



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.364 OF 2017**

**[Formerly Nairobi CAUSE NO.1113 OF 2017]**

**KENYA NATIONAL UNION OF NURSES.....CLAIMANT**

**VERSUS**

**NAKURU PUBLIC SERVICE BOARD.....RESPONDENT**

**JUDGEMENT**

The claimant trade union filed the claim on 16<sup>th</sup> June, 2017 and filed amended the claim on 2<sup>nd</sup> August, 2018.

The claimant is a registered trade union representing nurses who are in the employment of the national and County Governments, private and faith-based health facilities.

The respondent is established under section 57 of the County Government Act.

The parties have a Recognition Agreement signed on 14<sup>th</sup> December, 2016.

The claim is that the respondent employed eleven (11) nurses (grievants) and members of the claimant. The respondent issued a Posting Order dated 25<sup>th</sup> August, 2014 appointing nursing officers to various hospitals within the county. There was no letter of appointment despite the claimant seeking these be issued save that the grievants continued to earn their monthly salaries.

7 out of the 11 grievants entered into loan agreements with financial institutions with the respondent issuing the letter of recommendation on the reasons that the grievants were in their employment on permanent and pensionable terms.

While the grievants continued in their service, a verbal communication was issued that they should re-apply for their positions to facilitate the issuance of letters of appointment. They were shortlisted and interviewed but the payment of their salaries were stopped on 1<sup>st</sup> March, 2016. There was a verbal communication that the grievants should stop working.

The parties initiated an out of court settlement.

The claim is that on 5<sup>th</sup> March, 2018 the parties held a joint meeting with the agenda being the *settlement of Cause 364 of 2017 regarding the 11 BScN Nurses*. That is was agreed that the 11 nurses be reinstated and issued with letters of appointment; the nurses be considered for jog group L as the entry point; there be payment of arrears from May, 2016; and the respondent to issue letters by 9<sup>th</sup> March, 2018 to;

- 1) Muthaura Jesse Mutembei;
- 2) Kagwiri Mary Wanjiru;
- 3) Koech Syvvia Chepkemboi;
- 4) Ngotho Sally Wangechi;
- 5) Mweu Dennis Kinama;
- 6) Ondabu Dennis;

7) Diang'a James Mwango; and

8) Cheptoo Rebecca.

The claim is that the respondents in breach of the agreement reached failed to reinstate the grievants or issue them with letters of appointment and are in breach of the same and such action is constructive termination of employment and an unfair labour practice. There was no valid reason leading to termination of employment hence discriminatory practice contrary to section 5 of the Employment Act, section 41 and 43 of the Act.

The grievants were employed as Nursing Officers by the respondent from August, 2014 with a salary as follows;

Basic pay Ksh.34,200;

Rental house allowance Ksh.9,600;

Commuter allowance Ksh.5,000;

Health risk allowance ksh.3,850;

Extraneous allowance ksh.20,000.

The respondent failed to issue notice or give reasons terminating the grievants from their employment and therefore seek the following;

*a) Reinstatement of the grievants and deployment accordingly without loss of benefits and payment of accrued salaries and allowances;*

*b) Upon reinstatement the grievants be paid in accordance with the terms of agreement of 5<sup>th</sup> March, 2018;*

*c) In the alternative, the termination of employment be declared null and void and there be orders that;*

*i) The respondent should involve the claimant in all future undertakings;*

*ii) There be an order that the respondent should accept all liabilities arising out of bank loans;*

*iii) The respondent to pay salary for time worked for the month of February, 2016;*

*iv) The respondent to pay salary arrears from March, 2016 to date;*

*v) Payment of damages for unfair termination;*

*vi) An order stopping the respondent from any form of victimisation or any disciplinary measures against the grievants;*

*vii) Costs of the suit.*

In evidence, the claimant applied Rule 9 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and filed the statement of Diang'a Mwango James as the witness and who testified that he was posted with the other grievants to the service of the respondent for internship in the year 2013 from the Ministry of Health. It was a one year internship which ended in May, 2014.

Mr Diang'a also testified that at the end of their internship they wrote to the respondent seeking to be considered for employment by the County Government of Nakuru.

The grievants worked diligently until March, 2016 and were paid full benefits of employment as permanent and pensionable employees and in accordance with the scheme of service.

