



County Government of Machakos v Kenya Union of Clinical Officers (Petition E005 of 2024) [2024] KEELRC 13567 (KLR) (19 December 2024) (Judgment)

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
PETITION E005 OF 2024**

B ONGAYA, J

DECEMBER 19, 2024

**IN THE MATTER OF ARTICLES 10,21,22,23,24,27,28,41,43,47 AND
165 OF THE CONSTITUTION OF KENYA 2010 AS READ WITH
THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

-AND-

**IN THE MATTER OF THE LABOUR RELATIONS
ACT AND THE COUNTY GOVERNMENTS ACT**

BETWEEN

THE COUNTY GOVERNMENT OF MACHAKOS PETITIONER

AND

KENYA UNION OF CLINICAL OFFICERS RESPONDENT

JUDGMENT

1. The petitioner filed the petition dated 10.10.2024 through M/S Otieno Ogola & Company Advocates. The petitioner prayed for reliefs as follows:
 - a. A declaration does issue to the effect that the strike notice dated 24.09.2024 issued by the Kenya Union of Clinical Officers is illegal, null and void and contrary to Articles 10, 21, 27, 28, 41 and 43 of *the Constitution* of Kenya, 2010 as read with section 81 of the *Labour Relations Act*.
 - b. A declaration does issue to the effect that any industrial action pursuant to the strike notice dated 24.09.2024 by the Kenya Union of Clinical Officers, their members, employees, agents, assigns or any persons acting on their own behalf and interest is illegal and unconstitutional and contrary to Articles 10, 21, 27, 28, 41 and 43 of *the Constitution* of Kenya, 2010 and a threat and violation to the right to healthcare and provision of healthcare services thus contrary to Articles 25 of the Universal Declaration of Human Rights, 1984; Article 24 of the Convention



on the Rights of the Child; Article 12 of the International Covenant on Civil and Political Rights and Article 16 of the African Charter on Peoples and Human Rights.

- c. A declaration does issue to the effect that any industrial action pursuant to the strike notice dated 24.09.2024 by the Kenya Union of Clinical Officers their members, employees, agents, assigns, or any persons acting on their own behalf and interest is illegal and an abdication and dereliction of duties hence warranting disciplinary action.
 - d. A permanent injunction does issue prohibiting the Kenya Union of Clinical Officers, the respondents herein, their members, employees, agents, servants, assigns, and anybody else claiming under them from interfering with the smooth running of health services at the County Government of Machakos.
 - e. An order does issue to the effect that any employee and member of the 1st respondent who took part in the illegal strike is not entitled to any such payment and emoluments and salaries and benefits during the said period as a result of absconding their duties.
 - f. An order awarding costs of the petition to the petitioner.
 - g. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purposed of the enforcement of the petitioners fundamental rights and freedoms.
2. The petition was based upon the supporting affidavit of Dr. Muya Ndambuki (PHD), the County Secretary and Head of Public Service of the petitioner and exhibits thereto filed together with the petition, the petitioner's further response and response to cross petition dated 05.11.2024, the replying affidavit of Justus Kasivu, the Chief Officer Medical Services for Machakos County Government sworn on 11.11.2024. The petitioner's case is as follows:
- a. That the respondent issued a strike notice dated 24.09.2024 threatening to down their tools concerning provision of healthcare services to the County Government of Machakos.
 - b. The strike notice was to take effect on 10.10.2024 wherein the petitioner states that it made frantic efforts to address the respondent's issues and demands but the respondents issued unreasonable, illegal and unconstitutional demands whose effect was to paralyse the provision of healthcare services to the people and to jeopardize and compromise the right to health and healthcare services for the people as enshrined under article 43 of *the Constitution* of Kenya, 2010 as read with various other international and regional laws on the right to health.
 - c. The respondent's members are essential service providers whose right to go on strike is limited pursuant to Article 24 of *the Constitution* of Kenya, 2010 and thus it is illegal for the respondents to purport to go on strike and jeopardize essential healthcare services.
 - d. That the purported strike is illegal and the respondents are using the same to blackmail the petitioner as a gimmick to give into their demands.
 - e. The petitioner states that it has held several consultative meetings with the respondents in an attempt to address the concerns raised by respondents and it has made further efforts towards resolving the issues raised by the medical practitioners including the recruitment, promotion and conversion of terms of service from contract to permanent and pensionable, among other demands and conditions as recent as on 17.07.2024.
 - f. The petitioner states that as recent as 11.07.2024, it apportioned Kshs.24,562,560.00 in the first phase of recruitment of various persons in the healthcare sector in an aim at addressing



the perennial medic strikes and industrial unrest thus manifesting the commitment by the petitioner on addressing the concerns of the healthcare workers.

- g. That members of the respondents who are clinical officers, nurses, pharmaceutical technologists, medical laboratory officers and environmental and public health officers, have commenced an unlawful and unprotected strike thereby gravely affecting the health and wellbeing of patients seeking treatment within the Machakos health facilities run by the county government of Machakos.
 - h. That the respondent's decision to call for a strike is in violation of part X of the [Labour Relations Act](#), which outlines dispute resolution mechanisms. By proceeding with the strike while the trade dispute remains unresolved through conciliation, the respondents have disregarded sections 76 and 77 of the [Labour Relations Act](#).
 - i. The respondent's members ceased their duties, effectively shutting down hospital and maternity services across the county. The work stoppage led to a crisis in essential healthcare operations, endangering the health and well-being of residents.
 - j. The petitioner maintains that it has consistently demonstrated willingness to engage in negotiations with the respondents regarding the issues raised in the strike notice and that it remains committed to resolving the matters in dispute through dialogue and the respondents' decision to proceed with industrial action, despite these ongoing efforts is unjustified and undermines the negotiation process.
 - k. The petitioner states that it has been making diligent efforts to ensure the timely payment of salaries for its employees, including those of the respondents; however, delays have arisen due to late disbursements from the national treasury to the county governments regarding their equitable share. Further, the petitioner states that this issue is widely recognized as a public concern and the delays in payment of salaries is not unique to the members of the respondents, that it affects all employees within the public service of the petitioner, and the petitioner invited the court to take judicial notice of the same.
 - l. The petitioner states that despite its attempts and efforts, the respondents are hell bent on frustrating service delivery and healthcare service provision by the petitioner to the detriment of the people of Machakos in violation of Articles 10, 27, 28, 41 and 43 of [the Constitution](#) of Kenya, 2010 and Articles 25 of the Universal Declaration of Human Rights 1948; Article 24 of the Convention on the Rights of the Child; Article 12 of the International Covenant on Civil and Political Rights and article 16 of the African Charter on Peoples and Human Rights which all provide for the right to enjoy the best attainable state of physical and mental health and healthcare related services.
 - m. That public interest outweighs the respondent's private interests and striking or downing of tools amounts to absconding and dereliction of duty by the healthcare workers.
3. The respondent also the cross-petitioner filed a cross-petition dated 05.11.2024 through AKO Advocates LLP. The cross petitioner prayed as follows:
- a. The respondent's petition dated 10.10.2024 be dismissed with costs.
 - b. Declaratory orders that;
 - i. The cross-respondent is in breach of the said members' right to fair labour practices under Article 41 of [the Constitution](#) by unfairly refusing and failing to effect



promotions and re-designations as provided for in Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May 2016.

