



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 2 OF 2019

(FORMELY NAIROBI ELRC PETITION NO. 147 OF 2018)

THE COUNTY GOVERNMENT WORKERS UNION.....PETITIONER

VERSUS

NAROK COUNTY GOVERNMENT.....1ST RESPONDENT

NAROK COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner, a trade union acting on behalf of one of its members, **Emily Naanyu Sena**, filed this petition dated 20th December, 2018 on the 21st December, 2018 through the firm of Brian Otieno and company advocates. It alleges that it is a registered trade union under the labour relations Act which has a duly registered Collective Bargaining agreement with the respondent that was registered in this Court on 12th April, 2017.

2. That its member, Ms Sena, was employed by the respondent as an administrative officer under job group 'K' at the department of education and social services by its letter of appointment of 25th June 2014 for a salary of Kshs. 31,020/-. That on 2nd November, 2016, the 2nd respondent advertised to fill several position in its department of medical, which the petitioner member applied for the position of assistant director counselling services under Job Group 'P'. Subsequently, Ms Sena was shortlisted for the said position and was invited for an interview which she attended and on 23rd May, 2017, she received a confirmation letter with the new appointment taking effect on the same day. The salary attached to this position was Basic salary of Kshs. 72,527.00/= per month with total earnings inclusive of all allowance amounts to Kshs. 120,740/-.

3. It is stated that Ms. Sena, accepted the said employment offer by appending her signature to the letter of appointment and was duly deployed to the department of medical and health services at the Narok County Referral Hospital which she worked till February 2018 when she discovered that her salary had reduced to Kshs. 55,410/- with a basic salary marked at Kshs. 40,410/-. Consequently, she inquired on the salary review by her letter of 17th April, 2018 which failed to elicit any response from the respondents herein. further that the net salary received by Ms. Sena was Negative -7,160.55/- due to prior commitment that she had engaged in.

4. It is averred that the actions of the respondent to unilaterally change the petitioner's member's contract and review her salary downwards is unlawful and against Article 41(2)(a) of the constitution of Kenya and section 26 of the employment Act.

5. Further that the said reduction of salary had placed the petitioner's member into hardship as she no longer meets her financial obligations. Additionally, that the respondents have violated the Petitioner's rights as provided for under Articles 28, 41, 47, 232 of the Constitution and sections 17 and 26n of the Employment Act. The petitioner, therefore seeks the following reliefs; -

a) A declaration that the terms of offer of appointment contained in the petitioner's member's letter of appointment dated 23rd May, 2017 are proper and conclusive terms of employment contract regulating the employment relationship between the petitioner's member respectively and the respondents.

b) That this honourable court do make an order of injunction restraining the respondents either by themselves, employees, servants and or agents from varying the terms of engagement of the petitioner's member's terms of service of the petitioners member's as obtained in the letter of appointment and the Collective Bargaining Agreement between the petitioner and the respondents.

c) That a permanent injunction do issue restraining the respondents either by themselves, their agents, servants and or employees from varying and or altering the petitioners member's terms of employment and or engagement to the detriment

of the petitioners member and without complying with the due procedure of law.

d) That a mandatory order do issue compelling the respondents to pay the petitioner's member in full the unlawfully varied salary from the date of the action and or omissions of the respondents.

e) That this honourable Court be pleased to declare that the respondents violated the petitioner's member's rights to fair labour practices namely; reasonable working conditions including her terms and conditions of service as protected under Article 41 of the Constitution and the Employment Act.

f) That this Honourable Court be pleased to issue a declaration that the respondent directives to unlawfully vary the petitioner's member's salary is unfair, unlawful and violates the petitioner member's fundamental rights and freedoms which are protected by the law.

g) That this honourable Court be pleased to issue damages for breach of contract and costs plus interest on damages and costs at court rates.

h) That any other or further orders as this Honourable Court deems fit and appropriate.

6. The Respondents filed a Replying Affidavit sworn by the Chief Executive Officer of the 2nd Respondent, **Zipporah Sintoyia Gad**, on 23rd March, 2021, which was struck out on 27th April, 2021 by this Court and parties proceeded to filing submissions with the Petitioner filing on 8th July, 2020 and the Respondent on 24th March, 2021.

Petitioner's submissions

7. The petitioner's Counsel submitted that the actions by the respondents to unilaterally review the petitioner's member salary downwards was unlawful. He argued that the decision was unilateral and violated the said member's right to fair labour practices provided for under Article 41 of the constitution when the respondent varied the claimant's salary and terms of engagement against an existing Collective Bargaining Agreement which is recognized under section 26 of the Employment Act.

