



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 133 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> April, 2020)

IN THE MATTER OF ARTICLES 22, 23, 27, AND 38 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3, 10, 20, 27, 28, 29, 30, 36, 41 AND 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

ESTHER NJERI MAINA.....PETITIONER

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

1. The Respondent is a public university established under the Universities Act, of 2012. The Petitioner is an employee of the Respondent. She filed this Petition on 10<sup>th</sup> December 2018 together with her supporting affidavit sworn on 7<sup>th</sup> December 2018, to challenge her contractual terms and have her employment terms converted to permanent and pensionable. In particular, she sought the following prayers:-

*a. A declaration that the Respondent violated the Petitioner's fundamental rights and freedom enshrined in the bill of rights of the Constitution 2010.*

*b. A declaration that the Respondent is bound to recognize the Petitioner as a permanent employee having worked for the Respondent continuously for over 9 years.*

*c. A declaration that the seasonal contract of employment is null and void.*

*d. Orders restraining the respondent either by themselves, employees, servants or agents from terminating the employment of the Petitioner herein purported as a seasonal employee as the termination would be unlawful and irreparable harm will be caused to the Petitioner and interference with her rights under Article 41(1) and (2) of the Constitution.*

*e. Orders restraining and prohibiting the Respondent from dismissing and terminating the Petitioner from the Respondent's employment without following the law and the terms and conditions of employment.*

*f. Order restraining and prohibiting the Respondent from employing replacement labour or employees in the same position to perform the same or similar work as the Petitioner herein.*

*g. Order to convert the terms and conditions of service of the Petitioner herein purported to be a seasonal employee in the service of the Respondent to Respondent employee on term and condition of service consistent with the Employment Act 2007.*

*h. Order the Respondent to allow the Petitioner proceed on paid maternity leave.*

*i. Order the Petitioner to be allowed to join a trade union of her choice with immediate effect.*

***j. The Court do make an order compelling the Respondent to pay the Petitioner her dues in the following manner:-***

***i. Withheld house allowance for 9 years at the rate of 17,692.00 per month totalling to 1,910,736.00.***

***ii. Commuter allowance for 9 years calculated at the rate of 12,000.00 per month totalling to 1,296,000.00.***

***iii. Withheld annual leave pay for 9 years calculated at the rate of 9,700.00 per year and totalling to 87,300.00.***

***iv. Denied annual leave (21 x 527 x 9 = 99,603).***

***v. Denied sick off and unpaid maternity leave at the rate of monthly salary for 7 months (934 x 22 x 7 = 143,826.00).***

***k. The Respondent pay the cost of the Petition.***

***l. Any other further and better orders as this Court may deem just and fit to grant.***

2. The Respondent has opposed this Petition vide the Replying Affidavit of Professor Fatuma Chege sworn on 10<sup>th</sup> July 2019 and the Grounds of Opposition filed on 12<sup>th</sup> June 2018.

### **The Petitioner's Case**

3. The Petitioner avers that she was employed in August 2009 as a secretary and has been in employment to date this being her 10<sup>th</sup> year of service. She also avers that she has worked for the Respondent continuously without any off days, paid maternity leave, sick off or annual leave.

4. She avers that she has performed her duties for a long time and on a permanent basis since her initial engagement with the Respondent who has persisted in terming her a casual employee and has never issued her with written terms and conditions of service as required by Section 10 of the Employment Act 2007.

5. The Petitioner avers that though the Respondent has continuously made statutory deductions of NHIF, NSSF and PAYE on her behalf, the same has never been itemized neither has she been issued with a statement of the same.

6. She avers that a memo was issued on 9<sup>th</sup> July 2018 through the office of the Deputy Vice Chancellor requiring casual employees to report to the graduation square on 19<sup>th</sup> July 2018 so as to sign individual contracts or they would not be included in the Respondent's payroll for July 2018.

7. It is averred that on 19<sup>th</sup> July 2019, the Petitioner and some of her colleagues approached the Administration Registrar, who was in charge of the said exercise, to enquire about maternity leave and why the contract indicated that the same had been explained to the employee yet this was untrue. The Registrar undertook to follow up on the matter but never did.

8. It is the Petitioner's case that the seasonal contracts reduced the salaries from Kshs.934.00 a day, to Kshs. 873.00 a day and was based on 22 working days in a month. She further avers that the contract indicated that her salary would be Kshs. 19,223.00 but the Respondent failed to explain the basis of the same. Further, the contract did not make provisions for maternity leave.

