



Ndwiga v Principal Secretary, Ministry of Health & another (Constitutional Petition 137 of 2021) [2024] KEELRC 2703 (KLR) (28 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2703 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION 137 OF 2021**

**K OCHARO, J
OCTOBER 28, 2024**

BETWEEN

MARY WANJIRU NDWIGA PETITIONER

AND

THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

Withholding of Clinical Officer Interns' salaries without explanation was a violation of their right to fair labour practices

The Employment and Labour Relations Court ruled that the Ministry of Health violated the constitutional rights of Clinical Officer Interns (Diploma Level) by withholding their salaries and allowances from January 2015. The court found that the interns were employees under the Employment Act and were entitled to remuneration under the Revised Scheme of Service for Clinical Officers. It held that the Ministry's failure to pay amounted to unfair labour practices, servitude, and a breach of fair administrative action. The court ordered the payment of salaries, awarded KES 500,000 in damages to each intern, and imposed interest on the withheld amounts.

Reported by John Ribia

Labour Law – employees – definition – classification of interns, apprentices, and indentured learners - whether the inclusion of apprentices and learners in the definition of employees under the Employment meant that interns, apprentices and indentured learners were employees - whether Clinical Officer Interns (Diploma Level) were employees of the National Government or they were interns only facilitated by internship placement - whether Clinical Officer interns' were entitled to damages for delayed salary payments - Employment Act (cap 226) section 2.

Constitutional Law – fundamental rights and freedoms – right to fair administrative action – freedom against slavery, servitude, and forced labour – right to fair labour practices - Clinical Officer interns (Diploma Level) – where they were unpaid for a year - whether the withholding of Clinical Officer interns' salaries without an explanation constituted a violation of the rights to; fair administrative action, fair labour practices and a violation of the freedom against slavery - whether unpaid work under a mandatory governmental internship program



constituted a violation of constitutional rights, including fair labour practices and protection from servitude - Constitution of Kenya articles 2, 3, 4, 5, 10(1), 27(1), 29(d), 30, 40(1), 41, 43, 47, 55(a), 73, 185, 201, 232(1), and 234; Employment Act (cap 226) sections 2: 3, 5, 10, 18, 20, 25, 26, 27, 28, and 34; Clinical Officers (Training, Registration And Licensing) Act (cap 260); Clinical Officers [Training, Registration, and Licensing] [Training, Registration, Assessment, and Internship] Regulations, 1998 (cap 260 Sub Leg).

Brief facts

The petitioner filed a constitutional petition on behalf of Clinical Officer interns (Diploma Level) working in 76 internship hospitals across Kenya. She alleged that the Ministry of Health unlawfully withheld their salaries and allowances from January 2015, despite their entitlement under the Revised Scheme of Service for Clinical Officers, April 2010. The interns had been posted to various public hospitals by the Director of Medical Services and had completed their formal training, making the internship a mandatory requirement for professional registration.

The petitioners claimed that their salaries had been included in the national budget, yet the Ministry of Health failed to disburse the funds. Meanwhile, interns from other medical fields, including degree-level clinical officers, nurses, and medical officers, continued to receive their salaries. The petitioners protested the non-payment through a strike in June 2015 but later called it off in favour of legal action.

The Ministry of Health opposed the petition, arguing that the internship did not create an employer-employee relationship and that there was no approved government policy to pay diploma-level clinical officer interns. The petitioners sought declarations affirming their right to salaries, orders compelling payment, and compensation for the violation of their constitutional rights.

Issues

- i. Whether the inclusion of apprentices and learners in the definition of employees under the Employment meant that interns, apprentices and indentured learners were employees?
- ii. Whether Clinical Officer interns (Diploma Level) were employees of the National Government or they were interns only facilitated by internship placement.
- iii. Whether unpaid work under a mandatory governmental internship program constituted a violation of constitutional rights, including fair labour practices and protection from servitude.
- iv. Whether the withholding of Clinical Officer interns' salaries without an explanation constituted a violation of the rights to; fair administrative action, fair labour practices and a violation of the freedom against slavery.
- v. Whether Clinical Officer interns' were entitled to damages for delayed salary payments.

Held

1. An Intern was usually understood to be a person who was employed in an organization in a structured and managed programme that provided work experience for an agreed period. Contracts of apprenticeship were included within the broad definition of employment contract under the Employment Act (the Act). Further, section 2 of the Act, defined an employee as a person employed for wages or a salary and included an apprentice and indentured learner. For purposes of the employment and labour law, interns were employees. The implication of the inclusion of apprentices and learners in the definition was that they acquired protected status, enjoying the expansive protections and rights set out in the Act.
2. The ELRC had already held that the clinical officers were *stricto sensu* not students. They had completed their college and Council exams and been posted by the 1st respondent for placement as Clinical Officers for internship and awaiting the Council confirmation. The decision was not reviewed or appealed, the instant court could not disturb those findings.
3. The role of the Ministry of Health (1st respondent) was merely facilitative. At all material times, the petitioners were employees of the National Government, employed through the 1st respondent.



