



Musembi & 3 others v Machakos County Assembly Service Board (Cause 59 & 103 of 2018 & 60 & 62 of 2023 (Consolidated)) [2024] KEELRC 2829 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2829 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE 59 & 103 OF 2018 & 60 & 62 OF 2023 (CONSOLIDATED)**

**B ONGAYA, J
NOVEMBER 15, 2024**

BETWEEN

**DOMINIC MUTUKU MUSEMBI 1ST CLAIMANT
PATRICK W MWANGANGI 2ND CLAIMANT
STEPHEN MAINGI KIMONDIU 3RD CLAIMANT
SIMON MWEU KINGOLA 4TH CLAIMANT**

AND

MACHAKOS COUNTY ASSEMBLY SERVICE BOARD RESPONDENT

JUDGMENT

1. The claimants filed their respective statements of claims against the respondent through Musembi Ndolo & Company Advocates. Subsequently they opted to act in person.
2. The claimants' case is that by written contract, each was employed as a Personal Assistant to the assigned Member of the County Assembly of Machakos as follows:
 - a. The 1st claimant was employed for a contract commencing 01.10.2013 and he resigned on 31.10.2015 at Kshs.25,000.00 per month.
 - b. The 2nd claimant was employed by the written agreement dated 30.09.2013 as a secretary at Kshs. 17,000.00 until 31.10.2015 when he was promoted to Personal Assistant at Kshs. 25,000.00 per month. The respondent revoked all previous appointment letters by the letter dated 05.11.2013 by recalling the earlier contracts to facilitate signing of fresh contracts. The fresh contract was not issued at all. The claimant together with other employees were summoned by the Human Resource Department to the meeting of 20.06.2017 and directed to continue working even after expiry of the life of the then County Assembly which expiry was due on 08.08.2017. however, the claimant and other staff of the claimant received the text



message from Lilian of the communication section to hand over to the newly elected respective members of the County Assembly before Monday 23.10.2017. After 18.10.2017 there was no further communication. On 16.03.2018 the claimant and similarly affected staff wrote on explanation for the silence and demanded salary arrears. The respondent replied by the letter dated 26.03.2018 stating that the contract of service had lapsed on 08.08.2017 (the lapsing date of the out-going members of the County Assembly). The salary for August and September were paid and it is urged that the contract cannot have lapsed on 08.08.2017.

- c. The pleaded case for the 3rd and 4th claimants is similar to that of the 2nd claimant. The 3rd respondent pleaded that he was employed as a Personal Assistant by written agreement dated 30.09.2013 with effect from 01.10.2013. The 4th respondent was employed initially as a Secretary by contract dated 30.09.2013 effective 01.10.2013 ending at expiry of the current Assembly and at Kshs.17,000.00 per month. The contracts for 3rd and 4th claimants were revoked by letter of 05.11.2013 for fresh ones to issue but which were not issued. The 3rd and 4th claimants left employment under similar circumstances as the 2nd claimant's pleaded case.
 - d. The 1st claimant claimed payment of house allowance; commuter allowance, annual leave, overtime, water for drinking, gratuity, certificate of service, deducted and not remitted NSSF and NHIF making a sum of Kshs. 566, 280.00. The 2nd, 3rd and 4th claimants claimed salary arrears for October 2017 to March 2018 and upon same headings as the 1st claimant making a sum of Kshs. 1, 971, 100.00 for 2nd and 3rd claimants and a sum of Kshs.1, 437, 230.00 for 4th claimant, respectively.
3. The respondent filed a defence in each of the suits and through Kamende D.C & Company Advocates. The respondent pleaded as follows:
 - a. The respondent denied that it had employed the claimants.
 - b. The respondent discovered that Members of the County Assembly had fraudulently given appointment letters to persons known as Personal Assistants and Secretaries, which was not provided for in the County structure and the contracts were terminated by the letters of 05.11.2013. The respondent denied the claims and prayers made for the 1st, 2nd, 3rd and 4th claimants.
 4. Parties were given an opportunity to compromise the suit. The claimants agreed that their respective cases be determined based on their pleadings and documents. The documents filed for parties were deemed produced as filed. The claimants called no witness. The respondent's witness (RW) was the County Assembly Clerk. Parties filed their respective final submissions. The Court has considered all the material on record and returns as follows:
 - a. The 1st issue is whether the respondent had at all material times employed the claimants. RW testified that the respective member of the County Assembly and not the respondent employed the claimants. The 2nd, 3rd and 4th claimants are bound by their own pleadings that their contracts of employment were withdrawn or revoked by the respondent's letter (actually an internal memo) dated 05.11.2013. The internal memo was issued by the office of the clerk and was addressed to All Personal Assistants; All Secretaries; and, All Messengers. The memo read in part, "This is to convey the decision of the County Assembly Service Board sitting on 4th November 2013 that all the above-mentioned employees working to the ward offices are employed by the Members of County Assembly. However, this office is arranging to facilitate signing of contracts between you and the Members of County Assembly. Therefore, be advised that all letters of appointments issued to you by the County Assembly stands



revoked with immediate effect.” It appears to the Court that after the revocation, there was no further relationship between the claimants and the respondent. The respondent has exhibited correspondences that show that indeed the claimants and other persons in the cadre held by claimants were indeed employed by the respective County Assembly Members to serve the members at ward offices. The members effecting the employment would then write to the Assembly Clerk for purposes of payments under some arrangements between the clerk and the members.