9. She avers that the contract was signed under duress for fear of being denied her July 2018 salary. She is of the view that the said exercise was in a bid to terminate her employment without following the laid down procedures.

10. The Petitioner avers that she sent emails to the Vice Chancellor, Deputy Vice Chancellor and the Administration Registrar requesting to be given audience so as to discuss particulars of her employment such as maternity leave, change of terms to permanent employment among others; but her emails went unresponded.

11. In her affidavit, the Petitioner avers that the Respondent has four categories of employees namely: permanent, contractual, temporary and seasonal (formerly casual) employees. She states that the terms of the first three categories of employees are compliant with the provisions of the Employment Act.

12. She avers that her previous and current heads of department recommended that her terms be changed from casual to permanent. The request was considered but was not approved.

13. The Petitioner avers that in December 2015, the Respondent declined to approve her 14 days sick off which had been issued by the Kenyatta National Hospital for purposes of bedrest due to a high-risk twins' pregnancy. However, she was informed that her terms of engagement did not cater for sick off and she was advised to take unpaid maternity leave.

14. Her condition got worse and in January 2016 she requested for sick off yet again which was denied on the previous grounds. She avers that this was contrary to Sections 30(1) and 29(1) of the Employment Act. It is her position that the said terms of engagement have never been issued by the Respondent or made public. She avers that on 22<sup>nd</sup> January 2016, she requested for the said unpaid maternity, went on a premature maternity leave and resumed work in September 2016.

15. The Claimant avers that since 2009, the procedure has been that before she is paid her monthly dues, she must sign a muster roll that is co-signed by her HOD. Something that she does to date.

16. She deposes that on 26<sup>th</sup> September 2018, her HOD issued her with another contract effective from 1<sup>st</sup> October 2018, and instructed her to sign it in his presence and not photocopy or take photographs of the same. She did as was instructed, for fear of being dismissed from employment.

17. She further deposes that on 14<sup>th</sup> November 2018, she was summoned by the administration registrar regarding the remark she wrote on the contract signed on 9<sup>th</sup> November 2018. She avers that the remarks were approved by her Head of Department. They were:-

***a. She did not understand the contract since the meeting to explain the contract had not yet been held and that she had signed under duress.***

***b. That there was misrepresentation of facts with regard to salary.***

***c. That the issues of maternity leave raised at the graduation square were yet to be looked into as promised.***

18. In response to her remarks, the Registrar informed her that she knew the terms of her employment were casual when she took up the position in 2009 but still did not explain the seasonal contract to her.

19. She avers that the Respondent has violated her rights under Article 41(1) and (2) of the Constitution as she has been discriminated against because the employment terms of other categories of employees are in line with the provisions of the Employment Act and that she has been denied the opportunity to serve on permanent terms yet she is more qualified than other employees. Further, that other female employees who are in the first three categories earlier stated, are entitled to sick off and paid maternity leave.

### **The Respondent's Case**

20. The Respondent avers that the Petition does not demonstrate any instance of a constitutional violation hence there was no basis for filing the same. Further, that the Petition does not meet the criteria for granting the orders outlined in Article 23(3)(a), (b) and (e). It is also averred that the jurisdiction of this Court has been improperly invoked as the Petition is based on inapplicable provisions of the law.

21. The Respondent avers that the Petitioner will not suffer any prejudice if the orders sought are not granted and that it is in the public interest that the orders sought are not granted as they are in furtherance of the Petitioner's private interests. Further, that the Petition is incurably defective because the orders sought have been overtaken by events.

22. It is the Respondent's case that the Petitioner has failed to furnish this Court with facts that would enable it exercise its discretion in the Petitioner's favour. It is averred that the petition is frivolous, a misapprehension of the law, incompetent, misconceived, baseless, has no proper grounding in law, amounts to approbating and reprobating and contains general allegations hence an abuse of the court process.

23. The Respondent avers that the Petition ignores the cardinal principle of the law that courts do not make contracts for parties.

24. The Respondent denies paragraphs 1 – 18 of the Petition regarding the background of this Petition. In her replying affidavit, the Affiant denies the Petitioner's averment that she has worked continuously for the Respondent from 2009 or that she has worked continuously for a year. She also denies that the Petitioner's duties are of an essential nature which can only be performed by her or that the Respondent issued her with written contracts.