- ii. The respondent is in breach of the said members' right to fair labour practices under Articles 41 and 43(1)(a) of *the Constitution* by failing to put in place an effective medical insurance scheme for the employees as also envisaged under section 34 of the *Employment Act*.
 - iii. The respondent is in breach of the said members right to fair labour practices under Article 41 of *the Constitution* by unfairly refusing and failing to effect new career guidelines for the members of the cross petitioner who are in their employment as provided for in Career Guidelines for Clinical Officers, approved by the Public Service Commission on 09.05.2024.
 - iv. The respondent has defeated the said member's legitimate expectation and are therefore in breach of the said members' right to fair administrative action under Article 47 of *the Constitution* for failing to honour their undertakings in various agreements in respect of promotions and re-designations, medical insurance scheme and effecting new career guidelines.
 - v. The respondent poses a threat to the said members' right to go on strike under Article 41(2) (d) of *the Constitution* declaring that the 1st respondent is in breach of the petitioner's right to fair administrative action under article 47 of *the Constitution* for refusing and/or failing to respond and or act on the petitioner's correspondence dated 28.10.2022, 15.02.2023 and on 16.03.2023.
- c. A judicial review order of mandamus directing the respondent to forthwith:
- i. Effect promotions and re-designations of the members of the cross-petitioners as provided for in the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May 2016 and as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024.
 - ii. Procure, effect and operationalise a satisfactory medical insurance scheme as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024.
 - iii. Effect new career guidelines for the members of the cross petitioner who are in their employment as provided for in career guidelines for clinical officers, approved by the Public Service Commission on 09.05.2024.
 - iv. A declaration that the petitioner and its members have a constitutional right to call for and proceed on strike on account of the respondents' failure to meet their undertakings as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024 and such other or other future agreements regarding the issues entailed in the agreements.
 - v. Costs on full indemnity basis



- vi. Such further or other orders as it may deem just and expedient for the ends of justice
4. The cross petition was based upon the supporting affidavit of George Maroah Gibore, the general secretary of the 1st respondent/cross petitioner, as well as his affidavit in reply to the petition. The affidavits were both sworn on 05.11.2024 and made through AKO Advocates LLP. It was stated and urged as follows:
- a. That the respondent in the cross petition only respond to industrial action.
 - b. The cross petitioner's members started holding negotiation meetings and agreements with the current regime of the cross respondents before they assumed office. They signed an agreement/memorandum charter titled Machakos County Health Care System Charter, 2022 dated 03.08.2022 by which inter alia the current political leadership of the county undertook as follows:
 - i. Put in place measures that would ensure self-sustaining funding and financing for the health sector including ensuring adequate budgetary allocation for healthcare, devising measures to generate more revenue from the facilities and sealing loopholes to ensure that all resources can be tracked, ensure effective funding of all levels of care, setting a sub-county health systems budget, setting up an annual fund for infrastructural improvement of health facilities, setting up a research fund to foster research within the health sector to help in making evidence based decisions and contribute to global knowledge, and, ring fencing health sector generated funds to be budgeted and utilized at the point of generation.
 - ii. Promote and re-designate all health workers who are due for promotion and have them upgraded
 - iii. Allow programmed and uninterrupted career development coupled with respective re-designation as stipulated by respective schemes of service
 - iv. Honour all signed CBAs and scheme of services for respective health workforce.
 - v. Champion for conclusion registration and implementation of all pending CBAs
 - vi. Provide a comprehensive health insurance cover for health workers.
 - c. The cross petitioner states that after assuming office the governor requested for one year to implement the agreement. In June 2023, the cross petitioner realised that the government was non-committal on the agreed issues and thus issued a joint strike notice dated 26.06.2023 and the issues raised therein were as follows:
 - i. Promotions.
 - ii. Staff shortages.
 - iii. Inadequate hospital supplies.
 - d. After the strike notice of 26.06.2023 the cross respondent convened a meeting with the cross petitioner on 13.07.2023 and entered into an agreement dubbed "Agreement between the County Government of Machakos and Health Union Officials". In the agreement the county agreed to promote 422 healthcare workers which was done but did not honour part 4 of the agreement until August 2024 when the cross respondents began paying the arrears for the 422 officers in tranches of 20% every month, ending December 2024.



- e. Part 7 of the agreement was not implemented by the cross respondent causing the cross petitioner to issue a strike notice on 02.02.2024 to compel the cross respondent to implement the agreement and ensure promotions, a sufficient comprehensive medical cover among others.
 - f. In response to the strike notice the cross petitioner states that the cross respondent convened another meeting on 23.02.2024 and entered into another agreement dubbed Agreement between the county government of machakos and health workers union offices dated 23.02.2024.
 - g. In said agreement the cross respondent committed to start processing phase 2 of promotions and that this process was to culminate with issuing of promotion letters to the officers who would be promoted not later than 05.06.2024. Additionally the cross respondent undertook that it would review the beneficiaries package, start members' sensitization and that they would carry out proper public participation and engage the cross petitioner at appropriate time. It is stated that the agreement was not honoured.
 - h. The cross petitioner states that it tried to reach the cross respondent to discuss the issue to no avail, forcing it to issue another strike notice on 26.09.2024 resulting in the present proceedings.
 - i. The cross petitioner states that the cross respondents are in breach of its members right to fair labour practices under article 41 of *the constitution* by unfairly refusing and or failing to effect promotions and re-designations as provided for in the public service commission human resource manual 2016.
 - j. The cross petitioner's members' legitimate expectation for re-designations, promotions and fairness in employment pursuant to the requirements endorsed in the public service commission human resource manual,2016 and the cross respondent bears the responsibility to its full implementation.
 - k. The cross respondent has breached the cross petitioners' members' right to fair labour practices under Articles 41 and 43(1)(a) of *the Constitution* by failing to put in place an effective medical insurance scheme for the employees as also envisaged under section 34 of the *Employment Act*.
 - l. The respondent in the cross petition is in breach of the said members' right to fair labour practices under Article 41 of *the Constitution* by unfairly refusing and failing to effect new career guidelines for the members of the cross petitioner who are in their employment as provided for in Public Service Commission Human Resource Policies and Procedures manual for the public service may, 2016.
 - m. The cross petitioner maintains that the cross respondent has unduly and unfairly defeated the said members' legitimate expectation and are therefore in breach of the said members' right to fair administrative action under article 47 of *the constitution* for failing to honour their undertakings in various agreements in respect of promotions and re-designations, medical insurance scheme and effecting new career guidelines.
 - n. The cross respondent poses a threat to the cross petitioner's members right to go on strike under article 41 (2) (d) of *the constitution* by perpetually sabotaging strike notices issued by the cross petitioner.
5. The cross-respondent (petitioner) filed the replying affidavit of Justus Kasivu, the Chief Officer of Medicals Services, Machakos County Government sworn on 11.11.2024 to answer and respond to the cross-petition. It was urged and stated as follows:



- a. The cross-respondents deny violating rights and fundamental rights and freedoms of the cross-petitioners as alleged.
- b. The cross-petition is calculated to sanitize the illegality of the on-going strike.
- c. The issues raised for the cross-petitioner were in issue in County Government of Meru –Versus- Kenya Medical Practitioners, Pharmacists and Dentists Union, Kenya Union of Clinical Officers and Others, Constitutional Petition No.ELRC E004 of 2024 at Meru and judgment was delivered on 09.10.2024 by Onesmus N. Makau J.
- d. The strike notice took effect on 09.10.2024 and the cross-respondent has tried to address the grievances raised but the cross-petitioners have raised issues and demands that are unreasonable, illegal and unconstitutional with effect that there is paralysis in provision of health services to the people and jeopardy to the right to health and health services to the people per Article 43 of *the Constitution* of Kenya.
- e. The cross-petitioner’s members are essential service providers whose right to go to strike is limited pursuant to Article 24 of *the Constitution* of Kenya 2010 and they should not go on strike and jeopardize the essential healthcare services.
- f. There were 180 applications for re-designation. 173 have been completed and letters issued; 5 were due for suitability interviews held on 08.10.2024 and Board results are awaited; and, 2 were declined because applicants lacked qualifications.
- g. The department has recruited 85 healthcare officers of mixed cadres in 2024 and those recruited already deployed. The 19 doctors serving on term contracts were converted to permanent and pensionable terms in July 2024.
- h. The process of recruiting 321 health officers is underway. Interviews commenced on 07.10.2024 and process will end in November 2024 in which over 21,000 applications had been received. Recruitment and promotions have been hampered by lack of funds due to revocation of Finance Act, 2024 and the memo issued by the Salaries and Remuneration Commission freezing promotions and recruitments.
- i. The new career guidelines in issue have not been forwarded to the County Public Service Board and the County Government.
- j. Since 2021, the department had promoted 89 doctors (79 medical specialists and medical officers, 6 dentists, 4 pharmacists), 172 clinical officers, and, 45 public health officers and their arrears are being paid.
- k. The officers under national government are not on comprehensive medical cover. All staff of the county are under comprehensive insurance cover with Jubilee Insurance. The request with respect to national government employees is not under the county government.
- l. Timely payment of statutory deductions is to be undertaken by the Department of Finance but sometimes-late payments of statutory deductions are caused by delayed disbursement by the ex-chequer from national government.
- m. While the department has provided Sub County Medical Officer of Health with fuel cards to facilitate movement within the Sub-County, repair and servicing of motor cycles has been factored in the procurement plan of FY 2024/2025.



- n. The department had not factored in FY 2024/2025 budget for redesignation of consultants or specialist doctors and who had completed their masters degree to correct Job Groups (J.G. Q and above).
 - o. The position of Director for Public Health is open to all professional cadres in the health sector and is not a preserve of any one cadre.
 - p. The strike was called in violation of Part X of the Labour Relations Act, which provides for dispute resolution mechanism. The strike proceeded while the dispute remained unresolved in disregard of sections 76 and 77 of the Labour Relations Act. The union has failed to pursue conciliation and instead has opted to file a cross-petition. The strike is illegal as urged for the cross respondent.
 - q. The prayers made for the cross-petitioner are not justified and should not be granted. Strike by employees in essential services is prohibited and prayer 4 should not be granted.
6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
7. The 1st issue for determination is whether the grievances in the strike notice dated 24.09.2024 issued by the respondents are valid. The strike notice dated 24.09.2021 stated that the union had been engaging the petitioner for the longest about issues highlighted in the strike notice namely promotion and redesignation; adoption of new career guidelines; medical insurance cover; and the following demands were made:
- a. That the county government promotes and re-designates all the union members who have applied for the same and who meet the criteria immediately and with no further delay.
 - b. The government through the office of the county secretary adopts and implements the new career guidelines without any further delays. Any advertisement, promotion, redesignation and any appointment by the county government should use the new career guideline.
 - c. The county government through the office of the county secretary to convene a meeting of all stakeholders to discuss medical insurance cover. (the cover by Jubilee Insurance having a lot of bureaucracies in its administration).
 - d. That the government convenes a meeting urgently with the union to discuss on the implementation of the Return to Work Formula (RTWF) agreed upon by the Council of Governors and the Union on 08.07.2024.
8. The RTWF of 08.07.2024 provided for the following salient issues:
- a. The county government to commence negotiating a CBA forthwith and conclude the agreement in 60 days from the date of execution of the RTWF or any other time agreed upon by parties. The proposed risk allowance shall be negotiated and paid upon approval by Salaries and Remuneration Commission.
 - b. The county government to promote and re-designate clinical officers in a process to commence and per Public Service Guidelines and policies within one (1) month and complete the same by 01.09.2024.
 - c. Appreciating that there are staffing gaps in counties affecting health service delivery, the county government shall replace officers that have exited service due to natural attrition and recruit



Clinical Officers annually based on availability of resources and informed by staffing norms and staff establishments.

- d. For absorption of Universal Health Coverage (UHC) and COVID-19 employees, the Ministry of county governments to cater for the UHC and COVID-19 employees' salary at the prevailing market rates including the employment benefits such as medical insurance and pension.
 - e. The county government to provide medical cover to the Clinical Officers to commence and conclude the process of acquiring the medical cover enjoyed by other county public servants in accordance with the prevailing Public Service Policies and Guidelines by 01.09.2024.
 - f. The issue of withheld salaries for striking Clinical Officers pursuant to strike notice of 2021 to be dealt with by the union and respective county government guided by the court order.
 - g. Premised on the principle of equal pay for work of equal value, the terms of service for clinical officers employed by the county governments shall be harmonised in accordance with existing legal and policy framework.
 - h. The union to call off the strike flowing from the strike notice dated 25.03.2024 and work to resume in 24 hours. All unpaid union dues and salaries shall be paid in accordance with existing contractual obligations.
 - i. No victimization of Clinical Officers for having participated in the strike ensuing pursuant to the strike notice of 25.03.2024 and all commenced disciplinary proceedings and imposed punishments voided.
9. It is the union's case that the petitioners failed to meet the demands in the strike notice. Instead of addressing the issues in the strike notice, the petitioners rushed to Court and filed the instant petition. On 11.10.2024 the Court ordered, inter alia, that pending the inter-partes hearing or further orders by the Court there be stay of the strike notice dated 24.09.2024 and further stay of the strike flowing therefrom subject to:
- a. no victimization or punishment of the union members or employees concerned in view of that strike notice or strike; and,
 - b. the parties to forthwith convene with a view to negotiate or conciliate in good faith towards an amicable compromise of the dispute including the grievances involved and to agree on the minimum safety services in event of such strike by union members, with a view of recording a consent on the return date, as may be just and appropriate.

The order directed the parties to seek assistance of the County Labour Officer at Machakos, to assist, as may be expedient and effective.

10. The union's case is that consequential to the order suspending the strike its members resumed work. The union states that its efforts to resolve the grievances have yielded no fruits and the petitioners only responded to industrial action. The history of the grievances was as set out in the union's affidavit. Parties have entered various agreements towards resolving the grievances notably agreement between the government and health workers of 13.07.2023 on promotions and arrears; agreement of 23.02.2024 again on promotions and medical insurance cover; and, the outstanding issues were promotions and redesignation, improvement of medical insurance cover, and, adoption of new career guidelines for clinical officers. The union states that the petitioners should not be allowed to abuse the court process to perpetually abuse the employees' right to fair labour practices per Article 41 of *the Constitution*.