4. The order to render an account was deliberately made to facilitate compliance with the orders of the ELRC. The order was never set aside. The petitioners were entitled to salary and allowances for Job Group ‘H’.
5. The petitioners brought out the rights and constitutional provisions they held were violated and how they were, sufficiently, and as would come out shortly after they did prove the violation to a large extent. The case attained the threshold for constitutional petitions.
6. The employer must remunerate his employees. Contractually agreed remuneration must be paid promptly and without delay. The duty on the part of the employer to remunerate his employees fairly was no longer a common law duty only, it was a constitutional imperative following the constitutionalizing of the employee’s right to fair pay.
7. A person’s employment was usually one of the most important things in his or her life. It gave not only a livelihood but an occupation, an identity and a sense of self-esteem. To inexplicably refuse and or neglect to pay the employees their remuneration as was the case herein, would subject the them to work under unsatisfactory, unsafe and unhealthy conditions, thus in contravention to article 41(2)(b) which commanded reasonable working conditions for employees.
8. The respondents breached the petitioners’ right to fair labour practices in contravention of article 41(2) (a) and (b) of the Constitution.
9. Article 30(1) of Constitution prohibited slavery and servitude. For more than one year, the petitioners worked without pay, yet as indicated hereinabove, there was a budgetary allocation for the payment. They were forced to work under that situation as they had no choice. They couldn’t be registered and consequently allowed to practice as Clinical Officers without first completing the internship process. The situation that was availed unjustifiably for them, amounted to inhuman treatment and was equivalent to slavery and servitude.
10. Withholding the interns’ salaries not only caused social and economic hardship to them and constituted a breach of the 1st respondent’s obligation under the law but it also had the unpleasant effect of consigning them to a state of slavery and servitude.
11. The 1st respondent neglected and or refused to pay the petitioners their salaries and allowances purportedly on the ground that there wasn’t in place a Scheme of Service allowing such payment, yet as indicated hereinabove there was. Therefore, they breached the petitioners’ right fair administrative action contrary to article 47 of Constitution.
12. The petitioners were to be paid the same as per the Clinical Officers Scheme of Service, April 2010 under Job Group “H”, for the one year that they were under internship. The respondents were bound by the national values and principles of governance, *inter alia*, accountability, respect for human rights, rule of law and transparency.

Petition allowed.

Orders

- i. *Declaration issued that their constitutional rights under articles 47, 41, and 30 were violated by the respondents.*
- ii. *General damages, KSHs. 500,0000 were awarded for each of the 914 Petitioners, for the violated rights.*
- iii. *Payment of entitled salaries and allowances that they ought to have earned under the Clinical Officers Scheme of Service, April 2010, for twelve months with effect from January 2015. The 1st respondent was to compute the same on this basis.*
- iv. *Interest at court rates from January 2015, on the salaries and allowances, till full payment.*
- v. *Interest at court rates on the awarded general damages from the date of the judgment till full payment.*
- vi. *Costs of the petition were awarded to the petitioners.*

Citations

Cases



1. John Gakuo v County Government of Nairobi & 3 others Civil Appeal 201 of 2016; [2018] KECA 462 (KLR) — Followed
2. Kusow Billows Isaac v Ministry of Interior and Coordination of National Government and 3 others Petition 191 of 2019; [2020] KEELRC 1185 (KLR) — (Explained)
3. Muchai ,Stanley Mungai v National Oil Corporation Cause 447(N) of 2009; [2012] KEELRC 38 (KLR) — (Mentioned)
4. Mumu Matemu v Trusted Society of Human Rights Alliance 3 others Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) — (Mentioned)
5. Nyaboga , Naftali Mogaka v Kisii County Government & another Petition 15 of 2020; [2022] KEELRC 132 (KLR) — (Explained)
6. Onduko , James v Computer for School Kenya Cause 1437 of 2011; [2014] KEELRC 800 (KLR) — (Followed)
7. Spangler Jonathan v Centre for African Family Studies (CAFS) Cause 108 of 2015; [2017] KEELRC 1242 (KLR)-(Mentioned)

Statutes

1. Constitution of Kenya, 2010 — articles 2, 3(1); 3(6); 10(1); 27(1) (2) (4) (5); 29(d); 30; 40(1) 3; 41(1), (2); 43(1) (a) (e), (2); 47(c); 55(a);73; 185; 201; 232(1); 234 — (Interpreted)
2. Clinical Officers (Training, Registration And Licensing) Act (cap 260) — (Cited) In general
3. Clinical Officers [Training, Registration, and Licensing] [Training, Registration, Assessment, and Internship] Regulations, 1998 (cap 260 Sub Leg) — (Cited) In general
4. Employment Act (cap 226) — sections 2: 3(3) (6); 5; 10; 18(1) (b), (2) (c); 20(1) (2) (a), (b); 25; 26; 27; 28 ; 34(1) (2) — (Interpreted)

Advocates

Mr. Gesuba for the petitioner

Ms. Mbilu for the respondent

JUDGMENT

1. Through the petitioner herein dated 31 August 2015 the petitioner (Mary Wanjiru Ndwiga) a Clinical Officer expressing that she initiated the same on her own behalf and that of all Clinical Officers Interns (Diploma level) in service, at 76 Internship Hospitals in Kenya, sought against the respondents jointly and severally: -
 - a. A declaration that the Interns are entitled to the rights guaranteed under articles 27(1), 2, 4 & 5, 29(d), 40(1) (a), & 3; 41(1) & (2); 43(1) (a)(e), & (2); 47(c) and 55(a) and (d); of Constitution of Kenya 2010.
 - b. A declaration that the 1st respondent has contravened the interns rights guaranteed under articles 27(1), 2, (4) & (5), 29(d), 40(1)(a), & 3; 41(1) & (12); 43(1) (a) (e), & (2); 47(1) and 55(a) and (d); of Constitution of Kenya 2010.
 - c. A declaration that the 1st respondent has abrogated Constitution of Kenya, 2010 by violating the values and principles under articles 3(1); 10(1)(c) and (2); 73(1) & (2), (b), (d) & (e); 201(a) (b) (iii) and 232(1) (a)(b), (e)(f) & (2) (a) thereof.
 - d. A declaration that pursuant to sections 2: 3(3) & (6); 5; 10; 18(1)(b), (2) (c); 20(1) & (2)(a), (b); 25; 26; 27; 28 and 34(1) & (2), of the Employment Act 2007 and Approved Scheme of Service



for Clinical Officers, April 2010, the Interns are entitled to monthly salary for the period of internship at the prevalent job Group H salary scale allowances.

