



**Njue & 2 others v County Service Board Kirinyaga & another  
(Employment and Labour Relations Petition E003, E004 & E005 of 2020  
(Consolidated)) [2023] KEELRC 1638 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1638 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS PETITION  
E003, E004 & E005 OF 2020 (CONSOLIDATED)**

**ON MAKAU, J**

**JULY 7, 2023**

**BETWEEN**

**CAROLYNE WAMBUI NJUE ..... 1<sup>ST</sup> PETITIONER**

**ESTHER WANJIKU MUCHIRI ..... 2<sup>ND</sup> PETITIONER**

**PATRICIA WAIRIMU MUNENE ..... 3<sup>RD</sup> PETITIONER**

**AND**

**COUNTY SERVICE BOARD KIRINYAGA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIRINYAGA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners herein filed separate petitions but on 23<sup>rd</sup> March 2022, the suits were consolidated. By the said petitions, the petitioners alleged that their constitutional rights were violated by the respondents when they were unlawfully demoted from their position as Medical Social Worker Job Group G. Therefore they seek the following reliefs:
  - i. A declaration that under the respondent's decision as contained in the 2<sup>nd</sup> respondent's letter to the petitioner dated 28.03.2019 to re-designate the petitioner from the position of medical social worker Job Group G to support staff supervisor Job Group E and to recover medical allowances paid to the petitioner is unconstitutional, in breach of the petitioner's fundamental rights and freedoms as enshrined under articles 28, 30, 40, 41, 47 and 50 of *the Constitution* and therefore null and void.
  - ii. A conservatory order be issued restraining the respondents from effecting or implementing the recommendations contained in the letter to the petitioner dated 28.3.2019 and to return



the petitioner to her job Group G and designation as medical social worker as per her letter of appointment dated 26.8.2014 without loss of benefit, salary or allowance.

- iii. An order that the respondents refund to the petitioner all monies deducted from her salary in full plus interest.
  - iv. An order that the respondents jointly and severally pay to the petitioner all salary underpayments from 28.3.2019 at the rate of Kshs.48,240.00 per month until full payment with interest at court rates.
  - v. An order of compensation/damages plus interest.
  - vi. Costs plus interest.
  - vii. Such other order (s) as this Honourable court shall deem just.
2. The facts of the case are that all the three petitioners were employed by the respondents in 2014 as Medical Health Social Workers on Permanent and pensionable terms. Their terms of service were set out in their appointment letters as;
- Kshs.16,692 x 835-Kshs.17,527 x 876- Kshs.19,323 x 966- Kshs.20,289 x 1,015 – Kshs.21,304 p.m. House allowance Kshs.3,000p.m, Commuter allowance Kshs.4,000p.m, Extraneous allowance Kshs.15,000p.m, Risk allowance Kshs.3,000p.m. With an entry point of Kshs.16,692.
3. The petitioners served well and the respondent paid their due salaries and allowance which stood at Kshs.73,810.00 as at 1<sup>st</sup> October 2018. However, without any prior notice, warning or consultation, the respondents changed the petitioners' designation from Medical Social Worker Job Group G to Supervisor Support Staff Job Group E. The said change was effective from 28<sup>th</sup> March 2019 and drastically reduced the petitioners' salary to Kshs.25,570.00 per month. The respondents further, allegedly began to deduct the salary to recover medical allowances which had been paid to them since the start of their employment.
4. It is the petitioners' case that the said decision by the respondents was reached without giving them the right of being heard, or consultations. Its further petitioners' case that the alleged re-designation was a demotion in violation of the *Employment Act*, *Labour Institutions Act*, County Government Act and the Fair Administrative Actions Act. Further the decision violated the petitioners' constitutional rights to fair administrative action, right to property, and right to dignity, freedom from servitude and forced labour.
5. The respondents admit that they employed the petitioners as medical social workers in Job Group G on permanent and pensionable terms which post did not attract Health Service Allowance. During a meeting held on 22<sup>nd</sup> January 2019, the 1<sup>st</sup> respondent noted anomalies in the Payroll designation of certain staff members including the petitioners. Although the petitioners had been appointed as Medical Social Workers, the payroll had erroneously designated them as Public health Assistant which post attracts health services allowance.
6. It is further respondent's case that further review of the petitioners' documents revealed that they did not even meet the minimum qualifications for the post of Medical social work, that is Mean Grade C (plain) in KCSE or its equivalent, and Diploma in Social Work, Sociology, Psychology, Anthropology and or mental health or its equivalent. It was discovered that they had scored below the KCSE qualifications and their Diplomas did not come from a recognized institution.



