



Henry & 4 others v County Government of Vihiga (Employment and Labour Relations Cause 36 of 2023) [2024] KEELRC 2852 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2852 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 36 OF 2023**

**JW KELI, J
NOVEMBER 14, 2024**

BETWEEN

**NDOLI HYNES HENRY 1ST CLAIMANT
DIANAH ANDEMO ATINGO 2ND CLAIMANT
ELIZABETH ANYANGO AJWANG 3RD CLAIMANT
ERASTUS MIDAMBO NGASE 4TH CLAIMANT
SHARON ILLAH AKINYI 5TH CLAIMANT**

AND

COUNTY GOVERNMENT OF VIHIGA RESPONDENT

JUDGMENT

1. This suit was instituted by the Claimants vide a Memorandum of Claim dated 9th September 2020 seeking the following orders:-
 - a. A declaration that the Respondent has usurped the powers of the County Public Service Board under Section 59 of the County Government Act.
 - b. An order that the Respondent do pay the Claimants their salaries and allowances for the period between May 2019 to date.
 - c. An order to quash/stay the purported letters of termination issued to the Claimants.
 - d. A declaration that the Respondent has contravened the national value of adhering to the rule of law doctrine as mandated by Article 10 of *the Constitution*.
 - e. A declaration that the Respondent has contravened the Claimants' rights under Articles 29,30,36,37,40 and 41 of *the Constitution*.



- f. Vindictory damages for contravention of the rights described in paragraph(e)above.
 - g. A permanent injunction restraining the Respondent from breaching the contracts of employment made by it with the Claimants.
2. The Memorandum of Claim dated 9th September 2020 was filed alongside the Verifying Affidavit sworn by the 1st Claimant on 9th September 2020; the Witness Statement sworn by the 1st Claimant on 22nd August 2020; the Witness Statement sworn by the 2nd Claimant on 22nd August 2020; the Witness Statement sworn by the 3rd Claimant on 22nd August 2020; the Witness Statement sworn by the 4th Claimant on 22nd August 2020; the Witness Statement sworn by the 5th Claimant on 22nd August 2020; and the documents attached to the respective witness statements. The Claimants also filed Supplementary Witness Statements dated 27th March 2024; the Claimant's Supplementary List of Documents dated 12th January 2024; the Claimants' Second Supplementary List of Documents dated 31st January 2024; and the Claimant's Third Supplementary Bundle of Documents dated 9th April 2024.
 3. The Respondent entered appearance through its County Attorney and filed a Memorandum of Response dated 19th February 2024, alongside the Witness Statement of Caxton Alwende dated 19th February 2024, a List of Documents dated 19th February 2024, and a List of Witnesses dated 19th February 2024.
 4. In response to the Respondent's Memorandum of Response, the Claimants filed a Response filed on 18th March 2024.
 5. Following the directions of the Court issued on 3rd July 2024 that parties filed their respective written submissions, the Claimant filed submissions and a List of Authorities dated 26th August 2024; and the Respondent filed submissions dated 9th September 2024.

Hearing

The Claimant's case

6. The Claimant's case was heard on 16th April 2024, when the 1st Claimant, Ndoli Hynes Henry (CW1) testified under oath. He adopted his written witness statement dated 22nd August 2020, and Supplementary Witness Statements dated 27th March 2024 as his evidence in chief. He also produced the documents on pages 15 to 26 of the Claimants' Bundle of Documents; the documents attached to the Claimant's Supplementary List of Documents dated 12th January 2024, the Claimants' Second Supplementary List of Documents dated 31st January 2024; and the Claimant's Third Supplementary Bundle of Documents dated 9th April 2024, as his exhibits. CW1 was cross-examined by Mr. Musiega, appearing for the Respondent.
7. CW1 testified that he was issued with an offer of employment by the County Public Service Board, which is produced on pages 18-21 of the Claimants' Bundle. He accepted the offer as evidenced by his signature on page 21. He was issued with Notice of Termination of Service which is produced on page 26 of the Claimants' Bundle. CW1 stated that the Respondent formulated an Ad- Hoc committee which investigated the recruitment and appointment of staff in the Respondent's Department of Health Services. They issued a Press Statement which is produced at pages 182 to 185 of the Claimants' Second Supplementary List of Documents dated 31st January 2024; and a Report produced from page 186 of the same Bundle. Under recommendations, the committee recommended annulment contracts for the affected staff. The Report was said to be applicable with immediate effect. Nonetheless, CW1