- e. An order of mandamus to compel the 1st respondent to deposit with the honourable court full salary due to the interns in service plus compound interest at commercial rates in respect of January 2015 to August 2015.
 - f. An order of mandamus to compel the 1st respondent to deposit with the Honourable court from September 2015 the monthly salary for all Interns in service until the completion of internship training.
 - g. An order that the salary deposited with the honourable court be released to Onyoni Opini & Gasuba Advocates for the petitioners as stakeholders to distribute to the Interns and file returns in court.
 - h. An order that the 1st respondent do pay each Intern in service damages in compensation for contravention of their rights and fundamental freedoms secured by Constitution of Kenya 2010.
 - i. An order that the 1st respondent do pay interest on the compensation amounts at court rates until payment in full.
 - j. The 1st respondent pays the costs of this petition plus interest until payment is made in full.
2. The petition is supported by an affidavit by the petitioner sworn on the 31st of August 2015.
 3. Contemporaneously with the petition the petitioner filed a notice of motion application dated 31 August 2015, wherein she sought: -
 - a. That the honourable court be pleased to grant an interim order that the 1st respondent does deposit with the court at the 1st respondent's costs, the January 2015 to August 2015 salary and allowances [less taxes] plus compound interest at commercial rates due on account of Clinical Officer Interns (Diploma level) in service pending the hearing and determination of the application.
 - b. That the honourable court be pleased to order that upon being deposited in court, the salary be released to Onyoni Opini & Gesuba Advocates for the petitioners as stakeholders to distribute to the Clinical Officer Interns (Diploma level) in service and file returns in court, pending the hearing and determination of the petition.
 - c. That the honourable court be pleased to order that the 1st respondent do deposit with the honourable court at the 1st respondent's costs the monthly salary (less taxes) in respect of the balance internship period on account of the Clinical Officer Interns (Diploma level) in service with effect from end of September 2015 pending the hearing and determination of the petition.
 - d. That the honourable court be pleased to order that upon being deposited in court, the salary effective September 2015, be released to Onyoni Opini & Gesuba Advocates for the petitioners as a stakeholder to distribute to the Clinical Officer Interns (Diploma level) in service and file returns in court pending the hearing and determination of the petition.
 4. The application was supported by an affidavit dated 31 August 2015 and another dated 4 September 2015, both sworn by the petitioner.



5. On 4 September 2015 the application was placed before Lady Justice Mbaru when she issued orders thereon thus: -
 - a. That the application is certified as urgent and is heard *ex parte* in the first instance.
 - b. That an interim order be and is hereby issued that the 1st respondent does deposit with the honourable court at the 1st respondent's costs, January 2015 to August 2015 salary and allowances [less taxes] plus compounded interest at commercial rates due on account of Clinical Officer Interns (Diploma level) in service pending the hearing and determination of the application.
 - c. That upon being deposited in court, the salary be released to Onyoni Opini & Gesuba Advocates for the petitioner as stakeholders to the Clinical Officer Interns (Diploma level) in service and file returns in court pending the hearing and determination of the application.
 - d. That the prayers OF compound interest and commercial rates shall be addressed at the hearing.
6. When the application came up for an *inter-partes* hearing on the 14th of September 2015, the court directed: -

“In the interest of justice, the respondent has 5 days to reply and mention on 21 September 2015 for compliance and further directions.”
7. On the 18 September 2015 the 2nd respondent filed an application dated 15 September 2015 under a certificate of urgency seeking the following orders:
 - i. That, the application be certified urgent and be heard *ex-parte* in the 1st instance.
 - ii. That the interim *ex-parte* order issued on the 4 September 2015 that the 1st respondent deposit with the honourable court at the 1st respondent's costs, the January 2015 to August 2015 salary and allowances (less taxes)) plus compound interest at commercial rates due on account of the Clinical Officer Interns (Diploma level) in service pending the hearing and determination of the application dated August 31, 2015 and any subsequent consequential order thereof, be stayed pending the hearing and determination of this application.
 - iii. That an interim *ex-parte* order issued on the 4 September 2015 that upon being deposited in court the salary be released to Onyoni Opini & Gasuba Advocates for the petitioner as stakeholders to distribute to the Clinical Officers Interns (Diploma level) in service pending the hearing and determination of the application dated 31 August 2015 and any subsequent consequential orders thereto be stayed pending hearing and determination of this application.
 - iv. That the *ex-parte* interlocutory interim orders entered against the 1st and 2nd respondents on 4 September 2015 and any subsequent consequential orders thereto be stayed pending hearing and determination of this application and the substantive petition on record.
 - v. That the interim *ex-parte* orders issued on 4 September 2015 that the 1st respondent deposit with the Honourable court at the 1st respondent's costs the January 2015 to August 2015 salary and allowances (less taxes) plus compound interest at commercial rates due on account of the Clinical Officer Interns (Diploma level) in service pending the hearing and determination of the application dated 31 August 2015 and any subsequent consequential orders thereto be reviewed and/or set aside pending hearing and determination of the petition by the petitioners dated 31 August 2015.



- vi. That the interim *ex-parte* order issued on the 4 September 2015 that upon being deposited in court the salary be released to Onyoni Opini & Gachuba Advocates for the petitioner as stakeholders to distribute to the Clinical Office Interns (Diploma level) in service pending the hearing and determination of the application dated 31 August 2015 and any subsequent consequential orders thereto be reviewed and/or set aside pending hearing and determination of the Petition by the petitioners dated 31 August 2015.
 - vii. That the *ex-parte* interlocutory interim orders entered against the 1st and 2nd respondents on 4 September 2015 and any subsequent consequential orders thereto be reviewed and or set aside pending hearing and determination of the petition by the petitioners dated 31 August 2015.
 - viii. That the cost of the application be provided for.
8. On the 21st of September 2015, counsel for the respondent indicated to the court that they had filed the application dated 18 September 2015, and sought that the same be heard ahead of the petitioners' dated 31 August 2015. The petitioners' counsel vehemently opposed the application. The court ruled that the application dated 31 August 2015 be heard. As a result, counsel for the parties made their submissions on the application. The application was slated for ruling on 23 September 2015.
9. In the ruling delivered, the court held: -

“

“31. The respondents carry a public duty towards the officers, interns and staff under their care, employment and internship.

