



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 82 OF 2018

SAMUEL MATHEW & 45 OTHERS.....CLAIMANTS

VERSUS

KIRAITU MURUNGI, GOVERNOR MERU COUNTY.....1ST RESPONDENT

MERU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

1. The 46 Claimants sued the Governor of Meru and Meru County Government for unfair dismissal and termination. They aver that they were engaged on diverse dates and worked as County employees for the 2nd Respondent from 1992 to 2018 serving as drivers, revenue collectors, cleaners, loaders and security guards as tabulated at pages 2 and 3 of the Memorandum of Claim. The Claimants aver that even though the Respondents adopted them from the previous regime upon introduction of devolution, they have never been issued with any employment letters and were neither provided with NSSF and NHIF covers as required by law. They further averred that they been on the Respondents' payroll since integration into the new dispensation and the Respondents cannot as such purport that they were not the Respondents' employees. They also aver that none of them has been able to go for any annual leave since they got employed. The Claimants averred that in January 2018, the Respondents unlawfully terminated their employment by summary dismissal without any explanation, justifiable cause, notice and/or hearing and that the terminations were glaringly irrational, unprocedural and unfair as it deprived them of their only source of income. They averred that the Respondents failed to heed to demands to place them on permanent terms and conditions of service and instead halted their pay. They thus seek from the Respondents their rightful statutory entitlements and terminal benefits and pray for judgment against the Respondents for:

- a. A declaration that by terminating the services of the claimants, the Respondents acted illegally and in contravention of the relevant employment and labour laws.
- b. Unpaid salaries from February 2018 to date.
- c. Unpaid leave days.
- d. 12 months salaries as compensation for loss of employment.
- e. Severance pay.
- f. Service pay.
- g. 1 month's salaries in lieu of notice.
- h. Certificate of service.
- i. Costs of the suit together with interest
- j. Any other relief that this Honourable Court may deem just and fit to grant.

2. The Claimants also filed 4 Witness Statements in total which in the main reiterated the averments made in their Memorandum of Claim. There is no defence on the file, however, on 28th August 2019 the Respondents filed on a Statement by Samuel Muriithi, the Acting Director Human Resource of the 2nd Respondent. He states that sometimes in early January 2018, the 2nd Respondent carried out a validation process

of about 1,030 workers who were allegedly working as casuals and drawing payment from the county government. That the validation process was to match the person, the work place, the skills and the salary earned so as to weed out ghost workers. That about 750 persons complied and showed their places of work and when the rest were removed from the payroll, 30 of them came forth to show their places of work and were verified. He asserts that any casuals not re-engaged afresh after their casual period ended cannot force themselves for employment by the Respondent. He further stated that some of the Claimants were recruited to work for the 2nd Respondent in a flawed process since they were not issued with any engagement letter either as a casual worker or a permanent and pensionable employee. He asserts that since the Claimants simply failed to present their documents it would be illegal for the 2nd Respondent to continue paying persons who are not in its employ. He deponed that the Claimants are also not entitled to the prayers sought in their Claim because casuals are normally paid on a daily basis for the days worked and as per the details contained in a Muster roll and that further, those who worked on Saturdays and Sundays were fully paid and therefore no issue of unpaid days should arise. He urged the Court to dismiss the Claim with costs to the Respondents.

3. Parties were to file submissions and the Claimants' submissions were to the effect that the Respondents violated the provisions of Section 41, 43, 45 and 51 of the Employment Act which stipulate the mandatory procedures every employee should be taken through before termination. They submit that the Respondents further violated the Claimants' right to administration and protection of their rights to fair labour practices contrary to Articles 47(1) and (2) and 41(1) of the Constitution of Kenya 2010 and Article 28 of the Constitution. They submitted that the employees have the right to have their inherent dignity respected and protected and that removing employees from employment without good reason contravenes this inherent dignity, especially in view of the values and principles of public service in Article 232 of the Constitution. They submitted that under Section 61(3) of the County Governments Act, the 2nd Respondent could abolish offices held by employees subject to the due process of removing or retiring the employees, including adherence to the principles of natural justice, unless the affected public officer is deployed to another office. The Claimants further submit that since some of them worked for the Respondents for more than 26 years and the least being for a period of 1 year, the Respondents did not consider the law that an individual becomes an employee after performing duties in a respective post for more than 6 months. The Claimants submitted that they were paid at the end of each month and not on a daily basis as in casual employment and were thus entitled to permanent terms of service as envisaged in Section 37 of the Employment Act and that therefore their casual service consequently became terminable by 28 days' notice under Section 35(1)(c) of the Act. They submitted that they have established their case and are entitled to the remedies prayed for and beseech the Court to find that the facts as pleaded by them have not been rebutted by the Respondents. They fully relied on the Court's opinion on the rights of workers under the Constitution and casual employment in the public service made in the case of **Peter Wambugu Kariuki & 16 Others v Kenya Agricultural Research Institute [2013] eKLR**. The Claimants thus urged the grant of the prayers in the memorandum of claim.