testified that the Respondent has admitted that the Ad Hoc committee's findings were abandoned. He stated that the staff were retained in the Respondent's payroll as evidenced by the Respondent's letter produced on page 33 of the Claimant's Third Supplementary Bundle of Documents dated 9th April 2024.

8. On the denial by the Respondent that the Claimants were employed by it, CW1 drew the Court's attention to the photograph of his Staff ID Card which is contained within the Claimants' Bundle, evidencing that he was employed by the Respondent. He produced an original of the same staff ID on 28th May 2024. He testified that he worked at Elawada Health Centre. CW1 stated that he would submit monthly reports while working at Elawada Health Centre which are produced on pages 14-17 of the Claimants' Bundle. He has also produced copies of delivery notes issued upon supply by KEMSA.
9. When queried whether the Claimants filed a copy of the advertisement for the subject positions, how many positions were advertised, and whether they had filed copies of their application, the Claimant answered that he did not make a copy of the application when applying. He gave the same answer in relation to documents proving that he attended the interview. CW1 admitted during cross-examination that the CEO of the County Public Service Board, who had issued him with his letter of offer, had been suspended from work and subjected to disciplinary proceedings, with one of the issues raised being the subject irregular appointments. Further, CW1 stated that he had not appealed the decision of the Respondent to validate his documents under Section 77 of the County Government Act. When asked whether he was aware that the County Public Service Board could delegate its powers to any other office of the County Government, CW1 answered in the negative. On the issue of how many members of staff were irregularly appointed, CW1 stated that it was 318 staff, since the advertised positions were 211, but 529 staff were appointed.
10. CW1 complained that the Claimants, including him, had not been paid their salaries for the months of October to December 2019, January to October 2020, and January to July 2021.
11. The 4th Claimant, Erastus Midambo Ngase, testified on 28th May 2024 as CW2. He adopted his Witness Statement dated 22nd August 2020 as his evidence in chief and produced the documents attached from page 87 of the Claimants' Bundle as his exhibits. He also relied on his Supplementary Witness Statement dated 18th March 2024, the documents produced by CW1, Claimants' Bundle dated 12th January 2024, Bundle dated 31st January 2024, Bundle dated 9th April 2024, and Reply to Response dated 15th March 2024.
12. On cross-examination by Mr. Musiega, CW2 confirmed that he had brought his original Staff ID Card, and produced it in Court. He confirmed that it had no date of issue and validity period. CW2 admitted that 318 members of staff were irregularly employed and that the Respondent's CEO was involved in the over-employment. However, he indicated that he was subjected to an interview before being employed, so he did not believe that he was irregularly employed. He indicated that they had not sued the County Public Service Board or summoned members of the board to be witnesses in the case. He stated that he had not been issued with a termination letter himself, but had approached the Court when the gazette notice phasing them out was published. Similar to CW1, CW1 asserted that he was seeking unpaid salaries for 20 months.
13. On re-examination, CW2 testified that he was offered employment by the Respondent following an interview by the Board, and accepted the offer. He stated that he had worked for the Respondent since his acceptance of the offer in June 2019. On the Ad-Hoc committee, CW2 stated that he was not summoned by the committee or interviewed on his recruitment.



