



Kenya Union of Clinical Officers & 76 others v County Government of Vihiga (Employment and Labour Relations Cause 32 of 2021) [2023] KEELRC 1343 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1343 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 32 OF 2021**

**JW KELI, J
MAY 26, 2023**

**BETWEEN
KENYA UNION OF CLINICAL OFFICERS & 76 OTHERS CLAIMANT
AND
COUNTY GOVERNMENT OF VIHIGA RESPONDENT**

JUDGMENT

1. The claimants vide amended statement of claim dated 8th December 2019 sought the following reliefs against the respondent:-
 - a. A declaration that the respondent has usurped powers of the County Public Service Board under section 59 of the *County Governments Act*.
 - b. An order that the respondent do pay the 2nd to 40th claimants their salaries for the period between May 2019 and 31st October 2019.
 - c. An order to quash/stay the purported letters of termination issued to 2nd to 40th claimants.
 - d.
 - i) An order to quash/stay purported letters of invitation to attend for verification of qualifications between 12th November 2019 and 14th November 2019
 - ii) A declaration that the purported verification exercise which took place between 12th and 14th November 2019 of the educational records of the 41st to 74th claimants and the interested 75th to 77th claimants is unconstitutional, null and void.



- e. A declaration that the Respondent has contravened the national value of adhering to the rule of law doctrine as mandated by Article 10 of *the constitution*.
 - f. A declaration that the respondent has contravened claimants' rights under Articles 29,30,36,37,40 and 41 of *the Constitution*.
 - g. Vindictory damages for contravention of the rights described in paragraph (f) above
 - h. A permanent injunction restraining the Respondent from breaching the contracts of employment made by it with the 2nd to 40th claimants.
 - i. Costs of this suit.
2. The claimant together with the memorandum of claim filed verifying affidavit and witness statement both of Hawkins Alingo of 11th November 2019 and bundle of documents dated 11th November and 9th December 2019 respectively, the claimants further filed witness statements on 24th February 2020 and on same day filed supplementary bundle of documents. On the 6th September 2022 the claimants filed a supplementary witness statement made by the 2nd claimant Walter Kisumba and a bundle of documents.
 3. The claim was opposed. The Respondent entered appearance through the its county attorney office and filed defence on the 30th September 2020 accompanied by a witness statement by Stella Orengo and a replying affidavit. Upon amendment of claim the defendants filed another defence dated 19th September 2022 and received in court on the 20th September 2022 together with list of documents and the bundle and respondent's witness statement of Caxton Aluende Musiega of even date.
 4. The claimant filed response to the defence on the 29th September 2022.
 5. The claimants submit that they rely on two sets of pleadings. The amended memorandum of claim dated 8th December 2019 and the reply to defence dated 29th September 2022.
 6. The Claimant's case was heard on the 3rd October 2022 and 7th November 2022 with 3 witnesses of fact being Hakins Alingo (CW1), Vonyoli Ibrahim(CW2) who adopted his statement dated 18th February 2019 as his evidence in chief and relied on filed documents and Walter Adoli Kisumba(CW3) who adopted his statement dated 12th February 2020 as his evidence in chief . CW1 produced bundle of documents for the claimants dated 11th November 2022 as C-exhibits 1-11, witness statements filed on the 24th February 2020 , lists of witnesses dated 28th April 2022 making 71 statements filed which he produced as bundle of claimants' evidence. CW1 relied on the amended claim and adopted the prayers therein. The witnesses testified on behalf of the other claimants (70 claimants inclusive of the union according to SC Dr. Kamau Kuria). The witnesses were cross-examined by the Counsel for the respondent Mr. Mukabi, the Vihiga County Solicitor.
 7. The defence case was listed to be heard on the 17th November 2022 but the virtual teams platform was not working on the said date. The defence case was then taken out to the 30th January 2023 with one witness of fact, Mr. Caxton Musiega , who adopted his witness statement dated 19th September 2022 as his evidence in chief. DW further produced bundle of documents under list of documents dated 19th September 2022 and was cross- examined by Counsel for the claimants Dr. Kamau Kuria SC.
 8. The parties filed written submissions after the closure of the defence case.
 9. The Claimants' written submissions drawn by Kamau Kuria & Company Advocates were dated 25th February 2023 and received in court on the 17th March 2023.



10. The Respondent's written submissions drawn by Tony Godia, County Legal Counsel – office of the Vihiga County Attorney were dated 28th March 2023 and received in court on the 29th March 2023.