11. The Court has considered the parties respective cases on the facts and finds as follows:
- a. The petitioners have not categorically stated whatever was being done to improve or remove bureaucratic challenges associated with the Jubilee Medical Insurance Cover.
 - b. Promotions have been hampered by lack of funds due to revocation of Finance Act, 2024 and the memo issued by the Salaries and Remuneration Commission freezing promotions and recruitments. The union has not challenged the assertion while the petitioners do not deny that there are union members due for promotion.
 - c. The new career guidelines in issue have not been forwarded to the County Public Service Board and the County Government. However, the petitioners have not offered any explanation why they have been unable to obtain the guidelines from the national government or Public Service Commission. The approved career guidelines appear to have been issued by the Commission on 09.05.2024
 - d. The petitioners have not offered an explanation why they have not been able to implement re-designations, which have no extra financial implications.
 - e. The respondent appear not to say much about any outstanding implementation of the RTWF of 08.07.2024 as may be outstanding outside the other grievances in the strike notice.
 - f. Accordingly, upon findings in (a), (b), (c), (d) and (e) above on improvement of the medical insurance cover; adoption of new career guidelines (a mere policy decision); re-designations which have no financial implications, and on the RTWF the Court further finds that the grievances in that regard as raised for the union members are merited. The Court therefore returns that the grievances stated in the impugned strike notice are genuine as they are substantially valid and merited.
12. To answer the 2nd issue, the Court finds that in view of unexplained failure by the petitioners, thus, the failure to explain, negotiate, or resolve to improve the administration of the medical insurance cover; the failure to explain why the re-designations with no financial impact had not been undertaken; failure to explain the budgetary constraints in implementing timely promotions and incidental mitigating measures; and, failure to appraise on status of implementation of the RTWF of 08.07.2024 or comply with the agreements between the parties of 23.07.2023 and 23.02.2024; the Court returns that the union has established that the (cross-respondent) petitioner has violated the union members' right to fair practices under Article 41 of *the Constitution*.
13. The 3rd issue is whether the strike and strike notice was protected under the *Labour Relations Act*, aside, the constitutional arguments raised for the petitioner in view of section 81 of the Act.
14. Section 76 of the *Labour Relations Act* states thus:
- A person may participate in a strike or lockout if—
- (a) the trade dispute that forms the subject of the strike or lock-out concerns terms and conditions of employment or the recognition of a trade union;
 - (b) the trade dispute is unresolved after conciliation-
 - (i) under this Act; or,
 - (ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; failure to implement



the career guidelines already issued by the national government and the Public Service Commission; and, failure to appraise on any outstanding issues in view of the return to work formula (RTWF) of

- (c) seven days written notice of the strike or lockout has been given to the other parties and to the Minister by the authorised representative of –
 - (i) the trade union, in the case of a strike;
 - (ii) the employer, group of employers or employers' organisation, in the case of a lock-out.

15. Section 78 of the Act on prohibited strikes states as follows:

- (1) No person shall take part in a strike or lock-out or in any conduct in contemplation of a strike or lock-out if—
 - (a) any law, court award or a collective agreement or recognition agreement binding on that person prohibits a strike or lock-out in respect of the issue in dispute;
 - (b) the subject matter of the strike or lock-out is regulated by a collective agreement or recognition agreement binding on the parties to the dispute;
 - (c) the parties have agreed to refer the trade dispute to the Industrial Court or to arbitration;
 - (d) in the case of a dispute concerning the recognition of a trade union, the trade union has referred the matter to the Industrial Court;
 - (e) the trade dispute was not referred for conciliation in terms of –
 - (j) this Act; or
 - (ii) a collective agreement providing for conciliation;
 - (f) the employer and employees are engaged in an essential service;
 - (g) the strike or lock-out is not in furtherance of a trade dispute; or,
 - (h) the strike or lock-out constitutes a sympathetic strike or lock-out. (2) For the purposes of this section –
 - (a) an employee engages in a sympathetic strike if the employee participates in a strike in support of a trade dispute in respect of which the employee's employer –
 - (i) is not a party to the dispute; or,
 - (ii) is not represented by an employer's organisation that is a party to that dispute; or,
 - (b) an employer engages in a sympathetic lock-out if the employer locks-out an employee in support of a trade dispute –
 - (i) to which the employer is not a party; or,



- (ii) in respect of which the employer is not represented by an employer's organisation that is a party to dispute.

16. The union has exhibited a recognition agreement between the County Government of Machakos as employer and Kenya Union of Clinical Officers dated 19.12.2017. Clause 2(b) of the agreement states that the union shall represent its members in all negotiable matters concerning all terms and conditions of employment and career progression. Clause 5 on dispute settlement states that any dispute between the parties concerning the interpretation, amendment or implementation of the agreement shall be settled amicably through consultations and negotiations. Further, in event of failure to reach an amicable settlement on the interpretation, amendment or implementation of the agreement, either party may refer the dispute to the Cabinet Secretary responsible for Labour Relations in accordance with the terms of *Labour Relations Act*, 2007.
17. The Court has considered the cited provisions of the Act and the recognition agreement. It appears to the Court that parties had engaged in negotiations, consultations and subsequently went for conciliation, which culminated in the RTWF of 08.07.2024. The strike notice was dated 24.09.2024 and was taking effect after 14 days' notice therein, being on or about 09.10.2024. The petition was filed on or by 10.10.2024. Per the recognition agreement, the notice invited the petitioner to conciliation and negotiation about the stated grievances. The union confirms parties met on 08.10.2024 with no resolution of grievances. Instead of parties escalating the grievance to the Cabinet Secretary per their agreement, the petitioners addressed a press conference and then filed the instant petition. For their part, the union members embarked on the strike. The Court has considered the flow of events and finds that the strike commenced prior to the parties exhausting their agreed dispute resolution agreement. To that extent, the strike was not protected. The strike notice of 7-days was issued, the grievances related terms and conditions of service, but, while the union knew it needed to engage in consultation and amicable settlement and, failing, to invoke statutory conciliation, the negotiation and consultations were pursued concurrently as the strike notice issued. The agreed path was to request for conciliation and negotiation, within a stated time, if time lapsed, report the dispute to the Cabinet Secretary under the *Labour Relations Act*, if no settlement after the conciliation, the union to issue the strike notice. That appears not to have been the flow of events and the Court finds that the strike was not protected because, the union called the strike prior to exhausting the agreed dispute settlement procedure or the statutory conciliation under the Act. Even if the petitioners had previously been taking the union and its members in circles to defeat effective resolution of the grievances, the circles would amount to failed negotiation and consultation and the next lawful action was to report the trade dispute to the Cabinet Secretary for conciliation and only after the conciliation had failed could the union issue the strike notice and thereafter, the members to validly embark on a protected strike. It appears that after numerous and previous parties' agreements there had been some progress and time lapse. Those previous negotiation or conciliation agreements could not then pass for exhaustion of the agreed dispute settlement procedure in light of the emergent concerns as stated in the strike notice – which concerns or grievances, in the court's opinion, constituted a new dispute to be taken through the agreed or statutory dispute resolution process.
18. The 4th issue for determination is whether the strike notice dated 24.09.2024 issued by the respondents was illegal, null and void and contrary to Articles 10, 21, 27, 28, 41 and 43 of *the Constitution* of Kenya, 2010 as read with section 81 of the *Labour Relations Act*. It is submitted for the petitioners that the union members are engaged in essential services and cannot therefore go on strike because of the provisions of the Labour relations Court Act.
19. Under section 78(1) (f) of the Act there cannot be a lockout or a strike where the employer and employees are engaged in an essential service. Under section 76 on protected strikes and lockouts there



is no mention of essential services with respect to permissible protected strikes or lockouts. Section 81 of the Act on essential services provides as follows:

- (1) In this Part “essential services” means a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.
- (2) The Minister, after consultation with the Board–
 - (a) shall from time to time, amend the list of essential services contained in the Fourth Schedule ; and,
 - (b) may declare any other service an “essential service” for the purpose of this section if a strike or lock-out is so prolonged as to endanger the life, person or health of the population or any part of the population.
- (3) There shall be no strike or lock-out in an essential service.
- (4) Any trade dispute in a service that is listed as or is declared to be an essential service may be adjudicated upon by the Industrial Court.
- (5) A collective agreement may provide that any service may be deemed to be an essential service.