14. CW3 testified on 24th May 2024 and adopted her Witness Statement dated 22nd August 2020 as her evidence in chief. She also relied on the Claimants' Supplementary Witness Statement dated 18th March 2024, and produced the documents attached from page 33 of the Claimants' Bundle of Documents, while also relying on the documents by CW1.
15. On cross-examination by Mr. Musiega, CW3 stated that her letter of offer was signed by the CEO of the County Public Service Board, who was suspended and prosecuted in Court over the appointments. When queried on whether she was invited for an interview, CW3 answered in the affirmative and drew the Court's attention to the invite produced on page 46 of the Claimants' Bundle. She stated that she went for the interview on 27th May 2019 at the Respondent's boardroom. She, however, admitted that the invite did not bear her name and neither did it bear the name of the author.
16. On whether she had submitted her documents for verification, CW3 stated that she had. While admitting that she was aware that the Respondent had initially wanted only 149 employees, CW3 nonetheless stated that she had not seen a list of properly employed staff versus irregularly employed staff. Her name was certainly not on the purported list of irregularly employed staff.
17. On re-examination, CW3 stated that her termination letter was signed by the County Secretary who had no power to terminate her employment. She affirmed that she was not invited to the Ad Hoc committee to explain the process of her recruitment. She also stated that the County Public Service Board had never issued a letter challenging her recruitment. With regard to her application, CW3 confirmed that she applied for the job with the Respondent by filling a form on the Respondent's website. She was then invited for an interview.

The Respondent's case

18. The Respondent's case was heard on 3rd July 2024, when its witness Caxton Alwende (RW1) testified under oath, and was cross-examined by the Claimants' counsel, Dr. Kuria SC. He adopted his Witness Statement 19th February 2024 as his evidence in chief, and produced the documents attached to the Respondent's list of documents dated 19th February 2024 as the Respondent's exhibits.
19. RW1 explained that recruitment is a public process, where the Respondent requests a specific number of employees. Budgetary support evidence is provided and forwarded to the Cabinet, then the County Public Service Board, which advertises and reviews applicants for short-listing. The applicants are then interviewed. It was RW1's testimony that in relation to the subject of this case, the Respondent published the 1st advertisement on 14th January 2019 for 121 vacancies within the Department of Health. The deadline for applications was 31st January 2019. The 2nd advertisement was published on 14th May 2019 for 28 positions. Hence the total number of vacancies in the Department of Health which had been budgeted for was 149. Eventually, 528 personnel were employed, making an excess of 379 personnel which was not budgeted for.
20. RW1 stated that as far as he was aware, the Respondent issued 528 appointment letters. The employees were deployed in various facilities within the County. With regard to the termination of the employees, the County Government through the County Secretary issued termination letters as they surpassed the departmental budget. The County Public Service Board issued the termination letters since it wanted to regularise the employment status of the staff. One mode of regularisation was authentication of the employment letters which was done.
21. On cross-examination by Dr. Kuria SC for the Claimants, RW1 admitted that the Respondent has not produced evidence of the verification of documents by the County Public Service Board. He also admitted that the letters of termination issued to the Claimants were issued the County Secretary as



a result of the Ad Hoc committee report, and not as a result of the decision of County Public Service Board. On the employment of the Claimants, RW1 confirmed that the Claimants were employed by the County Public Service Board.

22. On re-examination, RW1 emphasized that the County Public Service Board under Section 59 of the County Government Act acts on behalf of the County Government. He, however, stated that the Board is not empowered to employ excess employees from those requested by the County Government, and nothing in law stops the County Government from getting rid of excess employees irregularly employed by the Board.

WRITTEN SUBMISSIONS

23. After the close of the closure of hearing the Court issued directions for filing of written submissions. The parties complied. The claimants' written submission drawn by Kamau Kuria & Company Advocates were dated 26th August 2024 and received in Court on the 28th August 2024. The Respondent's written submissions drawn by Aggrey B. Musiega, the County Attorney of the Respondent were dated 9th September 2024 and received in Court on the 10th September 2024 together with the list of authorities.