4. The Respondents on their part submitted that the Claimants were ghost workers and were never at any time employed by the 2nd Respondents. The Respondents submitted that the burden of proof lies on the Claimants as per the provisions of Section 107 of the Evidence Act. It was submitted that it was incumbent upon the Claimants for them to demonstrate the merits of their case and that failure of existence of an employment relationship and alleged termination shows that the Claimants have no cause of action before court. The Respondents submitted that Section 47(5) of the Employment Act provides that for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving occurrence of the same rests on the employee. They urge the Court to be guided by the case of **Casmir Nyakuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR** where the court stated that while it is the responsibility of an employer to prove or disprove a term of employment, the claimant was not released from the burden of proving his case. The Respondents urge this Court to critically analyse the documents attached and authenticate the same with individual Claimants and to especially be guided by Section 64 of the Evidence Act which provides that the contents of documents may be proved either by primary or secondary evidence. The Respondents submit that under Section 66 of the Evidence Act, secondary evidence includes certified copies given under the provisions of the Act. They submit that documents may be proved by secondary evidence only in the cases enumerated in Section 68(1) of the Evidence Act with the relevant cases for purposes of the instant case being:

(e) when the original is a public document within the meaning of section 79 of the Act;

(f) when the original is a document of which a certified copy is permitted by the Evidence Act or by any written law to be given in evidence.

5. The Respondents further submit that Section 68(2)(c) provides that the documents mentioned in Section 68(1)(e) and (f) have to be certified. The Respondents cite the case of **Dickson Ngigi Ngugi v Morrison Njenga Waweru [1979] eKLR** where the Court of Appeal held that a copy of a document which is not certified is inadmissible and the court may not look at it because of the provisions of section 67 and 68(1)(e) and (f) and (2)(c) of the Evidence Act. The Respondents submit that apart from *Exhibit No. 3 in the List of Documents dated 27th February 2020 and the bank statement under account description 'Young Enovators'*, all the attached documents are inadmissible as enumerated above. That the said inadmissible documents further relate to only 23 Claimants confirming that the Claimants are ghost workers. They assert that *Exhibit 3 (Bundle of Financial Statements from Family Bank) in the Claimant's List of Documents filed on 4th March 2020* is meant to mislead the Court as the account name belongs to the 27th Claimant, Janis Kanairo. The Respondents submitted that the Claimants were not dismissed having established that there was no employment relationship in the first place. On the issue of casual employment, the Respondents cite the case of **Josphat Njuguna v High Rise Self Group [2014] eKLR** where Abuodha J. analysed the construction of section 37 of the Employment Act as follows:

"...It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment can not be made at the end of the day or make the hiring be for more than 24 hours.... The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates."

6. The Respondents' reading of Section 37 of the Employment Act is that before the court converts a contract of service thereunder, the employee ought to first establish that they have been engaged by the employer on a casual basis and secondly, that they have worked for the said employer for a period aggregating more than one month and cited the case of **Krystalline Salt Limited v Kwekwe Mwakele & 67**

Others [2017] eKLR. They submit that the Claimants were unable to prove on a balance of probability that they were engaged by the employer for a period aggregating to more than one month so as to convert their casual daily contract to term contract as held by the Court of Appeal in **Rashid Mazuri Ramadhani & 10 Others v Doshi & Company (Hardware) Limited & Another [2018] eKLR.** The Respondents submit that in view of the contention by some Claimants and vide all the adduced Bundle of Daily Work Tickets, the Claimants were casual employees who never worked continuously but were only hired as and when need arose. The Respondents urged the Court to hold and find that the Claimants in question were in casual employment and were never converted to regular term contracts within the meaning of section 37 of the Employment Act. They further submit that the reliefs sought by the Claimants have no basis and that the orders sought are incapable of being granted.

7. The Claimants allege employment by the Respondents. They however did not attach any contracts of service and the documents that were attached in support only served to weaken their claim for conversion of their services to the predecessor of the County Government from casual labour to contract employment. As held by Abuodha J. in the case of **Josphat Njuguna v High Rise Self Group (supra)** where the learned Judge analysed the construction of Section 37 of the Employment Act as follows:

“...It is a misinterpretation of section 37(1) of the Employment Act to hurriedly deem a casual employee who has not been paid at the end of the day and who has been hired for more than 24 hours, as a regular or permanent employee. There could be logistical, circumstantial or even consensual reasons why payment can not be made at the end of the day or make the hiring be for more than 24 hours.... The provisions of section 37(1) therefore does not oblige an employer to absorb in his workforce casual employees merely because they have not been paid at the end of the day and have been hired for more than 24 hours. Any other interpretation would yield absurd results and interfere with freedom of contract, the premise upon which employment law operates.”

8. There was a burden placed on the Claimants to each prove their employment with the 2nd Respondent in order to recover. Suing the 1st Respondent was superfluous as the employment of employees of any county are the responsibility of the County Public Service Boards. Under Section 55 of the County Governments Act 2012, the County Public Service Boards were established pursuant to Article 235 of the Constitution. The functions of the County Public Service Board are set out in Section 59. Section 59(1)(a) and (b) provide as follows:-

(a) Establish and abolish offices in the county public service;

(b) Appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments

9. The Claimants did not provide any proof that the Meru County Service Board appointed them to any position. Indeed, they averred in paragraph 10 of their claim that they had *been under the Respondent's payroll since integration into the new dispensation yet they were not formally employed and as such cannot purport that the Claimants were not the Respondent's employees.* The assertions by the Respondents that the 'employees' were ghost workers identified through a verification exercise was not rebutted by the Claimants. In the premises considering the absence of evidence of employment and the foregoing, this suit is devoid of merit and is accordingly dismissed. Each party shall bear their own costs.

10. The Court unreservedly apologises for the delay in rendering the decision which was delayed by the failure of the ELRC Registry at Meru forwarding the file as directed by the Court in November 2020. Despite the fault not being of my making it is nonetheless my duty as a Judicial officer to ensure decisions are issued as required in law. Hopefully this type of delays will be a thing of the past with the continued digitisation of judicial services.

It is so ordered.

Dated and delivered at Nairobi this 18th day of February 2021

Nzioki wa Makau

JUDGE