Determination

Issues for determination

11. The claimants in their written submissions addressed the merit of their case and reliefs sought.
12. The respondent in its written submissions identified the following issues for determination: -
 - a. Whether the claimants are currently employees of the 1st respondent
 - b. Whether the claimant is entitled to reliefs sought
 - c. Who should pay costs
13. The court having considered the submissions by the parties and the having heard the case was of the considered opinion that the issues placed before the court for determination by the parties were as follows:-
 - a. Whether the claimants were employees of the respondent
 - b. Whether the claimants' rights were violated by the respondent and Whether the claimants were entitled to reliefs sought

Whether the claimants were employees of the respondent

14. The claimants admitted at the hearing and in their written witness statements that they were all working for the respondent. CW1 Hawkins Alingo was the chairman of the union Vihiga branch elected in 2021. On cross-examination CW1 told the court that that he was not an employee of the respondent but union officer of the 1st claimant and employed at Kericho County. CW1 during cross-examination told the court:- that its members in court were paid monthly salary, that none of the members in court had been dismissed from employment, that the advert was for 149 employees and after the process the numbers ballooned to 523 hence excess of 372 employees. CW1 confirmed that the county government had to re-adjust budget as the increased numbers were not budgeted for. CW1 confirmed that some of the claimants had received personal numbers and confirmed the process of issuance of personal numbers was centralised in Nairobi and was on going. CW1 in re-examination stated the claimants had been paid salary from September 2021 and not the arrears.
15. CW2 Vonyoli Ibrahim was a claimant and serving employee of the respondent. He told the court he had since been issued with his personal number 20190632555 and had arrears of salary of 22 months and had been receiving salary since September 2021. On cross examination CW2 confirmed arrears in 2021 was for 7 months not 9 months and 10 months arrears in 2020. CW2 confirmed that the county was processing personal numbers of all employees. On re-examination CW2 told the court the process of absorption in the establishment was ongoing. CW2 told the court he suffered as a result of the unpaid salaries for several months and could not obtain loans for lack of permanent employment letters.
16. CW3 was Walter Adoli Kisumba. He testified that he was employee of the respondent in service and had received 4 months salary in 2019 and no further payment until September 2021 when monthly salary was remitted to date. That he reported to work in June 2019. CW3 told the court he had been issued with personal number but no letter of confirmation into permanent and pensionable terms. CW3 agreed on cross examination that the county was still regularising the employment of the



claimants and others. CW3 confirmed he was posted and working and the environment was okay. CW3 told the court he suffered as a result of the unpaid salaries for several months and could not obtain loans for lack of permanent employment letters.

17. The evidence of the 3 claimants witnesses applied to all other claimants.
18. DW1 was Caxton Musiega who told the court he was the head of Human Resources Department of Health with the Respondent. DW1 confirmed there was an issue with recruitment of the claimants as the number exceeded the advertised and approved number from 149 to recruited 529 and excess number was not budgeted for. That the department vide county executive memo and after approval of the Controller of Budget placed the recruited persons on the wage bill and have been settling the arrears but paying monthly salaries. That the department had sent the list of the names of the officers to the Board for it to have the names confirmed into permanent and pensionable terms, the process of getting employment numbers was at 90% complete.
19. On cross examination DW1 confirmed that the letters of employment were to the effect that the claimants were to be confirmed to employment after 6 months but were yet to be issued with the confirmation letters. DW1 stated they awaited conclusion of the court case. DW1 confirmed salary in arrears was not paid. DW1 stated that in the cabinet memo arrears were to be paid. DW1 confirmed that the claimants continued working even with the salary arrears. DW1 told the court the termination letters were not effected. That there was adhoc report but the same was never implemented. On re-exam DW1 stated that the Board had indicated it was awaiting the court decision as the staff had not been exonerated. That the department continued to pay the arrears.

Issue a. Decision

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

b. Whether the claimants' rights were violated by the respondent and Whether the claimants were entitled to reliefs sought

22. The claimants under their witness statements state that the case was precipitated by the issuance of termination letters and /or verification letters pursuant to adhoc report of the county executive which found excess persons had been employed by the Board. The Vihiga County Public Service Board had advertised 149 staff of various cadre in the department of health and the board employed 529 hence overemployment. That this was discovered in July 2019 when in attempt to place the staff on payroll the discrepancies were discovered between the number of vacancies approved, budgeted and advertised for recruitment and actual number recruited. There was adhoc committee leading to the adhoc report that recommended verification of the employees employment and termination. That the county secretary issued termination letters. That there was a stay before the effective date of termination. The claimants confirmed through CW2 and CW3 that they were never dismissed and were working. The Claimants led evidence that they had unsettled salary arrears before September 2021 when they started receiving monthly salaries regularly and relied on their statements and filed schedule of salary arrears. They further confirmed majority of the claimants had received personal numbers. The claimants alleged that the salary delay caused them anguish and stress as they were unable to meet needs. That due to lack of confirmation to employment they were unable to access loans.



