



Anyona & 6 others v Principal Secretary, Ministry of Health & 2 others; Kenya Medical Practitioners, Pharmacists and Dentist Union & 4 others (Interested Parties) (Petition E041 of 2023) [2023] KEELRC 2968 (KLR) (20 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2968 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E041 OF 2023
B ONGAYA, J
NOVEMBER 20, 2023**

BETWEEN

**DR ONSARE M ANYONA 1ST PETITIONER
DR JOHN GIKUNDI KUBAI 2ND PETITIONER
DR REBEKAH WANJALA MWAMINO 3RD PETITIONER
DR ADAN ABDULLAHI IBRO 4TH PETITIONER
DR PHILIP KIOKO MUTISYA 5TH PETITIONER
DR JANET KABIRA 6TH PETITIONER
DR WALTER MICHENI 7TH PETITIONER**

AND

**PRINCIPAL SECRETARY, MINISTRY OF HEALTH 1ST RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

AND

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTIST UNION INTERESTED PARTY
DR SOSPETER OTUYA INTERESTED PARTY
DR BENARD OLUOCH INTERESTED PARTY
DR SHIUNDU RICHARD INTERESTED PARTY
DR JOHN TOLA INTERESTED PARTY**



JUDGMENT

1. The petitioners filed the petition on 02.03.2023 through J & J Company Advocates. The petitioners prayed for:
 - a. A declaration that the creation of the two categories of direct entry pharmacy interns and upgrading pharmacy interns thereafter paying the internship stipend and allowance based on the categories was unfair and in breach of the letters of offer, the internship policy for health care professionals and the revised medical scheme of services for medical officers, dental officers, and pharmacists.
 - b. A declaration that the respondents in creating the two categories of direct entry pharmacy interns and upgrading pharmacy interns and thereafter paying the internship stipend and allowance based on the categories was in breach of their statutory obligations under section 5 of the employment act and articles 10,27, 28 and 41 of the constitution of Kenya
 - c. An order directing and compelling the respondents to pay each of the claimants the calculated sum being Kshs.6,658,460 as particularized in paragraph 11 and 12 of the petitions with interest at court rates from the date of filing of this suit.
 - d. An order that the costs of this suit be awarded to the petitioners with interest thereon at court rates from the date of filing of the claim.
 - e. Any other relief as the court would deem just and expedient to grant.
2. The petition was based upon the supporting affidavit of Dr. Onsare M. Anyona and exhibits thereto filed together with the petition. The petitioners' case is as follows:
 - a. That the petitioners are all qualified health professional practitioners having attained the relevant regulatory board or council qualification within the Republic of Kenya, and, have done their internship in the health sector performing compulsory learning.
 - b. That the petitioners were examined by the pharmacy & poison board and were found fit to be interns having passed the pre-internship examination.
 - c. The pharmacy & poison board thereafter forwarded the petitioners names to the Ministry of Health.
 - d. The Ministry of Health forwarded the petitioners' names and details to the Treasury, resulting in the Treasury releasing funds to cater and pay for the petitioners' stipend and allowances.
 - e. That the term of the internship was for a period of 12 months.
 - f. That there is another category of pharmaceutical interns who qualified as interns directly upon graduating from the university.
 - g. That it is the policy of the 1st respondent to pay all pharmaceutical interns a monthly stipend from funds budgeted and released by the Treasury.
 - h. It is the petitioners' case that despite the release of the funds by the Treasury the 1st and 2nd respondents have without any justifiable cause failed to pay the said stipend to the petitioners despite paying the same to the pharmaceutical interns who graduate directly from the Universities.



