



**Kenya County Government Workers Union v County Government of Wajir & another
(Petition E046 of 2022) [2022] KEELRC 3774 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3774 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E046 OF 2022
SC RUTTO, J
AUGUST 19, 2022
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE NATIONAL VALUES AND PRINCIPLES OF
GOVERNANCE UNDER ARTICLE 10 OF THE CONSTITUTION
AND
IN THE MATTER OF THE VALUES AND PRINCIPLES OF PUBLIC
SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION
AND
IN THE MATTER OF THE ALLEGED VIOLATION OF
CONSTITUTIONAL RIGHTS UNDER ARTICLES 27, 41 AND 47 OF THE
CONSTITUTION
AND
IN THE MATTER OF SECTION 12 OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT
AND
IN THE MATTER OF PART VII OF THE COUNTY GOVERNMENTS
ACT, 2012
AND
IN THE MATTER OF THE FAILURE, REFUSAL, OMISSION AND/OR
NEGLECT BY THE WAJIR COUNTY GOVERNMENT TO ABSORB
EMPLOYEES INTO ITS PAYROLL
AND



**IN THE MATTER OF NON-PAYMENT OF SALARIES TO NEWLY
EMPLOYED EMPLOYEES BY THE WAJIR COUNTY GOVERNMENT**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION PETITIONER

AND

COUNTY GOVERNMENT OF WAJIR 1ST RESPONDENT

WAJIR COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

1. The petitioner, herein being a trade union representing the employees of the respondents, brought the instant petition dated March 8, 2022, on behalf of its members.
2. The 1st respondent is a county government established pursuant to article 6 and 176(1) and the first schedule of the Constitution, 2010. The 2nd respondent is a county public service board established under section 57 of the County Governments Act, 2012, pursuant to article 235 of the Constitution.
3. The petition which is supported by the affidavit sworn on March 8, 2022, by Mr Roba Sharu Duba, who describes himself as the General Secretary of the petitioner, seeks the following orders on behalf of its members: -
 - a) A declaration be and is hereby issued that the respondents have violated the constitutional rights of the petitioner's members to equality, fair labour practices, fair administrative action and to protection from discrimination.
 - b) The honorable court be pleased to issue an order of compensation for all the petitioner's members who were competitively recruited and issued with appointment letters on diverse dates between April, 2021 and October, 2021 but who are yet to be placed on the 2nd respondent's payroll or paid their salaries for the violation of their constitutional rights to fair labour practices and equality.
 - c) This honorable court be pleased to issue an order of mandamus compelling the 2nd respondent to absorb and/or place into its payroll all the petitioner's members who were competitively recruited and issued with appointment letters on diverse dates between April, 2021 and October, 2021.
 - d) The honourable court be pleased to order the 2nd respondent to pay the salary arrears of all the members of the petitioner affected by its failure to absorb them into its payroll, from the date of issuance of appointment letters to the date of filing the suit.
 - e) Costs of this petition be provided for and the same be borne by the respondents.



Petitioner's Case

4. It is the petitioner's case that vide an advertisement notice dated March 26, 2020, the 2nd respondent expressed its intention to recruit competent, self-driven and qualified staff to fill various positions in various departments. That among the positions advertised by the 2nd respondent to be filled by suitably qualified individuals, was the position of Town Administrator, job group "N".
5. The petitioner further avers that having met the requirements for appointment as Town Administrators, the following members applied for the advertised job, were shortlisted and interviewed by the 2nd respondent and offered appointment letters on diverse dates between April, 2021 and October, 2021:-
 - i. Ahmed Idle Ahmed;
 - ii. Abdihakim Bare Hassan;
 - iii. Deka Diriye Adan;
 - iv. Sahara Bishar Mohamed;
 - v. Daud Bulle Salat;
 - vi. Yussuf Abdi Mohamud;
 - vii. Ahmed Maalim Abdullahi;
 - viii. Mohamed Ibrahim Ahmed;
 - ix. Amina Hani Rashid;
 - x. Ibrahim Yusuf Hussein;
 - xi. Mohamed Abdi Hassan;
 - xii. Abdille Suleiman Abdi;
 - xiii. Mohamed Abubakari Ojale;
 - xiv. Daud Adow Ibrahim;
 - xv. Mohamed Ali Mohamed;
 - xvi. Osman Mohamed Sheikh;
 - xvii. Mohamednur Abdow Kano;
 - xviii. Shimo Mohamed Saman;
 - xix. Qassim Mohamed Omar; and
 - xx. Adan Sambui Abdi.
6. The petitioner further states that the 2nd respondent only absorbed some employees and left out others discriminatorily mainly along tribal, clan ties and political machinations. That consequently, the said employees have not been paid salary from the date the 2nd respondent issued them with appointment letters, thus appointing them as town administrators, Wajir County.