8. The petitioner's counsel submitted that the petitioner's Member was duly appointed in the position of assistant director counseling services at job group 'P' after a competitive process of recruitment. That she was issued with a letter of appointment, therefore the respondents ought to have equally at the very least communicate the review of the salary and the downgrading of the petitioner's member's Job Group from 'P' to Job Group 'K'. Accordingly, the petitioner submitted that the actions of the respondents was unfair and unlawful and relied on the case of **Maxwell Miyawa & 7 others –vs- Judicial Service Commission [2017] eKLR**.

9. It is the Petitioner's submissions that the petitioner's member had legitimate expectation based on its letter of 23rd May, 2017, so that in case of any variation in the terms of the contract, the respondents had to renegotiate with the employee on the new terms they are proposing and arrive at a mutual agreement. He buttressed his argument by relying on the case of **Jackson K. Berege –vs- Maasai Mara University [2015] eKLR**.

10. Counsel submitted that the cumulative actions leading to the revision of the petitioner's member's Job group from 'P' to 'K' without her input amounts to discrimination at work place contrary to the provisions of Article 27 of the Constitution as read with section 5(2) of the Employment Act. Further that right to dignity provided for under Article 28 of the constitution has been violated by the respondents when Ms. Sena's salary was reduce to Kshs. 55,410/- bringing the petitioner net salary to Kshs -7,160,55/- which she is unable to meet her daily financial obligations.

11. The petitioner's Counsel submitted that, Section 10 of the Employment Act sets out the contents and terms that ought to be included in an employment contract so that when there is any change on the said contents the same ought to be communicated in writing to the affected employee. He argued that the petitioner's member was qualified for the position applied having completed her Masters studies and even submitted in the interview her certificate of completion which was accepted by the respondents therefore the alleged review of her Job group is not justified. In this he cited the cases of **Nyangau Erick Nyakundi –vs- Secretary Teacher Service Commission [2016] eKLR** and this Honourable Court decision in **Kenya County Government Workers Union –vs- Wajir County Government and Another[2020] eKLR**.

12. On whether the respondents have violated the petitioner constitutional rights, it was submitted that the respondent have violated Article 10 (2)(b) of the Constitution when they unilaterally revised the petitioner's member salary downwards without consulting the said employee and failing to take any accountability of their actions. It is alleged that Article 27 of the constitution was violated by the respondent when they subjected the petitioner's member to unfair labour practices thus curtailing her right under Article 41 of the constitution. Further that the reduction of her salary subjected the petitioner's member to financial difficulties since she cannot meet her daily financial obligation now that her net salary is on the negative therefore the respondents violated her right to dignity as espoused under Article 28 of the Constitution.

13. It was also submitted that the respondents failed to consult the petitioner on the change of terms of employment and the salary review thereof which in essence subjected the petitioner member to unfair labour practices within the meaning of Article 47 of the Constitution.

14. The petitioner therefore urged this court to allow its petition as prayed.

Respondents' submissions

15. The respondents submitted from the onset that the petitioner here lack the requisite locus standi to institute this Suit for the said Ms. Sena

and that a party seeking to sue on behalf of another must possess the said *locus standi* as held in the case of **Law society of Kenya –vs- Commissioner of lands & 2 others [2001] eKlr**. Accordingly, he argued that the Petitioner herein has not furnished this court with any evidence to affirm that indeed Ms. Sena is their member and that this Court cannot assume that the said employee is a member of the trade union unless it is furnished with evidence. Further that a trade unions does not have general authority to protect workers interest rather that they should represent a specific class of employees who should be identifiable who must have a face as was held by Justice Rika in **Geoffrey Mareko –vs- National general secretary dock workers union & 2 others [2015] eKlr**. The advocate thus urged this court to dismiss this petition for want of locus.

16. The respondents counsel further submitted that the suit herein was filed by the petitioner prematurely in that the petitioner failed to exhaust its internal dispute resolution mechanism provided for under Section 77(1) &(2) of the County Government Act as read with section K. 10 of the Human resource and procedures Manual for the public service, 2016 that mandates a public officer aggrieved by the decision of the 2nd Respondent herein to appeal to the Public Service Commission and further seek review within 6 months, from the said commission as provided for under Section 77 (5) Government Act as read with section K.11 of the Human resource and procedures Manual for the public service, 2016 .