7. It is further respondents defence that the 1<sup>st</sup> respondent rectified the said error by serving the petitioners with re-designation letters redeploying them to the positions of Support Staff Supervisor Job Group E under the medical field where they qualified to serve. Therefore the respondents prayed for the petitions to be dismissed with costs because the petitioners were not qualified for the job they were appointed to do, and that they were drawing Kshs.20,000.00 medical allowance without any basis in their appointment letters.

### **Submissions**

8. It was submitted for the petitioner that the respondents breached Article 28, 30, 41, 47 and 50 of *the Constitution*. That the petitioners being parents with children were demoted unfairly and denied livelihood through unlawful deduction of their salaries. As such they were subjected inhuman and undignified treatment. They have further been subjected to salary and servitude by working for no pay due to the said illegal deductions which make them receive negative pay at the end of the month.
9. It was further submitted that the respondents have violated the petitioners' right to property by deducting their salary for lawful cause and leaving them with nil pay. Reference was made to the bundle of pay slips filed as exhibits.
10. It was submitted that the respondents have violated petitioners' right to fair labour practices especially the right to fair remuneration and reasonable working conditions. Further the re-designation, demotion and recovering of allowances paid to the petitioners, unilaterally is unlawful and amounts to unfair labour practices. It is also a violation of the right to fair administrative action as enshrined under Section 47 of *the Constitution* and amplified under section 4 of the *Fair Administrative Action Act*. He was also denied right to hearing.
11. It was submitted that the alleged re-designation was a demotion in disguise because it went against the spirit of Section 2 of the County Government Act which defines re-designation as conferment of a County Public Office at equal grade to the one previously held in an horizontal mobility. Further section 69 of the County Government Act re-designation shall not be done if the officer has not consented and it shall not result in reduction of remuneration.
12. It was argued that the respondents have breached section 2 and 69 of the County Government Act by purporting to re-designate the petitioners without their consent and by reducing their remunerations. Further, they have breached section 19(3) of the *Employment Act* by deducting the petitioners' salaries beyond the two-thirds (2/3) maximum limit allowed by the law, and proceeding to pay them nil.
13. In view of the foregoing, it was urged that the petitioners are entitled to the reliefs sought including damages of Kshs.1,500,000.00 for violation of their constitution. Reliance was placed on the case of Benedict Mtoto Mwabili v County Public Service Board Taita Tavet County (2018) eKLR and James Ang'awa Atanda & 10 others v Judicial Service Commission (2017) eKLR where the court canvassed damages for breach of employees' constitutional rights to fair labour practices.
14. The respondents on the other hand submitted that it was within the 1<sup>st</sup> respondents' powers under section 75 of the County Government Act to investigate the process through which the petitioners were designated to a wrong job group in payroll and take the necessary corrective measures. That the petitioners were placed in the wrong payroll designation which gave them unfair enrichment. It was denied that unlawful deductions were being made from the petitioners' remuneration and the court was urged to note that the payment done during the wrong designation was not recovered on humanitarian grounds.