- b. The claimants have exhibited the payslips showing that the respondent in fact paid them.
- c. The Court has carefully considered the evidence. It is that the claimants were employed by the respondent to serve at the ward offices. It is also that the respondent appears to have abdicated its responsibility to create a proper staff establishment at the ward office, to recruit staff for the ward office per prevailing law and regulations, to exercise disciplinary control over the staff and to generally undertake due human resource functions over the staff. The abdication of statutory duty cannot amount to escaping the statutory duty as the employer. The work the claimants performed at the ward offices and for the County Assembly Members as assigned belonged to the Assembly. There is no established provision of law that the County Assembly Members were entitled by themselves to advertise, recruit or select, appoint, pay, promote, exercise disciplinary control, and undertake other human resource functions over the staff of the County Assembly serving at the ward offices.
- d. To confirm that the staff at the ward offices in service of the members of the County Assembly were public officers subject to the respondent’s human resource powers and functions, the respondent has exhibited correspondence by the Commission on Revenue Allocation making provision about staff such as the claimants and whose salaries and other terms of service were to be determined by the respondent in accordance with existing legislation and in line with the guidelines by the Salaries Remuneration Commission and provisions of the Public Finance Management Law.
- e. The respondent has also exhibited the minutes of the First Assembly Services Board Committee Meeting held on 29.07.2013 at the speaker’s office where the clerk reported that the Board had not set up modalities of employing the three (3) staff at county ward level offices and that some members of the County Assembly had already engaged staff in their respective wards. The respondent has also exhibited the extract of the Board Committee meeting held on 03.09.2013 stating that as per earlier discussions the ward office will comprise partisan employees being a Personal Assistant; Secretary; and, Messenger and further “It was reported that each ward has a vote of Kshs.74, 000.00 as wages for the staff. The Committee resolved that Members of the County Assembly will be at liberty to employ their own”. The effect of the resolution, in the opinion of the Court, merely meant that the Board Committee had delegated to the members to undertake the employment of the staff in the claimants’ cadre.
- f. The *County Assembly Services Act*, 2017 was published on 13.07.2017. The date of assent was 6th July 2017 and the date of commencement was on 27th July 2017. The long title to the Act stated, “AN ACT of Parliament to make further provisions on the County Assembly Service Board and the County Assembly Service as established under the *County Governments Act* in relation to each county and for connected purposes.” The *County Governments Act, Act 17 of 2012* established the County Assembly Service Board in section 12 and per that section and section 13, inter alia, with the functions of constituting offices in the county assembly service; appointing and supervising office holders; and, determining remuneration of the clerk and staff of the county assembly, upon, the advice of the Salaries and Remuneration Commission. Thus,



as at 2013, the respondent existed as a statutory body and person in law. The [County Assembly Services Act, 2017](#) merely amplified and clarified the functions and roles of the respondent and the County Assembly Service.

- g. The Court finds that the respondent was the sole employer of the claimants.
5. The 2nd issue is whether the claimants are entitled to the remedies as prayed for. The Court returns as follows:
- a. The claimants pleaded that the agreed monthly salary was Kshs. 25,000.00 except for the 4th respondent whose pleaded gross monthly salary was Kshs. 17, 000.00. It appears each work at the ward office as appointed until the separation. There were no grievances during the service on the headings of house allowance which must have been included in the gross payment per section 31(1) of the [Employment Act, 2007](#); commuter allowance which was not agreed upon or based on a contractual provision; overtime and water whose base of claims was not justified and no evidence provided; and, gratuity was not due because the claimants confirmed they were members of NSSF and section 35 of the [Employment Act, 2007](#) precluded them from claiming gratuity unless based on a contractual provision. In any event, the claimants offered no rebuttal evidence to defeat the respondent's case and testimony that NSSF was contributed and the claimants had been paid a month's salary for each calendar year served with the respondent. It is submitted for the claimants that gratuity ought to have been at 31% of the salary earned throughout the service but, their pleaded case was for one month salary for each year worked. They each must be bound by the pleading and no justification has shown to grant the claim for gratuity.
- b. The claimants prayed for payment in lieu of annual leave. However, they provided no evidence to show the days claimed and that in fact they never took annual leave. The prayer will fail for want of due evidence to establish the claim.
- c. The claimants testified that their contracts were for term of the current County Assembly. The claim for salary arrears after 08.08.2017 is found unjustified. Similarly, there was no evidence that they had worked after 08.08.2017. The respondent appears to have acted and Paid September Salary to facilitate the handover and no more. There is no established reason to doubt that respondent's explanation.
- d. As urged for the respondent, the claimants knew that their employment would lapse on 08.08.2017 when the Assembly Members ceased to be members of the Assembly. The contracts lapsed by effluxion of time. There was no established basis to claim two months payment in lieu of notice. Similarly, there is no established unfair termination and compensation in that regard is unfounded.
- e. The claimants offered no evidence on NHIF and NSSF refunds as claimed. They may pursue any outstanding issues in accordance with applicable statutory provisions.
6. Each claimant is entitled to a certificate of service. The Court has considered all circumstances of the case and the margin of success including the respondent's failure to acknowledge and undertake the statutory duties with respect to the claimants' employment. Each claimant is awarded Kshs. 25, 000.00 partial costs of the suit.

In conclusion, judgment is hereby entered for the claimants against the respondent for:

1. The declaration that the respondent was the sole employer of the claimants.



2. The respondent to pay each claimant a sum of Kshs. 25,000.00 being partial costs of the suit and to pay by 01.03.2025 failing, interest to be payable thereon at Court rates from the date of this judgment until full payment.
3. The respondent to deliver to each claimant a certificate of service by 15.12.2024.
4. The Deputy Registrar to cause return of the court files herein to the Machakos Sub-registry forthwith.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

