



**Nyaboga v Kisii County Government & another (Petition
15 of 2020) [2022] KEELRC 132 (KLR) (28 April 2022) (Judgment)**

Naftali Mogaka Nyaboga v Kisii County Government & another [2022] eKLR

Neutral citation: [2022] KEELRC 132 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO

PETITION 15 OF 2020

ON MAKAU, J

APRIL 28, 2022

**IN THE MATTER OF ARTICLES 1, 2, 12, 19, 21, 22, 23, 27,
41,43, 49 & 51 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 19, 21, 22, 23,
27,41, 45 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTION 5, 17, 18, 97 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTION 3, 5, & 6 OF THE COUNTY GOVERNMENT ACT, 2012

BETWEEN

NAFTALI MOGAKA NYABOGA CLAIMANT

AND

KISII COUNTY GOVERNMENT 1ST RESPONDENT

KISII COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The Petition's claim is contained in the Amended Petition dated 13th August 2020 and it seeks the following reliefs: -



- a) A finding and holding that the Petitioner is a bona fide employee of the Respondents who has hitherto rendered his services to the Respondents for which the petitioner earned and was entitled to payment
 - b) A finding and holding that the act of hitherto withholding of the Petitioner's salaries and dues is unlawful and unfair and at therefore going against Section 5, 17 and 18 of the Employment Act, 2007.
 - c) A declaration that the Respondent's conduct of withholding the Petitioner's salary and dues has infringed Article 19, 21,23,27,41,43,1nd 47 of the Constitution of Kenya,2010.
 - d) A Mandatory injunction and or mandamus orders requiring that the salary and allowance for 41 months amounting to Kshs 3,334,243/= as at 30/6/2020 be immediately paid to the Petitioner without any further delay.
 - e) Mandatory injunction and or mandamus orders requiring the Respondent herein to include the claimant's name herein in their pay roll and process and pay the Petitioners salary and allowances monthly from 1/7/2020.
 - f) Damages for the violation of the Petitioner's Constitutional Rights under Articles 27, 41, 43 and 47 of constitution.
 - g) A prohibition order restraining the Respondents from prejudicing and or victimizing the Petitioner for filing this suit against them.
 - h) Costs of this Petition.
 - i) Interest on the (d),(f) and (h) above
 - j) Any other such order that this Honourable Court may deem fit in the interest of Justice.
2. The facts of the case are that the Petitioner is an employee of the respondents having been appointed as a Clinical Officer Job group "H" vide the letter dated 19th January 2017. The position was advertised by the 2nd respondent and the petitioner applied, was interviewed, appointed and thereafter posted to Keumbu Sub County Referral Hospital on 22nd March 2017.
 3. Since 22nd March 2017, the petitioner has been working at the said facility which is owned and managed by the 1st respondent. However, he has never been put into the respondents' pay roll and has therefore not been paid any salary since appointment. According to his appointment letter his salary scale was Kshs 19,323 in a salary scale of Kshs 19,323x 966 – 20,289 x 1,015 - 21,304x1065 - 22,369x1, 120 - 23489x1, 173 - 24,662.
 4. The respondents were served with the petition and all the supporting Affidavits and documents but they never filed any response to deny the petitioner's averments.
 5. The suit was heard verbally on 26th January, 2022 when the petitioner gave his evidence and thereafter filed written submission.

Evidence

6. The petitioner called Mr. Dolfas Rogito who testified as PW1 and told this court that on 10th July, 2020 he fell sick and went to Keumbu Sub County Hospital for treatment. On arrival at the hospital, he was led to a doctor who treated him of Gonorrhoea and got healed. He identified the petitioner as the doctor who treated him at the said hospital.



