



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 21 OF 2020

IN THE MATTER OF ARTICLE 1, 2, 3 (1), 10, 19, 20, 21, 22, 27 (1) (2)(3), 28, 47 (1) (2), 50 (1), 165 (3) (B) & AND 258 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 (1) (2) (3), 28, 41 (1) AND 50 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF RULES 4, 10, 11,13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF SECTION 31 AND 40 (1) & (2) OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF SECTIONS 41 AND 45 OF THE EMPLOYMENT ACT

BETWEEN

ABDIAZIZI SHEIKH MAAD.....1ST PETITIONER

SHAMSA MOHAMMED HAJI.....2ND PETITIONER

JOHORA MOHAMED ABDI.....3RD PETITIONER

HASSAN MOHAMED AHMED.....4TH PETITIONER

AND

THE GOVERNOR, MANDERA COUNTY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MANDERA.....2ND RESPONDENT

MANDERA COUNTY

PUBLIC SERVICE BOARD.....3RD RESPONDENT

RULING

1. On 20.4.2020, I delivered judgment in favour of the petitioners in which I granted an order of certiorari quashing termination of the petitioners' employment and prohibition the respondents from replacing them with new appointees. However, considering submissions made by the respondent on the practicability of the reinstatement, I gave the respondents the option of paying the petitioners, gratuity earned as at the date of termination plus salary for the remainder of their contract term within 90 days from the date of the said judgment.

2. The respondents computed the salary payable to the petitioners and filed the same in court vide the letter dated 15.5.2020 but the petitioners were not satisfied and through a consultant, they computed their dues and filed in court vide the letter dated 18.6.2020. By the letter dated 22.7.2020, the respondents reviewed the earlier sums downwards and told the court to ignore the computation in the letter dated 15.5.2020 stating that allowances ought to be excluded while computing terminal dues as per the Salaries and Remuneration Commission (SRC) guidelines.

3. As a result of the above deadlock, the petitioners brought the Notice of Motion dated 14.8.2020 seeking the following orders:

a) THAT the Respondents be compelled to pay them the following amounts:

(i) 1st Petitioner Ksh. 14,529,993.75

(ii) 2nd Petitioner Ksh. 12,033,021.48

(iii) 3rd Petitioner Ksh. 13,253,678.09

(iv) 4th Petitioner Ksh. 10,878,978.06

b) Costs of the application and interest.

c) Any other relief that this court may deem fit to grant.

4. The application is premised on the grounds on the body of the motion and the supporting affidavit sworn on 14.8.2020 by the 1st petitioner, Mr. Abdiaziz Sheikh Maad on behalf of his co-petitioners. The application is however opposed by the respondents vide the Replying Affidavits sworn on 2.9.2020 and 15.10.2020 Abdinur Maalim Hussein and Mr. Adan Kullow respectively.

5. The parties did not make any submissions and instead asked the court to make a ruling based on the affidavits and grounds of opposition filed.

Applicants case.

6. The applicants' case is that after the court directed the respondents to reinstate them or pay damages within 90 days of the judgment, the respondents opted to pay the damages and on 15.5.2020 they wrote to the Deputy Registrar of the court indicating that they had computed the amounts due as follows:

1st petitioner Ksh. 9,684,598.40

2nd petitioner Ksh. 6,225,798.40

3rd petitioner Kshs. 8,244,598.40

4th petitioner Ksh. 6,119,489.40

7. On 18.6.2020, the petitioners wrote to the Deputy Registrar of the Court indicating the following dues, inclusive of unpaid allowances and per diem, as computed for them by a Consultant on the basis of their employment contracts, SRC Guidelines, payslips, and travel documents among other documents:

1st petitioner Ksh. 20,854,592.15

2nd petitioner Ksh. 15,667,939.88

3rd petitioner Ksh. 18,138,276.49

4th petitioner Ksh. 14,516,753.86

8. On 22.7.2020, the respondent wrote again to the Deputy Registrar asking her to ignore the earlier computation and indicated the following as the salary due to the petitioners based on the SRC guidelines:

1st petitioner Ksh. 6,324,598.40

2nd petitioner Ksh. 3,634,918.40

3rd petitioner Ksh. 4,884,598.40

4th petitioner Ksh. 3,637,775.80

9. On 28.7.2020, the petitioners wrote to the Deputy Registrar of the Court indicating the dues following as computed for them by a consultant, less the foregoing paid amounts:

1st petitioner Ksh. 14,529,993.75

2nd petitioner Ksh. 12,033,021.48

3rd petitioner Kshs. 13,253,678.09

4th petitioner Ksh. 10,878,978.06

10. The petitioners maintained that they are entitled to the foregoing dues being the net of the amount paid after the judgment.

