



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**CAUSE NO 4 OF 2019**

**1. MUSTAFA HAMESA DAS**

**2. KOMORA ABUBAKAR RASHID**

**3. GHAMALOKU MWANAMISI SALIM**

**4. REHEMA GHAMALOKU AKARE**

**5. RASHID K JILO**

**6. MOHAMED DOYO ABIYU**

**7. SELINA HALAKO BONAYA**

**8. REHEMA GHAMACHANA WAYU.....CLAIMANTS**

**VERSUS**

**COUNTY GOVERNMENT OF TANA RIVER.....1<sup>ST</sup> RESPONDENT**

**ABOUBAKAR YUSUF.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimants assert that they were all hired into the service of the 1<sup>st</sup> Respondent on diverse dates between 2014 and 2016 and deployed to work in different capacities at the said 1<sup>st</sup> Respondent's Hola Referral Hospital. Their contracts were allegedly initially of a temporary nature and expressed to last for a term of three (3) months. However, the Claimants contend that over time, these arrangements graduated into long-term employment. It is their case that these contracts were unlawfully terminated when the 1<sup>st</sup> Respondent issued them with individual termination letters dated 2<sup>nd</sup> January 2019.

2. The Respondents' position is that the appointments in question were all irregularly entered into. That they were all undertaken contrary to the law governing appointment of persons into the public service of County Governments. Proceeding on this premise, the Respondents assert that the 1<sup>st</sup> Respondent revoked, by way of termination of contracts, the various appointments of the respective Claimants.

3. The law that regulates appointment of persons into public service of County Governments is now enshrined in the County Governments Act (CGA) as read with the Constitution. Article 232 of the Constitution provides the broad values and principles that regulate public service. These include: high standards of professional ethics; efficient and effective use of public resources; provision of effective, responsive, prompt, impartial and equitable services in the public realm; public participation in decision making relating to public service; accountability for administrative acts; fair competition and merit in appointment of public servants; gender, regional and ethnic balance in public appointments among others. These principles are embraced by part VII of the CGA.

4. Besides, the foregoing, contracts of employment as any other contract, are regulated by the general principles of the law of contract either generally or as modified by the Employment Act, 2007. One area where the Employment Act has modified the general principles of the law of contract relates to termination. In this area, the Employment Act regulates the application of the principle of freedom of contract by placing constraints on the power of the employer to terminate at will.

5. Under the CGA, the power to hire, exercise disciplinary control over, and remove personnel in the service of a County Government is now entrusted with the County Public Service Boards (CPSBs) of the respective County Governments. This power is donated to the County Public Service Board (CPSB) by sections 59 and 63 of the CGA. In exercise of this mandate, the CPSBs are required to uphold the

constitutional dictates set out in articles 10 and 232 of the Constitution of Kenya 2010.

6. In this case, the aforesaid pieces of legislation come into play. Therefore, I will keep them in mind as I prepare this determination.

7. The Claimants' case is a straight forward one. They assert that they were employed into various positions within the rank and file of the 1<sup>st</sup> Respondent. That they were then posted to the Hola Referral Hospital, an institution run by the 1<sup>st</sup> Respondent.

8. The Claimants assert that sometime around 2<sup>nd</sup> of January 2019, they received letters from the 1<sup>st</sup> Respondent's officer terminating their respective contracts of employment. That the reason for the purported termination was that the Claimants' contracts were irregular having purportedly been entered into contrary to the applicable law and Constitution.

9. The Claimants dispute the justification given by the 1<sup>st</sup> Respondent for terminating their contracts of service. It is the Claimants' case that they were terminated on ethnic grounds as only members of the Pokomo ethnic group were allegedly sent home in the purge.

10. The Respondents make an equally straight forward case. It is their case that the Claimants' case is misplaced. That the Claimants were terminated when an audit revealed that there were members of the 1<sup>st</sup> Respondent's staff that had been recruited contrary to law. That the Claimants' termination was actuated by the desire to correct the anomaly occasioned by the Claimants' irregular hiring.

11. According to the Respondents, the Claimants were all hired by an entity other than the CPSB which, by law, is the only agency empowered to employ, discipline and terminate staff in County public service. Consequently, the Claimants' contracts of employment were in violation of the law governing human resource management in County Governments. Put differently, the Claimants' contracts of employment were null and void from inception. They are therefore incapable of protection by or enforcement in law.

12. The general position in law in relation to contracts is that an illegal contract is incapable of enforcement. This is particularly so if the contract is tainted with illegality from inception. For this principle, I refer to the submissions by counsel for the Respondents in which she helpfully cites the decision by the Court of Appeal in *Kenya Airways Limited v Satwant Singh Flora [2013] eKLR*. I also refer to the High Court decision in *Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiema & another [2020] eKLR*.