7. The petitioner then testified as PW2 and told this court that he has been working at Keumbu Sub County Hospital since March 2017 when he was posted there by the respondents. He reiterated that he was appointed on 19th January, 2017 and thereafter he was posted to the said facility posted on 20th March, 2017, vide order number 3 of 2017 and reported on 22nd March, 2017. He produced correspondence to fortify his testimony. He also produced duty roaster, attendance register, leave record's and letter from medical officer of health in charge of the hospital to prove that he has been attending duty since 2017.
8. He contended that his salary was Kshs 83000 gross but the net was Kshs 69000. He prayed for the reliefs south in the petition which include the unpaid salary from March 2017 to date.
9. On cross-examination, he testified that his job was advertised in the Daily Nation of Wednesday 18th December, 2013, and he put in an application. He then did the interview in mid-2014 and he was told to wait for the results. In the cause of time he was called for his letter appointment which he picked from the 2nd respondent's office at Mwalimu Building.
10. He reiterated that since March 2017 he has been working at the hospital up to and including the night before the date of the hearing of this petition. He denied that his appointment letter was fake contending that he has never received any letter revoking it. Furthermore, he has attended head-count exercise twice where he presented all the required documents except his pay slip. Therefore, he brought this suit after his demand for salary was ignored.

Submissions

11. The Petitioner submits that he has adduced sufficient evidence to prove that he is a lawful employee of the respondents. He further submits that the failure by the respondents to pay his salary is contrary to Section 17 of the *Employment Act*, and it amounts to violation of his constitutions rights. For emphasis he relied on Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR and Kusow Billow Isaack Vs Ministry of Interior and Coordination of National Government and 3 others [2021] eKLR where the court held that failure to pay salary to an employee after rendering services amounts to subjecting him to degrading inhuman and torturous condition contrary to article 28 and 30 of *the constitution*.
12. In view of the foregoing, the petitioner contended that he is entitled to the reliefs sought in the amended petition.

Issues for Determination and analysis

13. I have considered the pleadings, evidence and the submissions presented before this court and the following are the issues determination: -
 - a) Whether the claimant was lawfully appointed as an employee of the respondents.
 - b) Whether the petitioner has rendered services to the respondents.
 - c) Whether the reliefs sought are merited.

Was the petitioner lawfully appointment?

14. The claimant's evidence that he is a lawful employee of the respondent has not been controverted by pleadings and evidence. He has produced a letter of appointment dated 19th January, 2017 and letter from Medical Officer of Health in charge Keumbu Sub County Hospital confirming his arrival on 22nd



March, 2017 and another one dated 20th March, 2020 confirming that he has been rendering services to hospital.

15. The foregoing evidence has not been rebutted. Surprisingly the respondents have not revoked the appointment letter dated 19th January, 2017 and they have also not reported the matter to the police if, at all a crime was committed in issuing the said letter. Consequently, the court is satisfied that the petitioner has proved on a balance of probability that he was lawfully appointed by the respondents as a clinical officer.

Has the petitioner rendered services?

16. I have already pointed out at some documentary evidence on record that confirms that the petitioner has been rendering services to the respondents since 22nd March, 2017. PW1 has also given evidence to prove that the petitioner is a clinical officer-treating patient at Keumbu Sub-County Hospital. His supervisor, the Medical Officer of Health in the facility cannot be lying to write the said letters which confirm that the petitioner has been rendering services at the hospital. Therefore, I find and hold that the petitioner has been rendering services as a clinical officer at Keumbu Sub-County Hospital from March 2017 to date, pursuant to his appointment and posting by the respondents.

Reliefs

17. In view of the findings above, the court makes declaration that the petitioner is a lawful and bona fide employee of the respondents and he is entitled to payment of salary and allowances from 22nd March, 2017 to date based on the appointment letter dated 19th January, 2017. It is further declared that the withholding of the petitioner's salary and dues is unlawful and unfair and contrary section 5, 17, and 18 of the *Employment Act*.
18. It is also declared that the respondents, conduct of withholding the petitioner's salary and dues has infringed on Article 41 and 47 of *the Constitution* of Kenya. There is evidence that he has been in service as an employee but without pay, and without being accorded any hearing as to why salary cannot be paid to him even after being issued with an appointment letter and posting order.
19. In addition, I find that he was also discriminated from his colleagues who were appointed and working with him contrary to Article 27 of *the Constitution*. He was also treated like a slave and in an undignified manner contrary to Article 28 and 30 of *the Constitution*. I gather support from the Spangler Case, Supra, where Mbaru J held as follows concerning withholding of salary: -

“Such I find to be inhuman, degrading and placing the claimant under servitude and slavery. This was an exploitation of labours, good will and contrary to the job.”