17. It was submitted by the respondents that the Petitioner herein ought to have instituted a simple claim and not a constitutional petitioner as the issue in dispute majorly is on downgrading of Ms. Sena from Jog Group ‘P’ to job group ‘K’ and not any violation of constitutional right as alleged by the petitioner. He further argued that since the employment act has provided for ways of dealing with disputes arising out of employment contract the petitioner ought to have filed a Claim and not a petition as was held in the cases of **Speaker of National Assembly –V- James Njenga Karume [1992] Eklr** and in the case of **Alice Mweru Ngai –V- Kenya Power And Lighting Co. Ltd[2015] Eklr** which court was categorical that when the law provides for specific rules in dealing with a given issue, the courts must respect and uphold the law and allow the said specific rules take precedence.

18. The respondent also cited the case of **Secretary,County Public Service Board & Another- Versus Hulbhai Gedi Abdille [2017] Eklr** which in summary upheld the bar to the invocation of the court jurisdiction where there is alternative remedy and held that section 77 of the county government Act bestowed upon the PSC original and specialized jurisdiction to hear appeals on decision made by county public service board relating to employment of a person in the county government including the decision in respect to the matter listed under section 77(2)(a)to(g) of the County Government Act. Additionally, counsel submitted that section 77 of the County Government Act, is couched in mandatory terms and the operative word is “shall” as was held in **James Akelerio Alias Muguu & Another –V- Moses Kasaine Lenolkilal & 3 Others [2014] Eklr**.

19. The respondents further submitted that, the 2nd respondent is empowered under section 59(4)(f) of the County Government Act to carry out investigation on its own initiative or upon a complaint by any person or groups on the violation of any values and principles provided under Article 10 of the constitution. Further that under section 60(1)(d) and (e) of the County Government Act the 2nd respondent is enjoined to establish offices if it is satisfied that the establishment of such offices including level of grading, qualification and remuneration shall not disadvantage similar officers in the County public service or occasion unfair competition for staff among county public service bodies. Moreover, it was submitted that under section 63(2)(c) of the County Government Act the 2nd respondent can review the said appointments either on its own motion or on account of best interest of the county Public service and parity treatment of the public officers depending on circumstance of each case. Accordingly, it was submitted that Ms. Sena was erroneously graded and appointed to the said position which error was realized later by the respondent and swiftly acted upon to avoid any further unfair advantage gained by the said Ms. Sena.

20. Counsel buttress his arguments by citing the case of **Nicholas Muturi Okemwa & 8 others v Judicial Service Commission [2016] eKLR**, where *Lady Justice Linnet Ndolo* was faced with a similar matter and held as follows:

“So was the Respondent right in re-designating the Claimants? The Respondent’s witness told the Court that the positions and resultant salaries assigned to the Claimants irregularly had distorted the existing schemes of service and had created establishment anomalies within the Judiciary. In the final submissions filed on behalf of the Respondent reference was made to the decision by Ongaya J in Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another [2013] eKLR where the Court found recruitment undertaken outside established policy guidelines and regulations to be unlawful. In my view the respondent was not only mandated but was infact obligated to right the wrong that had occurred, more importantly a court of law cannot confirm actions taken illegally”

21. Accordingly the respondents submitted that Ms. Sena was re-graded to an appropriate job group in accordance with her qualification therefore the respondent acted within the law. Additionally, that the remedial action taken by the respondent to remedy the error of grading of Ms. Sena should not be seen as changes contemplated under section 10(5) of the Employment Act that in essence would have warranted the consultation of the employee before any action was to be undertake.

22. The Respondent therefore urged this Court to dismiss this Petition for lacking merit.

23. I have examined the averments and submissions of the parties herein. The issues for this court’s determination are as follows;

- i) Whether the petitioner herein has locus to file this petition on behalf of grievant herein Ms. Sena.**
- ii) Whether this petition was filed prematurely without exhausting of all the internal dispute resolution mechanisms provided under the law.**
- iii) Whether the petitioner erred in filing a petition as opposed to a claim.**
- iv) Whether the respondent erred in law by regrading the grievant downwards.**

v) **Whether the respondent breached the grievant's rights under the constitution.**

vi) **What remedies to grant in the circumstances.**

24. On the issue No.1, the respondent have submitted that the petitioner lacks locus in filing this petition on behalf of the grievant.

25. They aver that the petition have not furnished any proof that the grievant is their member. However from the supporting affidavit filed on 2/12/2018 by the petitioner Secretary General, the petitioner annexed App RSD1' to show they are a registered union in the local Government sector.

26. The petitioner and respondent also have a CBA which covers some staff employed by the respondent.

27. The CBA annexed and dated 1.9.2012 – RSD 2' indicates that it was to apply to officers on contract on permanent establishment for which the grievant was as per the appointment letter dated 26.6.2014.