Such responsibility includes the facilitation and support necessary for interns posted in the respondents' facilities, the respondents have run away from such duty and responsibility. There is a duty to render accounts. Not just to the petitioners but to the people of Kenya for whom resources have been placed at the hands of the respondents. This is the account that must be rendered. With the above outline, the list of petitioners now held by the respondents, noting the budgetary allocations made available to the 1st respondent. I direct as follows: -

- a. The respondent shall render an account with regard to the petitioners' salary and allowances based on the budget made and approved by parliament for the fiscal year 2014/2015 in terms of the orders made on September 4, 2015.
 - b. Such accounts shall be rendered within 7 days.
 - c. The respondents shall file such account on before the 1st day of October 2015.
 - d. The court shall proceed based on (a) and (b) above to direct as appropriate.
 - e. Parties shall herein appear in court on October 5, 2015 for further directions.”
10. When the matter came up before the court on the 5th of October 2015, for the above-stated purpose, the court noted that there had been no compliance by the respondents and ordered: -

“There is an order herein directing the respondents to comply in 7 days which has not been done.

The court shall move and ensure a proper administration of justice and in this regard, the person and officer of the 1st respondent shall personally appear in court on October 9, 2015



with a report to the Order No 1 and the court ruling of September 23, 2015, failure to which the court shall move as appropriate.”

11. On the 7 October 2015 the court was informed that the respondents had filed documents as had been directed by the court. As a result, their counsel asked the court to lift the orders of October 5, 2015, which required the personal attendance of the Permanent Secretary. The court lifted the order and allowed the petitioner to file and serve a further affidavit within 14 days. The matter got fixed for mention for further orders for 29 October 2015.
12. On 30 November 2015, the petitioner filed a notice of motion application dated 25 November 2015, wherein she sought the following orders: -
 - a. That the application be certified urgent and it is heard ex-parte and service be dispensed with in the first instance.
 - b. That pending the hearing and determination of this application the honourable court be pleased to issue mandatory orders directing the 1st respondent to avail all information within her power, possession and/or custody that is vital in enforcing the petitioner’s fundamental rights and freedoms and more specifically the information listed hereinbelow.
 - i. Certified copy of the Internship Policy.
 - ii. Certified copy of the Internship Policy Guidelines developed as per the National Treasury letter Ref R 108/13/01B (5) dated 17 March 2014.
 - iii. Certified copy of internship Policy submitted by the 1st respondent to the National Treasury for purposes of the Budget for Fiscal Years 2014/2015 and 2015/2016.
 - iv. Certified copy of the Internship Budget proposal for Fiscal Years 2014/2015 and 2016/2016 by the 1st respondent to the National Treasury.
 - v. Certified copy of funds transfer from National Treasury/Central Bank in respect of Internship Budget Programme for Fiscal Years 2014/2015 and 2015/2016.
 - vi. Full names, identity and internship licence numbers and posting schedules of the
 1. 910 Medical Officers (Interns) who were paid in 2014/2015.
 2. 100 Dental Officer (Interns) who were paid in 2014/2015.
 3. 200 Pharmacists (Interns) who were paid in 2014/2015.
 4. 350 BSCN (Graduates Nurses) who were paid in 2014/2015.
 5. 150 BSC (Clinical Officers) who were paid in 2014/2015.
 - vii. Certified copy of monthly pay slips for each intern referred to in paragraph 3 (vi) 1-5 above.
 - viii. Full names, identity, internship licence numbers and posting schedule of all interns paid by the 1st respondent during the Fiscal Year 2015/2016.
 - ix. Certified copies of the monthly payslips for each intern referred to in paragraph (viii) above.
 - x. Certified copies of monthly bank instructions to transfer the funds to all the interns referred to in paragraph (ix) above.



- c. That pending the hearing and determination of this petition this Honourable court be pleased to issue mandatory orders directing the 1st respondent to avail all information within her power, possession and/or custody that are vital in enforcing the petitioner's fundamental rights and freedoms and more specifically the information listed herein in prayer 2(a) to (k) above.
 - xi. Certified copy of the Internship Policy.
 - xii. Certified copy of the Internship Policy Guidelines developed as per the National Treasury letter Ref R 108/13/01B (5) dated March 17, 2014.
 - xiii. Certified copy of internship Policy submitted by the 1st respondent to the National Treasury for purposes of the Budget for Fiscal Years 2014/2015 and 2015/2016.
 - xiv. Certified copy of the Internship Budget proposal for Fiscal Years 2014/2015 and 2016/2016 by the 1st respondent to the National Treasury.
 - xv. Certified copy of funds transfer from National Treasury/Central Bank in respect of Internship Budget Programme for Fiscal Years 2014/2015 and 2015/2016.
 - xvi. Full names, identity and internship licence numbers and posting schedules of the
 - 6. 910 Medical Officers (Interns) who were paid in 2014/2015.
 - 7. 100 Dental Officer (Interns) who were paid in 2014/2015.
 - 8. 200 Pharmacists (Interns) who were paid in 2014/2015.
 - 9. 350 BSCN (Graduates Nurses) who were paid in 2014/2015.
 - 10. 150 BSC (Clinical Officers) who were paid in 2014/2015.
 - xvii. Certified copy of monthly pay slips for each intern referred to in paragraph 3 (vi) 1-5 above.
 - xviii. Full names, identity, internship licence numbers and posting schedule of all interns paid by the 1st respondent during the Fiscal Year 2015/2016.
 - xix. Certified copies of the monthly payslips for each intern referred to in paragraph (viii) above.
 - xx. Certified copies of monthly bank instructions to transfer the funds to all the interns referred to in paragraph (ix) above.
 - d. That costs of this application be provided for.
13. Eventually, a ruling on the application was not written. On the 29th of September 2016, for the sake of expeditious disposal of the controversy, Justice Mbaru directed that the parties focus their energies on the main petition. The issue on the documents- the subject matter of the application, be canvassed during the hearing of the petition.
14. On July 24, 2023, the petition was placed before me for direction on the hearing thereof. I directed *Inter alia*, that the petition be canvassed by way of written submissions and gave specific timelines to the parties. The submissions are on record



15. The petition is resisted through an affidavit that was sworn on the 15th of September 2015, by Dr Khadijah Kassachoon, the then Principal Secretary, of the Ministry of Health.