25. The affiant also denies that the Petitioner was denied sick off in December 2015 or that her salary was reduced. She contends that the seasonal contracts are not akin to termination of employment and have been renewed in the past. She avers that the Petitioner is currently employed by the Respondent on contractual terms.

26. The allegation that the Petitioner was working diligently and that she was recommended for promotion has been denied. The affiant further denies the allegation of discrimination against the Petitioner and avers that the Respondent treats its employees fairly to ensure that they are contented.

27. The affiant avers that the Petitioner's salary was calculated on a daily basis and paid at the end of the month to avoid reconciliation and logistical difficulties.

28. She avers that the Respondent has a policy of employing casuals and fixed term contractual employees for work that is not permanent in nature and may not be part of the core business. She further avers that the Respondent operates on a semester system and as such there are some instances when the student population is higher. Consequently, there are times when the Respondent needs a higher number of staff.

29. The affiant admits that the Petitioner has worked as a casual employee on several occasions and was engaged based on the availability of work. It is averred that in July 2018 it became necessary to formalize the Petitioner's engagement to ensure that the number of casual employees hired on a day to day basis reduced and to outline the employment terms in writing.

30. The affiant avers that most casual employees welcomed the move and 2,842 casual employees executed the written contracts. She contends that the Petitioner freely signed the contract and should not be allowed to approbate and reprobate as it is only fair to hold the Petitioner to the terms of the contract which she duly signed.

31. The affiant contends that the Petitioner did not fill the requisite forms requesting to go on maternity leave hence the allegation that she was denied maternity leave is false. She further contends that the Petitioner has not provided evidence to prove that the Respondent intends to terminate her employment on account of pregnancy.

32. Lastly she avers that the orders sought extremely prejudice the Respondent hence granting the same would amount to re-writing the contract and would militate against the public interest that the Respondent represents.

33. The Petition was disposed of by way of written submissions where the Petitioner filed hers on 14<sup>th</sup> August 2019 while the Respondent filed theirs on 8<sup>th</sup> October 2019.

#### **The Petitioner's Submissions**

34. The Petitioner submits that she is a permanent employee and not a casual employee because She had worked for 9 years and was being paid a monthly salary. As such, her employment converted to contractual by dint of section 37. She relies on the case of **Civil Appeal 20 of 2017; Nanyuki water and Sewerage Company Limited vs. Benson Mwiti Ntiritu & 4 Others [2018]** where the Court of Appeal affirmed the trial Court's decision and held that the Respondents' contract of service assumed permanency and they were deemed to be the ones where the wages are paid monthly and Section 35 (1) (c) shall apply to that contract of service in terms of Section 37. She also cites the cases of **Rashid Odhiambo Allogoh & 245 Others vs. Haco Industries Limited [2015] eKLR**, **Silas Mutwiri vs. Haggai Multi-Cargo Handling Services Limited [2013] eKLR** and **Chemelil Sugar Company vs. Ebrahim Ochieng Otuon & 2 Others [2015] eKLR**.

35. The Petitioner submits that changing terms from permanent to casual was a clear violation of the law. She further submits that the Respondent did not issue her with a termination notice before terminating her contract of service vide a seasonal contract.

36. It is submitted that the Respondent violated the Petitioner's rights as enshrined in article 41 (1) and (2) of the Constitution by denying her the right to sick off and maternity leave as provided for under Section 29 (1) and (2), and by reviewing her salary downwards and by failing to issue her with an itemized pay statement and a statutory deduction statement in writing as per Sections 20 and 21 of the Employment Act, 2007. She relies on the case of **Peter Wambugu Kariuki & 16 Others vs. Kenya Agricultural Research Institute [2013] eKLR** where the court found that the Respondent had breached the Petitioners' rights to fair labour practice by failing to uphold the provisions of the Employment Act.

37. The Petitioner submits that in computing her claim, she applied the rates of other staff members whose work was equivalent to hers.

38. The Petitioner submits that she is entitled to house allowance as the Respondent did not submit any contract or adduce any evidence to prove that she had been paid house allowance.

39. She also submits that she is entitled to commuter allowance as it was never paid to her and which is paid out to employees who do not use private cars. It is submitted that she is entitled to payment for the accrued leave days as she never took the same. Her calculations are at the rate of Kshs.9,700 which is the grade she believes she falls in. She also submits that she is entitled to accrued annual leave pay as she was never paid the same.

40. It is the Petitioner's submissions that she is entitled to payment for denied sick off and unpaid maternity leave. She further submits that she is entitled to damages for the Respondent's violations and urges this Court to award her costs.