Respondents' case

11. The 1st and 2nd respondents contended that the computation filed on 22.7.2020 is the proper computation based on the SRC Manual for the State Officers for the County Governments and Part 7 of the Contracts of service signed by the petitioners. They contended that they paid the petitioners the following before 29.7.2020:

1st petitioner Ksh. 6,324,598.40

2nd petitioner Ksh. 3,634,918.40

3rd petitioner Ksh. 4,884,598.40

4th petitioner Ksh. 3,637,775.80

12. They argued that the said computation was based on the petitioners' basic salary and excludes their allowances because they are only paid to facilitate the employee's performance of duty. Accordingly, they contended that the claimants are not entitled to medical insurance benefit, motor insurance benefit and personal accident cover since they are no longer offering services to the public.

13. They further stated that they have paid the gratuity owed to the petitioners into the County Pension Fund and it will be released to the petitioners after clear with the County Government. Consequently, it is their view, that they have fully complied with the judgment delivered on 29.4.2020, and the court should adopt their computation and reject the application herein for being devoid of merit.

14. The 3rd respondent's case is that pursuant to Kenya Gazette Notice No 6518 dated 7.7.2017, the gross remuneration of a member of County Executive Committee was set at a consolidated sum of Kshs. 259,875 per month while the basic pay is 60% of the said sum equaling to Kshs. 155,925. Using the said basic pay, the 3rd respondent calculated the salary for the 1st, 2nd and 3rd respondent for the remaining 32 months of their contract to a total of kshs. 4,898,600 less PAYE of ksh. 1,300,281.60 and NHIF of kshs. 54,400 equaling to Kshs. 3,634,918.40.

15. The 3rd respondent, further argued that 2nd and 4th petitioners have been fully paid using their correct salary but the 1st and 3rd petitioners have been overpaid as follows by being paid kshs. 90,000 as house allowance in addition to the kshs. 155,925:

1st petitioner Ksh. 1,730,400.00

3rd petitioner Ksh. 1,249,680.00

16. As regards the payment of gratuity, the 3rd respondent contended that the said Gazette Notice also provided that gratuity shall be calculated using the basic pay, which is 60% of the said gross package. In addition, the petitioners' contracts of service provided that gratuity shall be calculated at 31% of the basic pay. According the 3rd respondent, allowances are not part of the petitioners' basic pay and as such the computation by the Consultant is incorrect because it is based on basic pay plus allowances.

17. The 3rd respondent reiterated the contention by the 1st and 2nd respondents that the judgment has fully been complied with by the payment to the petitioners' salary for the remaining term of their contracts and their gratuity being deposited with the County Pension Fund. Therefore, it prayed for the application to be dismissed with costs.

Issues for determination

18. There is no dispute that the court rendered judgment on 29.4.2020 allowing the respondents to pay the petitioners all their accrued gratuity plus salary for the unexpired term of their contracts. It is also clear from the said judgment that it only dealt with those two benefits and as such the application to compel the respondent to pay any other benefits is not going to be granted herein. Therefore the issues for determination are:

- (a) What was the petitioners' gross salary?
- (b) Whether the respondents paid the petitioners all their salary for the remainder of their contract term.
- (c) How much gratuity did each petitioner earn before termination of their contracts?

What was each Petitioners' gross monthly salary?

19. In the case of *Postal Corporation of Kenya vs. Andrew K. Tanui [2019] eKLR* the Court of Appeal discussed the issue of salary as follows: -

“Gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary.”

20. Again in *Richard Erskine Leakey & 2 Others vs. Samson Kipkoech Chemai [2019] eKLR* the Court of Appeal held that: -

“In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”

21. What I gather from the foregoing binding precedents is that an employee's actual gross salary is constituted by the basic salary plus all allowances which are not dependent on actual service and performance of the contract. In this case, the petitioners' salary was set by the SRC under the said Gazette Notice number 6518 of 8.8.2017. Accordingly, the 1st, 2nd, and 3rd petitioners' gross salary was fixed at kshs. 259,925 for their entire contract term of which 60% was basic salary while 40% comprised allowances. The said petitioners were also entitled to further allowances and benefits including Official Transport, Medical Benefit, Retirement Benefit, Group Life Insurance, Group Personal Accident cover, Car Loan, Mortgage Benefit, Daily Subsistence Allowance, Airtime and Security.