The Petition

16. The petitioner contended that the Interns have undergone formal training in clinical medicine, and consequently, were licenced to undergo internship training. In December 2014 the 1st respondent. In December 2014, the Director of Medical Services posted them to various hospitals within various Counties.
17. In January 2015, the Interns reported to their respective internship training Hospitals and commenced their internship training. The training is mandatory under the *Clinical Officers [Training, Registration and Licensing] Act*, cap 260. The terms and conditions of service for them are more particularly set out in the Revised Scheme of Service for Clinical Officers, April 2010.
18. According to the petitioner, under the Scheme of Service for Clinical Officers the Interns were Job Group H employees of the respective hospitals for one year starting January 2015. They were entitled to a salary and allowances like any other employee serving under the Job Group.
19. The Interns' salary and allowances were provided for in the Budget Statements for the Fiscal Years 2014/ 2015 and 2015/2016. This notwithstanding, the 1st respondent unreasonably withheld the Interns' salary and allowances.
20. It was further stated that during the period, the 1st respondent continued to pay regular monthly salaries to other categories of Interns namely, Clinical Officer Interns [Degree level], Nursing Interns and Medical Officer Interns.
21. The 1st respondent didn't come forth with any reason why she was, withholding Interns' salaries and allowances, and discriminating against them.
22. On 24 June 2015, the Interns went on strike to protest the non-payment of their outstanding salaries. In addition, they presented petitions to the 1st respondent and other various public institutions requesting to be paid their long outstanding salaries. These efforts didn't yield any fruit. On 6 August 2015, they called off the strike in favour of the court process.
23. It was the petitioner's case that the Interns' right to equality and freedom from discrimination was violated when the respondents failed to comply with the *Employment Act*, 2007 and Revised Scheme of Service for Clinical Officers, April. 2010.
24. The respondents violated their right to freedom and security by subjecting them to psychological torture. Further, their right to property by depriving them of their salary.
25. By its action of denying them fair remuneration and reasonable working conditions, the 1st respondent, breached their right to fair labour practices.
26. The 1st respondent contravened the Interns' right to fair administrative action by failing to give them written reasons for its action.
27. It was argued that the 1st respondent contravened the Interns' economic and social rights by denying them medical cover and social protection.
28. Lastly, the petitioner contended that the 1st respondent abrogated *Constitution* by failing to uphold the values and principles under articles 3[1], 10[1] [c]& [2], 73[1] & [2], [b], [d]&[e], 201[a], [b][iii]and 232[1][a], [b], [e], [f] & [2][a].



The Respondents' Case

29. The respondents asserted that the petitioner's petition and claims against them is misguided and full of material untruths. It is legally untenable.
30. It was further contended that the Ministry of Health did not have any employment engagement with the petitioner or any other Clinical Officer including Clinical Officer Diploma Interns. As such, any issue or claim for payment of salaries is unfounded.
31. The Clinical Medicine Diploma Course program offered in Kenya is regulated by the Clinical Officers Council established under the *Clinical Officers [Training, Registration and Licensing] Act* cap 260 Laws of Kenya, which requires students to undergo a one-year compulsory internship program, to be registered as a Clinical Officer.
32. The Ministry of Health in liaison with the Registrar of Clinical Officers only aids and facilitates the students in getting them placement for internship in various health institutions. The internship offer doesn't amount to employment of the students but only offer them an opportunity to acquire the practical skills and exposure before being registered as Clinical Officers.
33. The respondents argued that the petitioner has no legal and or constitutional right capable of being enforced against the Ministry of Health and or the Government at large as the Government owes not the petitioner and or the Clinical Officers [Diploma Holders] Interns any legal duties capable of accruing rights.
34. The Scheme of Service for Clinical Personnel dated March 2214, doesn't provide for salary for Clinical Officer [Diploma Level] Interns or other Clinical Officer Interns.
35. The respondents contended that the petitioners' petition is misconceived, incompetent, and untenable in law as they haven't demonstrated in any least possible way or demonstrated how the constitutional rights provided under the articles of *Constitution* set out in the petition were infringed upon.

The Petitioner's Submissions

36. The petitioner's counsel identified the following issues for determination in this matter, thus;
 - I. Whether the petitioners were employees.
 - II. Whether the petitioners were entitled to salaries and allowances from January to December. 2015.
 - III. Whether the respondents breached the petitioners' rights.
 - IV. Whether the petitioners are entitled to compensation for breach of rights.
 - V. Whether the petitioners are entitled to interest.
 - VI. Whether the petitioners are entitled to the costs of the petition.
37. Counsel submitted that there is no dispute that the petitioners provided their labour in exchange for salaries and allowances. The 1st respondent integrated the petitioners into the various public hospitals, exerted control over their activities, and provided them with the necessary equipment and tools, and determined the duration of internships, hence employer-employee relationship was firmly established.
38. Citing Justice Mbaru's ruling of 23 September 2015 in this matter, the decisions in *James Onduko v Computer for School Kenya* [2014] eKLR, and *Stanley Mungai Muchai v National Oil Corporation*