13. In my view, the protection accorded to contracts of employment under the Employment Act presupposes the existence of a valid contract of service. In other words, for a party to seek to benefit from the protection under the Employment Act, he/she must first have a legally enforceable employment contract. This position appears apparent in the decision of the Court of Appeal in the *Kenya Airways Limited v Satwant Singh* case aforesaid when it observes (quoting another source) as follows: -

***“A finding of illegality means, however, not only that no common law claim may be maintained on the contract, but also that the employee subject to the contract, loses any statutory employment rights which rely on his having been an employee under a contract of employment, in particular the right to claim unfair dismissal.”***

14. It is this aspect of illegality that the Respondents argue deprives the Claimants of any right under employment law that is capable of protection. According to the Respondents, as the Claimants were irregularly hired, they lack a basis to approach the court to seek protection of the invalid arrangement between the parties.

15. As mentioned in the evidence by the parties, all the Claimants were engaged on diverse dates between 2014 and 2016. From the letters of appointment produced as exhibits, the appointments were by the 1<sup>st</sup> Respondent's officers attached to the 1<sup>st</sup> Respondent's health department. These included the Chief Officer of Health and the County Director/Administrator, Health. It is not immediately clear whether these two titles relate to one and the same office.

16. What is however clear is that it is not suggested by either party that the officers who hired the Claimants comprised the 1<sup>st</sup> Respondent's CPSB within the meaning of the CGA. In any event, the CPSB's composition as provided for under section 58 of the CGA does not comprise of one individual. Further, section 57 of the CGA contemplates a body corporate as the CPSB. Therefore, it cannot be possible by any stretch of imagination that the 1<sup>st</sup> Respondent's officers referred to above comprised, at the time, the 1<sup>st</sup> Respondent's CPSB.

17. The CGA came into force around 14<sup>th</sup> July 2012, the date it received presidential assent. As the Claimants were all appointed from 2014 onwards, their appointments, if they related to the public service bureaucracy of the 1<sup>st</sup> Respondent, could only be lawfully done within the guidelines set out in the CGA.

18. This include the following: -

***a) That the appointments are by the CPSB either at the instance of a chief officer of a department within the 1<sup>st</sup> Respondent or on the sole decision of the CPSB itself.***

***b) That prior to recruitment, the CPSB advertises the position so as to reach as wide a population of potential applicants as possible.***

***c) That the CPSB, whilst processing the appointments, takes into account the requirements of articles 10 and 232 of the Constitution 2010.***

19. It is possible that the CSPB may delegate its statutory mandate in this respect. However, where it does this section 86 of the CGA

requires that such delegation be in writing.

20. Should it turn out that the provisions of the CGA were not observed in the process of appointments, discipline and termination of a public servant, the CPSB is empowered under section 75 of the CGA to: -

**a) Revoke the resultant decision;**

**b) Require that the process leading to the decision commences afresh;**

**c) Take any other corrective (including disciplinary) action.**

21. Under section 74 of the CGA, the CPSBs are mandated to regulate the engagement of the following persons on behalf of their respective County Governments: persons on contract; volunteers and casuals; staff of joint ventures; and interns within their areas of jurisdiction. Essentially and in my view, the involvement and approval by the CPSBs of the process must be documented.

22. From the evidence on record CW1, Rehema Ghamaloku confirmed that she was first engaged as a volunteer. That she was hired by the Chief Officer of Health (CEO, Health) of the 1<sup>st</sup> Respondent. That her appointment was not preceded with a public advertisement of the position she was appointed to. CW, Mohammed Doyo stated that he was hired as a casual by the CEO, Health. CW3, Komora Abubakar Rashid, indicated that he had been working as a volunteer at the 1<sup>st</sup> Respondent's Hola hospital before he was hired by the health department. CW4, Mustafa Dase, confirmed that he was hired by the CEO of the 1<sup>st</sup> Respondent. CW5, Ghamaloki Mwanamisi testified that she was hired by the 1<sup>st</sup> Respondent's department of health at Hola Hospital. CW6, Selina Halako similarly confirmed that she was engaged by the CEO health. CW7, Rehema Wayu confirmed that she was also hired by the CEO Hola. CW8, Rashid Jilo confirmed that he was hired without the position having been advertised.

23. Essentially, all the eight (8) Claimants concede that their appointments were not processed in line with the applicable law under the CGA. Either they were hired without the vacancies being advertised first or by persons who were not the 1<sup>st</sup> Respondent's CPSB. Further, no evidence was provided that the CPSB of the 1<sup>st</sup> Respondent had delegated its mandate aforesaid under the CGA to the persons who purportedly recruited the Claimants.

