



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION 38 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 16th January, 2020)

KENYA COUNTY

GOVERNMENT WORKERS UNION.....PETITIONER

VERSUS

WAJIR COUNTY GOVERNMENT.....1ST RESPONDENT

WAJIR COUNTY

ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

JUDGEMENT

1. The Petitioner instituted this suit vide the Petition dated 28th January 2019. However, the same was amended by an Amended Petition filed on 30th May 2019 where the Petitioner sought the following prayers:-

- a) A declaration that the terms of the offer of appointment contained in the Petitioner's members' letter of appointment and/or terms of engagement before January 2015 are proper and conclusive term of the employment contract regulating the employment relationship between the Petitioner's members and the Respondents.*
- b) THAT this Honourable Court do make an order of injunction restraining the Respondent either by themselves, employees, servants and/or agents from varying the terms of engagement of the Petitioner's members' terms of service as confirmed in the employment of the Respondent and/or varying the terms of service of the Petitioner's members as obtaining in their letters of appointment.*
- 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 Petitioner's members' terms of employment and/or engagement, to the detriment of the Petitioner's members and without complying with the due process of the law.*
- d) THAT a mandatory order do issue compelling the Respondents to pay the Petitioner's members in full the unlawfully varied salaries from January 2015 to date.*
- e) THAT this Honourable Court be pleased to declare that the Respondents violated the Petitioner's members rights to fair labour practices namely reasonable working 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's directive to unlawfully vary the Petitioner's members salaries is unfair, unlawful and violates the Petitioners members fundamental rights and freedoms which are protected by the law.*
- g) THAT this Honourable Court be pleased to grant damages to the Petitioner's members for breach of contract and costs, plus interests on damages and costs at Court rates.*
- h) THAT any other or further orders as this Honourable Court deems fit and appropriate.*

2. The Petitioner's case is that on diverse dates in 2015 and 2016, the Respondents reviewed the salary of the Petitioner's members

downwards, an act it views as unlawful. Additionally, the Respondent intended to review their job groups and salary scale downwards. The Petitioner states that none of its members were consulted.

3. The Petitioner and the Kenya National Commission on Human Rights wrote to the 2nd Respondent and the County Assembly of Wajir respectively, in their letters of 18/12/2018 and 28/11/2018, regarding the matter but there was no response. Consequently, vide the letter of 3/01/2019 the Petitioner wrote to the County Assembly of Wajir demanding reinstatement of its members' salaries.

4. The Petitioner states that the salary deductions has exposed its members to extreme hardships and is an infringement of their rights under Article 41 and 47 and violates the provisions of Article 232 of the Constitution and Sections 17 and 26 of the Employment Act.

5. In response to the Petition, the Respondents filed their grounds of opposition contending that the Petitioner was not entitled to the orders sought for deliberate non-disclosure of material facts. For instance, the employees were consulted and their views taken into account. Further, that the employees were aware that the salary harmonization was aimed at aligning their job groups with that of their counterparts at similar levels in the Wajir County Public Service.

6. The Respondents also contend that the Petitioner has not adduced evidence to prove that the employees seeking compensation were members of the Petitioner or its predecessor, Kenya Local Governments Union, hence it is not clear in which capacity the Petitioner has filed the Petition.

7. It is the Respondent's contention that the Petitioner should not be granted prayers (a) and (d) because no individual letters of appointment for the Petitioner's members have been produced. That prayer (b) and (c) have been overtaken by events and that prayer (d) would go against public policy if granted.

8. The Respondent further contends that prayers (e) and (f) cannot be granted because they are not properly particularized while prayer (g) cannot be granted because the Respondents' actions did not amount to breach of contract.

9. The Petition was disposed of by way of written submissions where only the Petitioner filed its submissions on 4/09/2019. There is no record of the Respondent's submissions in the Court file.

10. The Petitioner submits that for the variation of an employment contract to be lawful, there should be mutual agreement between the employer and employee or the representatives, where there is organized labour.

11. It is the Petitioner's submissions that the Respondents have not adduced evidence to indicate their employees accepted the salary reduction. To buttress this position, the Petitioner relies on the cases of **Ronald Kampa Lugaba vs. Kenol Kobil Limited [2016] eKLR**, **Jackline Wakesho vs. Aroma Cafe [2014] eKLR**, **Maxwell Miyawa & 7 Others vs. JSC [2017] eKLR**, **Alice Mbithe Mwanzia vs. Express It Courier Limited [2016] eKLR**.

12. The Petitioner is of the position that a unilateral variation without an employee's consent amounts to breach of contract which is in itself constructive dismissal and a violation of the Petitioner's members' rights under Articles 41 of the Constitution. The Petitioner relies on the cases of **Hoggs vs. Dover College [1990] ICR 39** and **Alram Extrusions vs. Yates & Others [2996] IRLR 327** where the Courts held that where a contract is fundamentally varied and the employee continues to serve the employer, they are entitled to bring an action for breach of the previous contract.