20. It was submitted for the petitioners that in *County Government of Meru v Kenya Medical Practitioners Pharmacists and Dentists Union & 2 others; Meru County Public Service Board & 2 others (Interested Parties) (Constitutional Petition E004 of 2024) [2024] KEELRC 2449 (KLR) (9 October 2024) (Judgment) ON Makau J* extensively reviewed the law on the strikes in essential services, returned and held as follows:

“66. The question that arises is whether the strike by the respondents is lawful and justified. Article 41 of *the Constitution* of Kenya, 2010 provides that: -

- “1. Every person has the right to fair labor practices;
2. Every worker has the right-
 - A. To fair remuneration,
 - B. To reasonable working condition,
 - c. ...
 - d. To go on strike”

67. The right to go on strike is not one of the absolute rights listed under Article 25 of *the Constitution*. In fact, with respect to essential services, the right to go on strike has been taken away altogether in Kenya. Section 81 of the *Labour Relations Act* provides that: -

- “(1) In this part ‘essential services’ means a service the interruption of which would probably endanger the life of a person or health of the population or any part of the population.
- (2) ...
- (3) There shall be no strike or lock-out in an essential service.
- (4) ...”



68. Article 24 of the Constitution allows for limitation of a right or fundamental freedom as follows: -

“A right or fundamental freedom in the Bill of Right shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...”

69. This court has dealt with several cases where the right to go on strike by workers in health sector has been raised. In the said cases, the court has agreed that the right to go on strike is not absolute and therefore it can be limited under Article 24 above. However, there seems to be no case where the court has determined whether or not the provisions of section 81(3) of the Labour Relations Act is unconstitutional. The court has also not been invited to make such a determination in this case.

70. In the case of Okiya Omtatah Okoiti v Attorney General & 5 others (2015) eKLR Nduma J held that:

“58. In this case we are concerned with the prohibition of strikes in essential services prohibited under section 78 (1) (f) and section 81 (3) of the Labour Relations Act, 2007.

59. These provisions derogate from the core content of the right to strike provided under Article 41 (2) (d) of the Constitution and the Legislature should revisit the law with a view to remove the apparent conflict between the constitutional provision and the statutory law.”

71. In County Government of Kakamega and another v Kenya National Union of Nurses and another (2017) eKLR, Onyango J held that:

“It is my opinion that the limitations under section 81 of the Labour Relations Act meet the tests under Article 24 (1). Withdrawal of Hospital services derogates on the right to life under Article 26, the right to the highest attainable standard of health under Article 43 (1) and the right to emergency medical treatment under Article 43 (2). I think it is not a disputed fact that withdrawal of medical services is likely to, and in fact does, lead to loss of life to people who need medical services. The right to life is in a wider sense part of the right to human dignity under Article 28. The withdrawal of health services may therefore lead to cruel, inhuman or degrading treatment of patients and their relatives who do not have the resources to get treatment at private medical facilities and who have to suffer death or watch their loved ones die without medical attention. Freedom from cruelty, inhuman or degrading treatment are part of the rights under Article 25 and cannot be limited or derogated.”



72. In the case of *Joseph Otieno Oluoch v KPMDU (2021)* eKLR cited by the petitioner a three Judge bench of the court considered the South African and Canadian jurisprudence and also sought guidance from the ILO Digest of Decisions of the Freedom of Association Committee of the Governing body and the European Social Charter. The court confirmed that the right to go on strike in essential services can be restricted or prohibited for public servants. However, the right can be enjoyed if “minimum service” can be maintained during the strike to ensure that life, personal safety or health of the whole or part of the prohibition will not be endangered.
73. In the end, the court agreed with Nduma J in the *Okiya Omtatah Okoiti* case supra, that an outright prohibition of the right to go on strike for employees in essential services would derogate from the core of that right, which is not what *the Constitution* contemplates. The court then went on to hold that:
- ‘We are however convinced that the right to go on strike is qualified and is therefore contingent upon retention of ‘Minimum service’ at the affected facilities to ensure that there is no danger to life or health of members of the public”
74. Finally, the court made the following orders: -
- ‘a. Industrial action by health workers is not permitted unless there is a known and acceptable formula of ‘Minimum Service’ retention at every affected health facility. This limitation is in addition to those imposed by the conciliation procedures set by the *Labour Relations Act*.’
 - b. The Cabinet Secretaries in charge of Health and Labour, in conjunction with all major stakeholders within the health sectors, shall within the next 12 months from the date of this Judgment, develop and publish guidelines to give effect to order (a) above;
 - c. ...” (emphasis added)
75. Since the said decision, there have been numerous strikes in the health sector some extending for months. In the instant case, the strike by the respondents’ members has extended two months. There is evidence that all the doctors, clinical officers and nurses in the petitioner’s public health facilities went on strike and left no one to attend to emergency cases.
76. This court has not been shown any evidence that the decisions of this court cited above, on the limitation of the right to go on strike, were set aside by a higher court. There is also no legal or policy framework put in place since the decision in *Joseph Otieno Oluoch* case, supra, to regulate strike in the essential services sector.
77. Consequently, I find that the law as it is in Kenya, is that the right to go on strike in essential services for public service is prohibited under section 81 of the *Labour Relations Act*, 2007 until that law is repealed or otherwise changed to provide for a balance between the right to go on strike under Article 41 (2)



(d) of the Constitution and the right to life; right to be treated with dignity; and right to the highest standard of health under Article 26, 28 and 43 of the Constitution of Kenya, 2010. The said balance is only possible if the law, CBAs, or HR Policy Manuals are formulated to provide for ‘Minimum service’ in essential services sector during the period of strike.

78. Having said that, and in view of the undisputed fact that the respondents have called a strike in essential service contrary to section 81 (3) of the Labour Relations Act without guaranteeing minimum service, I find and hold that the strike has violated and continues to violate Article 26, 28 and 43 (1) (a) of the Constitution which form part of the Bill of Rights as alleged.”

21. The petitioner also relied on the holding by CN Baari J in *County Government of Kisii v Kenya Medical Practitioners Pharmacists & Dentists Union (KMPDU) & another* (Cause E016 of 2024) [2024] KEELRC 561 (KLR) (14 March 2024) (Ruling) Neutral citation: [2024] KEELRC 561 (KLR). The Court held:

“23. Rights guaranteed under the Constitution can only be limited within the threshold set under Article 24 of the Constitution, which states thus:

“ A right or fundamental freedom in the Bill of Rights shall not
1. be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- a. the nature of the right or fundamental freedom;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and,
- e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
- f. Despite clause (1), a provision in legislation limiting a right or fundamental freedom—
 - a. in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;



- b. shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and,
- c. shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.”