7. The petitioner contends that failure and /or neglect by the respondents to absorb the employees mentioned into its payroll constitutes a violation of their constitutional rights to fair labour practices, equality before the law, protection from discrimination and fair administrative action. That despite the respondents' failure and/or neglect the affected members of the petitioner have continued to discharge their duties in line with their letters of appointment.
8. The respondents did not file any response to the petition despite being duly served.
9. The petition was canvassed by written submissions.

Petitioner's Submissions

10. The petitioner submitted that by the respondents failing to place its members on the county payroll and pay their salaries, they have violated the said members' constitutional rights under articles 41 and 28 of the Constitution. That further, failure to pay the salaries amounts to servitude and violation of the said members' rights to human dignity under article 28 of the Constitution. The case of Jonathan Spangler v Centre for African Family Studies (CAFS) [2017] eKLR was cited in support of the petitioner's submission.
11. It was the petitioner's further submission that by selectively placing employees on its payroll and absorbing or paying salaries of only some of the employees appointed to the same positions as the petitioner's members, the respondents had violated its members' constitutional rights under article 27 of the Constitution to equality before the law and protection.

Analysis And Determination

12. Flowing from the record, it is evident that the following issues stand out for determination by the court: -
 - i. Whether the respondents have violated the constitutional rights of the petitioner's members?
 - ii. Whether the remedies sought should issue?

Violation Of Constitutional Rights

13. The thrust of the petitioner's case is that the respondents competitively recruited its members but has failed to place them on the county payroll and pay their salaries.
14. It is worth mentioning at this juncture that the petitioner obtained orders in the form of a mandatory injunction through which the respondents were ordered to place into its payroll the petitioner's members and to commence payment of their salary arrears.
15. The petitioner argues that some of its members, were issued with appointment letters by the 2nd respondent following a competitive recruitment process but have never been placed on the payroll nor received their salaries.
16. The members of the petitioner were issued with appointment letters which were similarly worded. They read in part: -

“ Appointment as a Town Administrator

I am pleased to inform you that the Board has decided to offer you the above post with effect from the date of this letter on the following terms....”



17. It is apparent that the letters of appointment constitute the parties' contracts employment as they provide for the terms and conditions of employment, specifically; the terms of appointment, salary scale, allowances, termination, contributory pension scheme, medical scheme and leave.
18. It is also evident that the members of the petitioner accepted the letters of appointment by appending their signatures thereon, thus signifying their acceptance of the terms of employment.
19. As I have stated herein, the respondents did not tender any response to the petition hence the petitioner's assertions that its members have never been paid, was not controverted. Similarly, there is no evidence that the letters of appointment were withdrawn, hence the employment contracts are still alive and valid.
20. To further support its assertion, the petitioner has exhibited reporting letters of its members thus proving that upon employment as Town Administrators at Wajir County, they reported to work. As the respondents failed to tender any response, the Petitioner's assertions remain uncontroverted.
21. In addition, there is no evidence that the said members have not been performing their duties as expected and there was no explanation as to why the members of the petitioner have not been placed on the payroll nor paid salary.
22. To this end, I am led to conclude that indeed, the respondents failed to place the members of the petitioner on the county payroll and pay their salaries.
23. The right to fair labour practices is guaranteed under article 41(1) of the Constitution. Be that as it may, there is no singular definition assigned to the term "unfair labour practice". Therefore, the specific acts of violation alleged to have been committed by an employer, would determine whether or not, there has been an unfair labour practice.
24. Article 41 of the Constitution is so weighty as it underpins most of the provisions contained in the Employment Act. Case in point is payment of salary for work performed. No doubt, the duty of the employer to compensate an employee for services rendered, is a cardinal rule in any employment relationship. This position is aptly captured under section 17(1) of the Employment Act (Act) and reads as follows: -

"Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service..."
25. So significant is this provision that section 17 (10) of the Act provides for a penalty in the event an employer fails to make payment of or to tender wages earned or payable to an employee in accordance with section 17 (1).
26. In light of the foregoing, it is therefore evident that the respondents' actions and omissions constituted an unfair labour practice hence was in violation of article 41 (1) of the Constitution.
27. Further, the actions and omissions of the respondents was contrary to the provisions of article 28 of the Constitution which guarantees the right to dignity. The respondent's failure to pay the members of the petitioner their salaries exposed them to pecuniary embarrassment and other attendant consequences. As such, they were robbed of their human dignity.
28. Turning to the petitioner's claim of discrimination and alleged violation of article 27 of the Constitution, it is noteworthy that the Petitioner did not lead any evidence to prove that the respondent indeed paid some of its employees who were appointed at the same time with its members and that



such payment was on account of tribal, clan ties and political machinations. Further, there were no particulars provided hence the allegation was not substantiated.

29. The total sum of the foregoing is that I find that the petition is merited and the petitioner has proved that the respondents violated the constitutional rights of its members and in particular article 41 & 28 of the *Constitution*.
30. Having found as above, what reliefs avail the members of the petitioner?

Appropriate Reliefs

31. As I have found that the respondents violated the constitutional rights of the Petitioner's members, they are entitled to compensation. On this score, I am aligned to the determination by the court in the case of *Donald C Avude v Kenya Forest Service* [2015] eKLR, thus: -

“Withholding salary exposes the claimant to financial embarrassment that cannot be remedied by the mere release of the withheld salary.”

Orders

32. The petition dated March 8, 2022, is hereby allowed in the following terms:
- a. A declaration be and is hereby issued that the respondents have violated the constitutional rights of the petitioner's members to fair labour practices.
 - a. The court confirms and reiterates the order issued on April 28, 2022, compelling the respondents to place into its payroll the following members of the petitioner; Ahmed Idle Ahmed; Abdihakim Bare Hassan; Deka Diriye Adan; Sahara Bishar Mohamed; Daud Bulle Salat; Yussuf Abdi Mohamud; Ahmed Maalim Abdullahi; Mohamed Ibrahim Ahmed; Amina Hani Rashid; Ibrahim Yusuf Hussein; Mohamed Abdi Hassan; Abdille Suleiman Abdi; Mohamed Abubakari Ojale; Daud Adow Ibrahim; Mohamed Ali Mohamed; Osman Mohamed Sheikh; Mohamednur Abdow Kano; Shimoi Mohamed Saman; Qassim Mohamed Omar; and Adan Sambui Abdi.
 - b. The court confirms and reiterates the order issued on April 28, 2022, compelling the respondents to pay the salary arrears of the following members of the petitioner; Ahmed Idle Ahmed; Abdihakim Bare Hassan; Deka Diriye Adan; Sahara Bishar Mohamed; Daud Bulle Salat; Yussuf Abdi Mohamud; Ahmed Maalim Abdullahi; Mohamed Ibrahim Ahmed; Amina Hani Rashid; Ibrahim Yusuf Hussein; Mohamed Abdi Hassan; Abdille Suleiman Abdi; Mohamed Abubakari Ojale; Daud Adow Ibrahim; Mohamed Ali Mohamed; Osman Mohamed Sheikh; Mohamednur Abdow Kano; Shimoi Mohamed Saman; Qassim Mohamed Omar; and Adan Sambui Abdi.
 - c. The respondent to pay the following members of the petitioner damages in the sum of Kshs 300,000.00 each, on account of breach of their constitutional rights; Ahmed Idle Ahmed; Abdihakim Bare Hassan; Deka Diriye Adan; Sahara Bishar Mohamed; Daud Bulle Salat; Yussuf Abdi Mohamud; Ahmed Maalim Abdullahi; Mohamed Ibrahim Ahmed; Amina Hani Rashid; Ibrahim Yusuf Hussein; Mohamed Abdi Hassan; Abdille Suleiman Abdi; Mohamed Abubakari Ojale; Daud Adow Ibrahim; Mohamed Ali Mohamed; Osman Mohamed Sheikh; Mohamednur Abdow Kano; Shimoi Mohamed Saman; Qassim Mohamed Omar; and Adan Sambui Abdi.



- d. The respondent shall pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

STELLA RUTTO

JUDGE

Appearance:

Mr Oginga for the petitioner.

No appearance by the respondents.

Court Assistant Abdimalik Hussein.

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 March 15, 2020 and subsequent directions of April 21, 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

STELLA RUTTO

JUDGE