Determination

Issues for determination

24. The Court having considered the parties pleadings, oral and documentary evidence and submissions, was of the considered opinion that this case was similar in all fronts with the claim in *Kenya Union of Clinical Officers & 76 others v County Government of Vihiga (Bungoma Employment and Labour Relations Court Cause 32 of 2021)* where the judgment was delivered on the 26 May 2023. The parties' in their written submissions adopted the issues under the said claim of which the Court finds are the issues for determination in the instant suit :-
- i. Whether the claimants were employees of the respondent
 - ii. Whether the claimants' rights were violated by the respondent
 - iii. Whether the claimants were entitled to reliefs sought

Preliminary

25. The Court taking into consideration its judgment of 26th May 2023 in *Kenya Union of Clinical Officers & 76 others v County Government of Vihiga (Bungoma Employment and Labour Relations Court Cause 32 of 2021)* returns that it had already pronounced itself on all the issues raised by the parties in the instant case in that judgment. The prayers sought in both claims are similar. The facts of the two cases were similar arising from recruitment of clinical officers of the Respondent by its public service board in 2019 which the Court found had employed more officers than it had advertised. The Court also found though the Claimants were issued with termination of employment letters by the County Secretary following the Ad Hoc Committee report, the same were not implemented and were a nullity for not having been issued by the Vihiga County Public Service Board. The said employees were deployed and RW1 confirmed the claimants were in employment. The claimants were all aggrieved for having not been paid salary for some periods which they led evidence and the Court decided the facts being similar the unpaid salary was for 20 months.
26. The claimants in their written submissions at the last paragraph, stated:-



“ the claimants submit that Bungoma ELRC No. 32 of 2021 in which a judgment was delivered on 26th May 2023, is of the kind all the claimants seek. The issues raised in the said suit , which have been resolved, are similar to the issues raised in this suit, for the forgoing reasons , the claimants urge this Court to allow the said claim as prayed with costs. “

27. On the other hand the Respondent in its written submissions did not make similar submissions as the Claimants but adopted the findings of the Court on the Adhoc Committee, that the verification process was lawful, that the recruitment of the claimants and others not before court as clinical officers of the Respondent was flawed for engaging more persons than advertised and that the claimants were still in employment. Relying on the findings of the court the Respondent submitted that the unpaid wages could not be paid. The respondent adopted the findings of the Court in Bungoma Claim No. 32 of 2021 on all issues save for payment of unpaid salaries.
28. Consequently, the Court returns that the only contested issue for the Court to make a finding in this suit is as concerns reliefs sought. The Court adopts its decision on the other issues as follows:-

Issue 1. Whether the claimants were employees of the respondent

29. RW1 admitted that the claimants were in service. The Court adopts its judgment of 26th May 2023 in *Kenya Union of Clinical Officers & 76 others v County Government of Vihiga (Bungoma Employment and Labour Relations Court Cause 32 of 2021)* as the facts are similar, to apply on the issue to wit:-

- “ 20. On the issue, evidence before the Court was that the claimants were in employment working and some had been issued with personal numbers. The officers were receiving monthly salaries regularly from September 2021 and had varied outstanding arrears yet to be fully paid by the respondent for period before September 2021.
21. The Court holds that the respondent proved that the claimants, save for the 1st claimant union and those who had left, were on its payroll and that their contracts were never terminated.”

