



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 23 OF 2017

IN THE MATTER OF VIOLATION OF ARTICLES 10, 22, 28, 41(1) & (2), 48(3), 232 AND 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 5, 9, 10 AND 37 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTION 61(3) OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF AN APPLICATION BY THE KENYA COUNTY GOVERNMENT WORKERS UNION

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER

v

COUNTY GOVERNMENT OF MACHAKOS1st RESPONDENT

MACHAKOS COUNTY PUBLIC SERVICE BOARD.....2nd RESPONDENT

JUDGMENT

1. This Petition could have been heard and concluded earlier had the parties adhered to Court directives as to the filing of affidavits and submissions, and generally prosecuted their respective cases diligently. Instead, the parties threw at the Court all that they could without synthesising and precisely examining the gravamen of their respective cases.

2. The Kenya County Government Workers Union (the Union) instituted legal proceedings against the County Government of Machakos and the County Public Service Board Machakos on 24 March 2017 alleging constitutional violations and breach of contract in respect of some 340 of its members (Grievants).

3. On 16 May 2018, the Union filed an Amended Petition in which it sought orders

(a) THAT this Honourable Court do make an order of injunction restraining the Respondents either by themselves, employees, servants and/or agents from terminating the employment of the Petitioner's members without following the due process of the law.

(b) THAT the Respondents be restrained and prohibited from employing replacement labour and/or employees in the same positions to perform the same or similar work as the Petitioner's members.

(c) THAT this Honourable Court be pleased to vary the terms of service of the casual employees in the service of the Petitioner's members and in so doing declare the employees to be employed on terms and conditions of service consistent with the Employment Act.

(d) THAT the Honourable Court be pleased to issue an injunctive order restraining the Respondents from making any unauthorised deductions on the Petitioners members' salaries.

(e) THAT the Honourable Court be pleased to issue a mandatory injunctive order compelling the Respondents to issue the Petitioner's members with itemised pay statements.

(f) THAT this Honourable Court be pleased to issue an injunctive order restraining the Respondents from intimidating, threatening or in any way victimising the Petitioner's members.

(g) THAT this Honourable Court be pleased to declare the Respondents violated the Petitioners/Applicants members' right to fair labour practices namely reasonable working conditions including permanent terms and conditions of service as protected under Article 41(1) of the Constitution and the provisions of the Employment Act.

(h) THAT this Honourable Court be pleased to issue an order directing that the Respondents unconditionally reinstate the Petitioner's members to their employment services and former positions with the Respondents without any loss of benefits or seniority and without any conditionality.

(i) THAT costs of this application be borne by the Respondents.

(j) THAT any other or further orders as this Honourable Court deems fit and appropriate.

(k) THAT costs be provided to the Petitioner.

4. The Amended Petition was prompted by the change of circumstances in that the Grievants contracts had purportedly been terminated.

5. Pursuant to Court order, the parties filed a List of Agreed Issues on 27 July 2018. The Issues as identified by the parties were

1. Whether the Petitioner's members were employees of the Respondents and if yes, what were the terms of employment?

2. Whether the Respondents violated the Petitioner's members' rights under Article 41(1) of the Constitution

3. Whether the Respondents violated the Petitioner's members' rights under Article 232 of the Constitution?

4. Whether the Respondents violated the Petitioner's members' rights under Article 236 of the Constitution?

5. Whether the Respondents violated the Petitioner's members' rights under section 37 of the Employment Act?

6. Whether the termination of the Petitioner's members were unfair?

7. Whether the Petitioner's members are entitled to the reliefs sought?

8. Whether the Petitioner's members are entitled to reinstatement?

9. What are the appropriate orders to be made in this Petition?

10. Who is liable to pay costs of the Petition?

6. The Petition was heard on 18 September 2019, 14 November 2019, 23 January 2020, and was concluded on 25 February 2020. The Parties agreed on 18 September 2019 that the large volume(s) of documents filed be admitted as bundles and that admissibility of any particular document be raised during submissions.

7. The Union filed its submissions on 18 March 2020 (the submissions were verbose in the extreme and repetitive) but served it upon the Respondents only on 11 May 2020 (should have been filed/served before 20 March 2020) while the Respondents filed their submissions on 16 May 2020.

8. The Court has considered all the material placed before it including the submissions and will examine the case in terms of the Agreed Issues.

9. The Court will, however, address some preliminary issues raised by the Respondents.

Recognition agreement

10. The Respondents contended that the Union had no recognition agreement with them and therefore it could not purport to represent any of their employees.

11. The Court of Appeal in Civil Appeal No. 37 of 2019, *Modern Soap Factory v Kenya Shoe and Leather Workers Union* drew a distinction between a Union's right to represent its members and the right to collective bargaining which is anchored on a recognition agreement.

12. The lack of a recognition agreement by and of itself, in the view of this Court, would in the circumstances of this dispute not serve as a legal handicap to the competency of the Petition or *locus standi* of the Union.

Burden of Proof/Admissibility of affidavits of uncalled Grievants

13. The Union filed many affidavits in support of its case including by one Roba Duba, its Secretary-General and others, who were not called to testify (only 5 of the Grievants were called to testify).

