



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NOS. 6-11 OF 2019

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 28, 30, 40, 41, 47 AND 50 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

EUNICE NJERI WAMBUGU & 5 OTHERS.....PETITIONERS

VERSUS

COUNTY PUBLIC SERVICE BOARD, KIRINYAGA COUNTY.....RESPONDENT

JUDGMENT

1. The Petitioners are all employees of the Respondent serving in various capacities and seeks various reliefs against the Respondent asserting that their employment has been unilaterally been affected by the Respondent who has gone ahead to re-designate them, unilaterally reduce their salaries and commence deductions of allowances made in their pay. They all assert that the actions of the Respondent are of the effect that they stand demoted their salary deducted to the point they do not take home any salary. The Petitioners aver they have worked diligently for the Respondent without any complaints against them on their competence, performance nor disciplinary issues. They aver the actions of the Respondent are against their fundamental rights to fair labour practices and freedom from servitude, forced labour and fair administrative action. They therefore seek the Court to declare the decision to re-designate them and deduct their salaries as unconstitutional and in breach of their fundamental rights as enshrined under Articles 28, 30, 40, 41, 47 and 50 of the Constitution thus null and void. They also seek an order to restrain the Respondent from implementing the recommendations in the letters re-designating them and return the Petitioners to their right job groups and designation per their letters of appointment without loss of benefit. They also seek an order of compensation/damages, costs of the suit and any other relief this honourable court shall deem just. To each of their Petitions were attached copies of the letters of re-designation, the letters of appointment, various correspondence, copies of their payslips before the changes and after the changes as well as their demand letters.

2. The Respondent never filed any defence and only filed a notice of appointment. The Petitioners' petitions were heard and each of the Petitioners testified in support of their Petitions. The Petitioners produced their exhibits being the letters of appointment, the letters of re-deployment and re-designation, copies of some of their payslips from date of appointment to post re-deployment and they each sought to be granted the reliefs enumerated in their Petitions.

3. The Petitioners submitted that the Petitions were undefended and that the Court had directed that they proceed as undefended causes as no defence had been filed after the Respondents filed their notices of appointment. The Petitioners submitted that the genesis of the dispute are the letters of re-designation issued in March 2019 which left them with nil pay despite serving the Respondent. The Petitioners submitted that on account of its unilateral actions the Respondent was in contravention and breach of the Constitution and the various statutes relating to labour and employment. They submit that under Article 30, the Constitution provides that no person shall be held in slavery or servitude and that under Article 40 they are protected against the deprivation of property of any description without lawful cause. They submitted that in their cases, the Respondent has been depriving them of their pay (property) leaving them with nil pay at the end of the month in violation of Article 40. They submit that under Article 41 they are entitled to the right to fair labour practices, fair remuneration and reasonable working conditions. They submit that the Respondent's unilateral decision to re-designate the Petitioners, demote them and start unlawful deductions amounts to unfair labour practices. They submit that under Article 50 of the Constitution they are entitled to a fair hearing and the Respondent's action fundamentally affected their right to livelihood without hearing. They submit that under the County Governments Act No. 17 of 2012, re-designation is defined as *the conferment upon a person of a county public office at a grade equal to the one previously held by that person and whose major consequence is to change from one cadre to the other to facilitate that person's horizontal mobility characterized with change in career path*. The Petitioners submit that Section 69 of the County Governments Act requires an officer to consent to the re-designation and they shall not suffer any reduction in remuneration. The Petitioners relied on the case of **Benedict Mtoto Mwabili v County Public Service Taita Taveta County [2018] eKLR** where the court held the re-designation of the claimant unlawful as well as the case of **James Ang'awa Atanda & 10 Others v Judicial Service Commission [2017] eKLR** where the court found the

unilateral valuation was unconstitutional and an award of Kshs. 750,000/- made for the unfair labour practices. They urged the court to find in their favour and award costs of the Petitions. No submissions were filed by the Respondent.