24. The various contracts of service having been so processed, it is easily discernible that they were irregular from inception for want of compliance with the law. But the Claimants argue that these contracts were renewed and thus graduated into permanent positions. This may suggest that the Claimants' position is that despite the initial irregularity in their engagement, there was some form of ratification of the initial contracts or acquiescence by the 1<sup>st</sup> Respondent in relation to their irregularity thereby clothing them with some element of legality.

25. I think that this issue was impliedly addressed by the Court of Appeal in the *Kenya Airways Limited v Satwant Singh* case when the court suggested that the illegitimacy afflicting the initial contract cannot be deemed as cured through its renewal either directly or through acquiescence. The subsequent renewal is as illegitimate as the initial contract.

26. What then is the position of the parties in respect of enforcement of rights under such contract whether donated by agreement or by statute such as the Employment Act? In my view, a contract that is tainted by illegality yields no rights that are capable of protection. A quote from the *Law of Contracts* by *Cheshire, Fifoot and Furmston, 8th edition* at page 334 on the subject quoted in the *Kenya Airways v Satwant* decision aforesaid states as follows: -

***“No person can claim any right or remedy whatsoever under an illegal transaction in which it has participated. The court is bound to veto the enforcement of a contract once it knows that it is illegal, whether knowledge comes from the statement of the guilty party or from outside sources”.***

The Court further takes extracts from *Halsbury's Laws of England (4th edition), volume 16 (1A)* page 29 particularly on contracts of employment and states as follows: -

***“A finding of illegality means, however, not only that no common law claim may be maintained on the contract, but also that the employee subject to the contract, loses any statutory employment rights which rely on his having been an employee under a contract of employment, in particular the right to claim unfair dismissal.”***

27. In a nutshell, parties cannot enforce rights purportedly accruing from such contract. And it is improper for the court to aid in enforcement of the contract once its attention is drawn to the illegality afflicting it.

28. In my view, this is the position that the Claimants find themselves in. They may not enforce the protections granted to employees under the Employment Act in relation to the impugned contracts as these contracts were entered into contrary to the law (see *Jackson Cheruiyot Rono v County Secretary Bomet & another [2017] eKLR*). As I said earlier, the presupposition of the Employment Act is that a party invoking its provisions to protect his/her right under a contract of service has a valid contract in the first place.

29. As is clear from the evidence and written submissions by both parties, the 1<sup>st</sup> Respondent terminated the Claimants' contracts. Whilst the Claimants argue that the terminations were illegal, the 1<sup>st</sup> Respondent stated that it lawfully invoked the power donated to it under section 75 of the CGA to revoke the irregular contracts.

30. In my view, in invoking its power under section 75 of the CGA, the 1<sup>st</sup> Respondent was expected to observe the principles of natural

justice in the process as required under section 76 of the CGA. The question is whether it did so.

31. There is evidence on record that before terminating the Claimants, the 1<sup>st</sup> Respondent undertook an administrative investigation into the matter. That this inquiry was undertaken by a committee set up for this purpose by the 1<sup>st</sup> Respondent. That the committee visited the affected departments of the 1<sup>st</sup> Respondent where it collected and collated data before making recommendations that led to the termination of the Claimants and other affected employees. That, in taking the decision to terminate the Claimants, the 1<sup>st</sup> Respondent acted on the basis of the data collected and collated by the committee and not on the basis of some other subjective considerations. That the Claimants even challenged the 1<sup>st</sup> Respondent's decision to terminate them through an appeal which was considered and a verdict returned on it.

32. To my mind, this evidence demonstrates that the 1<sup>st</sup> Respondent observed the requirements of natural justice in processing the Claimants' release. And in terminating the Claimants' contracts of service, the 1<sup>st</sup> Respondent acted within the power donated to it under section 75 of the CGA, the said contracts having been found to have been tainted with illegality.

33. The Claimants' main complaint against the 1<sup>st</sup> Respondent is that it permitted or acquiesced in the 2<sup>nd</sup> Respondent's machinations to use the staff rationalization process to victimize the Claimants on ethnic grounds. As a consequence, the Claimants assert that they were discriminated against contrary to the provisions of article 27 of the Constitution as read with section 5 of the Employment Act. First, in view of the sentiments expressed earlier on in this judgment, it is doubtful that the Claimants would lawfully plead violation of a constitutional right arising from an unlawful and or irregular arrangement. Second, I did not seem to get sufficient evidence from the Claimants to support this grievance.