24. In my view, the prohibition of strikes in an important sector such as the health sector, is reasonable and justifiable, as to allow strikes would have the effect of prejudicing the rights and fundamental freedoms of the general public.

25. Further, the right to strike guaranteed under Section 41(2) (d) of *the Constitution* is not an absolute right. I therefore return that Section 81 of the *Labour Relations Act*, which prohibits strikes in essential services, meets the threshold set under Article 24 of *the Constitution* on limitation of rights and fundamental freedoms, and amounts to a reasonable limitation to the right to strike and does not in any way conflict with Article 41. (See No. 70 of 2014, *Okiya Omtatah Okoiti v The Attorney General*)”

22. Article 24 of *the Constitution* further states:

“(4)

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

- (a) Article 31 — Privacy;
- (b) Article 36 — Freedom of association;
- (c) Article 37 — Assembly, demonstration, picketing and petition;
- (d) Article 41 — Labour relations;
- (e) Article 43 — Economic and social rights; and, 22 Constitution
- (f) Article 49 — Rights of arrested persons.”

23. The 4th schedule to the Labour Relations Court Act lists the following essential services:

- a. Water Supply Services.
- b. Hospital Services. (The instant case is about health services in hospitals and is properly an essential service)
- c. Air Traffic Control Services and Civil Aviation Telecommunications Services.



- d. Fire Services of the Government or Public Institutions.
 - e. Posts Authority and Local Government Authorities.
 - f. Ferry Service.
24. It appears to the Court that section 81 of the *Labour Relations Act* in simply stating that there shall be no strikes or lockouts in essential services without more amounts to derogating from the core or essential content of the right to strike as conferred under Article 41 of *the Constitution* and as was held in some of the cited cases referred to earlier in this judgment. The right to strike in essential services is subject to provision of agreed or prescribed minimum safety services to be provided in event of a strike and which minimum safety services are necessary to safeguard life while assuring a balance that the strike is thereby not rendered ineffective or useless. In the instant case, despite previous court orders, including in the instant case, parties did not agree to minimum safety services and the petitioners have not shown any prescribed minimum safety services in event of a strike like is impugned in the instant case. The Court considers that both the government as employer and the union have, in the course of the ensuing strike, threatened and actually violated the rights and freedoms of the patients by having failed to agree or cause prescription of minimum safety services in event of a strike by union members.
25. The Court has as well reflected about the plight of workers in the essential services such as in hospitals against Article 41 on the right to fair labour practices. The right includes fair remuneration and fair terms and conditions of service. A violation of Article 41 can very easily amount to forced labour, slavery or servitude. Strike is the ultimate bargaining chip for workers. Now, Article 30 on forced work, slavery, and servitude states that a person shall not be held in slavery or servitude; and, a person shall not be required to perform forced labour. It appears to the Court that if an employer's promise and agreement to pay salary at a given rate, or, conferment of a crucial benefit such as medical cover, and, the employer does not specifically perform as agreed, and, with absolute no recourse by workers like through strikes and disregard of repeated efforts and requests by the employees for performance, it would amount to contravention of Article 30 of *the Constitution*. It cannot be that because of essential service provided by the employee, the employer requires the employee to continue working, without a machinery of the employee pursuing and enforcing the fundamental principles and basic rights of a fair employment relationship. Allowing such to happen would amount to complete disregard of the right to human dignity as protected in Article 28 of *the Constitution*, which states that every person has inherent dignity and the right to have that dignity respected and protected. It appears to the Court that in such considerations, Article 25 of *the Constitution* on fundamental rights and freedoms that may not be limited provides that despite any other provision in *the Constitution*, the following rights and fundamental freedoms shall not be limited—
- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
 - (b) freedom from slavery the or servitude;
 - (c) the right to a fair trial; and,
 - (d) the right to an order of habeas corpus.
26. Kenya ratified ILO C029 - Forced Labour Convention, 1930 (No 29) on 13.01.1964. Article 2 of ILO C029 states as follows:
- “ 1. For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the



menace of any penalty and for which the said person has not offered himself voluntarily.

2. Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include-

SUBPARA (a)

any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

SUBPARA (b)

any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

SUBPARA (c)

any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

SUBPARA (d)

any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

SUBPARA (e)

minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

27. The Court considers that work in essential services on an ordinary occasion falling outside emergencies must be regulated and enforced within tenets of Article 41 on the right to fair labour practices. The consequence is that requiring workers in essential services to work in circumstances that the employer has breached the fundamental principles, basic rights, terms and conditions of service would be untenable so that ordering the employee to work without a concomitant order that the employer complies with the agreed terms and conditions of service would amount to violation of Article 30 on forced work, slavery, and servitude – a right which cannot be limited.
28. In the instant case, the parties already submitted to Article 41 right to fair labour practices including the right to collectively bargain. The parties have already concluded a recognition agreement including dispute settlement mechanism that recognise the reporting of s dispute to the Cabinet Secretary for Labour. The parties must be construed to submit completely to the statutory regime in that respect including invoking of the provisions applicable to strike situations. The only special circumstance is that the parties are in essential service and about which the Court has found that strike the is chained



- by agreed or prescribed minimum safety services in event of a strike and which despite several Court orders and directions in that respect, parties have failed to institute.
29. While making the findings, the Court has upheld the submissions for the cross-petitioner on the position as per ILO Principles Concerning the Right to Strike, International Labour Review Vol. 137 (1998) No. 4 as follows and with respect to not entirely prohibiting strikes in essential services:
- a) One solution might be not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff of a negotiated minimum service when a total or prolonged stoppage might result in serious consequences for public.
 - b) “Minimum service retention” during strikes refers to and is limited to the operations which are strictly necessary to meet the basic needs of population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear.
 - c) In order to avoid damages which are irreversible or out of all proportion to the occupational interests of the parties to dispute, as well as damage to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services which are of public utility rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term.
 - d) A “minimum service” would be appropriate in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified.
 - e) It is important for provisions regarding the minimum service to be maintained to be established clearly, to be applied strictly and made known to those concerned in due time.
30. As was held in *National Union of Mineworkers –Versus- Essential Services Committee and Others* (JR 1147/16) [2019] ZALCJHB 82, “minimum service” is one that is sufficient to ensure that during the strike no person’s life, personal safety or health is endangered. In that South African case and in the Canadian case of *Saskatchewan Federation of Labour –Versus- Saskatchewan 2015 SSC 4* (CanLII), [2015] 1 SCR 245 (where the Court dealt with the Public Service Essential Services Act to limit the right to go on strike for public sector employees engaged in essential services), the best practice adopted appears to be instituting of a statutory intervention for determination of minimum safety service measures in event of a strike in essential services. The Court recommends such as the appropriate direction for Kenya after the right to strike being provided for in Article 41 of the Bill of Rights under *the Constitution* of Kenya, 2010 and to mitigate on the perennial adverse effects of strikes in essential services especially in the public health or hospital services.
31. To answer the 4th issue for determination the Court returns that the parties by failing to agree in the CBA or otherwise, or, failing to prescribe minimum safety measures in event of a strike by the union members, have jointly and severally threatened and violated Articles 10, 21, 27, 28, 41 and 43 of *the Constitution* of Kenya, 2010 as against the hospital patients and other persons entitled to access the hospitals in issue.
32. The 5th issue is whether the petitioner is entitled to remedies as prayed for. The Court returns as follows:
- a) The petitioner has prayed for a declaration to issue to the effect that the strike notice dated 24.09.2024 issued by the Kenya Union of Clinical Officers is illegal, null and void and contrary to Articles 10, 21,27,28,41 and 43 of *the Constitution* of Kenya, 2010 as read with section 81 of the *Labour Relations Act*. The Court has already found that a declaration will issue that both parties by failing to agree in the CBA or otherwise, or, failing to prescribe minimum safety