15. It was contended that the petitioner were treated humanely and with dignity contrary to their allegations. Further the petitioners have not proved the alleged unlawful deductions from their salary as all what was deducted was pension, Insurance, PAYE, NHIF and loans which were all lawful deductions.
16. As regards the re-designation of the petitioners, it was submitted that the same was due to an anomaly in the 1<sup>st</sup> respondent's pay roll, the revised scheme of 2009 and the law. That, under section 75 of the County Government, the 1<sup>st</sup> respondent was entitled to take corrective steps towards rectification of the same. Further section 65 of the Act empowers the 1<sup>st</sup> respondent to consider academic qualifications and experience of an employee before re-designation. That the said function is administrative and policy, and not disciplinary function that requires the rigors of a fair administrative procedure.
17. It was argued that in the exercise of the power to re-designate, there is no strict requirement in law that offices be given fair hearing or trial as this would only apply if the affected officers were being disciplined. To that extent, it was submitted that formal communication on re-designation such as was done in this case was sufficient.
18. Referring to section 2 of the County Government Act, it was submitted that due to lack of academic qualifications, there was substantially no equal position to confer upon the petitioners. Further the position she was unfairly gaining from was not the one she was employed under her contract of employment.
19. Further the petitioners lacked the requirements for the position of medical social worker and therefore they were re-designated to Support Staff Supervisor which they held qualification under section 69(2) of the County Government Act. Therefore it was submitted that the alleged infringement of rights was not proved as the alleged underpayment was the allowance erroneously paid to the petitioners' before the same was rectified by the re-designation and recovery waived. As such the court was urged to dismiss the petition with costs.

### **Analysis**

20. The issues for determination are:-
  - a. Whether the re-designation of the petitioners from the position of Medical Social Workers Job Group G to Support Staff Supervisor Job Group E was unlawful.
  - b. Whether the said re-designation amounted to breach of the petitioners' constitutional right to humane and dignified treatment, right to property, right to fair labour practices, right to fair administrative action, and right to hearing as envisioned under Article 28, 30, 40, 41, 47 and 50 of *the Constitution*.
  - c. Whether the reliefs sought are merited.

### **Re-designation**

21. The 1<sup>st</sup> respondent contends that it is entitled to designate County Public Officers. The petitioners on the other hand maintains that the re-designation was unlawful and amounted to a demotion. Re-designation is defined in Section 2 of the County Government Act as follows:

“The conferment upon a person, of a County Public Office at a grade equal to the one previously held by that person and whose major consequence is to change from one cadre to



the other to facilitate that person's horizontal mobility characterized with change in career path."

22. In addition Section 69 (2) and (3) provides that:-

“(2) A public officer shall not be re-designated to hold or act in a public office if-

(d) the officer subject to re-designation has not consented to the re-designation.

(3) if a public officer is re-designated, the officer shall not in any way suffer reduction in remuneration.”

23. There is no denial that the 1<sup>st</sup> respondent served each petitioner with a letter of re-designation dated 28<sup>th</sup> March, 2019 stating that although they were appointed as Medical Social Workers Job Group G, they were erroneously designated in the 1<sup>st</sup> respondent's pay roll as Public Health Assistant Job Group G which attracted Medical allowance not provided in their appointment letters. Further they did not possess the minimum qualifications for the position of Medical Social Workers being KCSE C plain or its equivalent from a recognized institution, and Diploma in Social Work, sociology, psychology, Anthropology, mental Health or its equivalent qualification from a recognized institution. Consequently the letter informed the petitioners that the Board had recommended that the medical allowances paid to the petitioners be recovered and further they be re-designated to the grade of Support staff Supervisor Job Group E.

24. Having considered the said re-designation letters in the face of the clear provisions of Section 2 and 69 of the County Government Act, it is obvious that the purported re-designation offended the law. First, it was not horizontally moving the petitioners to position of equal rank but vertically demoting them to lower position. Two, the consent of the petitioners was never sought and obtained. Three, the petitioners suffered reduction of remuneration.