- [2012] eKLR, Counsel submitted that under the *Employment Act*, 2007, Interns are employees and therefore entitled to the rights and benefits that are set out therein.
39. On the issue of the petitioners' entitlement to salaries, counsel submitted that under Clause 4[a] of the Revised Scheme of Service for Clinical Officers, April 2010, the petitioners were designated as Job Group H. They were thus entitled to the salary and allowances of Job Group H. Funds were set aside by the Cabinet Secretary for National Treasury to cater for their salaries and allowances. The respondent didn't explain or demonstrate what happened to the funds set aside for the benefit of the petitioners.
40. It was further submitted that being employees and having rendered their services from January to December 2015, the petitioners are entitled to their salaries and allowances. Under section 18[2][c] of the *Employment Act*, 2007, the petitioners' salaries and allowances were payable at the end of each month from January to December 2015. To support this point, counsel cited the case of *Naftali Mogaka nyaboga v Kisii County Government & another* [2022] eKLR, and the ruling herein by Justice Monicah Mbaru.
41. Counsel further submitted that the order of September 4, 2015 by Mbaru J, settled the issue of the petitioners' entitlement to salaries and allowances for January to December 2015, which was unlawfully, unreasonably, and unjustifiably withheld by the 1st respondent.
42. On whether the respondents were in breach of the petitioners' constitutional rights, counsel submitted that article 30 of *Constitution* of Kenya, protects persons from slavery and forced labour. Article 41[1][2][a][b] entitled the petitioners to fair labour practices, fair remuneration and reasonable working conditions. Article 47 [1] entitled them to fair administrative action. Lastly, article 55[d] protected them from exploitation.
43. He asserted that it is not disputed that the petitioners have not been paid their salaries and allowances since January 2015, to date. Work without remuneration amounted to slavery and forced labour, Psychological torture and exploitation. To buttress this point, counsel placed reliance on the case of *Jonathan Spangler v Centre for African Family Studies* [CAFS][2017]eKLR.
44. It was submitted further that the respondents therefore breached the Petitioners' right to the rule of law, protection of the marginalized, good governance, accountability, right to equal protection and equal benefit of the law; human dignity; right to security of person; freedom from servitude and forced labour; right to fair administrative action; right to fair labour practices, fair remuneration, as guaranteed under article 10 [2], 27[1], 29[d]and [f], 30,47[1][2] and 41[1][2][a][b] of *Constitution* of Kenya 2010.
45. That the petitioners are entitled to damages for their violated rights, counsel placed reliance on the Court of Appeal decision in *John Gakuo v County Government of Nairobi & 3 others* [2018] eKLR, and urged this court to award damages for each fundamental right violated independently, thus Kshs. 2500,000 for each violation, to each petitioner.

The Respondents' Submissions

46. Counsel for the respondents submitted that the petitioners were not and have never been employees of the respondents. The respondents were Interns who were only facilitated to get placement in the various health facilities across the country and at no time did they have an employment engagement with the petitioners.
47. It was further argued that should the court find that they were employees, then it should go further to find that they were not employees of the National Government due to the devolution of health services



- and the petitioners were placed in various counties. The services were rendered to the counties. There wasn't a privity of contract between the National Government and the Interns.
48. The approved Scheme of Service for Clinical Officers in March 2014, did not include grading for Clinical Officer Interns [Diploma level]. Further, the Government hadn't set salaries or allowances for petitioners who were Interns attached to various hospitals to undertake the internship and were not employees of the Ministry of Health. The purported Scheme of Service document that the petitioner is placing reliance on is a draft document for the year 2010, which had not been approved. The petitioners cannot thus claim that they were graded at Job Group as the document was not the approved establishment.
 49. According to counsel, the Public Service Commission, is charged with powers under article 234 to, subject to *Constitution* and legislation, establish and abolish office in the public service, and establish human resources in the public service.
 50. The Government of Kenya through the Public Service Commission didn't have in place an approved establishment for diploma clinical officer interns and policy authorizing the Ministry of Health to pay stipend for diploma Clinical Officers Interns in the three-year 2014/2015 and 2016/2016 and thus could not authorized expenditure. As such, the budgetary allocation of 2.4 billion mentioned in the budgetary statement referred to by the petitioners, didn't include a stipend for the petitioners and Officer Interns diploma holders.
 51. The Ministry of Health was only granted authority to pay a stipend for diploma Clinical Officer Interns in the year 2019 by the Public Service Commission, as evidenced by the letter dated April 16, 2014, addressed to the then Principal Secretary, Ministry of Health, Annexure 5, to the further affidavit filed by the Respondents herein.
 52. The petitioners ceased to be Interns before the authorization, the authorization didn't have a retrospective effect, and the petitioners cannot be heard to claim a benefit thereunder. After 2019, the Government put in place a comprehensive internship policy and framework to cover interns. The court cannot in the circumstances order the salary payment to the petitioners as that expenditure hadn't been authorized and approved as per the constitutional provisions.
 53. Judicial notice should be taken that health services were devolved on or about August 2013 in line with article 185 of *Constitution* of Kenya, 2010. The National Government is in charge of health policy while the County Governments are in charge of the health facilities and health workers in their respective counties.
 54. It was submitted that should the court find the petitioners are entitled to payment of any wage, an order for payment of the same cannot be directed against the respondents as the petitioners were attached to facilities under various County Governments who aren't parties to these proceedings.
 55. On the alleged violation of the petitioners' constitutional rights, it was submitted that by reason of the foregoing premises, it cannot be said that any of the rights were violated. Further, the petitioners didn't prove the alleged violation of their stated rights and or constitutional stipulations. The reliefs sought cannot as a consequence be availed to them.
 56. Lastly, contrary to the petitioners' assertions, the orders that was issued herein on September 4, 2015 were vacated when the respondents duly complied by rendering accounts as were required by the order to, that flowed from the ruling of September 23, 2015.



Analysis and Determination

57. I have carefully considered the petition herein, the affidavits sworn by the petitioner in support of the petition, the response affidavits filed by the respondents in opposition to the petition, and the submissions by both the petitioner and the respondents, and the following issues emerge for determination;
- I. Whether the petitioners were employees.
 - II. If the answer to [I] above is in the affirmative, whose employees, were they?
 - III. Were the orders of September 4, 2015, discharged?
 - IV. Were the petitioners as Clinical Officer Interns entitled to salary and allowance payment, as asserted?
 - V. Were the petitioners' constitutional rights, and or constitutional stipulations violated by the respondents in the manner alleged by the petitioners?
 - VI. Are the petitioners entitled to the reliefs sought?

