



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
PETITION NO. 3 OF 2019

(Originally Nairobi ELRC Petition No. 61 of 2019)

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 19, 20,
25(a), 28, 41(1) AND 47(1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE UNIVERSITY OF NAIROBI BEING A
PUBLIC INSTITUTION IN THE REPUBLIC OF KENYA**

BETWEEN

ELIAS WANJALA WEKESA.....PETITIONER

VERSUS

VICE-CHANCELLOR, UNIVERSITY OF NAIROBI.....1st RESPONDENT

REGISTRAR, ADMINISTRATION, UNIVERSITY OF NAIROBI.....2nd RESPONDENT

FINANCE OFFICER, UNIVERSITY OF NAIROBI.....3rd RESPONDENT

PRINCIPAL, KIKUYU CAMPUS, UNIVERSITY OF NAIROBI.....4th RESPONDENT

JUDGMENT

1. Elias Wanjala Wekesa (the Petitioner) was initially employed as a Clerk by the University of Nairobi (the University) on or around 1 March 2005.
2. On 3 November 2009, the Assistant Procurement Officer requested the Deputy Vice-Chancellor Administration and Finance to consider offering the Petitioner the position of Data Entry Clerk in Procurement office, Kikuyu campus.
3. The Principal, College of Education and External Studies offered the Petitioner the position of an acting Procurement Clerk on 28 January 2010.
4. The Petitioner continued to serve the University, and on 26 March 2014, he applied to be considered for the position of Records Clerk Grade IV.
5. On 14 November 2014, the Petitioner applied to the Deputy Vice-Chancellor to be considered for the position of Stores/Records Clerk Grade IV in the procurement office.
6. There are no documents to confirm whether there was a response to the application.

7. On 14 November 2016, the Principal, College of Education and External Studies, wrote to the Petitioner notifying him of the renewal of his contract for a period of 1-year (from 1 December 2016 to 30 November 2017).

8. The Principal, through a letter dated 11 December 2017, renewed the contract for another 1-year (from 1 December 2017 to 30 November 2018).

9. When the contract expired, the Petitioner applied for a renewal. However, through a letter dated 10 December 2018, the Principal notified the Petitioner that the request had not been approved.

10. The Petitioner was dissatisfied, and on 18 March 2019, he moved the Court in Nairobi alleging breach of contract and violation of his fundamental rights and freedoms.

11. In the Petition, the following reliefs were sought:

(i) THAT the Honourable Court declares that my fundamental rights were grossly violated by my employer, the University of Nairobi, contrary to Articles 43 and 47 of the Constitution of Kenya, 2010, sections 5(3)(b),(5),9(a), 28(1)(a) and 35(5)(c) of the Employment Act, 2007.

(ii) THAT the Honourable Court varies my terms and conditions of my employment and by so doing declares me as a permanent and pensionable employee of the University of Nairobi as per section 37(4)(3) of the Employment Act, 2007 with effect from the year 2005.

(iii) THAT the University redeploys me to a section different from my previous work station where I have been discriminated and mistreated.

(iv) THAT the Honourable Court orders that the University of Nairobi duly remunerates me with effect from 1st March 2005 to 30th November 2015, which is equivalent to 130 months based on my current salary scale of Storeman grade III at Kenya shillings 41,278.00 plus accrued interest on the claim.

(v) THAT the University pays my accrued leave days and interest on the payment with effect from June 2005 to November 2015.

(vi) THAT the University of Nairobi refunds me all medical expenses incurred for the treatment of the psychological conditions caused by the mental torture it caused me.

(vii) THAT the University of Nairobi duly pays me my salary arrears and gratuity at the rate of Kenya Shillings 41,278.00 being the salary of Storeman grade III with effect from 2005 or subsequently pay me for service rendered to my retirement age of 65 years of age.

(viii) THAT the Court order that provisions of the Constitution, the Employment Act 2007 and the internal and external collective bargaining agreements are fully complied with.

(ix) THAT the costs of this Petition is borne by the Respondents.

12. The Respondents did not file their responses to the Petition in time, and on 25 May 2019, the Court granted them leave to file the same within 14 days.

13. The leave was extended on 20 June 2019. At the same session, the Court transferred the Petition to Bungoma upon the request of the Petitioner.

14. The Respondents caused a replying affidavit in opposition to the Petition to be filed on 8 July 2019.

15. On 10 July 2019, the firm of Emmanuel Wanyonyi & Co. Advocates filed a Notice of Appointment to come on record for the Petitioner.

16. Since there was no permanent judge based in Bungoma, the file was later transferred to Kisumu.

17. The Court gave directions on 25 January 2021, as a consequence of which the Petitioner filed his submissions on 25 February 2021. The Respondents submissions were filed on 29 March 2021 (should have been filed and served by 25 March 2021).

