



Onanda & 26 others v Board of Management Migori Teachers College (Cause 213 of 2018) [2023] KEELRC 1349 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1349 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 213 OF 2018**

**S RADIDO, J
MAY 30, 2023**

BETWEEN

JOHN OTIENO ONANDA 1ST CLAIMANT
AGNES MOMANYI 2ND CLAIMANT
AMBROSE KAUNKO 3RD CLAIMANT
CHRISTOPHER OGWALA 4TH CLAIMANT
ELIDA ODHIAMBO 5TH CLAIMANT
HEZEKIAH KITOTO 6TH CLAIMANT
JACK OCHOLA 7TH CLAIMANT
JAMES OJOWI 8TH CLAIMANT
JOSEPH NDEGE 9TH CLAIMANT
JOSEPHINE ORIGA 10TH CLAIMANT
MAURICE BABU 11TH CLAIMANT
SAMUEL DEBE 12TH CLAIMANT
SILVANUS OYUGI 13TH CLAIMANT
TOM OLENDU 14TH CLAIMANT
TOM OUKO 15TH CLAIMANT
VINCENT DIETTO 16TH CLAIMANT
JACINTER OMOLLO 17TH CLAIMANT
JULITA ALOYO 18TH CLAIMANT
JULIUS OBADO 19TH CLAIMANT



RICHARD NYAGONA	20TH CLAIMANT
BEATRICE OKODE	21ST CLAIMANT
HARRISON OWUOR	22ND CLAIMANT
HULDER OPERE	23RD CLAIMANT
JANE ODERO	24TH CLAIMANT
JENIFFER ARESI	25TH CLAIMANT
PENINA ADAWO	26TH CLAIMANT
KENNEDY NGAO	27TH CLAIMANT

AND

BOARD OF MANAGEMENT MIGORI TEACHERS COLLEGE .. RESPONDENT

JUDGMENT

1. The 27 Claimants sued the Board of Management, Migori Teachers College on 13 June 2018, alleging that the failure of the Board of Management, Migori Teachers College (the Respondent) to implement the terms of Circulars dated 10 December 2014 and 11 August 2015 from the Salaries and Remuneration Commission and a Circular dated 11 July 2017 by the Ministry of Public Service was in breach of their contracts.
2. The Respondent filed a Defence on 19 September 2018, and this prompted the Claimants to file a Reply to Defence on 7 November 2018.
3. The Cause was heard on 24 November 2022 and 19 December 2022. The 1st Claimant and the Secretary of the Respondent testified.
4. At the close of the hearing, the Court directed the Salaries and Remuneration Commission to give a report on whether the 2 Circulars it had released applied in the case of the Claimant.
5. The Salaries and Remuneration Commission filed a report with the Court on 23 February 2023. It was a most casual report given the significance of the Circulars to the terms and conditions of public officers employed across the country.
6. It is regrettable that the Salaries and Remuneration Commission did not see the impact of the Circulars.
7. The Claimants filed their submissions on 21 March 2023, and the Respondent on 13 April 2023.
8. The Claimants identified the Issues for adjudication as:
 - i. Whether the Claimants are public/civil servants?
 - ii. Whether the Claimants are employees of the Respondent under various classifications of job groups and cadres vide their letters of appointment?
 - iii. Whether the Claimants' employment was made permanent and pensionable and the same was confirmed vide letters of appointment from the Respondent?



- iv. Whether the Claimants to date have been receiving their salaries and allowances based on the Circulars dated 25th June 2012 for alignment of salary structure for civil servants?
 - v. Whether the Respondent is aware that the salaries and house allowance of the Claimants were issued vide Circulars from the Salaries and Remuneration Commission and the same was to take effect as from 1.7.2015?
 - vi. Whether the Claimants' contention that the effect of the Circular dated 10/12/2014 and the Circular dated 11th August 2015 from the Salaries and Remuneration Commission should have been implemented as claimed?
 - vii. Whether the Respondent despite being aware of the Circulars from the Salaries and Remuneration Commission has failed and or ignored to implement the same?
 - viii. Whether the Claimants are entitled to the reliefs sought?
 - ix. Whether the Respondent should bear the costs of the claim?
9. The Respondent on its part isolated 3 Issues for determination:
- i. Whether the Claimants are employees of the Respondents or public/civil servants?
 - ii. Whether the Claimants are entitled to the reliefs sought?
 - iii. Who is to bear the costs?

Public officers and/or Civil Servants?

Public Officers

10. Article 260 of the [Constitution](#) defines public office as:
- means an office in the national government, a county government, or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.
11. The same provision defines a public officer as:
- any person, other than a State Officer, who holds a public office.
12. The Respondent's witness admitted during cross-examination that it is a government institution and that it got some of its monies from government allocations as well as student fees.
13. The witness further conceded that the remuneration of the Claimants is paid from the government allocation in terms of subsidies as well as from the fee paid by the students.
14. The Court, therefore, has no difficulty in concluding that the Claimants are public officers.