Whether the petitioners were employees

58. The term “Intern” and “Internship” have been defined in various ways, often depending on the field in which they are used. An Intern is usually understood to be “a person who is employed in an organization in a structured and managed programme that provides work experience for an agreed period. Under the [Clinical Officers \[Training, Registration, and Licensing\] \[Training, Registration, Assessment, and Internship\] Regulations, 1998](#) an Intern is defined as;

“a person holding a diploma in clinical medicine and surgery or similar qualifications recognized by the council who is undergoing a prescribed period of training in an approved training institution.”

And Internship as;

“one-year compulsory training course undertaken by a clinical officer immediately after completion of his basic training course in an approved training institution and may also include any further institutional training recommended by the council to be undertaken by a clinical officer who is either trained outside Kenya and who wishes to be registered and / or licensed by the council or who has been assessed by the council and been recommended for further training.”

59. Contracts of apprenticeship are included within the broad definition of employment contract under the [Employment Act](#). Further, section 2 of the Act, defines an employee as;

‘Employee means a person employed for wages or a salary and includes an apprentice and indentured learner.’

No doubt, for purposes of Employment and Labour law, interns are employees. In the ruling hereinabove mentioned Mbaru J, had the opportunity to state aptly that;

“The petitioners are therefore *stricto sensu* not students. They have completed their college and council exams and been posted by the 1st respondent for placement as Clinical Officers for internship and awaiting the Council confirmation. The drafters of the [Employment Act](#) addressed such a scenario



under section 2 of the *Employment Act* and indeed parliament passed it with approval when an employee was defined to include such an Intern, Learner, bonded or salaried person.....”

60. The implication of the inclusion of apprentices and learners in the definition is that they acquire protected status, enjoying the expansive protections and rights set out in the Act.

Whose Employees, were they?

61. Undeniably, in her detailed ruling of 23 September 2015, Mbaru J, definitively rendered herself on issues that are vital to this petition. The tragedy for the respondents is that they never successfully assailed the findings on the issues in any of those manners the law provides. They neither applied for review nor appealed against the ruling. It is imperative to state that the submissions that the respondents have made against the petition, largely remained the same as those that were advanced against the Petitioners’ application. This court cannot have any sound grounding to disturb her findings.

62. The respondents argued at the hearing of the stated application, and have submitted before me that the interns were not employees of the 1st respondent [read the National Government] as there was no privity of contract between them and the 1st respondent. Further, the only role that the 1st respondent played was facilitating the placement of the petitioners with the various hospitals for their internship.

63. If indeed the role of the 1st respondent was merely facilitative, nothing could have been easier than the respondents who were asserting so, to refer the court to a policy and or law from which the alleged facilitative role flowed. They did not.

64. In the above-stated ruling this issue [the role of the 1st respondent] was dealt with and the respondents’ position was discounted. The court stated;

“ 25. In this case, the posting of the petitioners was by the Minister of Health under the docket of the Director of Medical Services. This cannot be said that as of 23 December 2014, the 1st respondent by error sent such interns to the hospitals to undertake their duties in ignorance of devolution and thus didn’t budget for the Interns to ensure each Hospital provided every support to ensure training and learning takes place as required by law.”

65. By reason of the foregoing premises, I find no difficulty in concluding that at all material times, the petitioners were employees of the National Government, employed through the 1st Respondent.

Was the Order of 4th September 2015 set aside?

66. The respondents argued that by its disposal orders, in the ruling dated 23 September 2015, the court ordered the 1st respondent to render accounts. The accounts were rendered in compliance, and as such the orders of 4 September 2015, stood vacated. I am unable to think of any other reason that can inform such an argument in the circumstances of the matter and the wording of the whole ruling, other than a deliberate move to mislead the court. I have carefully read the entire ruling, the body not in isolation from the disposal part, and take a clear view that the order to render an account was deliberately made to facilitate compliance with the orders of 4 September 2015. This is the reason why the court stated;

“ 30. The application is that since their posting the petitioners have not received any salary or allowances. There exists no pay slips upon which such a salary or allowance can be assessed at this point. But the court is not left without a mechanism to enforce compliance. For the Respondents to require the



petitioners to produce such a pay slip so as to qualify/ warrant the grant of the orders sought is simple highhandedness. Such bureaucracy doesn't aid justice. It only protracts the matter by making the ends of justice a mirage. This is not the purpose for which this court exist. To make such a demand on the petitioners is an injustice.

31. The respondents carry a duty towards the officers, Interns and Staff under their care, employment and internship. Such responsibility includes the facilitation and support necessary for the Interns posted in the 1st respondent facilities. The respondents cannot collectively run away from such duty and responsibility. There is a duty to render an account. Not just to the petitioners but to the people of Kenya for whom resources have been placed at the hands of the respondents. This is the account that must be rendered here.”

67. The order was never set aside. Its implications as I will bring out shortly hereinafter, stand.

Are the petitioners entitled to salary and allowances?

68. By its order of 4 September 2015, which order I have hereinabove stated has never been set aside, the court directed that the 1st respondent pay the petitioners their salaries and allowances. It provided a manner of how the same was to be transmitted to them. The order was never complied with. It hasn't to date. Pre- the order, the respondents took a blurred position on the petitioners' entitlement to the salaries and allowances, a position which they continued to maintain post-the order and the ruling of 23 September 2015.