Issue 2. Whether the claimants’ rights were violated by the Respondent

30. The parties led the same evidence under the issue with same facts as was in Bungoma Employment and Labour Relations Court Cause 32 of 2021. The Court adopts its judgment of 26th May 2023 in *Kenya Union of Clinical Officers & 76 others v County Government of Vihiga (Bungoma Employment and Labour Relations Court Cause 32 of 2021)* from paragraph 37 to apply on the issue to wit:-

- “
- “ 37. The claimants’ case was hinged on the termination letters by the acting County Secretary. The notice of termination of service of Ibrahim Vonyoli(CW2) dated 30th October 2019 was by Phillip Agiva acting County Secretary and head of public service of the respondent. The letter referred to the Adhoc Committee report which found he had not met the condition for valid employment and gave 1 month notice to terminate his contract. (see page 24 of the claimants’ bundle filed on 10th December 2019). Similar letter was issued to CW3 Walter Adoli (page 94 of same bundle). The defence led evidence that the adhoc report was never implemented and none of the claimants had been dismissed.



38. The Court noted that on the 11th December 2019 Justice Nduma issued order of status quo and ordered the claimants to continue in work and be paid salaries.
39. The Court finds that indeed the termination letters were not effected as there was no evidence of dismissal though the letters were issued. Perhaps this was because of the interim order of the Court stated above. There was evidence some verification was done but CW3 stated he did not attend the verification though invited.
40. The question then to be answered by the Court was whether the respondent's action of constitution of the adhoc committee to verify the recruitment was illegal. It was not in dispute that there was over recruitment from advertised number of 149 to 529 officers of various cadre in the county department of health. CW2 had no evidence and did not produce the same in Court that he applied for the job. He admitted 20 positions were advertised for his poison and 74 persons were employed. CW3 told the Court he had not produced evidence of application for the job he was employed to and had stated in his statement there was irregularities in the impugned recruitment. Following the adhoc report the acting County Secretary issued notice of termination letters to CW2 and CW3 stating they had not met criteria of valid employment. The Court issued interim orders injuncting the said letters. The Court finds that the termination was never effected against the claimants. The claimants submit in issuance of the purported termination letters the County Secretary usurped the role of the County Public Service Board. Section 59 of the [County Governments Act](#) provides for the role and powers of the County Public Service Boards as follows:- '59. Functions and powers of a County Public Service Board (1) The functions of the County Public Service Board shall be, on behalf of the county government, to—
- a. establish and abolish offices in the county public service;
 - b. appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;
 - c. exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;
 - d. prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
 - e. promote in the county public service the values and principles referred to in Articles 10 and 232;
 - f. evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;
 - g. facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;



- h. advise the county government on human resource management and development;
 - i. advise county government on implementation and monitoring of the national performance management system in counties;
 - j. make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employee.” The Court holds that the County Public Service Board is vested with exclusive mandate to employ and remove employees of the county public offices under section 59 above.
41. The Court holds that the Board is obliged to comply with article 10 of the Constitution in its mandate under section 59(1)(e) County Governments Act to wit: 2(c) states:- ‘(c) good governance, integrity, transparency and accountability;’ The Court holds that the Board in recruiting more than the advertised positions of various positions advertised violated the Constitutional principles of good governance, integrity, transparency and accountability.
 42. The Court holds that the appointment of adhoc committee by the Respondent was thus justified as it was not in dispute that the claimants’ recruitment process was flawed. The Court finds no illegality in the said constitution of the adhoc committee the Board having employed more staff than requested by the county executive. The Court holds that the verification process was not illegal and was reasonable step in the circumstances.
 43. The Court upholds the provisions of section 59 of the County Governments Act (supra) and holds that the termination notices issued to the claimants by the acting County secretary were an illegality. Only the board under section 59 of the County Governments Act had the mandate to issue the notice of termination of employment on finding the claimants had not been properly recruited. The adhoc committee report ought to have been referred to the Board for consideration.
 44. The Court holds that the notice of termination letters authored by the acting County Secretary were null and void as they were issued without jurisdiction and in holding so upholds decision of Privy Council In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, where Lord Denning held as follows as regards the effect of a null and void act;“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
 45. Evidence before Court was that none of the claimants was ever terminated pursuant to the said notice of termination letters. DW1 confirmed to the Court the staff were serving on permanent basis and 90% had been issued with personal numbers and the process was ongoing. Consequently, the Court holds that having served over 6 months the claimants are deemed to have



had their terms converted to permanent and pensionable as per terms of appointment.”