34. I am aware of the applicability of the evidential concept of reverse burden of proof on allegations of discrimination in employment matters particularly in view of the express provisions of section 5 (7) of the Employment Act. However, whilst the burden is on the employer to prove that the matters complained of did not in fact amount to discriminatory treatment, the law, in the first instance, requires the employee to provide prima facie evidence to establish the circumstances giving rise to his/her complaint of discrimination against the employer (see *G M V v Bank of Africa Kenya Limited [2013] eKLR*). It is only then that the evidential burden will shift onto the employer to justify that his/her actions were not discriminatory as suggested by the employee.

35. In the current case, the Claimants alleged that the 2<sup>nd</sup> Respondent took advantage of the staff rationalization and regularization process to select only members of the Pokomo community for termination. That the 2<sup>nd</sup> Respondent, who is alleged to be Somali, took advantage of the process to eject Pokomos from the 1<sup>st</sup> Respondent's workforce. That in the process, the 2<sup>nd</sup> Respondent may have been implementing a silent discriminatory policy by the 1<sup>st</sup> Respondent to rid itself of members of the Pokomo tribe.

36. However, in cross examination, CW1 (Rehema Akare) confirmed that the list of the employees who were terminated from the workforce of the 1<sup>st</sup> Respondent under the impugned programme had names of individuals from other communities. Only that those from Hola Hospital appeared to have been from the Pokomo community only.

37. In the defense evidence RW1 stated that a total of 53 employees were affected as a result of the exercise. It was his evidence that the 1<sup>st</sup> Respondent's casual workforce had grown beyond the limits set by the 1<sup>st</sup> Respondent. This prompted an audit of this cadre of workforce in the 1<sup>st</sup> Respondent's departments. That as a result of the audit, it was realized that a number of staff had been engaged without the involvement of the CPSB contrary to law. That a decision was then taken to address the issue by regularizing the appointment of critical staff and letting go the rest. That in releasing staff who were terminated, the 1<sup>st</sup> Respondent also considered matters such as retirement age of the affected group. He denied that one's ethnic background was a consideration in the exercise.

38. The confirmation by CW1 that the list of those released from employment by the 1<sup>st</sup> Respondent bore names of people not only from the Pokomo tribe but other tribes as well bolsters the position by the 1<sup>st</sup> Respondent that the exercise was not ethnically biased. In the face of this evidence from the protagonists, it will be illogical for me to find that the 1<sup>st</sup> Respondent terminated the Claimants because of their ethnic affiliation. I do not find sufficient prima facie evidence to reach this conclusion in order to require the 1<sup>st</sup> Respondent to rebut the evidence.

39. One final thing on this matter that has not been pleaded but upon which I wish to make some obiter observations relates to the effect of section 77 of the CGA on the proceedings. This section requires any individual aggrieved by a decision of a CPSB or persons exercising disciplinary powers over personnel in public service in Counties to appeal, if he/she elects, the decision to the Public Service Commission. A myriad decisions basing on this provision, have declined to permit aggrieved parties to come to court in the first instance. Having regard to the foregoing, could this suit have been wrongly instituted?

40. First, I note that this was not an issue for determination. Neither party pleaded or considered it. Therefore, it is only fair and lawful that I avoid making it a point for determination or elaborate discussion.

41. But it is perhaps necessary to point out that as the Claimants' grievance appeared to focus on violation of their right to protection against discrimination as protected under article 27 of the Constitution, I would have perhaps considered that the matter is properly filed before the court in view of the fact that protection of the rights in the Bill of Rights in the Constitution of Kenya 2010 appears to lie outside the direct mandate of the Public Service Commission.

42. One may of course argue that one of the core objects of Constitutional Commissions and Independent Offices under article 249 of the Constitution is to promote observance of constitutionalism which is wide enough to incorporate enforcement of the Bill of Rights. However, we at the same time appreciate that by virtue of articles 23 (1) and 165(2) (b) of the Constitution, the power to interrogate whether a right in the Bill of Rights has been violated or is threatened with violation and the power to redress the violation or threatened violation lies with the High Court or courts of equal status as may be appropriate.

43. That said, I decline to grant the reliefs sought by the Claimants. I dismiss the claim with costs to the Respondents.

**DATED, SIGNED AND DELIVERED ON THE 24TH DAY OF FEBRUARY, 2022**

**B. O. M. MANANI**

**JUDGE**

**IN THE PRESENCE OF:**

**GAMBO FOR THE CLAIMANT**

**OLENDO FOR THE 1ST AND 2ND RESPONDENTS**

**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.**

**B. O. M. MANANI**

**JUDGE**