14. The Respondents urged the Court to ignore the affidavits on the proposition that by virtue of the Evidence Act, the facts in those affidavits were not proved to the requisite standard.

15. The Respondents were in sum suggesting that all the 340 or so Grievants be called to testify. But was such a course even necessary?

16. The Respondents must, of course, be aware that no particular number of witnesses are required to prove any particular facts or evidence.

17. In the instant case, the parties identified common questions of fact and law to be proved or disproved. It, therefore, cannot be that the only appropriate way for the Union to satisfy the legal and evidential burden placed on it was to call all the Grievants.

18. Indeed most of the documents filed by both parties were those kept in the normal course of business such as bank statements and letters said to have been authored by servants and or agents of the Respondents.

19. The course of action as suggested by the Respondents and upon which it submitted the Petition should fail, in the view of the Court, would be antithetical to the constitutional imperative to administer justice without delay.

Employment relationship

20. The first Issue identified by the parties was whether the Grievants or any of them were in any form of a contractual relationship with the Respondents.

21. The Union brought the Petition on behalf of some 340 members whom it alleged were employed by the Respondents from around 2013 without break in the continuity of service up to March 2017.

22. To demonstrate the employment relationship, the Union filed and produced copies of secondary documents including *deployment letters* under the hand of the Sub-County Administrator, letters from the Sub-County Administrator to the Chief Officer, Decentralised Units requesting for payment of salary arrears; P9 for purposes tax returns; National Hospital Insurance Fund Data Summaries showing the employer as Machakos County; Provisional Member Statements of Account from National Social Security Fund indicating the employer as *Machakos County Government*; bank statements showing salary remittances by Machakos County; Duty Allocation rota; Work Tickets; letters from Respondents to the Police asking for assistance in return of uniforms by the Grievants, and parade participants lists during national days.

23. The Respondents, on the other hand, countered that the 340 members on whose behalf the Petition was brought were fictitious (ghosts) and that conflicting numbers were presented, the numbers ranging from 369 to 325.

24. Because of the numbers involved, and due to the contestation by the Respondents on the contractual relationship with the purported 340 Grievants, the Court on 20 December 2017 directed that a joint verification exercise on the identity and authenticity of the 340 Grievants be conducted under the guidance of the County Labour Officer, Machakos.

25. An Interim Report was filed on 30 January 2018 and a Final Report on 23 February 2018.

26. During the planning meeting held on 9 January 2018, the Union reversed the number of its members affected from 369 to 196.

27. During the verification on 11 January 2018 and 12 January 2018, it was established that 46 out of those in the Union list of 369 were in employment (38 having appointment letters) and that 323 of the Grievants employment status had to be verified.

28. At the verification, the Union presented documents from 157 of the 369 Grievants. There were no records in respect of 166 of the Grievants while 14 of the records were not in the list of 369.

29. At this juncture, the Court notes that the Union urged it to disregard and/or ignore the Verification Report allegedly because it did not participate in the verification exercise.

30. The Court finds the submission outlandish as the process was guided by a neutral public officer, the County Labour Officer and the report(s) filed in Court lists the names of the persons who participated in the exercise on the face of the report.

31. The Union was represented by Mr Christopher Mutinda Mutua, its Branch Secretary, Mr Joseph Muli, the Branch Treasurer and Ms Ruth John, the Youth Leader.

32. The Court has considered the Verification Report and come to the inescapable finding that it can only examine the validity of the

complaints raised on behalf of the 157 Grievants who presented some form of documentation to demonstrate a contractual relationship with the Respondents. The 157 were listed in Annexure 3 of the Verification Report.

33. These 157 Grievants presented either copies of bank statements, work tickets, P9 schedules or work identity card to assert that they were employees of the Respondents.

34. In the view of the Respondents, the only evidence which could illustrate a contractual relationship with the Grievants were appointment letters, and without production of the same, the claim of the contractual relationship remained mere allegations which had not been substantiated (*Lalji v Toka* (1981) eKLR).

35. Under section 9 of the Employment Act, 2007, it is the obligation of the employer to issue a written contract of employment. It, therefore, would be illogical to expect an employee to produce such a contract if the employer did not issue one.

36. In such a case, it would be permissible, as a matter of evidence to assert a contractual relationship based on secondary records and more so those kept in the ordinary course of business or by public regulatory bodies such as the National Hospital Insurance Fund or the National Social Security Fund.

37. On the basis of the secondary material on record and the Verification Report under the supervision of the County Labour Officer, the Court is satisfied and finds that the 157 Grievants were employees of the Respondents, paid by the month, and therefore on term employment by virtue of section 37 of the Employment Act, 2007.

Unfair labour practices

Unequal remuneration

38. Among the practices presented by the Union as comprising unfair labour practices was that the Grievants were paid unequal remuneration for work of equal value.

39. However, the Union did set out in detail or prove the remuneration paid to each Grievant, whether they were employed at the same or had the same qualifications, skills and experience. Even the identities of the comparators were not disclosed.