The Court found no basis to divert from its decision of 26th May 2023 in Bungoma ELRC Cause No. 32 of 2021 and upholds the same in toto to apply in determination of this issue.

Issue 3. Whether the claimants were entitled to reliefs sought

31. The Claimants submitted that Bungoma ELRC No. 32 of 2021 in which a judgment was delivered on 26th May 2023, was of the kind all the claimants sought. That the issues raised in the said suit, which have been resolved, were similar to the issues raised in this suit, and for the forgoing reasons, the claimants urged this Court to allow the said claim as prayed with costs.
32. The Respondents on other hand submitted that the employment of the claimants was perse openly unconstitutional and illegal as the Court ruled and this was what the claimants rushed to the court to defend and were using to support the claim for salary arrears. The Respondent stated that the big question was whether having been found to have been employed illegally, the Claimants could enforce what they obtained illegally. The Respondent stated the claimants avoided joining the County Public Service Board who aided them in the suit. The respondent submitted that the court could not enforce the payment in the circumstances and relied on the decisions in *Regional Institute of Business Management v Ondong (2023) e KLR* and in *Royal Media Services v Independent Electoral and Boundaries Commission ad 3 others (2019)e KLR* where the courts held that it was trite that no court of law would give effect to an illegal contract nor enforce obligations arising from illegal transactions. The Respondent submitted that nothing valid would come out of an illegal process.
33. The Respondent further relied on the provisions of Article 232 (1)(g) of *the Constitution* to wit:- “(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;” as read together with provisions of Article 10 of *the Constitution* on values and principles of public service. The Respondent further submitted that the *Public Finance Management Act* and the Regulations do not allow for unbudgeted expenditure. The Respondent further relied on the provisions of Article 226 (5) of *the Constitution* to wit:-
 - “(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.”
34. The Courts finds the evidence before Court is similar as was in Bungoma ERLC Cause No. 32 of 2021 where the claimants were employed in same cohort of 2019 health workers for the Respondent and that the circumstances of their case was the same as for the claimants in the instant case. The Court finds no basis then to divert from its decision in the said judgment which has not been set aside by higher Court. The court held:-
 - “47. The court found no illegality in the verification process which it found was justified by admitted facts of over recruitment by the County Public Service Board contrary to the user department requirements and advertised vacancies in contravention of the provisions of article 10(2)(c) of *the Constitution* to wit:- ‘(c) good governance, integrity, transparency and accountability;’” The court declines to quash the purported letters of invitation to attend the verification of qualifications. The court further holds the process is overtaken by events that court having held the claimants after 6 months of service were



deemed to be permanent employees.”(emphasis given) The court further held in paragraph 52 of the said Judgement:-

52. The court holds that the claimants are entitled to unpaid salary for work done as provided for under section 18 of the *Employment Act*.”

35. RW1 confirmed to the court that the claimants were in the employment of the Respondent. The Court returns that the Respondent cannot rely on defence of its own irregular recruitment process to deny wages for employees who hold valid contracts with it and have worked for the days for which they seek payment. That would be akin to slavery where one gives services for no payment without consent. The decisions in *Regional Institute of Business Management v Ondong (2023) e KLR* and in *Royal Media Services v Independent Electoral and Boundaries Commission ad 3 others (2019)e KLR* are distinguished, in that in the instant case the claimants held valid contracts issued by the employer, the County Public Service Board, and were still in employment and their wages were protected under section 18 of the *Employment Act* to wit:-

“ 18. When wages or salaries due

(1) Where a contract of service entered into under which a task or piece work is to be performed by an employee, the employee shall be entitled—

(a) when the task has not been completed, at the option of his employer, to be paid by his employer at the end of the day in proportion to the amount of the task which has been performed, or to complete the task on the following day, in which case he shall be entitled to be paid on completion of the task; or

(b) in the case of piece work, to be paid by his employer at the end of each month in proportion to the amount of work which he has performed during the month, or on completion of the work, whichever date is the earlier.”

