



Ngira v Secretary Busia County Public Service Board & another (Employment and Labour Relations Cause 33 of 2017) [2023] KEELRC 1352 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1352 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 33 OF 2017**

**JW KELI, J
MAY 30, 2023**

BETWEEN

NANCY EDITH NGIRA CLAIMANT

AND

**SECRETARY BUSIA COUNTY PUBLIC SERVICE BOARD ... 1ST RESPONDENT
CHIEF OFFICER, MINISTRY OF ROADS AND PUBLIC WORKS BUSIA
COUNTY 2ND RESPONDENT**

JUDGMENT

1. The claimant vide amended statement of claim dated May 5, 2016 brought a suit against the respondent seeking for the following orders:-
 - a. The claimant claims Kshs.480,000/- being salary for 24 months not paid between September 20, 2014 and September 20, 2014 and September 20, 2016 with accrued interest.
 - b. Costs of the claim
 - c. Interest at court rates
 - d. Any other or further relief that this Honourable court may deem fit and just to grant.
2. The statement of claim was accompanied by verifying affidavit sworn by the claimant and amended statement of the claimant all dated May 5, 2022 and the plaintiff's amended list of documents and the bundle of documents all of even date.
3. The claim was opposed. The 1st respondent entered appearance and filed witness statement by Martin Sikolia dated March 9, 2022, respondents' list of witnesses and list of documents all of even date together with bundle documents.



4. The respondent filed reply to the amended memorandum of claim by amending their response on the June 30, 2022.

Hearing.

5. The Claimant's claim was first heard on the May 30, 2018 by Justice Nduma Nderi. On the May 25, 2022 years later when parties before me they indicated new advocates had come on record. The court considered the change of Advocates and time lapse and ordered for hearing denovo. The claimant applied to amend claim and leave was granted. All parties having complied the claimant's case was heard on October 13, 2022 with the claimant as only witness of fact.
6. The Defence case was heard on February 6, 2023 with DW as Martin Sikolia as witness of fact, the Acting Secretary of Busia County.

The Claimant Case

7. The claimant's case was per her pleadings being the amended memorandum of claim and amended witness statement all dated May 5, 2022 and documents under list dated May 5, 2022 and her oral testimony. In oral testimony in chief the Claimant adopted her witness statement dated May 5, 2022. In summary the claimant's evidence in chief as per witness statement adopted was that in month of August 2014 the Respondent advertised vacancies for post of Plant Operator on casual basis, on September 20, 2014 she was employed by the respondent as Plant Operator in department of Roads, Public Works, Transport, Energy and Disaster Management as a casual worker at monthly salary of Kshs. 20,000. On October 30, 2014 she was involved in accident while on duty and verbally suspended to await finalization of the traffic case. She was later acquitted. That while still on employment as casual, the position of plant operator was advertised and she got a recommendation letter on the June 10, 2015 to enable her apply for the position of plant operator. She was not successful. That she continued to be on suspension and filed instant case on December 14, 2016. That on suing the respondents the position was advertised later and she was issued with appointment letter on June 11, 2017. The claim was for unpaid salary for September 24, 2014 to September 20, 2016.

Respondents' Case

8. The 1st respondent as per amended response stated it was a stranger to the 2nd respondent. That the claimant was employed as a casual worker and all due paid and due process fairness and equity was observed. The 1st Respondent stated that the County Public Service Board had no clear picture of alleged suspension. The 1st respondent stated the claimant was an employee of the County Government in the year 2017 appointed as Plant Operator. That the claimant further gave it a resignation letter with effect from June 8, 2018 having been offered employment by Ministry of Transport in State Department of Infrastructure vide letter dated March 21, 2018. The Ministry requested for transfer of services on August 28, 2018 and the County Government offered the claimant her last pay certificate on October 4, 2018. The DW Martin Sikolia adopted his statement dated March 9, 2022 reiterated the record of claimant as employee from 2017 to October 4, 2018 and stated that they had no picture of alleged suspension.

Submission

9. After the hearing all parties filed written submission. The claimant's written submissions dated March 3, 2023 were drawn by Onyando & Co. Advocates. The respondents submissions dated March 3, 2023 were drawn by Rodgers Sekere, County Solicitor Busia County.



Decision

10. The court having heard the case, read the filed pleadings and submissions was of the considered opinion that issues placed before the court for determination were as follows:-
- a. Whether the claimant was a casual employee of the respondents.
 - b. Whether the claimant had proved her case on suspension.
 - c. Whether the claimant was entitled to reliefs sought.
 - d. Who bears costs of the suit.

Issue (1) whether the claimant was a casual employee of the respondents.

11. The claimant in her amended witness statement dated May 5, 2022 stated that the respondent advertised vacancies for post of plant operator on casual basis in August 2014. That on September 20, 2014, she was employed by the respondents as a plant operator in the department of Roads, Public works & Transport Energy and Disaster Management as a casual worker at a monthly salary of KShs.20,000. That on October 30, 2014 she was involved in an accident and the respondent verbally suspended her to await outcome of the traffic case (exhibit 7 was the traffic case record). That on June 10, 2015 the respondent granted her recommendation letter to enable her apply for the position of a plant operator (C-exhibit 3). On cross-examination by counsel for the 1st respondent the claimant relied on the recommendation letter and stated there was no employment letter. That she was on suspension on 2015 to 2017. She confirmed she had no letter of suspension. On re-examination the claimant stated the letter of recommendation was by Chief officer Busia County to help on application for job and stated she was in employment from September 20, 2014 to June 10, 2015.

