



**Bett & 27 others v County Government of Uasin Gishu & 2 others (Petition 20 of 2020) [2023] KEELRC 1527 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1527 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
PETITION 20 OF 2020  
MA ONYANGO, J  
JUNE 15, 2023**

**BETWEEN**

**JOEL CHERUIYOT BETT & 27 OTHERS ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF UASIN GISHU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, UASIN GISHU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**UASIN GISHU COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners filed the instant petition alleging violation of Articles 22(2)(c), 41 and 258(2)(c) of the Constitution. The Petitioners also invoked Section 37 of the Employment Act, 2007 seeking orders against the Respondents jointly and severally as follows:
  - a. That a declaration that the Respondents violated the Petitioners fundamental rights and freedom enshrined in the bill of rights of the Constitution 2010.
  - b. That a declaration that the Respondents are bound to recognize the Petitioners as permanent employees having worked for the Respondents for over 6 years.
  - c. A declaration that the seasonal contract of employment is null and void.
  - d. Orders restraining the Respondents either by themselves, employees, servants or agents from terminating the employment of the petitioners herein purported as seasonal employees as the termination would be unlawful and irreparable harm will be caused to the Petitioners and interference with the rights under Article 41(1) and (2) of the Constitution.
  - e. Orders restraining and prohibiting the Respondents from dismissing and terminating the Petitioners from the Respondents employment.



- f. Orders restraining and prohibiting the Respondent from employing replacement labour or employees in the same position to perform the same or similar work as the Petitioners herein.
  - g. Order to convert the terms and conditions of service of the Petitioners herein purported to be seasonal employees in the service of the Respondents to Respondents employees on terms and conditions of service consistent with the *Employment Act*, 2007.
  - h. Order the Respondents to allow the Petitioners proceed to join a trade union of their choice with immediate effect.
  - i. Order compelling the Respondents to pay and/or award each Petitioner their lawful dues as pleaded at Paragraph 33 of the Petition hereto.
  - j. The Respondent to pay the cost of the Petition
  - k. Any other further and better orders as this court may deem just and fit to grant.
2. The Petition was supported by the affidavit of John Kirugu Wachira, the 2<sup>nd</sup> Petitioner herein.
  3. The Respondents despite entering appearance and participating in the interlocutory applications, did not file a response to the Petition.
  4. As directed by the court on May 31, 2021, the Petition was disposed of by way of written submissions.

#### **The Petitioners Case**

5. The Petitioners have averred that they were employed by the Respondents as general labourers in the capacity of cleaners, record keepers, clerks, maintenance officers, store keepers, cooks, revenue officers and groundsmen with effect from January 2014 earning a salary of Kshs 6,000 which figure they alleged to be very low.
6. They further aver that they have been serving the Respondents with loyalty, diligence and with full dedication but that they have been working for the respondents continuously without any off days, paid leave and/or sick off.
7. That they have performed their duties for a long time and on permanent basis since their initial engagement with the Respondents who have persisted in terming them as casual employees and have never issued them with written terms and conditions of service as required by Section 10 of the *Employment Act*.
8. It was further averred that though the Respondents have continuously made statutory deductions of NHIF, NSSF and PAYE on their behalf, the same has never been itemized and neither have they been issued with a statement of the same for the period the petitioners have worked for the Respondents.
9. According to the Petitioners, the Respondents have on numerous occasions forced them to sign individual contracts on threats that they would not be included in the Respondents payroll if they did not sign. That they have been signing under strict instructions not to photocopy or take photographs of the same which the Petitioners complied with for fear of losing their jobs.
10. That they have on numerous occasions sought audience with the Respondents to discuss the issues affecting them but to no avail.
11. It is the Petitioners case that the Respondents failure to confirm their services is unfair because the Respondents are not acting in accordance with justice and equity and that the Respondents are in violation of Section 37 of the *Employment Act* and Article 41 of the *Constitution*.



12. The Petitioners further aver that the consolidated minimum wage for general labourers for the year 2017 (basic pay of Kshs 11,926 plus 15% house allowance) which is applicable to the petitioners is Kshs 13,714.9 and has never been paid to the Petitioners.

### Submissions

13. In their submissions filed in court on April 20, 2023, Counsel for the Petitioners identified the issues for determination to be;
- i. What is the nature of the employment relationship between the Petitioners and the Respondents
  - ii. Whether the Respondents breached any of the Petitioners constitutional rights
  - iii. What are the consequences of the Respondents failing to file response to the instant petition
  - iv. Whether the Petitioners are entitled to the remedies they sought.
14. On the first issue, the Petitioners submitted that they are permanent employees and not casual employees because they have worked for over 6 years and were being paid a monthly salary. It was submitted that their employment converted to contractual by dint of Section 37 of the Employment Act.
15. According to the Petitioners, one cannot be held as a casual worker for over 3 months especially if one is doing the same job on a continuous basis. To buttress this position, Counsel cited the cases in Civil Appeal No 20 of 2017; Nanyuki Water and Sewerage Company Limited vs Benson Mwiti Ntiritu & 4 others (2018), Rashid Odhiambo Allogoh & 245 others VS Haco Industries Limited (2015) Eklr, Silas Mutwiri Vs Haggai Multi-Cargo Handling Services Limited (2013) Eklr and Chemilil Sugar Company Vs Ebrahim Ochieng Otuon & 2 others (2015) eklr.
16. The Petitioners further submit that the law envisages that an employer is duty bound to issue an employee with an appointment letter detailing the nature of the relationship as envisaged under Section 9 of the Employment Act. It was submitted that the Respondents failed to issue the Petitioners with contracts of employment and held them as casuels since 2014 to date as they performed the same tasks, which flouts the law.
17. It was submitted that the Respondents have infringed the Constitutional rights of the Petitioners, and in particular Articles 3, 10, 20, 22, 23, 27, 28, 30, 36, 38 and 47 of the Constitution.
18. The Petitioners submit that the Respondents having failed to file response to the instant petition, the same is unopposed. The court was thus urged to find that the Respondents submissions are not evidence by dint of Section 107 of the Evidence Act. It was submitted that the failure to file a response to the instant petition by the Respondents meant that the petition remains uncontroverted and therefore unchallenged.
19. The Petitioners urged the court to find and award the Petitioners the prayers sought in the petition together with costs.
20. The Respondents despite not filing a response to this petition filed their submissions on April 17, 2023
- i. Whether to dismiss the petition;
  - ii. Whether to grant the conversion of services from casual to regular staff.