The court returns that the employment contracts of the claimants were valid and were not nullified at any time by the Court or terminated by the employer. The employer is thus obliged to pay wages for work done under the said contracts of employment.

36. Consequently the Court returns it is good judgment to uphold its judgment in Bungoma ELRC Cause 32 of 2021 under the issue of reliefs sought which it hereby does as follows:-

“ Award on reliefs sought

46. The Court holds that the Respondent in issuance of notice of termination of employment of the claimants usurped the powers of the County Public Service Board under section 59 of the *County Governments Act* and the said letters are of no legal import. The notice of termination are overtaken by events and are a declared nullity.

47. The Court found no illegality in the verification process which it found was justified by admitted facts of over recruitment by the County Public Service Board contrary to the user department requirements and advertised vacancies



in contravention of the provisions of article 10(2)(c) of *the Constitution* to wit:- ‘ (c) good governance, integrity, transparency and accountability;’ The Court declines to quash the purported letters of invitation to attend the verification of qualifications. The Court further holds the process is overtaken by events that Court having held the claimants after 6 months of service were deemed to be permanent employees.

48. The Court finds that order of permanent injunction is futuristic and unjustified and that the claimants are always free to approach the Court in event of breach of their contracts. The order is declined.
49. On the declaration on rule of law the Court finds that the same is captured under order 1 on usurpation of powers of the Board under section 59 *County Governments Act*.
50. On the contravention of constitutional rights under articles 29,30,36,37,40,41 of *the Constitution*, the Court was not satisfied the claim was proved to be elevated to constitutional claim. The claim was based on purported notice of termination which was never effected and further on salary arrears. The Court was convinced the respondent had legitimate reason to form the adhoc committee and that there was prove of over recruitment which affected the budget. The claimants were not blameless as they failed to prove they applied for the jobs and further there was prove the Board recruited way beyond the advertised positions. The Court took judicial notice that the respondent is financed by exchequer pursuant to approved budget hence the salary arrears which the respondent stated it was committed to pay was not unreasonable. The Court looked into the authorities cited by the claimants and they all related to actual termination of employment or suspension. In Marete case(supra) there was suspension of more than 2 years without salary which the Court found oppressive, The Court looked into decision in David Maina Gachanja v Hon. Esther Nyambura Gathogo & another and found despite there being salary arrears of 5 months no constitutional compensation was awarded outside salary arrears due. The Court found that the claim for compensation for 10 Million was not justified. The authority relied on related to claim for discrimination in Benson Nguti case(supra). There was no prove of any discrimination in the instant case. The Court finds and holds the claim did not merit elevation to constitutional claim. The Court upholds the holding of Mativo J in Leonard Otieno v Airtel Kenya Limited (2018) where he held that:- ‘ 65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.’ The Court finds that an award of salary arrears with interest was adequate compensation in the claim.