69. In a bid to convince this court that the petitioners weren't entitled to salaries and allowances, the respondents submitted that the Revised Scheme for Clinical Officers April 2010, on which the petitioners based their argument that they were entitled to salaries and allowances, was a draft document that was never operationalized. These submissions in my view were in total ignorance of what the court stated in the ruling dated 23 September 2015, which I affirm, thus;

“ 17. To build clarity in this matter, I take great exception to the submissions made by the state counsel for the respondents. The facts stated in the submissions are not correct, are misleading and incorrect of such an officer. The Scheme of service stated to be a draft has since been approved by the Ministry of Devolution and Planning and copied to the respondents, in their Replying affidavit sworn by Dr Kassachoon annexure DKK-2 vide a letter dated 24 March 2014 from the Principal Administrative Secretary, Juster Nkoroi. Such Scheme of Service, Revised Scheme of Service for Clinical Personnel was to be implemented in March 2014 to assist in the recruitment, deployment, retention, and general development of Clinical Personnel

70. I have carefully considered the instrument, Clause 4 thereof provided for Grading Structure, designating Intern Clinical Officers [Diploma level], as Clinical Officers III [Intern-Diploma], and placed them under Job Group 'H'.

71. In the upshot, I come to the inevitable conclusion that the petitioners were entitled to salary and allowances for Job Group 'H'.



Were the Petitioners’ constitutional rights, and or constitutional stipulations violated by the Respondents?

72. The respondents argued that the petitioners’ petition doesn’t meet the requisite threshold as a properly crafted and proved petition. The petitioners haven’t in the petition set out how the alleged constitutional rights and constitutional postulations were violated. I have carefully considered how the petition has been crafted and presented and hold that the position taken by the respondents is unconvincing. In my view, the petitioners brought out the rights and constitutional provisions they hold were violated and how they were, sufficiently, and as will come out shortly hereinafter they did prove the violation to a large extent.
73. The threshold attained is that which was set out in the case of *Mumu Matemu v Trusted Society of Human Rights Alliance & 3 others* [2013]eKLR.
74. The petitioners argued that their right to fair labour practices as encapsulated in article 41[2] [a] and [b] of *Constitution* was infringed upon. The article provides;
- “ 1. Every person has the right to fair labour practices.
 2. Every worker has the right-
 - a. To fair remuneration;
 - b. To reasonable working conditions.”
75. Undeniably, the employer must remunerate his employees. It is virtually important that contractually agreed remuneration be paid promptly and without delay. The duty on the part of the employer to remunerate his employees fairly is no longer a common law duty only, it is a constitutional imperative following the constitutionalizing of the employee’s right to fair pay.
76. It cannot be gainsaid that it has been recognized that a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. To inexplicably refuse and or neglect to pay the employees their remuneration as was in this matter, will no doubt subject the them to work under unsatisfactory, unsafe and unhealthy conditions, thus in contravention to article 41[2][b] which commands reasonable working conditions for employees.
77. As a result of the foregoing, I find that the respondents breached the petitioners’ right to fair labour practices in contravention of article 41[2][a] and [b].
78. Article 30[1] of *Constitution* prohibits slavery and servitude. For more than one year, the petitioners worked without pay, yet as indicated hereinabove, there was a budgetary allocation for the payment. In my view, they were forced to work under this situation as they had no choice. They couldn’t be registered and consequently allowed to practice as Clinical Officers without first completing the Internship process duly. The situation that was availed here unjustifiably for them, amounted to inhuman treatment and was equivalent to slavery and servitude.
79. In the case of *Kusow Billows Isaac v Ministry of Interior and Coordination of National Government & 3 others* [2018] eKLR, cited by counsel for the petitioners, the court held;
- “Having considered the above admissions by the respondents that the petitioner worked without pay for 2 years, i agree with the petitioner that he was subjected to inhuman treatment akin to slavery or servitude. He was denied to afford a dignified living for himself



and his family for 2 years. Consequently, I find that the petitioner’s right to human dignity under article 28 of Constitution was violated by the respondents’ withholding of his salary for the whole period of his as Assistant Chief.”

80. Withholding the petitioner’s salary not only caused social and economic hardship on them and thus constituted a breach of the 1st respondent’s obligation under the law but also had the unpleasant effect of consigning them to a state of slavery and servitude.
81. In the circumstances of this matter, including that the 1st respondent neglected and or refused to pay the petitioners their salaries and allowances purportedly on the ground that there wasn’t in place a Scheme of Service allowing such payment, yet as indicated hereinabove there was, they breached the petitioners’ right fair administrative action contrary to article 47 of Constitution.

Whether the Petitioners are entitled to the reliefs sought.

82. Having found that the petitioners were entitled to salaries and allowances as I have hereinabove done, I hereby direct that they be paid the same as per the Clinical Officers Scheme of Service, April 2010 under Job Group “H”, for the one year that they were under Internship. The respondents are reminded that they are bound by the national values and principles of governance, *inter alia*, accountability, respect for human rights, rule of law and transparency.
83. The petitioners sought that I award them general damages for the violation of their constitutional rights. Having found that their rights were violated to the extent hereinabove brought out, I am inclined to grant them a global amount of KSHs 500,000 each, as damages for the violated rights.
84. I will not award a compounded interest on the awarded amounts as sought by the petitioners but simple interest on the salaries and allowances that they ought to have earned, from January 2015, till full payment. This money was unjustifiably, and in breach of a court order, not paid out to the petitioners.
85. In the upshot Judgment is hereby entered for the petitioners against the respondents jointly and severally, in the following terms;
 - I. A declaration that their constitutional rights under articles 47, 41, and 30 were violated by the respondents.
 - II. General damages, KSHs 500,000 for each of the 914 petitioners, for the violated rights.
 - III. Payment of entitled salaries and allowances that they ought to have earned under the Clinical Officers Scheme of Service, April 2010, for twelve months wef January 2015. The 1st respondent to compute the same on this basis.
 - IV. Interest at court rates from January 2015, on the salaries and allowances, till full payment.
 - V. Interest at court rates on the awarded general damages from the date of this judgment till full payment.
 - VI. Costs of the petition.

READ SIGNED AND DELIVERED THIS 28TH DAY OF OCTOBER 2024.

OCHARO KEBIRA

JUDGE.

In Presence of

Mr. Gesuba For the Petitioner



Ms. Mbilo For the Respondent.