20. In Kusow Billaw Isaack case, supra, cited by the petitioner, I held, and I see no reason to decide otherwise, that: -

“Having considered the above admission by the respondents that the petitioner worked without pay for over 2 years, I agree with the petitioner that he was subjected to inhuman treatment akin to slavery or servitude. He was denied the wherewithal to afford a dignified living for himself and his family for 2 years. Consequently, I find and hold that the petitioner's right to human dignity under Article 28 of *the Constitution* was violated by the respondents through the withholding of his salary for the whole period of his services as Assistant Chief.”



21. The petitioner further prays for salary amounting to Kshs 3,334,243 as at 30th June, 2020. This court is minded that the petitioner, being an employee who rendered services, is entitled to salary and allowances as per the scale set out in the appointment letter. The starting basic salary was Kshs 19,323, commuter allowance Kshs 4000, risk allowance of Kshs 3000 plus house allowance which was to be determined by his work station. Since the court has not been told the cost of housing in Keumbu, I assess the same using the conventional rate of 15% of the basic pay (Kshs 19,323) which works to Kshs 2,898.45. The petitioner's gross monthly pay is therefore Kshs 29,221.45 without the annual increments.
22. As at 30th June, 2020 the petitioner had worked for 40 months and the minimum salary earned less annual increments was Kshs 1,168,858. Therefore, I award him the said minimum pay and direct the employer to forthwith compute and pay all the annual increments as per the appointment letter dated 19th January, 2017. In addition to the foregoing, the respondents are further directed and compelled by an order of mandamus to add the petitioner into their payroll and pay him all his salary plus annual increments earned from 1st July, 2020.
23. The claimant is further awarded Kshs 1,000,000 as damages for violation of his right under Article 27, 28, 41 and 47 of *the Constitution* being freedom from discrimination and inhuman treatment, right to fair labour practices and fair administrative action.
24. Finally, the respondents are prohibited and restricted from victimising the petitioner for filing this suit. Section 45 and 46 of the *Employment Act* protects an employee from unfair termination for the reason that he has instituted a suit against the employer.
25. In conclusion, I enter judgment for the petitioner in the following terms:
 - a) The Petitioner is a bona fide employee of the Respondents and has hitherto rendered his services to them for which he has earned and is entitled to payment.
 - b) The withholding of the Petitioner's salaries and dues is unlawful and unfair and contrary to Section 5, 17 and 18 of the *Employment Act*, 2007.
 - c) A declaration that the Respondent's conduct of withholding the Petitioner's salary and dues has infringed Article 19, 21,23,27,41, and 47 of *the Constitution* of Kenya, 2010.
 - d) An order of mandamus is hereby issued requiring the respondents to include the petitioner to their Pay roll and pay him Kshs. 1,168,858 being his salary and allowances less annual increments for March 2017 to June 2020. The Respondents are further ordered to compute and pay the annual salary increments for the said period plus all his salary for the period after 1st July 2020.
 - e) The petitioner is further awarded Kshs. 1,000,000 as general damages for the violation of his Constitutional Rights under Articles 27, 41, and 47 of Constitution.
 - f) A prohibition order is also issued to restrain the Respondents from prejudicing and or victimizing the Petitioner for filing this suit against them.
 - g) The petitioner is awarded costs of the suit plus interest at court rates from the date hereof.
 - h) The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 28TH DAY OF APRIL, 2022.

ONESMUS N MAKAU

JUDGE



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 15th 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.

ONESMUS N. MAKAU

JUDGE