23. The respondent through DW1 relied on his replying affidavit and told the court that the arrears were caused by the over recruitment by the board outside budget and further they had to re-adjust budgets to cover arrears which could not be paid at once. That the respondent had placed all employees on payroll save for those who left and they were receiving monthly salaries. That the process of absorption to permanent status was ongoing under a centralised process in Nairobi and was 90% complete. CW1 union representative confirmed the foregoing position.

Claimants' Submissions

24. The claimants submit that the respondent usurped the role of the Board in purporting to issue the termination letters and verification invitations pursuant to the adhoc report. That it was only the County Public Service Board with power to recruit and remove persons from office under section 59 of the *County Governments Act*, 2012. That the defence to amended claim admitted prayers a to d and h and the same should be granted being :-
- a. A declaration that the respondent has usurped powers of the county public service board under section 59 of the County Government Act.
 - b. an order that the respondent do pay the 2nd to 40th claimants their salaries for the period between May 2019 and 31st October 2019
 - c. An order to quash/stay the purported letters of termination issued to 2nd to 40th claimants
 - d.
 - (i) An order to quash/stay purported letters of invitation to attend for verification of qualifications between 12th November 2019 and 14th November 2019
 - (ii) A declaration that the purported verification exercise which took place between 12th and 14th November 2019 of the educational records of the 41st to 74th claimants and the interested 75th to 7th claimants is unconstitutional, null and void.
 - h. A permanent injunction restraining the Respondent from breaching the contracts of employment made by it with the 2nd to 40th claimants. (The offer of employment and acceptance of Voyoli Ibrahim at pages 27 to 30 of claimants bundle filed in court on the 11th November 2019.)
25. The claimants submit that in the case of Walter Adoli Kisumba his employment was purportedly terminated by the executive committee through the letter at page 26 of the same bundle which was signed by the County Secretary of the Respondent. The claimant urged the court to enter judgment for the claimants and relied on the decision in Githunguri Dairy Farmers Cooperative Society Limited v County Council of Kiambu Where there were many cases and one served as test case and urged the court to follow the decision and rule 24 of the Employment and Labour Realisations Court (Procedure Rules)2016. The claimants relied on paragraphs 86 and 87 of the decision to wit:- '86. Accordingly I grant the following orders:
- a. a declaration that Local Government (Agricultural Produce Cess) Adoptive By-Laws Order, 2009 are ultra vires Sections 201 and 203 of the Local Government Act and are therefore null and void.



- b. a permanent injunction restraining the 1st Defendants by themselves, their servants or agents from enforcing the said by-laws.
 - c. a permanent injunction to restraining the 1st defendants by themselves, their servants or agents from claiming Kshs 7,654,500/= by virtue of the said by-laws.
 - d. Costs of the suit are awarded to the Plaintiff to be borne by the 1st Defendant.”
87. For avoidance of doubt this judgement will apply to Nairobi High Court Misc. Civil Applications Nos. 354 of 2010 – 363 of 2010.”
26. On the other prayers e, f, g and I the claimants submit that during cross-examination the respondent did not rebut the correctness of their following statements:-
- a. They were employees of the respondent
 - b. They were offered employment by it and accepted the same
 - c. The offers followed applications and interviews;
 - d. Both attended induction programs presided over by the Governor of the respondent
 - e. Walter was posted to Enzaro health center while Vonyoli was posted to Vihiga County Referral Hospital
 - f. That both performed their duties as clinical officers diligently
 - g. Both worked without any salaries between June 2019 and 20th January 2020 when they were paid salaries of 4 months only
 - h. That Walter at paragraphs 12 to 14 of his statement describes hardship for months worked without salary and in paragraph 17 stated the respondent promised to pay salary and this did not happen for many months.
 - i. That at page 57 paragraph 15 Vonyoli Ibrahim stated he received his first salary in January 2020.
 - j. That in paragraphs 16 and 17 Vonyoli describes his suffering for lack of salary being debts for unpaid rent for past 7 months, salary loan through cooperative bank which made his work difficult he often lacked fare to work and had no means of sustaining himself. That as a result he suffered psychological and emotional torture.
27. The claimants relied on the provisions of section 18 of the [Employment Act](#) to wit:- ‘18. When wages or salaries due
- 2. Subject to subsection (1), wages or salaries shall be deemed to be due— (b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;”
28. The claimants relied on the decision of *Marete v AG* 1987 KLR 690 on interpretation of Article 29 and 30 of [the Constitution](#) the successor of section 73 and 74 and further submitted that the summary on arrears (pages 3 to 5 of the claimant’s supplementary list of documents) indicated that the claimants had 20 to 24 salary arrears. The claimants submit that Justice Ocharo in Nairobi ELRC Cause No. 455 of 2015 *David Maina Gachanja v Hon. Esther Nyambura Gathogo & another* in paragraph 25 of judgment held as oppressive failure by employer to pay claimant for 5 months and submit in their case of no salary for 20 to 24 months the judge would pronounced the same as oppressive. The court stated:- ‘25. The court was urged to be persuaded by the decision in *Fredrick Odeke were -vs- West*



