



REPUBLIC OF KENYA



**Kariuki & 4 others v Office of the Auditor General & 2 others (Petition
16 of 2020) [2021] KEELRC 6 (KLR) (11 June 2021) (Judgment)**

Kelvin Gatembo Kariuki & 4 others v Office of the Auditor-General & 2 others [2021] eKLR

Neutral citation: [2021] KEELRC 6 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 16 OF 2020

J RIKA, J

JUNE 11, 2021

BETWEEN

KELVIN GATEMBO KARIUKI 1ST PETITIONER
ELIZABETH W MUTUA 2ND PETITIONER
BRENDA ANINDO 3RD PETITIONER
CATHERINE N MURIITHI 4TH PETITIONER
SCOLASTICA WARIRA NJERU 5TH PETITIONER

AND

OFFICE OF THE AUDITOR GENERAL 1ST RESPONDENT
THE HON. ATTORNEY GENERAL 2ND RESPONDENT
NATIONAL EMPLOYMENT AUTHORITY 3RD RESPONDENT

The legal value of a letter of appointment.

Reported by John Ribia

***Labour Law** – employment law – letter of appointment – letter of appointment vis-à-vis an employment contract – whether an employee recruitment exercise that culminated in successful applicants being awarded appointment letters could be invalidated on grounds that the letters were processed in disregard of the human resource policies and procedures – whether a letter of appointment that was delivered to a job applicant and was annulled before the applicant reported for duty without the job applicant’s knowledge was valid – whether an appointment letter was equivalent to an employment contract – Employment Act, 2007, sections 9 and 10.*

Brief facts

The petitioners applied for the positions at the Office of the Auditor General and were invited for interviews. They were successful and were issued with offer letters signed by the Auditor General and directed to report



for duty on August 15, 2019. However, on August 9, 2019 the Auditor General wrote to the Deputy Auditor General Corporate Services stating that it had come to his attention that the letters were processed in total disregard of the human resource policies and procedures. He annulled the letters of appointment, but that was not communicated to the petitioners. When they reported on August 15, 2019 as advised, they were indefinitely lied to, that the 1st respondent was in the process of procuring office space and equipment, in readiness for petitioners' undertaking of their new roles.

Issues

- i. Whether an employee recruitment exercise that culminated in successful applicants being awarded appointment letters could be invalidated on the grounds that the letters were processed in disregard of the human resource policies and procedures.
- ii. Whether a letter of appointment that was delivered to a job applicant and was annulled before the applicant reported for duty, without the job applicant's knowledge, was valid.
- iii. Whether an appointment letter was equivalent to an employment contract.

Held

1. The instant suit was mainly a contractual dispute, rather than a constitutional dispute. The petitioners ought to have sought a remedy from the Employment Act and from within the contracts they alleged were issued to them by the 1st respondent. If they found no remedy in the statute and the contracts, they would be justified in seeking a remedy from the Constitution, and probably asking the court to declare the Employment Act constitutionally impaired, for its failure to find a remedy to such a simple contractual grievance.
2. The court would look at the dispute from the perspective of the Employment Act and the contracts allegedly issued to the claimants, and explore if there was a breach and whether a remedy could be found from the Employment Act and the relevant contracts.
3. The contracts were valid under sections 9 and 10 of the Employment Act. The Auditor-General himself signed the contracts and the petitioners signed their respective letters. While other letters of employment said to have been issued validly by the 1st respondent were signed by another person for the Auditor-General, the Auditor-General himself, signed the letters issued to the petitioners. The employees' personal details, job descriptions, the date of commencement and the details of remuneration were stated in the letters. Having entered into those contracts, the 1st respondent could only terminate the contracts in accordance with the termination clause and the Employment Act.
4. The Auditor General advised that he had unilaterally annulled the letters. He did not say under what clause in the contracts or provisions in the Employment Act his decision was based. He alluded to the human resource policies and procedures. The 1st respondent did not exhibit the specific human resource policies and procedures and bring to the attention of the court clauses which invalidated the petitioners' letters of appointment, or any clause in the human resource policies and procedures, justifying the annulment of executed letters of appointment by the Auditor-General.
5. The Employment Act and the respective contracts had in themselves, adequate remedies in redressing breaches, which did not warrant at all, bloating the dispute into a constitutional dispute. The contracts concluded between the petitioners and the 1st respondent were lawful and binding in accordance with the Employment Act.
6. The petitioners' contracts were within the probation period of 6 months at the time the 1st respondent dishonoured them. The probation was for 6 months under contract. The petitioners reported for duty, but never started working and hence did not serve the 6 months period. The 1st respondent's unilateral annulment of the petitioner's contracts was unlawful under section 42(4) of the Employment Act, and the petitioners were entitled to 7 days' salary *in lieu* of notice. They could not claim under unfair termination law, since they had probationary contracts, terminable by 7 days' notice, or 7 days' salary, without the necessity of a hearing or giving of other reasons in justifying termination.



Petition allowed.

