages as provided for in the above section of the law and failure to pay her amounted to breach of the contract of service.”



42. In similar breath, the Petitioner herein, has shown that he was appointment to the service of the Respondents vide a letter dated 14th April, 2022, that he was deployed to his current station vide a letter dated 10th June, 2022 and by yet another letter dated 15th September, 2022, the Sub-County Medical Officer of Health for South Mugirango confirmed that the Petitioner reported to his station and had since then taken up his duties as Medical Officer in Nduru Sub-County Referral Hospital.
43. The Petitioner's evidence referred to above has not been controverted, and it follows then, that he is entitled to payment of his salary.
44. In conclusion, I find the Petitioner's petition merited and orders granted as follows: -
- i. A declaration that the failure by the Respondents to remit the Petitioner's monthly salary from 29th July, 2022 to date is discriminatory on account of his ethnic origin contrary to Article 27 of the Constitution of Kenya.
 - ii. An order be and is hereby issued compelling the Respondents to compute and release the Petitioner's salary and allowances from 29th July, 2022 to date, together with interest at 12% p.a from 29th August, 2022 until payment in full.
 - iii. The Petitioner is further awarded Kshs 1,000,000/- as damages for discrimination.
 - iv. The suit not having been defended, I make no orders on cost.
45. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF APRIL, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Onsongo h/b for Mr. Okelloh for the Petitioner

N/A for the Respondents

Arwin Ongor - C/A