- Kenya Sugar Company Limited (2020) eKLR, where in awarding a 10 months' salary as compensation, the court considered that the employee's salary had been underpaid, an act it considered oppressive." The court finds this was submissions by parties and not holding of the judge.
29. The claimants submit that the act of salary non- payment was in violation of *the Constitution* article 41 on labour rights, article 28 on right to dignity with relation to alleged suffering for lack of salary, and article 40 on the right to property, and violation of national values under article 10 for failure to adhere to rule of law. The claimants submit that their case was on breach of contract and contravention of *the constitution* and relied on decision of the Supreme Court of Kenya in Gichuru v Package Insurance Brokers Ltd (2021)e KLR where the court held that in addition to getting damages for breach of contract of employment the employee was entitled to damages for breach of his rights at paragraph 90. The same reads:- '[90] In light of the foregoing, this court can invoke its inherent powers to ensure that justice should not only be done but should manifestly and undoubtedly be done to all litigants. In conclusion, we partially allow this Appeal to the extent that we reduce the award of damages for discrimination from Ksh 5,000,000/= to Kshs 2,000,000/= and reinstate the trial court's award of 12 months' salary for unfair dismissal. It is so ordered. F. ORDERS (a) The Petition of Appeal dated 2nd September 2019 partially succeeds. (b) The Judgment of the Court of Appeal dated 19th July 2019 is hereby set aside. (c) Judgment be and is hereby entered in the following terms; i. Damages for discrimination.....Kshs 2,000,000 ii. 12 months' salary in compensation...Kshs 2, 384,100 iii. 1 Months' salary in lieu of notice..... Kshs 198,675 iv. Salary for July 2014..kshs 198,675 TotalKshs 4,781,450 (d) Costs be awarded to the appellant. (d) The amounts awarded shall attract interest at court rates from the date of the trial court's judgment until payment in full."
 30. The claimants submit that they should be awarded Kshs. 10 million each on account of violation of their constitutional rights in addition to the salary arrears. That the claimants further relied on the 'discussion on award of damages for constitutional rights contravention" by Judge Michael De La Battidute , Developments in Judicial protection of Human Rights In commonwealth Caribbean (2010, Common Wealth Bulletin page 223.
 31. On costs the claimants submit that the respondent's failure to observe value of rule of law and human rights by purporting to terminate the employment of the claimants compelled them to engage counsel to obtain interim orders on 18th November 2019 and 11th December 2019 to protect their jobs and make applications to compel payment of salaries and that the defence was later disowned on 19th September 2022 . That costs are based on principle of indemnity as stated by constitutional court of South Africa in President of the Republic of South Africa and others v Gauteng Lions Rugby Union ad Luyt where the law was stated as follows:- 'In all taxations it is important to keep in mind that one overarching general principle applicable to all awards of party to party costs, a principle which applies to this court as it does to the SCA. The principle was put in the following terms by Innes CJ in Texas Co.(S.A) Ltd v Cape Town Municipality : Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or defend litigation."
 32. The claimants submits that their reliefs fall under section 12 of the Employment and Labour Relations Court , Article 23 of *the constitution* and section 49 of the *Employment Act* and to buttress that submission relied on paragraph 41 of Supreme court decision in Kenfreight Limited V Benson K. Nguti. The said paragraph 41 states:-' [41] Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under Section 49 of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1)(a) is different from an award under Section 49 (1)



(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4)(m).”