51. On salary arrears the Court agrees that the claimants having worked in the unpaid periods are entitled to their full salary. The Court found discrepancies between the pleadings and oral testimony of CW2 and CW3 on the salary arrears. CW2 during cross examination confirmed he had arrears of 7 months in 2021 and not 9 months as pleaded. In total the Court found he had 3 months arrears of 2019, 10 months in 2020 and 7 months in 2021 making 20 months arrears contrary to 22 months under the schedule of arrears. CW3 stated he had arrears since October to August 2021 having received salary in September 2021 which could make 23 months and not the 24 months stated in the salary schedule.
 52. The Court holds that the claimants are entitled to unpaid salary for work done as provided for under section 18 of the *Employment Act*. The Court having found discrepancies between oral testimonies of CW2 and CW3 on salary arrears orders the parties to within 21 days reconcile outstanding salary arrears for the claimants and file in Court consent on payable salary arrears to each employee.
 53. On costs the Court having found the claim was based on an illegal and null termination notice and salary arrears not paid the Court finds that the claimants are entitled to reasonable costs to indemnify costs in the case as held in constitutional Court of South Africa in *President of the Republic of South Africa and others v Gauteng Lions Rugby Union ad Luyt* where the law was stated as follows:- ‘In all taxations it is important to keep in mind that one overarching general principle applicable to all awards of party to party costs, a principle which applies to this Court as it does to the SCA. The principle was put in the following terms by Innes CJ in *Texas Co.(S.A) Ltd v Cape Town Municipality* : Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or defend litigation.’ The Court awards costs of the suit to the claimants to be paid by the respondent.
 54. Interest is awarded from date of judgment until payment in full.
 55. Mention on the 21st June 2023 to adopt agreement on the payable salary arrears in the suit.”
37. The Court on the 30th November 2023 delivered judgment on the computation of salary arrears with respect to payable salary arrears in Bungoma ELRC Cause No. 32 of 2021 as follows:-
- “The Court on the 26th May 2023 delivered its Judgment in this suit and directed the parties to file agreement on payable salary arrears. There was no agreement. Each party filed own computation. The Claimant’s computation was filed in Court on the 12th June 2023. The Respondent filed and later withdrew initial computation for 64 persons and later substituted it with a computation received in Court on 24th October 2023 but for only 33 persons indicating they did not get records for 36 of the Claimants.
2. The parties having not agreed I proceed to compute and award the salary arrears.



3. The Claimants relied on the evidence of CW1, CW2 and CW3. CW1 was a union representative. CW2 Vonyoli Ibrahim was a test claimant and led evidence on the salary arrears and was cross-examined. The Court after the hearing held CW2 salary arrears amounted to 20 months (paragraph 51 of the Judgment). CW3 evidence was to effect his salary arrears was 23 months. I adopt the position of CW2 to bind Claimants with claims of 20 months and above as these employees were employed at same period and their circumstances were similar and I have seen other Claimants with 20 months claim. It is more probable the arrears were for 20 months for the majority save for those who left. The Claimants with claim of less than 20 months had either resigned or transferred. The Court takes their claim as stated.
4. The Court noted discrepancy in the computations filed by the parties of the gross salary. The Claimant stated Kshs. 81,780/- while the Respondent stated Kshs. 23,780/-. The Court noted at the hearing the schedule presented for arrears by the Claimant had Kshs. 81780/- as gross salary and the Respondent did not challenge that position. At this stage the Court must apply gross salary of Kshs. 81680/- as at trial which it proceeds to.”

The said award of salary arrears was subject to statutory deductions. The Court returns that the facts of two causes being the same it is good judgment and for consistency purposes to uphold the aforesaid decision of 30th November 2023 in Bungoma ELRC Cause No. 32 of 2021 to apply in the instant case.

38. Consequently, the claimants are each awarded as salary arrears for period of 20 months at monthly salary of Kshs 81,780 thus 20 months x 81780(applied in Bungoma ELRC Cause No. 32 of 2021) total Kshs. 1,635,600 less statutory deductions.

Conclusion And Disposition

39. In the upshot, judgment in the claim is hereby entered for each of the Claimants against the Respondent as follows:-
 - i. Payment of salary arrears for 20 months for total sum of Kshs. 1,635,600 less statutory deductions. (Amount payable subject to statutory deductions)
 - ii. Interest is awarded from the date of judgment until payment in full.
 - iii. Costs to the claimants.
40. Stay of 30 days.
41. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAIROBI THIS 14TH DAY OF NOVEMBER 2024

JEMIMAH KELI

JUDGE

In the presence of

C/A Caleb

For Claimant: Mr. Kuria h/b Dr. Kuria



For Respondent: Godia