In February, 2016 the grievants received communication from the county chief officer of health Dr Samwel Mwaura to attend interview as permanent employees. They were referred to the chair of the respondent Board Mr Waithanji Mutiti who confirmed that the health department was in need of the grievants services and should be absorbed.

Mr Diang'a also testified that on 25<sup>th</sup> August, 2014 they got posting orders to different hospitals. No letters of appointment were issued. Applications seeking for appointment letters on 26<sup>th</sup> August, 2015 did not bear fruits. The grievants remained in the continuous service of the respondent until March, 2016. The respondents wrote letters to the grievants confirming employment and which allowed them to take loan facilities with various banks. Due to falling into arrears they have been listed with the CRB.

Following negotiations for employment, the grievants were under a genuine belief that the matter would be resolved with a reinstatement and payment of salary arrears.

Mr Diang'a also testified that he is aged 32 years and is available to serve the respondent.

Upon cross-examination, Mr Diang'a testified that The grievants were given letters of offer of employment but only one grievant accepted the offer, Martin Mutegi. He did not accept the offer. Martin Mutegi is currently in the service of the respondent. there were 3 grievants not issued with the letters of offer;

Muthaura Jesse;

Dennis Momanyi; and

Himself.

They were not called before the board. He a not invited to the interview before the respondent, Board. He had been on internship and not employment with the respondent.

Defence

In response, the respondent filed response on 30<sup>th</sup> July, 2018 and filed amended response on 18<sup>th</sup> October, 2018.

The response is that the grievants were interns with the respondent and which ceased to apply at the end of its term. The respondent does not issue posting orders as alleged, upon being appointed the power to deploy or post is vested upon the chief officer. Section 72 (1) and (2) of the CGA allow for the deployment of employees of the county government and the respondent did not post the grievants. The grievants could not be issued with appointment letters as there was no appointment in the first instance.

The grievants were engaged by the national government and the engagement with the respondent came with devolution. The grievants were offered employment as Nursing Officers on temporary terms of service for a year and such was not a guarantee for employment as it was regular internship and dependent on the existence of substantive vacancies which were to be filled competitively.

On the claims that the grievants incurred liabilities with third parties, they are not party and should not be compelled to address. The respondent has the mandate to recruit personnel for the County government and not concerned with access to loan facilities.

The defence is also that the grievants were on a one year internship and where they chose to continue in service this was without the sanction of the respondent.

There arose vacancies for various positions within the medical department and an advertisement was made. Several candidates applied and were shortlisted including some grievants but none of those shortlisted were absorbed due to budgetary constraints. These vacancies were not filled.

Where there were alternative dispute resolution mechanisms, such was with a view to settle the matter out of court. there was a meeting held on 5<sup>th</sup> March, 2018 but the respondent was not a party to it or to any agreement arrived at as alleged.

The respondent in good faith and pursuant to section 66 of the CGA on advertisement of positions within the public service decided to call for the academic and professional certificates from the grievants and which was done on 6<sup>th</sup> April, 2018. Upon scrutiny the respondent made a list of the successful grievants and issued letters of appointment to 8 grievants for a 3 years renewable contract with effect from 9<sup>th</sup> May, 2018 pursuant to the mandate under section 74 of the CGA. Letters were issued to;

i) Muthaura Jesse Mutembe;

ii) Kagwiri Mary Wanjiru;

iii) Koech Sylvia Chepkemboi;

iv) Ngotho Sally Wangechi;

v) Mweu Dennis Kinama;

vi) Cheptoo Rebecca.

vii) Cecilia Wairimu Ngari;

viii) Nabwire Adelight;

The law allow the respondent to issue employees on contract.

From the scheme of Service for nurses, three (3) grievants were not qualified for the advertised positions. Upon recruitment, the respondent forwarded the list of names to the health department for engagement. Of the eight (8) who qualified, only one accepted the offer of

employment and is currently in the service of the respondent.

The respondent cannot be compelled to employ the grievants on permanent and pensionable terms. The respondent has a duty to employ persons who are competent and qualified. Reinstatement can only arise with regard to persons already in employment. The respondent has engaged its employees on contract terms and cannot be compelled to employ on permanent and pensionable terms or retrospectively from March, 2016 to date.