22. The 4th petitioner's basic salary was stated in the appointment letter and his allowances were set by the SRC guidelines including house allowance, hardship allowance and commuter allowance.

23. The petitioners contended that their salary for remainder of their contract term ought to include all the allowances. The respondents have however argued that only basic pay should be used to compute the petitioners' salaries for the said period.

24. I have considered the contentions by the two sides, and it is clear that 1st, 2nd and 3rd petitioners' salary was consolidated and SRC did not wish to give details of the allowances which constituted 40% of the consolidated salary. It is also clear that the said petitioners were entitled to other allowances and benefits by reason of their actual service to the public and the performance of their contract including Airtime, official transport, Daily Subsistence allowance, medical insurance, other insurances and mortgage.

25. In my view, the foregoing allowances and benefits, described by the said Gazette Notice as “other allowances and benefits” are excluded from the petitioners' salary and should therefore not be considered in computing their salary for the unexpired period of the contract term as contemplated in the judgment dated 29.4.2020. It follows therefore that the 1st, 2nd, and 3rd petitioners are only entitled to the salary set by the SRC in the said Gazette Notice being Kshs. 259,875 multiplied by the 32 months outstanding in their contract. The reason being that the said gross salary was fixed for the entire term of the petitioners pursuant to Note (b) of the Paragraph 1 of the Gazette Notice which stated that:

“(b) The monthly gross remuneration package is fixed for the term of the office of the State Officer in the County Government.”

26. As regards the 4th petitioner, the component of his remuneration to be considered in computing his gross salary is the basic salary plus house allowance. His monthly basic salary was not fixed like for the other petitioners. In 2020/2021, it was Kshs. 138,400, in 2021/2022 was kshs. 145,150 and from March 2022 was kshs. 152,010. His house allowance according to the undisputed contention was fixed at Kshs. 40,000 per month. The 3rd respondent has demonstrated that the 4th petitioner was paid the basic salary plus the annual increments for the remaining period of the contract term. What is outstanding is therefore, his House allowance for the said period at the rate of Kshs. 40,000 per month.

Whether the respondent paid the petitioners all their salary for unexpired contract term.

27. In view of the finding that the salary for the 1st, 2nd, and 3rd petitioners was Kshs.259875, the amount payable to each one of them was for the 32 months remaining before expiry of the contract was Kshs. 8,316,000 less PAYE only. As regards the 4th petitioner, he ought to receive kshs. 2,140,800 plus 2,221,800 plus 1,920,100 equaling kshs. 6,282,700. As indicated by the respondents, the 1st petitioner was paid Kshs. 6,324,598.40, the 2nd petitioner Kshs. 3,634,918.40, the 3rd petitioner Kshs. 4,884,598.40 and the 4th petitioner Kshs. 3,637,775.80. It

follows therefore, that the respondents did not pay the petitioners all their salary for the remaining term of their contracts as ordered by the court in the judgment delivered on 29.4.2020.

What gratuity is payable to each petitioner.

28. Pursuant to the aforesaid Gazette Notice, and/ or the contract of employment signed by the petitioners, they are all entitled to gratuity based on 31% of their basic salary for the period served. The same gazette Notice provided that the basic pay for the 1st, 2nd and 3rd petitioner is 60% of their gross salary of Kshs. 259,875. As regards the 4th petitioner, I have already pointed out that the basic pay was not fixed.

29. The respondents stated that they deposited the gratuity in the County Pension Fund pending clearance by the petitioners. The terms of that deposit has not been disclosed. The judgment did not give the respondents that option of investing the petitioners' gratuity without their consent.

Conclusion

30. I have found that the respondents have not paid the petitioners all their salaries for the unexpired term of the respective contracts of service. I have further found that the judgment dated 29.4.2020 did not give the respondents the option withholding or investing the petitioners' gratuity until they clear with the County Government. Consequently, I hereby direct and order the respondents to comply with the said judgment fully, by:

- (a) Properly computing the outstanding salary payable to each petitioners as indicated herein above less PAYE only.
- (b) Properly compute gratuity payable to each petitioner as indicated herein above less PAYE only.
- (c) Fully and forthwith pay and in any case not later than 30 days of today, the dues in (a) and (b) above.
- (d) The petitioners are granted costs of the application.

Dated and delivered at Nairobi this 25th day January, 2021.

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 Rule28(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