



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1621 OF 2018**

**CONSOLIDATED WITH 1622 OF 2018**

**BERNARD MULONGO.....1<sup>ST</sup> CLAIMANT**

**ANTHONY ODONGO.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**CABINET SECRETARY MINISTRY OF HEALTH.....1<sup>ST</sup> RESPONDENT**

**BUNGOMA COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Bernard Mulongo (1<sup>st</sup> Claimant) and Anthony Odongo (2<sup>nd</sup> Claimant) instituted separate suits in December 2018 against the Cabinet Secretary, Ministry of Health and Bungoma County Government. The Claimants pray for judgment against the Respondents jointly and severally for orders:-

- i. A Declaration that the Claimant's terms and conditions of employment are discriminatory and unfair.
- ii. The purported termination of employment on 27<sup>th</sup> August 2018 by the Respondents was unfair and unlawful. (1<sup>st</sup> Claimant)
- iii. An Order compelling the Respondents to forthwith employ the Claimant on permanent and pensionable terms.
- iv. An order compelling the Respondents to pay the Claimant the unpaid salaries and allowances to ensure equitable earnings applicable to his position on permanent and pensionable terms.
- v. General Damages and Maximum Compensation
- vi. Any other or further relief that this Honourable Court may deem fit to grant.
- vii. Interest on above and Costs of this Claim hereof.

2. The Claimants aver that they were each appointed through an offer of appointment letter dated 30<sup>th</sup> September 2010 by the Ministry of Health, Medical Services to the grade of Accountant 1 Job Group K on contract terms for a period of two (2) years effective from 11<sup>th</sup> October 2010. They aver that they diligently, honestly and unreservedly rendered their services to the Respondent at the Webuye and Bungoma District Hospitals where they had respectively been posted. They aver that contracts were renewed by the Respondent for a further period of two (2) years with effect from 2<sup>nd</sup> October, 2012 on a consolidated monthly salary of Kshs. 45,200/- for each of them and which contracts were again renewed for a further two years but without making the terms of employment permanent. It is the 1<sup>st</sup> Claimant's averment that he wrote a Memo dated 20<sup>th</sup> September 2017 to the 2<sup>nd</sup> Respondent over the conditions of employment. The 2<sup>nd</sup> Claimant avers that by a letter dated 20<sup>th</sup> February 2017, the Medical Superintendent, Bungoma County Referral Hospital entered into a 2 year contract with him and which contract was renewed for a further two years. The Claimants further aver that they were absorbed to the Counties after the transfer of services to the County Government of Bungoma and that they are still under short term contracts earning a monthly consolidated salary of Kshs. 45,200/-. They further aver that there was no annual increment for the 8 years they provided their services and which issue was never answered. They assert that they have been discriminated upon and subjected to unjust, unreasonable, unlawful and unconstitutional employment conditions and consequently suffered great loss, mental and psychological anguish.

3. The 1<sup>st</sup> Claimant stated in exam-in-chief that he relies on his filed documents and that he came to Court because of his terms of employment. He further testified that he has been working as an accountant since he was employed in 2010 and that there have been short term renewals of 3 months since the renewal of contract in 2012. He stated that he wishes to be treated as other workers under permanent and pensionable terms and that he seeks the reliefs sought plus costs. He stated under cross-examination that he got his last salary from the Ministry of Health in October 2014 and confirmed he was last a Ministry of Health employee in 2014 and that he filed his case 3 years after leaving Ministry of Health. In re-examination, he confirmed that he works for Bungoma County and wishes to be treated the same way as other colleagues at his rank and qualifications who earn more than him.

4. The 2<sup>nd</sup> Claimant also relied on his filed documents and testified that he began working for Bungoma County when the Ministry of Health was devolved to County Government but their contracts were maintained at the same rate. He also stated that even though health services are devolved, some functions remained with Ministry of Health. He stated under cross-examination that he earns a gross salary of Kshs. 45,000/- and in re-examination, he stated that his colleagues in other parts have been confirmed on permanent and pensionable terms except in Bungoma County and that the discrimination is continuing.

5. The 1<sup>st</sup> Respondent's advocate submitted that they raised objection to the claim by the Claimants against the Ministry of Health for being time barred. That the Claimants have confirmed they filed their claim over 3 years after they last worked for the Ministry which is past the time limited under Section 90 of the Employment Act. They rely on the case of **Beatrice Kahai Adagala v Postal Corporation [2015] eKLR** where the Court of Appeal stated that claims on employment must be filed in 3 years. She further argued that since the Claimants have confirmed they work for Bungoma County Government, the Court should not entertain their claim against the 1<sup>st</sup> Respondent and to dismiss it with costs.

6. The Claimants' advocate submitted that health is not 100% devolved and that the Claimants are civil servants who can serve anywhere the Government determines and that their main complaint is the discrimination which is a continuing act. He argued that the issue of the action being time barred does not lie and the same is unmerited and that they have raised many claims some requiring the Ministry of Health to carry out obligations such as giving the letter of transfers etc. The Claimants' advocate confirmed that the Claimant have not been dismissed from service and argued that their case is thus distinguishable. That if they had been dismissed and 3 years elapsed then they would be time barred and that they are however raising issues that affect them to date. He further argued that the 1<sup>st</sup> Respondent has not put any documents before Court confirming they distanced themselves with the claims and that the 1<sup>st</sup> Respondent's advocate cannot raise issues of fact from the Bar. He submitted that the law is clear that issues of discrimination are continual and issues of the constitution and rights are not expired. Further, that it is trite law that the Respondents being funded by tax payers and have triggered institution of the matter, cannot get costs and that the best they can get is the claim rejected with no order on costs. He further argued that the 1<sup>st</sup> Respondent has not filed any defence and prays that the Court considers the evidence and pleadings filed and grant judgment in favour of the Claimants.

7. The Claimants clearly stated that their services were devolved and they served in Bungoma County. They both confirmed in their testimony that they have not received any payments from the 1<sup>st</sup> Respondent since 5<sup>th</sup> December 2018. As such their claims against the 1<sup>st</sup> Respondent do not succeed and the claims against the 1<sup>st</sup> Respondent dismissed with no order as to costs. The Claimants had been serving the Bungoma County Government on what one would call short term contracts yet their colleagues had been absorbed as permanent and pensionable staff. In the case before me, they have demonstrated that they had been in the continuous employ of the 1<sup>st</sup> Respondent at the 2<sup>nd</sup> Respondent. It was discriminatory to have them remain on endless short term contracts contrary to the tenets of the devolution of health services. One of the key tenets was to promote access to health services throughout Kenya and to promote efficiency in the delivery of health services. As the Claimants are successful they are granted the following reliefs:-

- i. A declaration that their terms and conditions of employment were discriminatory and unfair
- ii. The termination of employment of the 1<sup>st</sup> Claimant on 27<sup>th</sup> August 2018 by the Respondents was unfair and unlawful.
  - a. The 1<sup>st</sup> Claimant to be paid the equivalent of 6 month's salary as compensation by the 2<sup>nd</sup> Respondent
- iii. The 2<sup>nd</sup> Claimant must be absorbed into permanent and pensionable terms within the next 60 days by the 2<sup>nd</sup> Respondent.
- iv. Costs of the suit to be borne by the 2<sup>nd</sup> Respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2021**

**NZIOKI WA MAKAU**

**JUDGE**