The allegations made by the claimant are denied, there is no breach of the constitution, the law or the recognition agreement as alleged. The grievants continued to irregularly receive salaries after the end of internship and there was no employment between the parties. The claims made should be dismissed with costs.

In evidence, the respondent called Joyce Njeri Ndegwa who testified that she is the secretary of the respondent and that the CGA mandate the respondent to recruit and appoint persons to hold office within the county public service. The grievants were engaged by the national government on temporary terms and placed with the respondent for a year vide letters of internship with effect from 23<sup>rd</sup> April, 2013. Such did not guarantee employment as employment within the respondent is through competitive process.

The respondent was not a party to a meeting held on 5<sup>th</sup> March, 2018 where it is alleged there was an agreement reinstating the grievants and the payment of salary arrears. The request to have academic documents from the grievants on 6<sup>th</sup> April, 2018 was to allow for scrutiny in terms of the scheme of service and to allow for assessment of successful applicants.

Upon arising of vacancies, only 8 grievants qualified and were issued with offer letters for employment for 3 years contract but only one grievant accepted the same and is currently in the service of the respondent. Ms Ndegwa also testified that the respondent cannot employ on permanent and pensionable terms due to the high wage bill and thus issues contracts to the competitively recruited employees in the public service. The grievants were not employees of the respondent and the order for reinstatement has no foundation and the claim should be dismissed with costs.

At the close of the hearing both parties filed written submissions.

From the pleadings, the evidence and written submissions the issues which emerge for determination can be summarised as follows;

The nature of relationship between the parties;

Whether the remedies sought should issue.

There is recognition between the parties. The recognition was signed on 14<sup>th</sup> December, 2016. With recognition, section 57 of the Labour Relations Act, 2007 allowed the claimant to negotiate and bargain for a collective agreement with the respondent.

In the Memorandum of Claim filed on 16<sup>th</sup> June, 2017 the claimant attached the letter issued to Mweu Dennis Kinama dated 12<sup>th</sup> April, 2013 by the Ministry of Medical Services being *offer of appointment* and states;

*With reference to your application, I am pleased to offer you employment as a Nursing Officer (Intern) on Temporary Terms of Service for a period of one year with effect from 23<sup>rd</sup> April, 2013. ...*

*Please note that the condition for this appointment requires that you serve in the station of your deployment i.e. Nakuru Provincial General Hospital for the period. You will be subject to the rules and regulations currently in force in the Kenya Civil Service on which may be promulgated from time to time.*

...

*It is further clarified that your appointment as a Nursing Officer intern does not guarantee you appointment in the regular establishment on the completion of the internship as this will depend on the existence of substantive vacancies which will be filled on a competitive basis. ...*

The court takes it that the letter to Kinama above applied to all the grievants as Mr Diang'a testified.

It is also understood that all the grievants reported to the service of the respondent on 23<sup>rd</sup> April, 2013.

In this regard therefore, it was clear from the letter of the Ministry of Medical Services on 12<sup>th</sup> April, 2013 that the grievants were placed as interns with the Nakuru Provincial General Hospital for a period of one (1) year. Such was not employment on pensionable and permanent basis and where the respondent required the services of the grievants that was to be addressed and *filled competitively*.

It is common cause that at the end of the internship period, the grievants continued in the service of the respondent without stoppage. This is evidenced by the continued payment of the due wages and allowances to the grievants by the *County Government of Nakuru* per payment statements for September, November, 2015 and March, 2016 attached to the Memorandum of Claim appendix 3.

It was also clarified to the grievants by the Ministry of Health Services that their appointment as Nursing officers and placement with the

respondent did not guarantee employment. For the respondent to fill the said position(s) it ought to have followed section 66 of the County Governments Act which provided that if a public office was to be filled, the County Public Service Board should invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible, and especially persons who for any reason had been or might have been disadvantaged. See **Republic versus Secretary County Public Board, Ex-parte Hulbai Gedi Abdille High Court at Nairobi Judicial Review Application No 271 of 2014.**

Section 66 of the CGA requires that;

*If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged.*

There was no recruitment of the grievants by the respondent as officers in its public service under the law.

Despite continued service of the grievants from May, 2014 to March, 2016 such service was not regularised in accordance with section 66 of the CGA.