Orders

- i. *The contracts of employment executed by the petitioners and the 1st respondent were valid, and were unlawfully terminated by the 1st respondent.*
- ii. *The 1st respondent was to pay 1st, 2nd, 3rd and 4th petitioners 7 days' salary each, as notice, at Kshs. 25,576; and, Kshs. 12,030 to the 5th petitioner.*
- iii. *Costs to the petitioners were to be paid by the 1st respondent.*
- iv. *The petition against the 2nd and 3rd respondents was declined with no order on the costs.*

Citations

Cases

None referred to

Statutes

Kenya

1. Constitution of Kenya articles 27, 41, 47, 252(1)(c) — (Interpreted)
2. Employment Act (cap 226) sections 9, 10, 42(4) — (Interpreted)
3. Fair Administrative Action Act (cap 7L) section 7 — (Interpreted)

Advocates

IN Nyaribo & Company Advocates for the petitioners

Micah Ondieki Advocate for the 1st respondent

Mercy G Kinyua, Senior State Counsel for the 2nd and 3rd respondents

JUDGMENT

1. In their petition dated February 4, 2020, the petitioners state that, the 1st respondent advertised job vacancies in local dailies. The petitioners, who describe themselves as Kenyan Youths, applied for these openings. They were interviewed by the 1st respondent on February 1, 2019.
2. They were successful in their interviews and were invited to collect their letters of appointment on August 14, 2019. They accepted the letters of appointment and signed the letters, ready for assignment of duty effective August 15, 2019, as instructed in the letters of appointment.
3. They were however advised by the 1st respondent's Human Resource Manager, not to report on the given date, but instead await further instructions on procurement by the 1st respondent, of adequate office space and equipment. They waited in vain.
4. They engaged counsel, who sought clarification on petitioners' reporting dates; there was no clear answer from the respondents.
5. They considered the respondents to have violated their rights under articles 27, 41 and 47 of the [Constitution](#). They were denied fair labour practice; discriminated against; and received no reasons why, they were not absorbed in 1st respondent's organization.
6. They seek orders:
 - a. Declaration that the petitioners' Constitutional rights above have been violated.
 - b. Declaration that the contract executed between the petitioners and the respondent is lawful and binding, and the 1st respondent is compelled to allow the petitioners to report to work.



- c. In the alternative to [a] and [b] above, declaration that the 1st respondent's actions amounted to unfair and unlawful termination of employment, and that the petitioners are entitled to compensation.
 - d. Costs to the petitioners.
 - e. Any other suitable relief.
7. 1st respondent's Deputy Director of Human Resources, filed his replying affidavit, sworn on July 17, 2020, challenging the petition. He states that the 1st respondent is an Independent Constitutional Office, mandated under article 252(1)(c) to recruit its own staff. It advertised for positions of Audit Associates, Office Assistants and Drivers in My Gov magazine, a pullout inside the local dailies, on December 18, 2018.
 8. The petitioners applied and were shortlisted for interviews. Interviews for Audit Associates, were conducted through University of Nairobi Enterprises Services [UNES]. The petitioners were unsuccessful, and were not offered employment by the 1st respondent. This is shown in the letter and attachments from UNES, exhibited as M1 and M2 in the 1st respondent's affidavit. The Human Resource Director recommended the successful applicants to the Auditor- General for appointment through a letter dated February 7, 2019, exhibit M3. Original letters of appointment are only issued upon the recipients upon signing the register acknowledging receipt, with the Human Resource Department. The petitioners did not sign the register. Successful candidates reported on February 25, 2019. There was no recruitment after this. The 1st respondent did not issue letters of appointment to the petitioners. They were afforded fair opportunity to fill the positions competitively. There was no discrimination. There was no contractual relation created between them and the 1st respondent. The 1st respondent prays the court to dismiss the Petition with costs.
 9. The 2nd and 3rd respondents oppose the petition based on grounds of opposition filed on May 29, 2020. They state that the petitioners have not shown any breach of constitutional rights. They have not discharged their evidentiary burden. They have clothed a contractual dispute as a constitutional dispute. The right way to address a violation under article 47 of the Constitution, is through Judicial Review, under section 7 of the Fair Administrative Action Act. The mandate of the 3rd respondent is limited to unemployed Youths who are registered with the 3rd respondent. The petitioners have not shown that they are registered as such. The 2nd and 3rd respondents have been improperly joined to the petition. They state, they are respecters of the Rule of Law.
 10. Parties agreed in court on January 22, 2021, that pending application is marked as settled, and the petition heard and disposed of, based on the record. The petitioners filed their submissions on February 24, 2021. The physical file does not, at the time of writing this judgment, show any submissions filed on the part of the respondents.

The Court Finds:

11. The court first would wish to agree entirely with the 2nd and 3rd respondents that this is mainly a contractual dispute, rather than a constitutional dispute. The petitioners ought to have sought remedy from the Employment Act, and from within the contracts they allege were issued to them by the 1st respondent. If they find no remedy in the Statute and the Contracts, they would be justified in seeking remedy from the Constitution, and probably seeking the court to declare the Employment Act constitutionally impaired, for its failure to find a remedy to such a simple contractual grievance.



