



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
CAUSE NUMBER 122 OF 2020

BETWEEN

KENYA NATIONAL UNION OF NURSESCLAIMANT

VERSUS

1. NAIROBI COUNTY PUBLIC SERVICE BOARD

2. MINISTRY OF HEALTH RESPONDENTS

Rika J

Court Assistant: Emmanuel Kiprono

Jane Wangari, Industrial Relations Officer for the Claimant

Miller & Company Advocates for the 1st Respondent

Attorney-General for the 2nd Respondent

JUDGMENT

1. The Claimant is a registered Trade Union, representing Nurses.
2. It represents this Claim, filed on 26th February 2020, on behalf of 70 Nurses, who were employed by the 1st Respondent on locum contracts, in June to November 2019, at Nairobi's Pumwani Maternity.
3. The Claimant avers, the Nurses held same qualifications as their colleagues, they discharged the same functions, but were denied equal pay for work of equal value.
4. They were denied salaries from November 2019 to February 2020. They were informed by the Hospital Administrator, on or about 25th February 2019, that their salaries would be paid based on hours worked, contrary to the terms of engagement. Further, they were advised that employment was not guaranteed, and that consultations on their status were going on, involving the County Administration. Engagement on locum contracts amounted to unfair labour practices. They are entitled to have their contracts converted to permanent and pensionable terms.
5. The 1st Respondent has contravened the Public Policy Manual by engaging the Nurses on casual terms, to discharge roles which are permanent in nature. They should have received probationary contracts after working for 6 months.
6. The Claimant prays the Court for Judgment against the Respondents to: -
 - a. Absorb all the 70 Nurses into permanent and pensionable terms, in accordance with their qualifications.

- b. Bar the Respondents from employing Nurses on locum contracts in permanent and pensionable positions.
- c. Pay all arrears of wages from the time of engagement to-date.
- d. Honour the mandatory provisions of Sections 17 and 37 of the Employment Act.
- e. The Court grants such orders as it deems fit.
- f. Costs.

7. The Claimant called one of the Nurses, Lucy Chepkorir, who gave evidence on 4th March 2021. The 1st Respondent opted not to call any Witness. The 2nd Respondent did not participate in the proceedings. Hearing closed on 4th March 2021.

8. Chepkorir did not add much to what is contained in Claimant's Pleadings. She stated she was one of the Nurses employed at Pumwani. They had not been paid their salaries, November 2019 to February 2020. She was dismissed in February 2020. She worked at Pumwani Maternity on locum contract. The contract was terminated in February 2020. The contract was for 3 months. It was renewable. Others were on similar contracts. Chepkorir was paid November and December 2019 salary. She was not paid in January, but received part of February 2020 salary. She told the Court she was claiming remaining salary for February 2020 and January 2020 salary. She claims an order of reinstatement.

9. Cross-examined, she told the Court she has been a Nurse for 6 years. She was a Shop Steward. She accepted employment on locum contracts. She did not know all the listed 70 Nurses. They were in different sections at Pumwani Maternity Hospital. The Nurses were on similar contracts, earning Kshs. 35,000 monthly salary. Some of the prayers have been overtaken by events. Some of the salary arrears have been paid. The Nurses were paid differently, from other Nurses. They were denied basic working conditions. She agreed that the Nurses had their own contracts. They did not all have the same qualifications. She was not sure if payment depended on the number of days worked. On redirection, Nurse Chepkorir told the Court she was paid about Kshs. 22,000 in February 2020.

The Court Finds: -

10. The evidence adduced by Nurse Chepkorir, is not adequate to support the Claim. She does not know all the 70 Nurses on whose behalf, this Claim is brought. Nurses did not all hold same qualifications.

11. The Nurses were offered and accepted locum contracts. Their Union ought to have engaged the Respondents at the inception, and argued its case for permanent and pensionable employment.

12. There is nothing unconstitutional or illegal about the locum contracts executed by the Nurses. They agreed to work for the periods given under locum, and agreed to monthly salary of Kshs. 35,000.

13. They knew the nature of their roles. There is nothing presented to the Court by the Claimant, to support its position that nursing role must always be deemed permanent and pensionable. Locum, is a common contractual instrument in the profession, which allows Nurses to temporarily fulfil the duties of another. It applies to Doctors as well. It is common in the medical and nursing profession to have temporary contracts. Doctors and Nurses are highly mobile, frequently rendering their skills in more than one medical facility. Locum contracts aids this mobility. The contracts were freely negotiated and executed by the Nurses. It is not correct that the Respondents violated the Constitution, by offering the Nurses locum contracts. The Nurses readily and freely accepted these contracts.

14. The Claim lacks specificity as shown in the evidence of Nurse Chepkorir on cross-examination. It was conceded that some of the prayers have been overtaken by events. There was no amendment to the Pleadings, to shed clarity on what prayers have been overtaken by events, and which remain to be considered. An Employee must assist the Court, in determining what arrears of salary, if any, are due from the Employer. There are 70 Nurses before this Court. How is the Court to know if there are salaries still owed to them, and arrive at a specific figure, in respect of each Nurse? Nurse Chepkorir was not even able to clarify her own figure, with regard to the prayer for arrears of salary.

15. Reinstatement is out of question. The Nurses were on limited- period contracts, which have since lapsed. Reinstatement restores the terms of the contract, including the relevant Effective Date of Termination [EDT]. The Nurses were on temporary contracts which expired on given dates. Reinstatement to locum contracts, would be upon terms and conditions of service authored by whom? They cannot be reinstated to permanent and pensionable contracts which never were. Certainly the Court is not allowed through the remedy of reinstatement, to rewrite contracts for the Parties.

16. The Claim has no merit.

IT IS ORDERED: -

a. The Claim is dismissed.

b. No order on the costs.

Dated signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 16th day of February 2022.

JAMES RIKA

JUDGE