Defence Case.

12. DW was Martin Sikolai who adopted his statement dated March 9, 2022 and denied the claimant was employed as casual and produced list of documents for defence under list dated March 9, 2022. DW stated as a casual the Board would have issued letter of appointment. DW noted the Claimant may have been a volunteer. That the recommendation letter intend was for the application of the job. On cross-examination DW stated he had not produced list of casuals. That the recommendation letter did not emanate from the Board which employs all staff of the County. DW stated he did not produce register of casuals as the same had not been requested for. DW stated they did not recommend claimant on her job to National Government. On re-examination, DW told the court the casuals have time frame and wages under letter of employment and the Claimant had none.

Decision

13. A casual is defined under the *Employment Act* to mean, ‘a person the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time’. The claimant submits that her evidence on employment as casual was not controverted being letter of recommendation dated June 10, 2015 and letter dated May 30, 2016 which she submits was evidence of having been in employment. Under section 107 of the *Evidence Act* the burden of prove lay with one who alleges as follows:- ‘107. Burden of proof. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.’”



14. Evidence of employer employee relationship is primal to any claim for employment. Parties are bound by their pleadings. The claimant in her amended witness statement of May 5, 2022 stated the position of casual Plant Operator was advertised in August 2014 without giving actual date, that she was employed on September 20, 2014 and suspended on October 30, 2014. The Claimant did not produce letter of employment or of the suspension. The claimant stated she was suspended to await conclusion of traffic case. She produced ruling in the Traffic Case No. 1005 of 2015 dated May 26, 2017 discharging her. The said pleadings did not mention anywhere she was in employment of the Respondents or the said motor vehicle belonged to the respondents or the County Government of Busia.
15. The claimant relied on letter dated May 30, 2016 by the respondent (1st). The court noted it referred to her letter dated February 5, 2016, (exhibit 1). In the letter of 5th February 2016, the claimant had complained of having not been confirmed following interviews. The court finds letter of May 30, 2016 did not disclose any existing employment relationship between the claimant and the respondents. On letter of June 10, 2015, the same was a recommendation letter by Chief officer of Public Workers, Roads Transport & Energy Disaster Management. It stated that the claimant had been a casual plant operator in the department from September 20, 2014 to date.
16. DW stated that the Board has mandate to employ all casuals and employees of the County and stated that the claimant in statement stated the recommendation letter was to help her get the job. DW relied on section 57 of the County Governments Act to state the Respondents were not the Board which has capacity to sue and be sued. That they do not have ministry but County Executive Committee hence the 2nd Respondent was a stranger to them. The Respondent submit that section 63 of the County Governments Act No. 17 of 2012 as read together with section 59 (b) of the Act vests power to make appointments in respect of officer in the County government to the County Public Service Board. That Section 74 of the Act bestows upon the Board mandate to regulate the engagement inter alia of persons on contract volunteer and casual workers.
17. That section 67 of the Act provides for mandatory contract to wit: ‘no appointment or assignment of duty in a County Public Service shall be valid unless it is evidenced in writing.’ The defence submits that if the claimant had been in casual employment as stated from September 20, 2014 to alleged suspension on October 30, 2014 which is denied she had not lasted beyond 40 days to warrant entitlement to payment of Kshs.480,000/-.
18. It is the opinion of the court that a casual worker without contract cannot be said to have been suspended from duty. The claimant states that her contract stood converted to employment having worked for more than one month. The court found the evidence relied on of letters of May 31, 2016 and June 10, 2015 were not prove of employment as casual.
19. The said letters contradict evidence of the claimant of having been suspended on October 30, 2014 and the ruling of traffic case in 2017. The court finds that the letter cannot bind the Board as prove of employment as section 59 (1) (b) bestows all appointment authority on the County Public Service Board. Section 67 of the County Government Act states:- “ No appointment or assignment of a duty in a County Public Service shall be valid unless it is evidenced in writing”. That is the law. The claimant did not provide evidence in writing of her employment which would be a contract. She did not provide prove of pay of the alleged salary of Kshs. 20,000/-. The court finds that the allegation of casual employment by the claimant was based on sinking sand. The burden of proof of employment had not been discharged. Further he who desires the court to make a certain finding must produce evidence to proof allegation. The burden never passed to the respondents who were not even the authorized employer.



20. Further the respondent produced the Application form for employment by the claimant dated 17th July 2017(D Exhibit 5). The application was for job of plant operator with Ministry of Public works, Roads, Transport and Energy. At clause 10 of the form was employment details. The claimant in the clause wrote N/A and stated had completed practical attachment as a plant operator in the Ministry from 3rd March 2014 to July 10, 2017. The court finds that this was conclusive admission by the claimant that she had not been an employee of the County.
21. The court then finds the claimant's case was based on false hoods and had no basis. There was no prove of employer employee relationship. The court finds no proof of employment by the Respondents and especially the Busia County Public Service Board, the claim is baseless and abuse of court process. The court finds no need to proceed on the other issues save for costs which are awarded to the Respondent.
22. The court noted the claimant earned a double salary between the period of employment by the National Government and her last salary by the Busia County. The same is recoverable and the Board ought to initiate the process with the Public Service Commission.
23. The claim as amended on May 5, 2022 is dismissed with costs to the 1st respondent.
24. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA ON THIS 30TH DAY OF MAY, 2023.

JEMIMAH KELI,

JUDGE

In the Presence of:

Court Assistant : Lucy Macheso

Claimant- Absent

Respondents- Absent

