



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E 074 OF 2020

IN THE MATTER ENFORCEMENT OF FUNDAMENTAL RIGHTS

AND FREEDOMS AND CONSTITUTIONAL VALUES AND PRINCIPLES

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT;

AND THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF ARTICLES 2, 10, 21, 27, 28, 41, 47, 50, 232

AND 259 OF THE CONSTITUTION OF KENYA, 2010, AS READ WITH,

THE FAIR ADMINISTRATIVE ACTION ACT, THE EMPLOYMENT ACT;

AND ALL OTHER ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER BETWEEN

NASRA ABDIRAHMAN ADAN.....PETITIONER

VERSUS

THE COUNTY PUBLIC SERVICE BOARD – MANDERA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MANDERA.....2ND RESPONDENT

JUDGMENT

1. The petition filed on 27th October, 2021 by the petitioner seeks reliefs against the respondents as follows: -

- (1) A DECLARATION does issue that the termination of the petitioner was unlawful and wrongful.
- (2) A DECLARATION that the termination of the petitioner violated her right to fair labour practices.
- (3) A DECLARATION that the termination of the petitioner violated her right to dignity.
- (4) A DECLARATION that the termination of the petitioner has violated her right not to be discriminated against.
- (5) AN ORDER of compensation and general damages does issue pursuant to Article 23 of the Constitution directing the County

Public Service Board and the County Government of Mandera to pay damages to the petitioner herein, for the violation and contravention of her fundamental rights and freedoms and her unlawful dismissal.

(6) Payment of Kshs 1,078,920 (Kenya Shillings One Million and Seventy-Eight Thousand Nine Hundred and Twenty) being gross salary for Thirty-Seven (37) months' compensation and pay in lieu of notice.

(7) AN ORDER does issue pursuant to Article 23 of the Constitution directing the County Public Service Board and the County Government of Mandera to migrate her records to the IPPD System.

(8) Reinstatement.

(9) AN ORDER does issue pursuant to Article 23 of the Constitution; Section 12 of the Employment and Labour Relations Act and Section 49 of the Employment Act directing the County Public Service Board and the County Government of Mandera to pay the Petitioner herein, the equivalent allowances, salaries and benefits she ought to have earned.

(10) AN ORDER awarding costs of the petition to the petitioner.

2. The facts of the petition are set out in paragraphs 1 to 17 of the Petition the nub of which is that she was constructively dismissed from her position as Clinical Officer II Job Group 'F' which was a Permanent and Pensionable position based in the County Government of Mandera, in the Ministry of Agriculture and Livestock by the respondent's act of arbitrarily stopping her salary for a period of thirty seven (37) months.

3. That the stopping of her salary was said to be on account of failure to attend Biometric registration of staff in the month of November, 2017.

4. The petitioner deposes that she did not receive notice to attend the registration exercise hence her failure to be registered which was the fault of the respondents and the omission was discriminatory and violated her Constitutional rights.

5. That the respondents were bound under Article 21 of the Constitution to observe, respect, protect and promote and fulfil the rights and fundamental freedoms in the bill of Rights.

6. That the Conduct by the respondent violated Article 27 of the Constitution which guaranteed the petitioner the right to equal protection of the law and it prohibits discrimination on any grounds.

7. Furthermore, the petitioner deposes that the respondents violated Article 41 of the Constitution which guarantees the petitioner the right to fair labour practice and to reasonable working conditions.

8. That stopping the salary of the petitioner without giving her opportunity to be heard violated her right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That the conduct also violated the petitioner's right to be heard before any punitive action is taken against her in terms of Section 50(1) of the Constitution.

9. The petitioner prays to be awarded as prayed.

10. The suit was not defended by the respondent despite service of the proceedings on them.

11. The petitioner filed submissions on 27th October, 2021 restating her case as set out in the petition.

12. The petitioner prays for reinstatement to her employment in terms of Section 49(1) (c) and (4) of the Employment Act, 2007 as the main relief and in the alternative an award of compensation and general damages pursuant to Article 23 of the Constitution. The facts of the case favour reinstatement of the claimant having been terminated for no fault at all. Having not been paid salary for 37 months and having no alternative employment to date. The respondents have not adduced any evidence that disfavors reinstatement.

13. The Court is satisfied that the petitioner has proved her case on a balance of probabilities the suit being undefended. The Court finds accordingly and makes the following orders in favour of the petitioner against the respondent: -

(a) The Constructive dismissal of the petitioner from the employment was unlawful and wrongful and violated her rights guaranteed under Articles 27, 41, 47 and 50 of the Constitution of Kenya, 2010.

(b) The respondents are directed to reinstate the petitioner to the position she held of Clerical Officer II Job Group 'F' under the Ministry of Agriculture and Livestock of the County Government of Mandera with immediate effect and without loss of any salary and or benefits or rank with the respondents.

(c) The Respondent is further directed to pay arrear salary due and owing to the petitioner as at the time of filing suit in the sum of Kshs 1,078,920 (Kenya Shillings One Million and Seventy Eight Thousand Nine Hundred and Twenty) being gross salary for Thirty seven (37) months unpaid salary, Less taxation.

(d) The award in (c) above is payable with interest at Court rates from date of Judgment till payment in full.

(e) *Costs of the suit.*

Dated and delivered at Nairobi this 24th day of February, 2022.

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Kilenyet for Petitioner

Mr. Hussein for Respondent

Ekale – Court Assistant