



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC PETITION NO.4 OF 2020

(Before D.K.N.Marete)

REGINA MUTHONI MURIITHI & 17 OTHERS.....PETITIONERS

VERSUS

CHAIRMAN AND OTHER MEMBERS OF B.O.M NGARU GIRLS HIGH SCHOOL...RESPONDENT

J U D G M E N T

This matter was originated on petition dated 4th March, 2020. The issue in dispute is therein cited as;

Refusal by the Management to implement the workers salaries as per the DPM Circulars as used by the Government.

The Respondent in a Replying Affidavit sworn on 16th June, 2021 denies the petition and faults it for lack of merit and prays that it be dismissed with costs.

The Petitioners case is that the Respondents, a public institution, refused to increase their salaries as required of the circulars from the Ministry of Public Service and Gender Affairs. These Salaries have to be implemented in Circular No.MPSY.DPSM.2/6/4A Vol.XI (21) by the Respondents for job Group A to G on claims that this was not applicable to the BOM Management of the Respondent.

The Petitioners further case is that government circulars on terms and conditions of service that apply to civil servants also apply to them under the public institutions of Kenya.

Their other case is that this matter was referred to a conciliator but this failed and therefore this course of action.

They pray as follows;

17. Your Lordship, the Petitioners prayer to this Hon.Court is to order the Respondent to implement the circular No.MPSY.DPSM.2/6/4A Vol.XI (21) dated 4.6.2018 to all employees of the school.

18. That the Respondent be ordered not victimize the Petitioners.

19. That the Court to order the Respondent to pay the arrears as from June 2018 to date.

The Respondents case is that the petitioners are her employees serving in various capacity while others are strangers to or no longer employees. These strangers are;

a. Puscuine Wambugu- 4th Petitioner

b. Joseph Kanjagua- 7th Petitioner

c. Bernard Githua- 8th Petitioner

d. Jacinta Wanjiru- 10th Petitioner

e. Daniel Kinyua -12th Petitioner

f. Eva Wanjiku-15th Petitioner

The Respondents other case comes out as follows;

- That the 1st Petitioner is no longer an employee having been relieved of her duties for good measure and as per her termination letter dated 14th February, 2021.
- That the Respondent had directed employees to make a written request for negotiations of their term and only the 2nd, 3rd, 5th, 6th, 9th, 11th and 13th petitioners responded. The exercise was undertaken and these were confirmed on employment on permanent basis and salaries increased.
- Circular No.MPSYG;DPM 2/6/4A Vol XI (21) is not applicable as the petitioners are their employees.
- The circular only applies to employees of the Public Service Commission.
- The increased salaries of the 2nd, 3rd, 5th, 6th, 9th, 11th and 13th Petitioners matched with those of the said circular.
- That prior to confirmation of appointment, salaries were paid and determined contractually and have been so fully paid.
- Petitioners 14 and 16 did not apply for regularization and therefore no employment was made, no confirmation of appointment nor salary review undertaken.

She ultimately prays that the petition be dismissed with costs.

The issues for determination therefore are;

1. Whether the Petitioners are entitled to the relief sought?
2. Who bears the costs of the cause?

The 1st issue for determination is whether the Petitioners are entitled to the relief sought. The Parties hold diametrically opposed positions on this.

The Petitioners in their written submissions dated 21st June, 2021 posit that they are public servants and therefore the DPM Circular in issue applies in the regularization of the salaries. This is expressed as follows;

“The petitioner submits that courts on various occasions have pronounced themselves on what this cadre of employees should be recognized as and what their terms of employment should be as pronounce in the case of THE BOARD OF MANAGEMENT KIGUMO TEACHERS TRAINING COLLEGE vs KUDHEIHA WORKERS they have further pronounced themselves on the matter of implementation of DPM circulars in schools which therefore the claimant relies upon in instituting this suit and deriving from the rights which are being denies to its members in the said institution Dadson Maina & 33 others vs Nyeri Primary School. The union on several occasions and meetings with the management tries to persuade the BOM to implement the DPM circular Ref No. MPSYG.DPSM.2/6/41VOL.XI (21) dated 4TH JUNE 2018. These institutions which operate under the directives given by the government have strict mandate to implement all advisories produced by the government to be adopted by public bodies. The non-implementation of the DPM circulars from the respondent is a clear show of infringement of right to workers denying them what they truly deserve and what they have worked for.

Having noted the above the DPM circular served to the respondent must have been produce through the public service board with the intention to be applied by all employers within the republic of Kenya respectively as to the nature of employees an employer has.

The particular respondent cannot claim to be an exemption in implementation of the DPM circulars yet the employees in her establishment are recognized as public servants. The actions of the area discriminatory to the employees working in this establishment as that the DPM circular provides terms of service for other public and civil servants in the country while for them they are denied these terms.

Section 59(p) of the Basic Education Act provides that the Board of Management is required to recruit, employ and remunerate such number of non-teaching staff as may be required by the institution in accordance with this Act. Based on the above provision, it is clear that the petitioners are employees of the respondent and their remuneration is to be carried out by the respondent. The import of this is that the petitioners cannot be considered to be civil servants as their employment is not under the public service commission but under a contract with the respondents.

On this they seek to rely on the authority of **Robert Mongare Ogori & 4 others v Board of Management Upper Hill School & another (2019)eKLR** where it was held as follows;

“In contending that they were underpaid, the claimants asserted that they were paid wages below those prescribed by Circular

No.MSPS2/6/4A VOL.X (2) DATED 25 June 2012. The court has looked at the circular. It was outlining the re-alignment of the salary structure for civil servants. It was effective 1 July 2012. The claimants were employees of the 1st Respondent and not employees of the Public Service Commission of Kenya. In this regard, the court finds that they were not civil servants for the purposes of the Circular even if they were public officers. The circular did not apply to them”

To further buttress their case, the Respondents sought to rely on the authority of **Fredrick Ouma v Spectre International Ltd (2013) eKLR** where it was held as follows;

“Fair remuneration in my view means remuneration that is adequate and commensurate to the services rendered. It certainly includes a measure of certainty. This is why it is imperative that the remuneration payable to an employee is discussed and agreed upon before services are rendered. The certainty here is important to allow the employer prepare and budget for his pay”

This matter comes out in favour of the respondents. They have demonstrably illustrated that the circular in issue does not apply to the petitioners, them not being civil servants but employees of the respondent. The claim by the petitioners is not backed by any evidence or law. It must fail.

I am inclined to find in favour of the Respondent’s case. The petitioners are therefore not entitled to the relief sought and I find as such. This answers the 1st issue for determination.

I am therefore inclined to dismiss the petition with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 9TH DAY OF MARCH, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Gitonga instructed by Kudheiha workers for the Claimants.
2. Mr.Muthuri instructed by State Law Office for the Respondents.