



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 6 OF 2019

(Originally Bungoma Cause No. 5 of 2018)

SOFIA MBONE AMADI

AVUDE SIMEON

MUKAYA IBRAHIM

MUHANDO NELSON

SUDI LAWRENCE

OYUGI ESSAU & 437 OTHERS.....CLAIMANTS

v

COUNTY GOVERNMENT OF VIHIGA.....RESPONDENT

RULING

1. The 443 Claimants lodged a Memorandum of Claim with the Court on 12 October 2019, and the Issues in Dispute were stated as:
 - (1) Definition of a casual worker.
 - (2) Unlawful and or unfair termination of employment.
 - (3) Damages for termination.
2. In the Memorandum of Claim, the Claimants indicated that the County Government of Vihiga (the County Government) had unfairly summarily dismissed them on 25 July 2018.
3. On 22 November 2018, the Claimants applied for judgment in default of Appearance and Response.
4. The County Government entered Appearance on 30 November 2018, and it filed a Response on 5 February 2019.
5. The hearing commenced on 30 January 2020, when one of the Claimants testified, and the hearing was rescheduled to 25 May 2020. Due to COVID 19, the hearing did not proceed.
6. When the parties next appeared for hearing on 10 June 2021, the Court directed the parties to file and exchange within agreed timelines, submissions on whether the Cause was caught up by the exhaustion principle in view of Article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act and sections 85, 86 and 87(2) of the Public Service Commission Act, 2017.
7. The Claimants filed their submissions on 1 July 2021, and the County Government filed its submissions on..
8. The Court has considered the record and the submissions.

9. It is not in dispute that the Claimants were part of the county public service within the County of Vihiga.

10. The Claimants, however, submitted that as *casual workers*, they were outside the ambit of Article 234(2)(i) of the Constitution because they did not hold offices established by the Public Service Commission.

11. And while urging that they fell outside the appellate jurisdiction of the Public Service Commission, the Claimants further asserted that section 77 of the County Governments Act and sections 85, 86 and 87 of the Public Service Commission Act, being inferior or subsidiary to the Constitution, not be applied in their case.

12. Article 234(2)(i) of the Constitution has clothed the Public Service Commission with appellate jurisdiction over county public service.

13. It provides:

234(1)

(2) The Commission shall—

(i) hear and determine appeals in respect of county governments’

public service; and

14. To further the appellate constitutional function of the Public Service Commission, section 77 of the County Governments Act provides:

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 the 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 the employment of a person in a county government, including a decision in respect of—

(e) retirement and other removal from service.

15. Sections 85 and 86 of the Public Service Commission Act, 2017, mirror the provisions of section 77 of the County Governments Act.

16. However, section 87(2) of the Public Service Commission Act, 2017 oust first instance jurisdiction of the Courts by providing that:

2) A person shall not file any legal proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this Part has been exhausted.

17. The decision to dismiss the Claimants was communicated through a Circular dated 13 March 2018 from the County Secretary and Head of the Public Service. The effective date of separation was stated as 31 May 2018.

18. It cannot be gainsaid that the decision fell within the parameters of section 77(2) of the County Governments Act as it purported to remove the Claimants from the county public service.

19. In terms of the provision, the decision was appealable to the Public Service Commission. The Claimants did not appeal. Instead, they approached the Court before exhausting the statutory appellate jurisdiction.

20. The exhaustion principle within the context of the county public service was the subject of examination by the Court of Appeal in *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR.

21. The Court of Appeal stated therein:

There is no doubt that the respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by **Section 77** of the Act. The section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance..... Her contention that she disregarded the appeal because it could not afford her an opportunity to question the procedure followed by the appellant is, in our view, without basis because **Section 77** has placed no fetter to the jurisdiction of the Public Service Commission.

22. The decision is binding on this Court.

23. The Claimants herein did not exhaust the appellate process as envisaged under both the Constitution and applicable statutes in place, and

the Court finds that its jurisdiction was invoked prematurely.

Conclusion and Orders

24. In light of the foregoing, the Court dismisses the Petition.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF DECEMBER 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant J.W. Sichangi & Co. Advocates

For Respondent Ibrahim Alubala Advocates

Court Assistant Mr Musanga