4. Conservatory orders were granted after *inter-partes* hearing of the Petitioners' counsel and the Respondent's counsel suspending the implementation of the directives issued in the letters of re-designation. In coming to this decision, the court has considered the pleadings, the testimony of the Petitioners, the evidence adduced, the law and precedents cited. The Respondent did not defend itself despite participating at the initial stages of the Petition. In short, the Petitioners seek relief against the Respondent's unilateral re-designation and reduction in salary and allowances emanating from the Respondent's decision to re-designate and re-deploy the Petitioners. The lead Petitioner Eunice Njeri Wambugi was re-designated from nutrition and dietetics technologist to support staff supervisor resulting in a salary cut from Kshs. 75,910/- a month to Kshs. 25,570/-. The Petitioners each demonstrated in their evidence that they were re-designated and suffered reduced pay just like Eunice Wambugi did. As a result of the re-designations they received to nil or even negative pay after deduction of loans, PAYE and NHIF and NSSF deductions. The Petitioners suffered the ignominy a reduction in pay to on account of the re-designation leading to the point they receive nil pay or in some cases owe the Respondent despite working for the Respondent each month. Under Article 30 of the Constitution of Kenya 2010, there is provision that a person shall not be held in slavery or servitude and that a person shall not be required to perform forced labour. The effect of their continued service under the terms of the re-designation is that the Petitioners are held in slavery and servitude by the Respondent and forced to perform forced labour since they do not get any pay or end up owing the Respondent as a result of the deductions imposed by the re-designation. The re-designations contravened the Constitution and the County Governments Act Sections 69 and the Fair Administrative Actions Act as they were not given any opportunity to get redress for the unilateral designation to positions that are below their initial appointment. In making the unilateral decision to re-designate the Petitioners, the Respondent abridged the Petitioners' rights under Articles 28, 30, 40, 41, 47 and 50 of the Constitution and the actions of the Respondent in that regard are null, void and of no effect for being in contravention of the Constitution of Kenya. In other words, the actions of the Respondent are against their fundamental rights to fair labour practices and freedom from servitude, forced labour and fair administrative action. In the final result, I grant the order restraining the Respondent, its servant and agents from implementing the recommendations in the letters re-designating the Petitioners and return the Petitioners to their right job groups and designation per their individual letters of appointment without loss of benefit. As the Respondent participated in actions that were and still are unconscionable in an open and democratic society to the detriment of the well-being of the Petitioners order of compensation by way of damages is granted to each of them in the sum of Kshs. 500,000/- per Petitioner. As costs of the motion that accompanied the Petition were reserved pending the outcome of the Petition, the Petitioners who were successful in seeking conservatory orders are entitled to costs of the Notice of Motion applications made contemporaneously with the filing of the Petitions. The Petitioners being successful in the Petitions are entitled to costs on the Petitions. Each Petitioner is also entitled to interest at court rates on the sums awarded from the date of judgment till payment in full. For avoidance of doubt the vacation of the re-designation places the Petitioners at the point they were serving the Respondent in March 2019 as the letters re-designating them are null and void *ab initio* for contravening the Constitution of Kenya. Judgment is hereby entered for the Petitioners against the Respondent:-

- a. an order do and is hereby issued restraining the Respondent, its servant and agents from implementing the recommendations in the letters re-designating the Petitioners
- b. an order do and is hereby issued returning the Petitioners to their right job groups and designation per their individual letters of appointment without loss of benefit.
- c. an order of compensation by way of damages do and is hereby issued awarding each Petitioner the sum of Kshs. 500,000/-.
- d. costs of the notice of motion applications dated 18th June 2019 reserved pending the outcome of the Petition awarded to the Petitioners
- e. Costs to each Petitioner in the respective Petitions
- f. Interest at court rates on the sums awarded from the date of judgment till payment in full.

5. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days. On lapse of the 14 days if any execution is to issue it must be sanctioned by the Court.

It is so ordered.

Dated and delivered at Nyeri this 31st day of March 2020

Nzioki wa Makau

JUDGE