Respondent’s submissions

33. The Respondent submits that the claimants’ cause of action was based on purported of termination letters and the same were produced and relied on. That the respondent rebutted this by stating that the purported letters of termination were issued in reference to the adhoc committee decision that had recommended their termination however, none of them was terminated as the report was never implemented. The respondent submits that the order to quash the purported letters of termination issues to the 2nd to 40 the claimants and an order to quash or stay the purported letters invitation to attend for verification of qualification between 12th November 2019 and 14th November 2019 is already overtaken by events as the same is based on an adhoc report that has never been implemented to date. That claim of attempted breach of contract is an afterthought and an abuse of court process and claim for breach of contract fails.
34. On the issue whether the claimants established violation of their constitutional rights the respondent contends that the claim did not rise any constitutional issues as the claimants have not demonstrated how their fundamental rights have been violated by the respondents. That it is trite law that constitutional violations must be pleaded with clarity and must with reasonable precision cite the constitutional provisions said to have been violated and the same must be proved. That no evidence was placed before the court to prove torture, slavery or unfair labour practices. To buttress the submission the respondent relied on the decision in Leonard Otieno v Airtel Kenya Limited (2018) where Mativo J held that:-⁴ 65. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”
36. On costs the respondent submits that the claim having failed costs follow the event and the claimants ought to meet costs of the claim

Issue b. Decision

35. The basis of the claimants’ case can be summarised as per CW3 Walter Adoli supplementary affidavit dated 6th September 2022 in paragraph 16 and 17 as follows:- ‘16. It was following the purported approval of the report of the adhoc committee that letters of either termination of employment or invitation to appear for verification of documents were issued to the claimants. The recommendation was that I submit myself for verification of my documents. 17. In purporting to interfere with my terms of service, the respondent has usurped the powers of the County Public Service Board. It was partly because of that usurpation of powers of the County Public Service Board by the respondent and other wrongs set out in the memorandum of claim that I and other claimants filed this suit.’ The affidavit supports similar averments in the amended claim dated 8th September 2019.
36. It was the defence case that the adhoc report was never implemented as the cabinet made a decision to include the 2019 staff (part of claimants) verified to be 320 on the county payroll establishment(D-EXHIBIT 2).



37. The claimants' case was hinged on the termination letters by the acting County Secretary. The notice of termination of service of Ibrahim Vonyoli(CW2) dated 30th October 2019 was by Phillip Agiva acting County Secretary and head of public service of the respondent. The letter referred to the Adhoc Committee report which found he had not met the condition for valid employment and gave 1 month notice to terminate his contract. (see page 24 of the claimants' bundle filed on 10th December 2019). Similar letter was issued to CW3 Walter Adoli (page 94 of same bundle). The defence led evidence that the adhoc report was never implemented and none of the claimants had been dismissed.
38. The court noted that on the 11th December 2019 Justice Nduma issued order of status quo and ordered the claimants to continue in work and be paid salaries.
39. The court finds that indeed the termination letters were not effected as there was no evidence of dismissal though the letters were issued. Perhaps this was because of the interim order of the court stated above. There was evidence some verification was done but CW3 stated he did not attend the verification though invited.
40. The question then to be answered by the court was whether the respondent's action of constitution of the adhoc committee to verify the recruitment was illegal. It was not in dispute that there was over recruitment from advertised number of 149 to 529 officers of various cadre in the county department of health. CW2 had no evidence and did not produce the same in court that he applied for the job. He admitted 20 positions were advertised for his position and 74 persons were employed. CW3 told the court he had not produced evidence of application for the job he was employed to and had stated in his statement there was irregularities in the impugned recruitment. Following the adhoc report the acting County Secretary issued notice of termination letters to CW2 and CW3 stating they had not met criteria of valid employment. The court issued interim orders injunctioning the said letters. The court finds that the termination was never effected against the claimants. The claimants submit in issuance of the purported termination letters the County Secretary usurped the role of the County Public Service Board. Section 59 of the [County Governments Act](#) provides for the role and powers of the County Public Service Boards as follows:- '59. Functions and powers of a County Public Service Board (1) The functions of the County Public Service Board shall be, on behalf of the county government, to— (a) establish and abolish offices in the county public service;
- (b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments; (c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part; (d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board; (e) promote in the county public service the values and principles referred to in Articles 10 and 232; (f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service; (g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties; (h) advise the county government on human resource management and development; (i) advise county government on implementation and monitoring of the national performance management system in counties; (j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employee.' The court holds that the County Public Service Board is vested with exclusive mandate to employ and remove employees of the county public offices under section 59 above.