measures in event of a strike by the union members, have jointly and severally threatened and violated Articles 10, 21, 27, 28, 41 and 43 of the Constitution of Kenya, 2010 as against the hospital patients and other persons entitled to access the hospitals in issue.

- b) The petitioner prayed for a declaration does issue to the effect that any industrial action pursuant to the strike notice dated 24.09.2024 by the Kenya Union of Clinical Officers, their members, employees, agents, assigns or any persons acting on their own behalf and interest is illegal and unconstitutional and contrary to Articles 10,21,27,28,41 and 43 of the Constitution of Kenya, 2010 and a threat and violation to the right to healthcare and provision of healthcare services thus contrary to Articles 25 of the Universal Declaration of Human Rights, 1984; Article 24 of the Convention on the Rights of the Child; Article 12 of the International Covenant on Civil and Political Rights and Article 16 of the African Charter on Peoples and Human Rights. The Court has found that the strike was unprotected under the Labour Relations Act. The liability for breach of rights has already been found to fall upon the parties jointly or severally. Accordingly, declaration will issue that the strike flowing from the strike notice dated 24.09.2024 was unprotected under the Labour Relations Act and as found in this judgment.
- c) The petitioner prayed for a declaration to issue to the effect that any industrial action pursuant to the strike notice dated 24.09.2024 by the Kenya Union of Clinical Officers their members, employees, agents, assigns or any persons acting on their own behalf and interest is illegal and an abdication and dereliction of duties hence warranting disciplinary action. The Court has considered that the respondents have established that the grievances were genuine and valid as found in this judgment. While the strike was unprotected, it appears that the determination of the merits of the grievances and the party who was liable in the special circumstances of the involved essential services vested in the Court. Thus section 81(4) of the Act states that any trade dispute in a service that is listed as or is declared an essential service may be adjudicated upon by the Industrial Court (read Employment and Labour Relations Court). On the merits of adjudication of the instant dispute, the grievances being genuine and valid, and the petitioner having failed to purge a number of the grievances for no explanation and as earlier found in this judgment, no punishment is justified because both parties are jointly liable for the ensuing strike and its adversity to patients, as already found earlier in this judgment. Section 46(h) of Employment Act specifically prohibits punishment upon the basis that the employee has raised a genuine grievance.
- d) The petitioner prayed for a permanent injunction to issue prohibiting the Kenya Union of Clinical Officers, the respondents herein, their members, employees, agents, servants, assigns, and anybody else claiming under them from interfering with the smooth running of health services at the County Government of Machakos. The Court considers that an injunction will issue prohibiting the respondent by itself, officials, members or its agents from interfering with the smooth running of health services at the County Government of Machakos through calling of prohibited strikes in view of the relevant provisions of the Labour Relations Act and as found by the Court in this judgment as relates to agreed or prescribed minimum safety services.
- e) The petitioner prayed for an order to issue to the effect that any employee and member of the 1st respondent who took part in the illegal strike is not entitled to any such payment and emoluments and salaries and benefits during the said period as a result of absconding their duties. The Court has already found for the joint liability of the parties for the ensuing strike and further found that the grievances were genuine and valid. The order will not issue in the circumstances of the case.



- f) The issue of costs will be considered after consideration of the cross-appeal.
33. The 6th issue is whether the reliefs in the cross-appeal should issue. The Court returns as follows:
- a. The cross-petitioner prayed for a declarations as follows:
- (i) The cross-petitioner prayed for a declaration that cross- respondent (petitioner) are in breach of the said members’ right to fair labour practices under Article 41 of *the Constitution* by unfairly refusing and failing to effect promotions and re-designations as provided for in Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May 2016. The Court has found this to be a valid grievance in view of previous agreements and the declaration will issue.
 - (ii) The cross-petitioner prayed that the cross respondent are in breach of the said members’ right to fair labour practices under Articles 41 and 43(1)(a) of *the Constitution* by failing to put in place an effective medical insurance scheme for the employees as also envisaged under section 34 of the *Employment Act*. The Court found the grievance to be valid and the declaration will issue.
 - (iii) The prayer was the cross respondent are in breach of the said members right to fair labour practices under Article 41 of *the Constitution* by unfairly refusing and failing to effect new career guidelines for the members of the cross petitioner who are in their employment as provided for in Career Guidelines for Clinical Officers, approved by the Public Service Commission on 09.05.2024. The grievance was found valid and the declaration will issue.
 - (iv) The prayer was the cross- respondent have defeated the said member’s legitimate expectation and are therefore in breach of the said members’ right to fair administrative action under Article 47 of *the Constitution* for failing to honour their undertakings in various agreements in respect of promotions and re-designations, medical insurance scheme and effecting new career guidelines. The Court considers that by the omission to honour the previous agreements, the cross-petitioner has established violation of Article 47 of *the Constitution* as prayed for the cross-petitioner. The declaration will issue.
 - (v) The prayer was the cross-respondent poses a threat to the said members’ right to go on strike under Article 41(2) (d) of *the Constitution* declaring that the 1st respondent is in breach of the petitioner’s right to fair administrative action under Article 47 of *the Constitution* for refusing or failing to respond and or act on the petitioner’s correspondence dated 28.10.2022, 15.02.2023 and on 16.03.2023. The cross-petitioner has not shown the justification for grant of this remedy as worded. It will be declined.
- c) The cross petitioners prayed for judicial review order of mandamus directing the cross-respondents to forthwith:
- (i) Effect promotions and re-designations of the members of the cross-petitioners as provided for in the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May 2016 and as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024.



- (ii) Procure, effect and operationalise a satisfactory medical insurance scheme as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024.
- (iii) Effect new career guidelines for the members of the cross petitioner who are in their employment as provided for in career guidelines for clinical officers, approved by the Public Service Commission on 09.05.2024.

The Court has found that the cross respondent had a duty revolving around the agreements between the union and the government to perform as prayed for but the respondent has failed to discharge the duty. The orders of mandamus will therefore issue as prayed.

- (iv) The cross-petitioner prayed for a declaration that the petitioner and its members have a constitutional right to call for and proceed on strike on account of the respondents' failure to meet their undertakings as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024 and such other or other future agreements regarding the issues entailed in the agreements. The Court has found the declaration will issue but subject to compliance with agreed or prescribed minimum safety services in event of a strike.