25. The court appreciates that the 1<sup>st</sup> respondent has the power to re-designate an officer to a new role. However the court has a legal duty to interfere with that role if the said power is not exercised in accordance with the law and the rules of Natural justice. In this case the 1<sup>st</sup> respondent was out of tune with section 2 and 69 of the County Government Act and therefore the alleged re-designation of the petitioners was unlawful. It also violated Section 10(5) of the *Employment Act*.

26. Whichever one looks at the facts of the case, the irresistible conclusion is that the petitioners' were demoted from Medical Social Workers Position Job Group G to support Staff Supervisors Job Group E. It was also a breach of their contract of employment as contained in their appointment letters.

### **Violation of constitutional rights**

27. The petitioners allege that their rights to dignity, right to property, right to fair labour practices, right to fair administrative action and rights to fair hearing were violated by the unlawful re-designation and recovery medical allowance through salary deductions. However the respondent have denied that the recovery of the allowances was done and maintained that the recovery was waived on humanitarian grounds. Further the respondents contend that the re-designation is an administrative and policy function and not a disciplinary function that requires the rigors of fair administrative procedure.



28. Section 10(5) of the *Employment Act* provides that:-

“Where any matter stipulated in subsection (1) changes, the employer shall in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

29. Further section 2 of the *Fair Administrative Action Act* defines administrative action as:-

- i. “The powers, functions and duties exercised by authorities or quasi tribunal;  
or
- ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

30. Further section 4 of *Fair Administrative Action Act* provides that;

1. “Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for administrative action that is taken against him.
3. Where administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
  - a. Prior and adequate notice of the nature and the reasons for the proposed administrative action;
  - b. An opportunity to be heard and to make representations in that regard;
  - c. ...”

31. The above provisions from the two statutes is a codification of the rules of natural justice that requires that a person shall not be condemned unheard. They resonate well with section 69 of the County Government Act which require that re-designation shall not be done without the consent of the affected officer. The requirement of consent by the employee presupposes that the employee will be consulted and be given an opportunity to make his/her representation.

32. The obligation to give prior notice of the reasons, and fair hearing becomes more pronounced where the administrative action by the employer, like in this case, would lead to demotion in rank and reduction of remuneration or recovery of already paid sums to the employee. Failure to comply with the said procedural fairness amounts to violation of the right to dignity, right to fair labour practices and right to fair administrative action as envisioned under Article 28, 41 and 47 of *the Constitution* and amplified by section 10(5) of the *Employment Act*, Section 4 of the *Fair Administrative Action Act* and Section 69 of the County Government Act.

33. In the case of James Ang’awa Atanda & 10 others v Judicial Service Commission, Radido J held that:

“67. The decision by the Respondent in regard to the contracts of the 1<sup>st</sup> to 7<sup>th</sup> Petitioners (1<sup>st</sup> Variation(s) as conveyed through letters of 30 January 2014 were therefore not only unlawful for being unilateral but also for lack of consultation and therefore amounted to a violation of the right to fair labour practices as it took away vested rights and entitlements.