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

Award on reliefs sought

46. The court holds that the Respondent in issuance of notice of termination of employment of the claimants usurped the powers of the County Public Service Board under section 59 of the *County Governments Act* and the said letters are of no legal import. The notice of termination are overtaken by events and are a declared nullity.
47. The court found no illegality in the verification process which it found was justified by admitted facts of over recruitment by the County Public Service Board contrary to the user department requirements and advertised vacancies in contravention of the provisions of article 10(2)(c) of *the Constitution* to wit:- '(c) good governance, integrity, transparency and accountability;” The court declines to quash the purported letters of invitation to attend the verification of qualifications. The court further holds the process is overtaken by events that court having held the claimants after 6 months of service were deemed to be permanent employees.
48. The Court finds that order of permanent injunction is futuristic and unjustified and that the claimants are always free to approach the court in event of breach of their contracts. The order is declined.



49. On the declaration on rule of law the court finds that the same is captured under order 1 on usurpation of powers of the Board under section 59 [County Governments Act](#).
50. On the contravention of constitutional rights under articles 29,30,36,37,40,41 of [the constitution](#) , the court was not satisfied the claim was proved to be elevated to constitutional claim. The claim was based on purported notice of termination which was never effected and further on salary arrears. The court was convinced the respondent had legitimate reason to form the adhoc committee and that there was prove of over recruitment which affected the budget. The claimants were not blameless as they failed to prove they applied for the jobs and further there was prove the Board recruited way beyond the advertised positions. The court took judicial notice that the respondent is financed by exchequer pursuant to approved budget hence the salary arrears which the respondent stated it was committed to pay was not unreasonable. The court looked into the authorities cited by the claimants and they all related to actual termination of employment or suspension. In Marete case(supra) there was suspension of more than 2 years without salary which the court found oppressive, The court looked into decision in David Maina Gachanja v Hon. Esther Nyambura Gathogo & another and found despite there being salary arrears of 5 months no constitutional compensation was awarded outside salary arrears due. The court found that the claim for compensation for 10 Million was not justified. The authority relied on related to claim for discrimination in Benson Nguti case(supra). There was no prove of any discrimination in the instant case. The court finds and holds the claim did not merit elevation to constitutional claim. The court upholds the holding of Mativo J in Leonard Otieno v Airtel Kenya Limited (2018) where he held that:-⁶⁵ It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize [the constitution](#) and inevitably result in ill considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.” The court finds that an award of salary arrears with interest was adequate compensation in the claim.
51. On salary arrears the court agrees that the claimants having worked in the unpaid periods are entitled to their full salary. The court found discrepancies between the pleadings and oral testimony of CW2 and CW3 on the salary arrears. CW2 during cross examination confirmed he had arrears of 7 months in 2021 and not 9 months as pleaded. In total the court found he had 3 months arrears of 2019, 10 months in 2020 and 7 months in 2021 making 20 months arrears contrary to 22 months under the schedule of arrears. CW3 stated he had arrears since October to August 2021 having received salary in September 2021 which could make 23 months and not the 24 months stated in the salary schedule.
52. The court holds that the claimants are entitled to unpaid salary for work done as provided for under section 18 of the [Employment Act](#). The court having found discrepancies between oral testimonies of CW2 and CW3 on salary arrears orders the parties to within 21 days reconcile outstanding salary arrears for the claimants and file in court consent on payable salary arrears to each employee.
53. On costs the court having found the claim was based on an illegal and null termination notice and salary arrears not paid the court finds that the claimants are entitled to reasonable costs to indemnify costs in the case as held in constitutional court of South Africa in President of the Republic of South Africa and others v Gauteng Lions Rugby Union ad Luyt where the law was stated as follows:- ‘In all taxations it is important to keep in mind that one overarching general principle applicable to all awards of party to party costs, a principle which applies to this court as it does to the SCA. The principle was put in the following terms by Innes CJ in Texas Co.(S.A) Ltd v Cape Town Municipality : Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put



through having been unjustly compelled either to initiate or defend litigation.” The court awards costs of the suit to the claimants to be paid by the respondent.

54. Interest is awarded from date of judgment until payment in full.
55. Mention on the 21st June 2023 to adopt agreement on the payable salary arrears in the suit.
56. It is so ordered,

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT THIS 26TH MAY, 2023.

JEMIMAH KELI,

JUDGE.

In the presence of

Court Assistant : Macheso

For Claimants Dr. Kamau Kuria SC

For Respondents – Mr. Mukabi