Even where the grievants held a legitimate expectation for employment by the respondent for the period after the lapse of the internship term, under paragraph 20 and 22 of the Amended Memorandum of Claim read together with paragraphs 11 and 13 of the Memorandum of Claim the claim is that;

*While the grievants continued working, a verbal communication was made to the claimant [grievants] requesting them to re-apply for their positions to facilitate issuance of appropriate letter.*

.....

*The grievants were verbally asked to stop working until they get communication on their fate from County Government which they [...] not up to date.*

The grievants were therefore aware at all material times that there was no employment with the respondent, efforts to regularise this were gone into without conclusion and until the communication issued to the grievants to stop their service(s) to the respondent. the acknowledgement by the grievants that there was verbal communication for stoppage of work and until further communication suffices.

The court takes it that in an effort to address and regularise the relationship between the parties and pursuant to the provisions of section 66 read together with section 72 of the CGA the respondent issued notice and *Vacancy List No.02 of 2015*. The notice was with regard to vacancies in the areas of Nursing Officer III job group K, Clinical officers, and other sectors in the health department.

In the evidence and statement of the claimants for the grievants and Mr Diang'a he did not outline as to whether any of the grievants applied for the advertised positions. What is apparent to the court, following the notification, the grievants were shortlisted for interview;

- 1) Adelight Nabwire;
- 2) Cecilia Ngari;
- 3) Dennis Momanyi;
- 4) Dennis Kinama;
- 5) James Dianga;
- 6) Jesse Muthaura;
- 7) Martin Mugeti;
- 8) Mary Kagwiri;
- 9) Rebecca Cheptoo;
- 10) Sally Ngotho; and
- 11) Sylvia Koech.

Following the interviews, 8 of the grievants were issued with letters of offer of employment save for 3 being;

- 1) Dennis Momanyi;

2) James Diang'a and

3) Jesse Muthaura.

Ms Ndegwa testified that the 3 who were not issued with letters of offer of employment did not meet the required threshold for employment by the respondent.

The respondent submitted the various letters of *offer of appointment – 3 years renewable contract* to the 8 grievants listed above. The evidence that only one grievant, Martin Mutegi accepted the offer and has since been in the service of the respondent was not challenged.

As correctly held in the case of **Agnes wanjiku & 10 others versus Chief Registrar of the Judiciary & another [2017] eKLR** that;

*The Claimants indeed served the Judiciary but their entry was premised on helping the defund Industrial Court transit to the Employment & Labour Relations Court. No advertisements for the jobs were made. They didn't go through a competitive recruitment process.*

The grievants were sourced as interns for the respondent. that lapsed. Upon advertisement for the jobs, 8 were offered employment but only one accepted and who remains in the service of the respondent.

Upon the seven (7) grievants who were offered employment declining the same, the respondent was under no legal obligations, constitutional or otherwise to retain the services of the grievants. Of the three (3) grievants not offered any employment, the respondent had no basis to employ all those who were interviewed as all employments are to be rationalised based on the provisions of section 66 of the CGA ac cited above.

With regard to the nature of relationship between the parties, the initial phase defined, the interim period addressed as above, to claim for reinstatement ad payment of back salaries and allowances or damages for alleged discrimination against the grievants is without a foundation. The respondent bound by statute to employment and deploy officers in the service of the County Government cannot issue any letters of employment or offer employment unless and until there is public notification, competitive sourcing and based on the need. See **Kenya County Government Workers Union v Kisumu County Assembly Public Service Board Cause No. 50 of 2014 (Kisumu)**.

The continued serving of the grievants as interns with the respondent and pending competitive recruitment of a substantive holders of the interned positions was ended vide verbal notice in February, 2016 and the grievants were paid the dues and allowances as of March, 2016 bringing to a close the relationship between the parties. For time served as interns, all dues were paid. The expectation for employment on permanent and pensionable terms has no foundation or basis in light of the analysis above.

**Accordingly, the claim is hereby dismissed in its entirety save each party shall bear own costs.**

**Dated and delivered electronically this 27 April, 2020 at 1200 hours.**

**M. MBARU JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in reference of the directions issued by his Lordship the Chief Justice on 15<sup>th</sup> March, 2020 and on given consent, the Judgement herein is delivered via e – mail;

**Issued electronically this 27<sup>h</sup> April, 2020.**

**M. MBARU JUDGE**