68. The Respondent in effect repudiated the initial contracts and because of the fundamental nature of the variations, these Petitioners were being put on new contracts which they accepted, but that does not derogate from the position that legally the Respondent's unilateral action amounted to unfair labour practice.”
34. Having considered the evidence filed by the petitioners and not controverted by the respondents, the procedure provided by the statutes for a County Public Service Board before re-designating officers in the County Public Service was not complied with. Further the requirement that a re-designation shall only facilitate a horizontal mobility of roles in the establishment without reduction of remuneration was also not complied with. The result of the said violation was demotion in rank from Job Group G to E.
35. The respondent sought to justify their action by citing the Revised Schemes of Service for medical social workers, 2009 which provided the minimum qualifications for medical social workers at KCSE C (plain) or its equivalent, and Diploma in social work, sociology, psychology, anthropology, mental health or its equivalent. The respondents did not produce the said scheme of service as evidence and therefore before this court, the alleged minimum qualifications have not been substantiated.
36. As the re-designation letters dated 28<sup>th</sup> March, 2019 allude, the petitioner were absorbed from the national government after the expiry of their contracts under the Economic Stimulus Program where they served as Community Health Extension Workers Job Group G from the year 2011. As at the time of their appointment under the said programme, the 2009 scheme of service had already been passed and the petitioners were still appointed to the said positions in 2011.
37. One wonders why the respondent appointed the petitioners as medical social worker in 2014 if they did not meet the minimum qualification under the said schemes of service. The rational conclusion from the evidence before the court is that the petitioners were qualified for the appointment as medical social workers and they were put in the proper job group according to the payroll in place at the time of appointment. The respondents' action is only an afterthought whose effect is violation of petitioners' constitutional rights as highlighted above.
38. However, the alleged violation of constitutional right through recovery of medical allowances paid to the petitioners before the letter of re-designation dated 28<sup>th</sup> March, 2019 has not been proved. The pay slips produced by the petitioners do not show that the respondent has made any deductions to recover the medical allowances since 28<sup>th</sup> March, 2019. The deductions reflected in the said pay slips is for statutory deductions and other items consented by the petitioners. In any case the respondents have contended that they have waived the recovery of the allowances on humanitarian grounds.

## Reliefs

39. In view of the matters stated above, the petitioners are entitled to declaration that the respondents' decision contained in the letters dated 28<sup>th</sup> March, 2019 re-designating the petitioners from the position of Medical Social Work Job Group G to Supervisor Support Staff Job Group E is unconstitutional, a breach of their constitutional right and freedoms as enshrined under Article 28, 41 and 47 of *the Constitution* and therefore null and void. The effect of this declaration is that the petitioners are reinstated to their former positions and Job Group. I won't make the same declaration with respect to the recovery of the Medical allowance paid because there is no evidence that the petitioners were entitled to the same under their contract of employment and that they were being



deducted the same from their current salaries. Having perused their respective appointment letters it is clear that the petitioners were not entitled to the medical allowance.

40. The petitioners have prayed for refund of all the monies deducted from their salaries. However, that blanket prayer present some vagueness because the pay slips produced show that the deductions included statutory deductions plus other items which must have been through request from the petitioners including Sacco dues, loans and Insurance.
41. The claim for underpayment of Kshs.48,240.00 per month from 1<sup>st</sup> April, 2019 plus interest at court rates is based on the gross salary of the petitioners. They alleged that their gross salary was reduced from Kshs.73,810.00 to Kshs.25,570.00 per month equaling to an underpayment of Kshs.48,240.00. Having found that the re-designation was unlawful, null and void, the court finds that the petitioners are entitled to their salary as Medical Social Workers as per their letter of appointment, basic salary, house allowance, commuter allowance, extraneous allowance and risk allowance.
42. As per the pay slips produced, the petitioners were receiving Kshs.20,000.00 as Health Services Allowance which is provided for in their appointment letters. It follows that the alleged underpayment is not Kshs.48,240.00 but Kshs.28,240.00 per month which I award each petitioner from 1<sup>st</sup> April, 2019 until the date of this judgment being 50 months and which works to Kshs.1,412,000.00 for each petitioner.
43. The petitioners are also awarded Kshs.500,000.00 each as compensation for the violation of their constitutional rights to human dignity, right to fair labour practices and right to fair administrative actions Act. I gather support from the case of James Ang'awa Atanda & 10 others, supra where the court awarded Kshs.750,000.00 as damages for breach of the right to fair labour practices. The Kshs.500,000.00 is in consideration that I have awarded them the lost salary.
44. In conclusion I enter judgment for the petitioners against the respondents jointly and severally in the following terms;
  - i. The re-designation of the petitioners from the position of Medical Social Worker Job Group G to Supervisor Support Staff Job Group E is declared unconstitutional, null and void.
  - ii. Each petitioner is awarded Kshs.1,912,000.00 less statutory deductions.
  - iii. The petitioners are further awarded costs plus interest at court rates from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