28. The contention that the petitioner had no locus to file this petition on her behalf is therefore not true.

29. On issue No.2, the respondent submitted that the petitioner filed the petition prematurely without exhausting all the internal dispute resolution mechanisms provided under Section 77(1) and (2) of the County Government Act as read with Section K10 of the HR & P Manual of Public Service 2016. Section 77 (1) and (2) of the County Government Act States as follows;

77. Appeals to the Public Service Commission

(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—

(a) recruitment, selection, appointment and qualifications attached to any office;

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and, values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

30. Indeed the law envisages that anyone aggrieved by any decision made by the County Public Service Board may appeal to the Public Service Commission.

31. In this case the grievant didn't exhaust all the existing internal dispute resolution mechanisms available. However the requirement for exhaustion of internal dispute resolution mechanism refers to incidents where an applicant choses to file a Judicial Review application as opposed to a petition as herein filed.

32. Indeed Section 9(2) of the Fair Administrative Action Act states as follows;

9. "Procedure for judicial review

(1)

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

In any case Section 9(4) states that;

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application

by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

33. In that regard the requirement to exhaust internal disciplinary mechanism is not cast in stone and the court has residual power to exempt the applicant from exhausting the said requirement. In the case of the petitioner herein, then, it would indeed not be in the interest of justice to refer the petitioner back to the Internal dispute mechanisms 3 years down the line when nothing has changed since 2018 when the impugned decision was made.

34. In the circumstances the submissions by the respondent is found without merit and the grievant is still entitled to some audience and consideration before this court despite not exhausting all the internal dispute resolution mechanisms before approaching this court.

35. On issue No.3 the respondent have argued that the petitioner should have filed a claim as opposed to a petition. I will determine this issue together with No.4 & 5 above.

36. In my view the only determination as to whether to file a claim as opposed to a petition is on whether the law adequately covers the remedies sought. Indeed where there is a constitutional breach, the Employment Act 2007 will not adequately cover the claim and therefore filing a petition would be appropriate.

37. The petitioner avers that the salary of the grievant was reduced and this was downgraded without recourse to her. She argues that this was in breach of the Employment Act 2007 of the constitution.

38. Indeed the grievant had been promoted to Job Group P' with effect 23/5/2017. In March 2018, the promotion was reversed making her earn a negative salary without consulting with her.

39. Section 10 (5) of the Employment Act 2007 states as follows;

(5) “Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

40. There is no indication that the grievant was consulted before she was degraded and her Job Group reversed downwards.

41. This was indeed a breach of her constitutional right to Fair Labour Practices as envisaged under Act 41 of the Constitution which states as follows;

41. Labour relations

(1) Every person has the right to fair labour practices. (2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike. Const2010 Constitution of Kenya, 2010 24

(3) Every employer has the right—

(a) to form and join an employers organisation; and

(b) to participate in the activities and programmes of an employer’s organisation.

(4) Every trade union and every employers’ organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining.

42. She was also against Article 28 of the constitution where her human dignity was called into play. Article 47 of the constitution also provides as follows;

47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

43. Administrative decisions were also made against her without any fair hearing and therefore her rights to fair administrative actions were breached.

44. It is therefore my finding that in answer to issues No. 3, 4 & 5 that the petitioner did not error in filing this petition.

45. It is also my finding that the respondent erred in law by regrading the grievant downwards.

In the same vein, the respondents breached the grievant's rights under the constitution and in particular Article 41, 28 & 47 of the constitution.

46. In terms of remedies I find for the petitioner and grant the following orders:-

a) A declaration that the terms of offer of appointment contained in the petitioner's member's letter of appointment dated 23rd May, 2017 are proper and conclusive terms of employment contract regulating the employment relationship between the petitioner's member respectively and the respondents.

b) That this honourable court makes an order of injunction restraining the respondents either by themselves, employees, servants and or agents from varying the terms of engagement of the petitioner's member's terms of service of the petitioner's member's as obtained in the letter of appointment and the Collective Bargaining Agreement between the petitioner and the respondents.

c) That a mandatory order is issued compelling the respondents to pay the petitioner's member in full the unlawfully varied salary from the date of the action and or omissions of the respondents.

d) That this honourable Court declares that the respondents violated the petitioner's member's rights to fair labour practices namely; reasonable working conditions including her terms and conditions of service as protected under Article 41 of the Constitution and the Employment Act.

e) That this Honourable Court issues a declaration that the respondent directives to unlawfully vary the petitioner's member's salary is unfair, unlawful and violates the petitioner member's fundamental rights and freedoms which are protected by the law.

f) The respondent to pay the grievant damages for breach of her constitutional rights in the sum of 1Million.

g) The respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

Dated and delivered in open Court this 20TH day of MAY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno for Petitioner – present

Kere for respondent – present

Court Assistant - Wanyoike