13. The Petitioner submits that the Respondents' actions have violated its members' rights under Articles 27, 28, 41, 43 and 47 and contravened the provisions of Articles 10 and 232 of the Constitution. As such, the Petitioner submits that its members are entitled to the prayers sought as they have demonstrated the violation of their rights by the Respondents. They rely on the cases of **Charles Thuo Muguku vs. K-Unity Savings & Credit Co-operative Society Limited [2016] eKLR** and **James Ang'awa Atanda & 10 Others vs. Judicial Service Commission [2017] eKLR**.

14. Lastly, the Petitioner submits that it is entitled to costs, bearing in mind the Respondent's conduct in varying the contracts and ignoring attempts to have the matter settled amicably and relies on the case of **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR**.

15. I have examined all the averments and submissions of the Parties herein.

16. From the record in the Petition, Appendix 1, the Petitioner herein is a registered union to deal with matters of Wajir County Assembly branch.

17. Appendix 2 is an agreement involving all Local Authorities in Kenya and the Association of Local Government Employers and Kenya Local Government Workers Union signed on 1/9/2012 which shows terms and conditions of service for officers of Local Authorities.

18. Appendix 4 is an appointment letter for one Ibrahim Omar Marade by the Wajir County Assembly Service Board. The appointments were casual in nature and were for periods of 3 months with effect from 1st August to 31st October 2014.

19. The appointment was further reviewed and extended to 28th February 2015 and later, on the said Ibrahim was confirmed in employment with effect from 1/11/2016.

20. Other appointments are for Abdi Yussuf, Ahmed Mohamed Adan on permanent and pensionable terms.

21. The Petitioners have averred that the Respondents have however gone against the employment letters of their various members and unlawfully reduced workers' salaries in contravention of the law. This is evidenced by the payslips of the members before January 2016 and those after January 2016.

22. The Respondents have not denied reducing the salaries as averred but insist that the Petitioners' members were consulted before the reduction.

23. The Respondents did not demonstrate how the Petitioner's members were consulted before the salary deduction as alleged. There are no letters for instance inviting the Petitioner or their members to any meeting to discuss the salary reduction issues. There is also no letter addressed to the Petitioner's members individually informing them of the intended salary reduction.

24. The unilateral decision by the Respondent to initiate salary reduction to its employees without consultation offends the provision of Section 10(5) of the Employment Act 2007, which is tantamount to a constructive dismissal. It is therefore in breach of Article 41 of the Constitution, which provides for fair labour practices for every employee.

25. The Petitioner have submitted that the Respondents breached various provisions of the Constitution including Article 41 on fair labour practice and Article 10. I agree with the Petitioner on this as the Respondent's action is against the correct position of the law as decided by this Court in various cases see Cause No. 1026/2013 – Ronald Kampa Lugaba vs Kenol Kobil Limited (2016) eKLR (J Wasilwa), Mombasa ELRC Cause No. 212/2013 – Jackline Wakesho vs Aroma Cafe (2014) eKLR and Nakuru ELRC Petition No. 29/2016 Maxwell Miyawa & 7 Others vs JSC (2017) eKLR where this Court held as follows:-

61. "Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.

65. The Respondent also did not suggest that the variation(s) involved consultations with these Petitioners.

66. The decision by the Respondent in regard to the contracts of the 7th and 8th Petitioners as conveyed through letters of 6 August 2013 were therefore not only unlawful for being unilateral but also for lack of consultation and therefore amounted to a violation of the right to fair labour practices as it took away vested rights and entitlements".

26. I make a finding that indeed the action of the Respondent in unilaterally reviewing the salaries of their employees without consultation, was unfair and unjustified and amounts to an unfair labour practice.

27. The Respondents also violated Article 27(1) and (2) of the Constitution which states as follows:-

(1) "Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

28. This Court finds that indeed the Respondents have breached the Petitioner's members rights. I therefore find for the Petitioner and issue orders as follows:-

a) "A declaration that the terms of the offer of appointment contained in the Petitioner's members' letter of appointment and/or terms of engagement before January 2015 are proper and conclusive term of the employment contract regulating the employment relationship between the Petitioner's members and the Respondents.

b) An order of injunction restraining the Respondent either by themselves, employees, servants and/or agents from varying the terms of engagement of the Petitioner's members' terms of service as confirmed in the employment of the Respondent and/or varying the terms of service of the Petitioner's members as obtaining in their letters of appointment.

c) A permanent injunction do issue restraining the Respondents either by themselves, their agents, servants and/or employees, from varying and/or altering the Petitioner's members' terms of employment and/or engagement, to the detriment of the Petitioner's members and without complying with the due process of the law.

d) A mandatory order do issue compelling the Respondents to pay the Petitioner's members in full the unlawfully varied salaries from January 2015 to date.

e) A declaration that the Respondents violated the Petitioner's members rights to fair labour practices namely reasonable working conditions of service as protected under Article 41 of the Constitution and the Employment Act.

f) A declaration that the Respondent's directive to unlawfully vary the Petitioner's members' salaries is unfair, unlawful and violates the Petitioner's members' fundamental rights and freedoms which are protected by the law.

29. The Respondent will pay costs of this Petition plus interest on the withheld salaries from the date the amounts fell due to the date of payment in full.

Dated and delivered in open Court this 16th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Otieno for Petitioner – Present

Respondents – Absent