12. The court shall therefore proceed to look at the dispute from the perspective of the [Employment Act](#) and the contracts allegedly issued upon the claimants, and explore if there was breach, whether remedy can be found from the [Employment Act](#) and the relevant contracts.
13. The existence of vacancies at the 1st respondent's office is not in dispute. The vacancies which included Audit Associate, were announced publicly by the 1st respondent in the local dailies. There no doubt from the record that the petitioners applied for these positions, and were invited for interviews. They were successful.
14. They were issued letters of appointment, signed by themselves, and by no lesser Officer of the 1st respondent than the Auditor-General himself, Edward RO Ouko. They were directed to report for duty on August 15, 2019.
15. However, on August 9, 2019, Edward RO Ouko wrote to the Deputy Auditor- General Corporate Services, stating that it had come to his attention that the letters were processed in total disregard of the Human Resource Policies and Procedures. He annulled the letters of appointment, but it would appear that this was not communicated to the petitioners. When they reported on August 15, 2019 as advised, they were indefinitely lied to, that the 1st respondent was in the process of procuring office space and equipment, in readiness for petitioners' undertaking of their new roles.
16. Were the contracts valid? They were valid under sections 9 and 10 of the [Employment Act 2007](#). The Auditor- General himself signed the contracts. The petitioners signed their respective letters. While other letters of employment said to have issued validly by the 1st respondent, were signed by a Mr Phillip O Owidi for the Auditor-General, the Auditor- General himself, signed the letters issued to the petitioners. The Employees' personal details are stated in the letters. Job descriptions are stated. Date of commencement is given. The details of remuneration are given in black and white.
17. Having entered into these contracts, the 1st respondent could only terminate the contracts in accordance with the termination clause, and the [Employment Act](#).
18. Unfortunately, Edward O Ouko advised that he had unilaterally annulled the letters. He does not say under what clause in the contracts or provision in the [Employment Act](#), his decision was based. He alluded to the Human Resource Policies and Procedures. The 1st respondent did not exhibit the specific Human Resource Policies and Procedures, and bring to the attention of the court clauses which invalidated the petitioners' letters of appointment, or any clause in the Human Resource Policies and Procedures, justifying annulment of executed letters of appointment by the Auditor-General.
19. The [Employment Act](#) and the respective contracts have in themselves, adequate remedy in redressing breach, which does not warrant at all, bloating the dispute into a constitutional dispute.
20. The court is satisfied, and declares that the contracts concluded between the petitioners and the 1st respondent were lawful and binding in accordance with the [Employment Act](#).
21. Petitioners' contracts were within the probation period of 6 months at the time the 1st respondent dishonoured them. Probation was for 6 months under contract. The petitioners reported for duty, but never started working and so did not serve the period of 6 months. The 1st respondent's unilateral annulment of the petitioner's contracts was unlawful under section 42[4] of the [Employment Act](#), and the petitioners would be entitled 7 days' salary in lieu of notice. They cannot claim under unfair termination law, theirs having been probationary contracts, terminable by 7 days' notice, or 7 days' salary, without the necessity of a hearing or giving of other reasons in justifying termination.



22. The 1st, 2nd, 3rd and 4th respondents earned monthly basic salary of Kshs 62,500, house allowance of Kshs 16,500, commuter allowance of Kshs 6,000, and extraneous allowance of Kshs 10,000 – total Kshs 95,000.
23. 7 days' salary based on a 26 –day working week would translate to Kshs 25,576 for each petitioner. The court grants notice pay of Kshs 25,576 to each of the first 4 petitioners.
24. The last petitioner's contract indicates she was appointed as an Office Assistant. Her monthly basic salary was Kshs 25,435. She had a house allowance of Kshs 6,750, commuter allowance of Kshs 5,000 and extraneous allowance of Kshs 7,500 monthly- total Kshs 44,685. She is granted in 7 days' salary as notice pay under contract, at 12,030.
25. Costs to be paid to the petitioners by the 1st respondent
26. The court has not been shown any reason, why the 2nd and 3rd respondents were added to this petition. The petition against 2nd and 3rd respondent is declined with no order on the costs.

In Sum it is Ordered:

- a. It is declared that the contracts of employment executed by the petitioners and the 1st respondent were valid, and were unlawfully terminated by the 1st respondent.
- b. The 1st respondent shall pay 1st, 2nd, 3rd and 4th petitioners 7 days' salary each, as notice, at Kshs 25,576; and, Kshs 12,030 to the 5th petitioner.
- c. Costs to the petitioners to be paid by the 1st respondent.
- d. The petition against the 2nd and 3rd respondents is declined with no order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 11TH DAY OF JUNE 2021.

JAMES RIKA

JUDGE

Court Assistant : Emmanuel Kieron

I.N. Nyaribo & Company Advocates for the Petitioners

Micah Ondieki Advocate for the 1st Respondent.

Mercy G. Kinyua, Senior State Counsel for the 2nd and 3rd Respondent