- i. That it is well stipulated in the letter of offer as well as the internship policy for health care professionals and the revised medical scheme of service for medical officers, dental officers and pharmacists that the petitioners are entitled to a stipend.
 - j. The petitioners state that they are aggrieved by the 1st respondent's action to categorise the interns while their qualifications are the same and the policy governing pharmaceutical interns is the same.
 - k. That by creating these two categories the 1st respondent did not treat the petitioners equally and hence discriminated them as well as engaged in unfair labour practices leaving the petitioners feeling undignified.
3. The 1st respondent filed the replying affidavit sworn on 15.05.2023 by Stephen Khaemba, the Deputy Director, Human Resource Management & Development in the Ministry of Health and filed through the office of the Hon. Attorney General. It was stated and urged as follows:
- a. That the petitioners are serving healthcare workers designated as Senior Pharmacist (job group N) Pharmacist Technologist (3) (Job Group H), Pharmacist Technologist (2) (Job Group J), Pharmacist Technologist (1) (Job Group L).
 - b. That the petitioners undertook a degree course in pharmacy and upon completion they are expected to undertake a one-year internship program for the purposes of obtaining a practising license.
 - c. That the petitioners while on internship expect the Ministry to pay them the emoluments of job group L which is applicable to all pharmacists-interns.
 - d. That the petitioners are already on a salary unlike the other set of interns who are not employed by the Ministry.
 - e. That the Ministry does not have two categories of interns and that the petitioners are serving officers who are on the government of Kenya pay roll.
 - f. That the petitioners are paid differently from the non-serving interns, and the reason for the differential payment is because they are serving officers who have a substantive designation and a job group, while pharmacist interns are enumerated at job group L.
4. The 2nd respondent filed the replying affidavit sworn on 29.06.2023 by Remmy Mulati, the Deputy Secretary and Deputy Chief Executive Officer of the 2nd respondent. It was stated and urged as follows:
- a. That the petitioners are serving public officers in various county governments and are therefore on government payroll.
 - b. That paying the petitioners additional stipend and allowances would amount to double payment as it is the same tax payer to cater for both payments.
 - c. That the appointment letter is usually issued to all admitted interns and it is at the point of entering details into the payroll that it was determined that the petitioners were already serving public officers who had opted to upgrade their qualifications from diploma to degree.
 - d. That the petitioners have not disclosed in their petition that they are serving officers and on government payroll in various county governments.
 - e. That paying them the additional stipend and allowances would make them earn double what other interns are earning.



5. The Petitioners filed an affidavit sworn by the 1st petitioner on 03.08.2023 in response to the replying affidavits of the 1st and 2nd respondents. It was stated and urged as follows:
 - a. That the letters of offer issued to the petitioners by the Ministry of Health have never been revoked.
 - b. That the determination not to pay the petitioners a stipend was never communicated to the petitioners despite their multiple demands and pleas.
 - c. That there was no consultation before the alleged determination not to pay the stipend and hence the decision not to pay the stipend was unilateral and amounted to unfair labour practice.
 - d. That the letters of offer created a legitimate expectation that the petitioners would be paid a stipend and allowances and the expectation was violated when the stipend was not paid.
 - e. That there is no clause in the internship policy for health care professionals and the revised medical scheme of service for medical officers and pharmacists that allows the respondents to unilaterally withdraw any stipend and allowances offered to interns.
 - f. That the petitioners are pharmacist technologists and that their salary is Kshs.13,306.15
 - g. That the term stipend refers to a form of compensation that is paid to certain individual for services rendered, other work, or while they receive training. Stipends are often provided in lieu of or (in some cases) in addition to a regular salary.
 - h. That without such a stipend being paid to the petitioners, there would be a category of interns being paid a net amount of Kshs.138,205 and the petitioners' category that is paid less and working within the county governments.
6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
7. To answer the 1st issue, the Court returns that the petitioners are interns as pleaded for them and parties are not in dispute in that regard.
8. To answer the 2nd issue, there is no dispute that the petitioners as interns have graduated with relevant university degrees as the other interns. The only difference, and it is not in dispute, the petitioners are serving in various job groups as civil servants in County Governments. The other interns against whom they are comparing themselves are said to be fresh graduates with university degrees but who are said not to be in the service of the County Governments. The petitioners and the other comparator interns, both categories, hold the degrees in Pharmacy.
9. The 3rd issue is whether the segregation on the basis of the internship stipend payable is rational and fair or offends the rule against discrimination. The evidence is that each petitioner was given by the 1st respondent a letter of offer of internship dated 28.07.2022 or other diverse dates stating that a stipend of Kshs.42,970.00 per month for a period not exceeding 12 months. Paragraph 5 of the replying affidavit for the 2nd respondent confirms that the 1st respondent who bears the obligation to pay the petitioners the stipend has not paid them. The interns not being in the petitioners' category were employed at Pharmacist Job Group L upon graduation per paragraph 9 of the 1st respondent's affidavit. By that evidence it immediately transpires that the petitioners have been mistreated and discriminated only if the difference is that they are on Government payroll. The Comparator interns are as well on the payroll, albeit, for the first time, while the petitioners have been on the payroll based on the