40. In the view of the Court, and the Court so finds this was simply a broad allegation thrown at the Court without factual foundation or evidential proof. It was not proved.

Failure to issue written contracts

41. Section 9(1) of the Employment Act, 2007 sets out the circumstances under which an employer must issue a written contract. A written contract of service in such circumstances is a fundamental right of an employee as it defines and sets out the basic conditions of employment.

42. The failure to give an employee a written contract of service with the requisite particulars makes an employer liable to a conviction and fine not exceeding Kshs 100,000 or imprisonment, or to other remedies by this Court, by virtue of section 16(4) & (5) of the Employment Act, 2007.

43. Most if not all the 157 Grievants found after the verification exercise to have an employment relationship with the Respondents did not have requisite contracts of service.

44. The obligation to cause to be drawn the contracts was upon the shoulders of the Respondents. No explanation was given why these Grievants were receiving remuneration and enjoying other benefits without written contracts of service.

45. The failure to issue them with written contracts of service, the Court finds, was an unfair labour practice (even if these Grievants were absorbed from the defunct local authorities).

Unfair termination of employment

46. Issues 2, 3, 4, 5 and 6 broadly pertained to the question whether the separation between the (157) Grievants and Respondents was unfair.

47. It was not in dispute that the Respondents internally advertised for the positions held by the Grievants on 21 February 2017 and that those who did not apply were directed through an Internal Memorandum dated 9 March 2017 to *stay away from Machakos County Government Offices or work stations with immediate effect*.

48. The Union on behalf of the Grievants contended that the advertisement by the Respondents for their positions within the Inspectorate Department, while they were serving, amounted to unlawful and unprocedural termination of their contract(s).

49. The decision, it was submitted was without notice, due process and arbitrary and violated the values and principles of public service, right to fair labour practices and right to protection assured public officers.

50. In terms of case law, the Union drew the attention of the Court to *Mark Ewesit Ewoi & 4 Ors v County Government of Turkana & Ors*

(2018) eKLR, *Peter Wambugu Kariuki & 16 Ors v Kenya Agricultural Research Institute* (2013) eKLR, *Rachel Carol Atamba v Masinde Muliro University of Science & Technology* (2015) eKLR and *David Ogega Kebiro & Ar v Kisii County Public Service Board & Ar* (2017) eKLR.

51. The Respondents did not dispute the authenticity of the Internal Memorandum dated 9 March 2017 which came under the hand of the Chief Officer, Department of Decentralised Units and County Administration.

52. The Memo instructed those in service but had not applied to stay away from the County Government offices and/or work stations with immediate effect.

53. The decision of the Respondents to advertise must have been prompted by certain circumstances. The act that some of the Union members could not produce any primary or secondary records of engagement by the Respondents or the precursor local authorities could have been one such prompter, hence the assertion of *ghost workers*.

54. In all probability, the Respondents wanted to clean their human resource records.

55. However, such a desire would not triumph over the need to afford an opportunity to be heard to those who were already on the payroll and were receiving monthly remuneration.

56. A verification exercise should have preceded the advertisement, recruitment process in general and the issuance of a notice to the Grievants who opted not to apply to *stay away from work*.

57. The Respondents urged in their submissions that the failure by the Grievants to apply in response to the Internal Advertisement meant that they had voluntarily forfeited their contracts of service(s).

58. The Court does not find the argument convincing as the 157 Grievants were already in contractual relationships with the Respondents and the decision to clean the human resource records of *ghost workers* was not of their making. If any ghost workers were on the payroll, they were on the books because of the actions and conduct of the Respondents and their servants and/or agents in positions of trust and decision making.

59. The Respondents should have afforded the Grievants due process even if they opted not to take the chance to apply formally for employment.

60. As for the 157 Grievants, being on term contract(s), they were assured of the protections ordinarily available to employees under sections 35(1)(c), 40 and 45(1) & (2) of the Employment Act as read together with Articles 41(1) and 236 of the Constitution.

61. The decision to direct these Grievants *to stay away from Machakos County Government offices or work stations* amounted to unfair termination of their contract(s) and the Court so finds.

Appropriate remedies

62. Issues 7, 8 and 9 spoke to the question of appropriate remedies.

63. The Respondents submitted that although clothed as a Constitutional Petition, the Union had not presented any evidence to support the allegations of constitutional violations and further that the dispute related to contractual dispute between employer/employee

64. In the view of the Court, the breaches alleged by the Union could have been established and proved using the statutory route rather than the Constitution. The Union didn't need to invoke the Constitutional route.

65. Indeed any constitutional questions could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

66. The Rule envisages a party raising disputes regarding the enforcement of any constitutional rights, and freedoms or any constitutional provision in a Statement of Claim.

67. Decades ago in *Harrisson v Attorney General of Trinidad & Tobago* (1980) AC 265, the Privy Council had stated

The right to apply to the High Court underof the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

68. The legal proposition was given an endorsement by our Court of Appeal in *Gabriel Mutava & 2 Ors v Managing Director, Kenya Ports Authority & Ar* (2016) eKLR.