18. The Petitioner did not explicitly identify in his submissions the Issues for determination.

19. From the Petition, affidavits and submissions, the Court understands the Petitioner's claims as anchored on breach of contract, and the Court will examine the same in terms of the reliefs which were pleaded.

Nature of contract: declaration Petitioner permanent and pensionable employee

20. The Petitioner had a contractual relationship with the University as early as 2005.

21. The relationship was not initially reduced into writing through a contract of service, but there are several secondary documents the Petitioner filed to demonstrate that he had a contractual relationship with the University.

22. It was only in 2015 that the University issued an appointment letter to the Petitioner. Before then, the Petitioner was paid monthly through vouchers.

23. The Petitioner contended that since he had served as a casual from 2005 to 2015, the University violated his rights by not placing him on permanent and pensionable terms. He cited the Court of Appeal judgment in *Nanyuki Water & Sewerage Co Ltd v Benson Mwiti Ntiritu & Ors* (2018) eKLR.

24. Section 14 of the Employment Act (now repealed) and sections 9, 10, and 37 of the Employment Act, 2007 all envisage and recognise different types of contracts of service, including casual employment, term-contracts, contracts of definite duration (fixed-term), contracts of indefinite duration and piece-rate contracts.

25. The Petitioner was paid by the month from 2005 to 2015. Therefore, he was on term-contract by virtue of section 37 of the Employment Act, 2007, at least from 2 June 2008 when the Act commenced.

26. The type of contract between the Petitioner and the University was one recognised by law, and without any evidence that such a contract violated the supreme law, the Court is unable to hold that there was a breach of the Petitioner's rights.

27. Consequently, the Court is unable to convert the contract(s) to permanent and pensionable terms. The nature of the contract was up to the party autonomy of the Petitioner and the University.

Compliance with terms of collective bargaining agreement(s)

28. The Petitioner sought an order compelling the Respondents to implement and/or comply with terms of collective bargaining agreements as far as his terms and conditions of service were concerned.

29. However, the Petitioner did not file/produce in Court copies of the collective bargaining agreements. He also did not disclose the particulars of the parties to the agreements.

30. In the circumstances, the Court cannot order compliance and/or implementation of collective bargaining agreements that were not placed before it.

31. In the same vein, the Court is unable to find that the Respondents were in breach of any such agreements.

Underpayments

32. The Petitioner sought an order compelling the University to pay him at the rate of Kshs 41,278/- (being the monthly salary in 2018) from 1 March 2005 to 30 November 2015.

33. Salary is ordinarily left to the contracting parties. The Court would only intervene where evidence is produced that the agreed salary was below the prescribed or gazetted minimum rates.

34. The Petitioner did not prove that the salary he was earning was below the prescribed minimum or contractually agreed rates.

Accrued leave days

35. On account of leave, the Petitioner prayed for an order compelling the University to pay accrued leave from 2005 to November 2015.

36. Section 28(4) of the Employment Act, 2007 circumscribes the number of leave days that can be carried forward.

37. The Petitioner did not provide evidence that he applied for leave and was denied or carried forward the 10 years accrued leave with the university's approval. A copy of the leave policy of the University was also not produced.

38. The Petitioner did not lay a sufficient evidentiary foundation for this head of the claim, and relief is declined.

39. The Court is also of the view that some of the claims for accrued leave is caught up by the law of limitation.

Medical expenses

40. This head of the claim was in the nature of special damages. If the Petitioner incurred medical costs in the course of work, he did not file copies of receipts to prove that he incurred any expenses from his pocket. The head of the claim was not proved.

Gratuity

41. The general law of employment does not provide for payment of gratuity. Section 35(5) of the Employment Act, 2007 allows *service pay* but only when the employee is not a member of a pension scheme or contributor to the National Social Security Fund.

42. The Petitioner did not file his initial letter of appointment, and the Court cannot determine whether payment of gratuity was one of the terms.

43. However, the University produced records to show that the Petitioner's gratuity was processed together with other employees whose contracts had expired.

44. Nothing, therefore, turns on this head of the claim.

Discrimination and redeployment

45. The Petitioner's contract lapsed, and the University opted not to renew it. The Court cannot order his redeployment/reinstatement as this was not a case of unfair termination of employment.

46. The Petitioner did not give particulars of discrimination or prove discrimination.

47. Before concluding, the Court notes that the Petitioner introduced in the submissions new prayers which were not pleaded, such as reinstatement, house allowance, transport allowance and compensation. The Petition was not amended to introduce these heads of relief. The reliefs could only have been considered if anchored on the pleadings.

48. The Petitioner approached the Court through a Petition. The Petition did not disclose any constitutional issues.

Conclusion and Orders

49. From the foregoing, the Court finds no merit in the Petition. It is dismissed with no order on costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 21st day of April 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Emmanuel Wanyonyi & Co. Advocates

For Respondents KTK Advocates

Court Assistant Chrispo Aura