#### **The Respondent's Submissions**

41. The Respondent submits that the suit should not be heard as a constitutional petition on the basis of affidavit evidence only, as the issues raised are the normal employment and labour relations issues which do not require a constitutional interpretation.

42. The Respondent urges that it reserves the right to submit, after the oral hearing or the Petitioner's cross examination. It is submitted that proceeding by way of affidavit evidence only will infringe upon the Respondent's right to be heard.

43. he Respondent further submits that the Petitioner is approbating and reprobating. According to the Respondent, the Petitioner duly signed a seasonal contract and is deriving benefits under it but wants the Court to declare her status of employment as permanent and disregard the signed contract. It is submitted that the Petitioner admitted in her affidavit that the procedure of employing her on 3 months' contract existed from the beginning but was based on the Respondent's memos.

44. The Respondent submits that the Petitioner was employed on fixed-term contractual terms. It is of the view that Section 37 of the Employment Act does not grant this court the powers to change a fixed term contract to permanent terms. Further, that Section 37 does not give this Court powers to change casual terms to permanent terms.

45. It is submitted that the Petitioner's employment terms cannot be converted to contractual terms as she is already employed on contractual terms. It is of the position that this Court should not interfere with freedom of contract as was held in the case of **Josphat Njuguna vs. Highrise Self Group [2014] eKLR**.

46. The Respondent submits that the claim for discrimination has not been proven and contends that 99.5% of its employees are on fixed term contracts. As such, the notion created by the Petitioner that she is being victimized is in bad faith.

47. On the prayers sought, the Respondent submits that the Petitioner is not entitled to a declaration that her fundamental rights have been

breached as she has not provided any particulars. Further, the Petitioner is not entitled to a declaration that she is a permanent employee as she was on a fixed term contract and that she has not proven that she served the Respondent for 9 years as alleged.

48. The Respondent submits that there is no basis to issue a declaration that the seasonal contract is null and void as the Petitioner is duly bound by the contract. It is submitted that prayers (d), (e) and (f) are premature and unnecessary as the Respondent is not contemplating terminating the Petitioner's employment.

49. It is the Respondent's submissions that the Petitioner's prayer to proceed on maternity leave is overtaken by events as she went on the same during the pendency of this suit. The Respondent urges that the petitioner has not been barred from joining a trade union, as such, the prayer is premature.

50. It is submitted that the Petitioner is not entitled to the special damages claimed, as the same were not specifically pleaded or strictly proven. In the Respondent's view, the Petitioner did not give the source of her computations neither was there evidence adduced to prove that she ought to have been in grade F and that the employees in that grade were earning the specified salary.

51. I have examined all the averments and submissions of the parties herein. The issues for this Court's determination are as follows:-

*(i) What is the nature of the employment relationship between the Petitioner and the Respondent?*

*(ii) Whether the Respondent breached any of the Petitioner's constitutional rights as submitted.*

*(iii) Whether the Petitioner is entitled to the remedies sought.*

#### **Issue No. 1**

52. As per the Petitioner's bank statement from Equity Bank dated 14<sup>th</sup> November 2013, the Petitioner was on Respondent's payroll as early as September 2009, October 2009, December 2009, January 2010, February 2010, March 2010, April 2010, May 2010, June 2010, July 2010, August 2010, September 2010, October 2010 and for every subsequent month to December 2011 and thereafter from February 2012 to December 2012.

53. The Petitioner confirmed receiving salary as a casual from the Respondents upto 2018, at the time of filing this Petition. She also exhibited her P9 form from KRA showing tax was remitted for her by the Respondent. Her NHIF card shows that she was a staff of the Respondent. In all these instances, the Petitioner was regarded as a casual worker every 3 months but on a continuous basis.

54. On 26<sup>th</sup> September 2018, the Petitioner was now placed on a seasonal contract of employment for 3 months or less depending on the task for which she had been engaged. This prompted the Petitioner to write to the Respondent complaining about this new arrangement and especially so, considering that the contract was silent on maternity leave and she was pregnant at the moment.

55. The Petitioner thereafter proceeded to file this Petition when there was no response to her concern.

56. The Petitioner has demonstrated that she has served the Respondent since 2009 at times continuously even for a year with a lapse of a month or so, and thereafter continuing to serve again for months on end and even years before 2018 when the Respondent decided to place her on a seasonal contract.

