



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

ELRC CONSTITUTIONAL PETITION NO. 6 OF 2019

(Before D.K.N.Marete)

STANLEY NTONGAI MITHIBUA.....1ST PETITIONER

BENSON MURIITHI.....2ND PETITIONER

ANNE KANANU NATHAN.....3RD PETITIONER

EVELYN KAGENDO.....4TH PETITIONER

VERSUS

COUNTY PUBLIC SERVICE BOARD OF MERU.....1ST RESPONDENT

GOVERNOR OF MERU COUNTY.....2ND RESPONDENT

COUNTY SECRETARY OF MERU.....3RD RESPONDENT

J U D G M E N T

This matter was originated by way of an Amended Petition amended on 7th December, 2020.

The Respondent in a Reply to Amended Petition sworn on 28th September, 2021, denies and faults the petition and prays that this be dismissed with costs.

The Petitioners case is that they are residents of Meru County and casual workers of the defunct Meru Municipal Council and the previous regime of devolved county government and still work for the county.

The Petitioners other case is on invocation of Section 37 of the Employment Act, 2007 as follows;

“37 (1) Notwithstanding any provisions of this Act, where a casual employee;

- a) Works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or*
- b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the Equivalent of three months or more;*

It is their case that by all implications, they are not casual employees but should be put on permanent and pensionable term considering the previous period of service. They put it thus;

13. Article 21 (1) of the Constitution of Kenya states that it is the fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.

This, the Respondent has failed to do, one year down the line.

The Petitioners further case is that they were dismissed from employment without notice and their terms of service unilaterally varied without notice or justification. They were coerced to enter into a one year contract of employment in order to get employed.

They pray as follows;

- i) *A declaration that the actions of the respondents of terminating the employment of the petitioners and relieving the petitioners of their duties is a breach of the petitioner's rights under article 27 (1) (2) & (3), 28,35,41,47 and 50 of the Constitution.*
- ii) *That this honourable court be pleased to issue a declaration that the respondents' directive to unlawfully vary the casual employees terms of employment is unfair, unlawful and violates the petitioners' fundamental rights and freedoms*
- iii) *That the honourable court be pleased to vary the terms of service of the casual employees in the service of the respondent and in so doing declare the employees to be employed on terms and conditions of service consistent with the Employment Act.*
- iv) *That the honourable court be pleased to declare that the respondents violated the casual employees rights to fair labour practices conditions of service as protected under Article 41 (1) of the Constitution and the provisions of the Employment Act, 2007.*
- v) *Compensation for unlawful dismissal and termination in terms of section 49 (1) of Employment Act.*
- vi) *General and exemplary damages for unlawful termination of employment and infringement of constitutional rights.*
- vii) *The respondents to pay costs of the petition.*
- viii) *Any other further orders as the court deems fit and appropriate.*

The Respondents deny the petition. It is their case that the petitioners are busy bodies with a concocted case and cagey on the salient issues belying this matter.

The Respondents further deny any termination/dismissal of the petitioners employment or any illegality on their part.

Her case is that upon assumption of office in 2017 there was a bloated workforce of about 1030 casual workers, 800 of them were not supported by the law, documents or at all.

The Respondents other case is that under the prevailing circumstances, the County Public Service Board embarked on a sanitization program by requesting that all these workers sign contracts to formalize the working relationships. Seven hundred (700), of them did sign the contracts but 69 declined, and absconded work and stopped reporting to their routine places of work.

The Respondents further case is as follows;

- That the new terms of service were an advantage to the workers.
- That the workers were given a one month notice of executing the contracts.
- *That prior to the signing of the employment contracts the said employees were piece rate workers who were involved in a working arrangement whereby they would be paid on each day's work, but an arrangement made whereby the cumulative payment would be done at the end of the month; such that there did exist a master roll/rooster whereby they signed for each day worked and one would only be paid for the days worked. Further nobody amongst them worked for more than 12 hours a day, the area of designation notwithstanding. Annexed and marked SM2 are copies of the said master roll.*
- *That it is hence not true that their employment would be converted to a contract employment as stipulated by section 37 of the Employment Act for the above enumerated reasons.*
- *That the petitioners and particularly the people he holds "brief" for merely want to circumvent the legitimate exercise by the county government which is to ensure transparency and legality in all the employment engagements.*

She therefore prays that the petition be dismissed with costs.

The issues for determination therefore are;

1. Whether indeed there was a termination of the employment of the petitioners by the Respondents?
2. If so, whether such termination of employment was wrongful, unfair or unlawful?
3. Whether the Petitioners are entitled to the relief sought?

4. Who bears the costs of this cause?

The 1st issue for determination is whether indeed there was a termination of the employment of the petitioners by the Respondents. The Petitioners submit a case of unlawful termination of employment as is deduced from the respondent introduction of the one year contract to beat a bloated workforce of 1030 casual labourers. To them, this was not formalization of the parties relationships but an intent of termination without incurring the terminal benefits and also avoid due process in this exercise.

The Petitioners admit failing to respond to the proposal contract on feeling that their rights are being infringed and as a consequence it is a memo annexed as SNM3. They were not given notice or subjected to any disciplinary proceedings of even afforded a hearing.

The Respondents on the other hand, submit and deny a case of termination of the employment of the petitioners. They put it thus;

“It is the Respondents contention that the Petitioners were not terminated nor dismissed and there is no evidence to show that they were terminated based on any contract. The Respondents explained that the workers were given contracts to sign in a bid to regularize the bloated workforce of about 1030 workers and for audit purposes. However, the petitioners herein blatantly refused to sign the contract and instead, absconded work and stopped reporting to their routine places of work.”

The Respondents further fault the exhibits and evidence in the petitioner’s supporting affidavit sworn on 18th June, 2019 for being non-compliant with the provisions of Rule 9 of the Oath and Statutory Declaration rules which provides as follows;

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with the serial letters of identification.”

This is not so for the Petitioner’s annexures.

The Respondents case overwhelms that of the Petitioners. This is because the petitioners have not ably demonstrated a case of termination of employment. They have not either controverted the respondents position and evidence that they side lined and ignored the request at formalization of their employment by refusing to sign the contracts of such formalization

The Claimants have failed to demonstrate their case per Section 47 (5) of the Employment Act, 2007 which provides thus;

“For any complaint of unfair employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

I therefore find a case of no termination of employment and hold as such. And this answers the 1st issue for determination.

On a finding of no termination of employment, all the other issues for determination fall by the way side.

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. MWITI INSTRUCTED BY MUCHOMBA LAW ADVOCATES FOR THE PETITIONERS

2. MISS MATERI INSTRUCTED BY MURIUKI & MBOGO ADVOCATES FOR THE RESPONDENTS.