Civil Servants

15. It is not in dispute that the Claimants were employed by the Respondent. Since the Respondent is a public body and they signed contracts with it, the Respondent remains the legal employer.
16. The Claimants herein were employed by the Respondent and not the Public Service Commission.



17. There was no evidence placed before the Court that the Respondent employed the Claimants under delegated authority as envisaged under the [Public Service Commission Act](#).
18. The Court will consequently endorse and apply the finding by the Court of Appeal in [Board of Management, Nyeri Primary School v Maina & 33 Ors](#) (2021) KECA 63 (KLR) that employees of Boards of Management of schools are not civil servants.

Permanent and Pensionable Terms

19. Some of the Claimants' appointment letters indicated that the contracts were subject to the agreement between the Ministry of Education and the Kenya Union of Domestic, Hotels, Educational Institutions & Allied Workers in 1985.
20. The Claimants did not produce a copy of the agreement.
21. The other Claimants were issued with appointment letters in 2003 and 2004. The appointment letters did not indicate the duration of the contracts.
22. The Court is, therefore, unable to declare that the Claimants were on permanent and Pensionable Terms of employment.
23. Issues (iv) to (vii) spoke to the question of whether the Circulars issued by the Salaries and Remuneration Commission and Ministry of Public Service applied to the Claimants.

Circulars dated 25 June 2012 and 11 July 2017 from the Ministry of Public Service

24. The Court has looked at Circulars Nos MSPS2/6/4A Vol. X/(2) dated 25 June 2012 and MPSYG.DPSM.2/6/4A Vol XI(3) dated 11 July 2017.
25. The first Circular was issued after a job evaluation conducted by the Salaries and Remuneration Commission and at paragraph 5, it indicated;

To whom applicable

5. The new salaries will apply to civil servants in the national government in job Groups 'A' to 'T' who will be in the service on or after
26. The second Circular indicated in the Reference part and in paragraph 2 that it applied to civil servants.
27. The Circulars relied on by the Claimants indicated on their bodies the cadre of public officers they applied to, civil servants.
28. Since the Court has found and applied the Court of Appeal decision in the Maina case that employees of Boards of Management of public schools are not civil servants, the logical conclusion on this issue is that the Circulars do not apply to the Claimants.

Circulars Dated 10 December 2014 and 11 August 2015 from the Salaries and Remuneration Commission

29. The Court has found that the Claimants are public officers.
30. Article 230(4)(b) of the [Constitution](#) has outlined one of the functions of the Salaries and Remuneration Commission as:



- (b) advise the national and county governments on the remuneration and benefits of all other public officers.
31. It is beyond question that the Respondent, an entity established under the *Basic Education Act* is under the supervision and guidance of the Ministry of Education which is part and parcel of the national government (education is not a devolved function).
32. The Salaries and Remuneration Commission has categorically but without reasons asserted that the Circulars in contention do not apply to employees of Boards of Management of public schools.
33. The effect of the assertion by the Salaries and Remuneration Commission is that the Commission has abdicated its Constitutional and statutory duty in advising on the Claimants remuneration as public officers.
34. It would, therefore, be remiss of the Court to impose upon the Commission or any other employer within the public sector advice on remuneration which the Court has been informed does not apply.
35. Before advising on the remuneration of public officers within any sector, the Salaries and Remuneration Commission undertakes extensive and participatory research and consultations. The Commission will require to undertake that public participation.
36. Instead of granting the orders sought by the Claimants, the most appropriate and efficacious remedy in the view of the Court would be to order the Salaries and Remuneration Commission to perform its function with respect to advising on the remuneration of the Claimants, and those in their situation.

Conclusion and Orders

37. Arising from the above the finds and declares:
- i. The Circulars dated 25 June 2012 and 11 July 2017 from the Ministry of Public Service, and 10 December 2014 and 11 August 2015 from the Salaries and Remuneration Commission do not apply to the Claimants.
 - ii. The Salaries and Remuneration Commission has abdicated its responsibility and function by failing to advise on the remuneration of the Claimants.
38. The Court orders:
- (i) The Salary and Remuneration Commission to advise the Respondent and other Boards of Management of public schools on the remuneration of employees of the Boards within a period of 9 months.
39. Each party to bear own costs considering the nature of the dispute which was placed before the Court, and the orders which have been granted.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 30TH DAY OF MAY 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimants Aoko, Ondieki & Co. Advocates

For Respondent Gabriel Fwaya Advocates



Court Assistant Chrispo Aura