57. Her NSSF statement shows that she was registered to the fund and remittances were made by the Respondent thereto from January 2011 to July 2013 on a continuous basis save for 2 months.

58. The Respondents have not denied this position.

59. The position in law concerning casual employment is provided for under Section 37 of the Employment Act 2007 which provides as follows: -

#### **37. Conversion of casual employment to term contract:-**

##### **1) Notwithstanding any provisions of this Act, where a casual employee:-**

**a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or**

**b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1)(c) shall apply to that contract of service.**

**2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.**

**3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee.**

**4) Notwithstanding any provisions of this Act, in any dispute before the Industrial Court on the terms and conditions of service of a casual employee, the Industrial Court shall have the power to vary the terms of service of the casual employee and may in so doing declare the employee to be employed on terms and conditions of service consistent with this Act.**

**5) A casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer and section 87 of this Act shall apply.**

60. In light of the foregoing provision, one cannot be held as a casual worker for over 3 months and especially so if one is doing the same job on a continuous basis as was the case with the Petitioner.

61. The law also envisages that an employer is duty bound to issue an employee with an appointment letter detailing the nature of the relationship as envisaged under Section 9 of the Employment Act. The Respondent failed to issue the petitioner with a contract of employment and held her as a casual for over 3 months as she performed the same tasks, which flouts the law.

62. In **Civil Appeal No. 20 of 2017, Nanyuki Water and Sewerage Company Limited vs. Benson Mwiti Ntiritu and 4 Others (2018)**, the Court of Appeal, JJA, Waki, Sichale and Kantai considered the issue of casual employment and affirmed the trial Court's decision as follows:-

***“A declaration that Section 37 of the Employment Act, 2007 applies to the employment of the Respondents to the effect that their casual employment was converted into a contract of service where wages are paid monthly and to which Section 35(1)(c) of the Act applies. The Respondents were entitled to such terms and conditions of service as they would have been entitled to under this Act had they not initially been employed as casual employees.”***

63. The JJA indeed confirmed the existence of causal employment but qualified that it cannot be indefinite, the respondents having served the Appellants for the length of time served.

64. This is the position in the instant Petition where there is no contention that the Petitioner served the Respondent continuously for months on end, which cumulatively comes to over many years.

65. The Respondent was therefore in breach of the law when it purported to unilaterally change the 'casual' employment to a temporary one in 2018 instead of confirming the permanent and pensionable employee status the Petitioner had earned after serving the Respondent from 2009.

66. It is my finding that the nature of the employment relationship between the Petitioner and Respondent is therefore not casual or temporary but permanent and pensionable and which I hereby declare as per Section 37(1) of the Employment Act 2007.

## **Issue No. 2**

67. The Petitioner submitted that her constitutional rights had been breached by the Respondents. The Respondents indicated that this is a normal employment case and not a constitutional petition.

68. From the Petition herein, the Petitioner has submitted that her constitutional rights were infringed. She cited Article 27, 28, 29, 30, 36, 41, 43, 47, 50 and 259 of the Constitution as the rights, which had been infringed. She avers that she was discriminated upon but she has not indicated as against who. As such, the claim for discrimination has not been proved.

69. Further, her claim under Articles 28, 30 and 36 of the Constitution have not proved.

70. However, under Article 41 of the Constitution, every person has a right to fair labour practices. Indeed, fair labour practices include adherence to the law through the issuance of an employment contract, confirmation of employment after serving under probationary period or being a casual employee for a period exceeding 3 months. The Respondent failed to adhere to the law and therefore subjected the Petitioner to unfair labour practices.

71. In addition, the Respondent breached other rights pertinent to a labour contract such as maternity leave and reasonable and fair remuneration.

72. I agree with the Petitioner that her rights under the Constitution were indeed breached and in particular, her right to fair labour practices.

73. On issue of remedies I find for Petitioner and I award her as follows:-

***(i) A declaration that her right to fair labour practices was infringed upon.***

***(ii) A declaration that the nature of her employment relationship with Respondent is not casual or temporary but permanent and***

*pensionable with effect from the date of this judgment.*

*(iii) The Respondent should henceforth issue the Petitioner with a contract detailing the nature of this contract as per the law and in tandem with other permanent and pensionable employees who are permanent and pensionable on her grade.*

*(iv) The Respondent to pay the Petitioner costs of this Petition.*

Dated and delivered in Chambers via Zoom on this 15<sup>th</sup> day of April, 2020.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Petitioner Present

Thuo for Respondent – Present