diverse dates of their appointments. The comparator interns are at Job Group L while petitioners are at various job groups below or above L, the highest being N. The Court returns that the policy then is not that persons on the payroll will not earn internship stipend. It is that they earn the stipend and then they are also emplaced on the payroll. Some of the persons freshly on the payroll appear to in fact earn more than some of the petitioners in lower Job Groups. Thus, the Court finds that the failure to pay the petitioners' internship stipend amounted to unreasonable decision thus unfair discrimination. The unreasonableness includes not complying with the contract as concluded per the letters of offer of internship as pharmacists concluded by the petitioners. The letters amount to contracts of service which the 1st respondent cannot be absolved in a situation that the petitioners have delivered on their part by undertaking the internship as was agreed with the Government. Further, the respondents have not cited a provision in the Internship Policy for Health Care Professionals that may have entitled the 1st respondent to refuse to pay the agreed stipend to the petitioners. As a matter of principle and good governance, once the policy was in place, the Parliament appropriated the money, and the petitioners submitted to the internship program, it was not open for the 1st respondent to decline to pay upon such discriminatory grounds which, were as well, not grounded in the policy or law. It is inconsistent with the values and principles in Articles 10 and 232 of the constitution that Parliament appropriates money and it is available from Treasury but the 1st respondent upon a subjective opinion unknown to the prevailing policy and laws fails to apply the money as directed by Parliament and the Policy. It was unreasonable and unconstitutional as submitted for the petitioners.

10. It was submitted that the petitioners are public officers and not interns. The Court finds the distinction superfluous and absurd as once they became interns, even if they had not been previously employed by the County Governments, they became part of the public service. Further, the Policy appears not to segregate against those already in the public service. However, the Policy defines "intern" thus, is a health professional graduate that is undergoing practical supervised training and mentorship in a health institution, recognised by the relevant regulatory board or council, in order to obtain registration and a licence. The Policy also defines "internship" thus, a prescribed period of compulsory hands on training for health professionals which is a legal requirement to practice after graduation from an approved training institution. Clause 1.3 on scope of the Policy states, "The policy shall apply to all health professionals for whom internship is a legal requirement. Graduates trained from recognized training institutions within and outside Kenya will be eligible for internship deployment once cleared by their respective regulatory bodies." Clause 3.24 on compensation of interns states, "Internship shall be considered part of the pre-service training; hence Interns within the government funded Programme shall be provided with a compensation package. This is to enable them meet their basic needs as they provide critical service within the public sector and contribute significantly to the delivery of health care. The compensation package for Government funded interns deployed in public health institutions shall be harmonized across all counties." The Policy provisions are clear on the purpose of the stipend and whoever qualifies so that it has nothing to do with whether one is a public officer or not and the 1st respondent's refusal to pay the petitioners' stipend is discriminatory and illegal in breach of section 5 of the Employment Act and in contravention of Articles 10 on values and principles of governance; Article 27 on equality before the law and freedom from discrimination; Article 28 on human dignity; Article 41 on fair labour practices; and, the Court returns that the petitioners were entitled to the stipend.
11. The 4th issue is on reliefs. The Court has found that the petitioners have established their respective cases for violation of rights and fundamental freedoms as well as section 5 of the Employment Act. The Court considers that each should be paid the internship stipend of Kshs.42,970.00 x 12-months = Kshs.515,640.00. The Court considers that the emplacement on Job Group L like fresh pharmacists being university degree holders would be something to be pursued with individual



County Public Service Boards and Governments. The 1st respondent's contractual undertaking was to pay the internship stipend. The Court also considers that for the discrimination suffered and related violations or mistreatment, each petitioner will be paid Kshs.50,000.00. The 1st respondent will pay the amounts due plus costs of the suit. While awarding the reliefs the Court considers that the petitioners being in employment of the various county governments, they are indeed already employed and their emplacement on Job Group L or the Scheme of Service for Pharmacists will need to take into account matters not litigated and not raised in the instant case which are impacted upon by relevant laws and policies. It could be that the respondents should work with the County Governments and Public Service Boards to harmonise the concerns now raised by the petitioners on modalities of joining the correct Scheme of Service.

In conclusion, judgment is hereby entered for the petitioners jointly and severally against the 1st respondent and 3rd respondent for:

1. The declaration that the refusal to pay the internship stipend to the petitioners was unfair and in breach of the letters of offer, the internship policy for health care professionals.
2. The declaration that the refusal to pay the internship stipend to the petitioners was in breach of their statutory obligations under section 5 of the Employment Act and Articles 10,27, 28 and 41 of the constitution of Kenya.
3. Payment to each of the petitioners a sum of Kshs.565,640.00 by 31.03.2024 failing interest to be payable thereon at Court rates from the date of this judgment until the date of full payment.
4. The 1st respondent to pay the petitioners' costs of the petition and the other parties to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 20TH NOVEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