34. The Court has considered the parties' margins of success and liability with respect to ensuing strike and each will bear own costs of the petition and the cross petition.
35. To avoid a similar adverse strike from happening, the parties shall agree upon the minimum safety service measures or an institutional framework for determining minimum safety measures and file in Court for appropriate adoption and recording in court by 01.07.2025. While making provision for such minimum safety service measures, the parties should bear in mind the principle on prompt provision of compensation of affected workers who may be deprived the right to strike or such right limited or constrained per the ILO Principles Concerning the Right to Strike International Labour Review, Vol. 137 (1998), No. 4. It is stated thus, "In this connection, the Committee has stated that a prohibition to strike in such circumstances should be "accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented," Further, that the ILO Committee of Experts has adopted a similar approach in stating thus, "If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely (ILO, 1994a, para. 164)".
36. The parties should therefore cooperate and the government should particularly take appropriate steps towards instituting fair system to assure minimum safety service measures in event of a strike in essential services and in particular in health services. The parties are more so encouraged to incorporate a system of minimum safety service measures in the collective bargaining agreement. The Court holds that what amounts to minimum safety service measures varies from one circumstance to another and it should be sufficient to provide for an institutional framework with parameters to be satisfied in every situation for



arriving at the minimum safety service measures that are fair to the interests of the workers, employers and the public interest involved.

37. In view of the persistent strikes in the essential services like in the instant case and particularly the public health services in Kenya, the parties will serve this judgment upon the Cabinet Secretary for Labour, the Honourable Attorney General, The Parliamentary Committee on Labour, the Central Organisation of Trade Unions (COTU-K), and the Federation of Kenya Employers(FKE) towards a robust policy and statutory interventions through social dialogue and stakeholder participation to govern strikes in essential services including, provision for due compensation of workers for restricted participation in strike; prompt disputes resolution by negotiation, conciliation and the court; mechanisms for prompt implementation of agreements or decisions by the Court ; and, the relevant institutional framework for determination of minimum safety measures in event of a strike in essential services or prescription of such minimum safety measures.

In conclusion, the petition and cross-petition are both hereby determined with orders as follows:

1. The declaration that both parties herein, the Machakos County Government and the union, by failing to agree in the collective bargaining agreement or otherwise, or, by failing to prescribe minimum safety service measures in event of a strike by the union members, the parties have jointly and severally threatened and violated Articles 10, 21, 27, 28, 41 and 43 of the Constitution of Kenya, 2010 as against the hospital patients and other persons entitled to access the county government hospitals in issue.
2. The declaration that the strike flowing from the strike notice dated 24.09.2024 was unprotected under the Labour Relations Act and as found in this judgment for want of exhaustion of the agreed dispute settlement by consultation or negotiation, and failing, by reporting a dispute to the Cabinet Secretary for Labour under the Labour Relations Act 2007, as appropriate.
3. The permanent injunction hereby issued prohibiting the respondent union by itself, officials, members or its agents from interfering with the smooth running of health services at the County Government of Machakos through calling of prohibited strikes in view of the relevant provisions of the Labour Relations Act and as found by the Court in this judgment as relates to agreed or prescribed minimum safety services measures.
4. The declaration that any employee and member of the 1st respondent who took part in the impugned unprotected strike is nevertheless, in the circumstances of the case, entitled to such payment and emoluments and salaries and benefits during the said period of the impugned strike on account that the union has established that the grievances leading to the impugned strike notice and strike were valid and genuine and both parties were liable for the missing minimum safety services measures that ought to have been in place in event of such a strike.
5. The declaration that the cross - respondent (petitioner) are in breach of the union members' right to fair labour practices under Article 41 of the Constitution by unfairly refusing and failing to effect promotions and re-designations as provided for in Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May 2016.
6. The declaration that the cross-respondent (petitioner) is in breach of the union members' right to fair labour practices under Articles 41 and 43(1) (a) of the Constitution by failing to put in place an effective medical insurance scheme for the employees as also envisaged under section 34 of the Employment Act.



7. The declaration that the cross-respondent (petitioner) is in breach of the union members' right to fair labour practices under Article 41 of *the Constitution* by unfairly refusing and failing to effect new career guidelines for the members of the cross petitioner who are in their employment as provided for in Career Guidelines for Clinical Officers, approved by the Public Service Commission on 09.05.2024.
8. The declaration that the cross-respondent (petitioner) has defeated the union member's legitimate expectation and is therefore in breach of the said members' right to fair administrative action under Article 47 of *the Constitution* for failing to honour their undertakings in various agreements in respect of promotions and re-designations, medical insurance scheme and effecting new career guidelines.
9. The order of mandamus hereby issued compelling the cross-respondent (petitioner) to undertake promotions and re-designations of the members of the cross-petitioner union as provided for in the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, May 2016 and as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024.
10. The order of mandamus hereby issued compelling the cross-respondent (petitioner) to procure, effect and operationalise a satisfactory medical insurance scheme as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024.
11. The order of mandamus hereby issued compelling the cross-respondent (petitioner) to implement the new career guidelines for the members of the cross petitioner who are in their employment as provided for in career guidelines for clinical officers, approved by the Public Service Commission on 09.05.2024.
12. The declaration that the union and its members have a constitutional right to call for and proceed on strike, per Article 41 of *the Constitution* and relevant provisions of the *Labour Relations Act*, on account of the respondents' failure to meet their undertakings as agreed in the agreement between the county government of Machakos and health union officials dated 13.07.2023 and agreement between the county government of Machakos and health workers union officers dated 23.02.2024 and such other or other future agreements regarding the issues entailed in the agreements, but, subject to compliance with agreed or prescribed minimum safety services measures, in event of such a strike, and as found in this Judgment.
13. The directive that the parties shall agree, in the collective agreement (CBA) or otherwise, upon the minimum safety service measures or an institutional framework for determining such minimum safety services measures to be maintained by the union members in the event of a strike in that regard and to file in Court for appropriate adoption and recording by the 01.05.2025; and until such measures are agreed upon or prescribed, the union shall not call any strike in the intervening period.
14. In view of this judgment, the union members herein not being on duty because of the impugned strike to resume duty not later than 08.00 am on 20.12.2024 free from victimization or punishment because of the impugned strike and with full prevailing remuneration and benefits, as any such disciplinary process or punishment imposed in that respect is hereby set aside.



15. In view of the persistent strikes in the essential services like in the instant case and particularly in the public health services in Kenya, the parties will serve this judgment, within seven days, upon the Cabinet Secretary for Labour, The Cabinet Secretary for Health, the Honourable Attorney General, the Parliamentary Committee on Labour, the Central Organisation of Trade Unions (COTU-K), and the Federation of Kenya Employers(FKE) towards consideration of formulation of a robust policy and statutory interventions, through social dialogue and stakeholder participation, for governing strikes in essential services including but not limited to, provision for due compensation of workers in essential services for their restricted participation in strike; prompt disputes resolution by negotiation, conciliation and this Court; mechanisms for prompt implementation of agreements or decisions by the Court in that respect; and, the relevant institutional framework for determination of minimum safety service measures in the event of a strike in essential services, or prescription of such minimum safety measures.
16. The petitioner (cross respondent) and the respondent (cross-petitioner) to each bear own costs of the petition and the cross-petition.
17. The Deputy Registrar to cause return of the case file herein to the Machakos Sub-Registry forthwith, within two days.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER, 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