21. On the first issue, counsel for the Respondents submitted that the petition is misconceived as the petitioners knowingly entered into an agreement with the respondents to be engaged on casual basis with full understanding of the terms they now seek to change to the detriment of the Respondents.
22. According to the Respondents, they have discretion to employ the petitioners on terms provided for by the law as per plans and budgetary allocations. That the county government was within its mandate to engage the Petitioners as casual employees in the Department of Health Services according to personnel and budgetary needs of the County Government.
23. On the second issue, counsel for the Respondents submitted that the Petitioners are casuals and not regular staff as claimed. Respondents cited and relied on the *Indian Case of Vice-chairman & Managing Director v R Varaprased & Others* (2003) LLR 707 SC where it was held that it is not for the courts to rewrite the terms of contract between parties.
24. The court was urged to dismiss this petition.

### **Determination**

25. Having considered the Petition and the submissions on record, the issues that fall for determination by this court are:
  - a) What is the nature of the Petitioners employment?
  - b) Whether the remedies sought by the Petitioners lie in law?
26. From the pleadings on record and the submissions of the parties, it is not in dispute that as of now, the Petitioners are working for the Respondents as casual employees.
27. It is also common ground that the Petitioners have served the Respondents in different capacities for a period of over 6 years and that they are paid salary on monthly basis.
28. In their submissions the Respondents aver that the Petitioners committed to the said terms by accepting the terms at the time of their engagement.
29. The *Employment Act* defines a casual employee under Section 2 as an individual whose engagement provide 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.
30. Section 37 of the *Employment Act* further provides for conversion of casual employment to regular contracts as follows:
  - (1) Notwithstanding any provisions of this Act, where a casual employee
    - (a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or
    - (b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.
  - (2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period



and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.

- (3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.
  - (4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.
  - (5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.
31. The import of Section 37 of the *Employment Act* is that the court is empowered to convert the contract of service of an employee engaged on casual basis to regular term contract.
  32. The Petitioners having worked for the Respondents for a period of over 6 years, are no longer casual employees. Their engagement automatically converted from casual engagement to term contracts by operation of the law.
  33. In the case of *Krystalline Salt Limited v Kwekwe Mwakele & 67 others* [2017] eKLR the Court of Appeal pronounced itself on a similar issue and observed as follows;

“Under section 37 of the *Employment Act*, this court has the power to vary the terms and conditions of service of workers and declare that employees are employed on terms and conditions consistent with the said Act. In this case, the claimants worked continuously for days, which in the aggregate was more than a month and as such under Section 37(1)(a) they had become protected by Section 35(1)(c) from arbitrary dismissal. Under Section 31(1)(c) an employee cannot be terminated without prior written notice of 28 days. In this case therefore, the respondent was barred from terminating the claimants employment without a prior written notice of 28 days....”
  34. Similarly, in the case cited by the Petitioners of Nanyuki Water & Sewage Company Limited vs Benson Mwiti Ntiritu & 4 others [2018] eKLR the court observed;

“Section 37 of the *Employment Act*, 2007 applies to the employment of the respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which section 35 (1) (c) of the Act applies. The respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.”
  35. As correctly observed by the Respondents, in the *Indian Case of Vice-chairman & Managing Director v R Varaprased & Others* (2003) LLR 707 SC it was held that it is not for the courts to rewrite the terms of contract between parties. However, the Respondent failed to point out that a contract whose terms are in contravention of the law is illegal. An illegal contract cannot be enforced by the court and neither are its terms binding on the parties. Such a contract is void.



36. Flowing from the above, the Petitioners herein, having worked continuously for over 6 years for the Respondents, are regular employees as their contracts were converted by operation of the law to regular contracts upon the lapse of 3 months from the date of engagement by the Respondents.
37. This court therefore makes a finding that by dint of Section 37 of the *Employment Act*, the Petitioners are regular employees entitled to the safeguards available to an employee on a regular contract of employment which safeguards include, protection from unfair termination, benefits such as leave and overtime.
38. Consequently, the court makes the following orders;
- a) A declaration be and is hereby issued that the Petitioners employment with the Respondent is not casual but converted to regular employment by operation of the law with the rights and benefits under the *Employment Act*, 2007;
  - b) The Respondents are hereby directed to issue to the Petitioners contracts of employment with terms and conditions similar to those issued to other employees in similar positions within the next 30 days;
  - c) The Respondents shall bear the petitioners' costs of this Petition.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF JUNE, 2023**

**MAUREEN ONYANGO**

**JUDGE**

