

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1068 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA COUNTY GOVERNMENT WORKERS UNION

CLAIMANT

VERSUS

COUNTY PUBLIC SERVICE BOARD OF KIAMBU COUNTY RESPONDENT

JUDGMENT

The claimant is a trade union registered under the Labour Relations Act to represent workers of county governments. The claimant was originally the Kenya Local Government Workers Union but changed its name following the establishment of county governments after the general elections in 2013.

The claimant has a recognition agreement with the Association of County Government Employers, formerly the Association of Local Government Employers and has negotiated a Collective Bargaining Agreement with Association, for the exclusive terms and conditions of employment for all unionisable employees of County Governments including the Respondents.

The suit herein is filed by the claimant on behalf of its members (the grievants) who were employees of the defunct Kiambu County Council. In the instant Memorandum of Claim filed on 19th June 2015 on behalf of 17 former employees of the defunct Municipal Council of Kiambu, the claimant avers that 54 persons were employed by the Municipal Council of Kiambu between 5th July 2012 and 1st August 2012 and assigned various duties.

It avers that pursuant to a Memo dated 27th September 2012 the Deputy Treasurer requested all parking attendants to attend a meeting on 2nd October 2012. It avers that during the meeting, the employees who attended the meeting were verbally ordered to return their original letters of appointment.

That on 17th July 2014 the claimant it wrote to the County Secretary giving him a final notice to reinstate the said employees and thereafter reported a trade dispute. A conciliator was appointed and convened several meetings which the Respondent failed to show up for or to submit its written proposal.

In the memorandum of claim, the claimant seeks the following prayers:

1. That this Court finds that the respondent acted unlawfully and

violated Articles 28 and 47 of the Constitution of Kenya, Employment Act 2007 and Article 41(1) our registered CBA rule No. 13.

2. That this court finds that these 17 employees have a right of fair treatment.

3. That this Court finds that since these employees were not issued with letters of termination, their inherent dignity was disregarded by the respondent, orders that they be reinstated back to their previous posts they were holding before they were dismissed.

4. That this Court orders the respondent to pay these employees all their salaries in respect of the period they have been subjected to unemployment illegally based on our current registered CBA.

5. That consideration that the period that these employees have

been subjected to untold human suffering, the Claimant prays that this Court gives time limit on the Respondent's action in reinstating them back to employment and payment of their salaries for that period they have been kept out of employment illegally.

The respondent filed a Response to the Memorandum of Claim on 31st July 2015 in which it avers that the Claimant is not seized with instructions to represent 17 employees of the then Municipal Council of Kiambu and that it lacks the capacity to institute this suit.

It denies having employed the grievants on permanent and pensionable basis. It avers that in June 2012 the then Kiambu Municipal Council was authorised by the Office of the Deputy Prime Minister and Ministry of Local Government to employ additional staff. That it recruited and engaged some of the casual employees it had in its employment in July and August 2012 and put them on probation. That other casuals

who had not been employed raised a complaint with various government institutions alleging nepotism and discrimination in recruitment.

That following the complaints it withdrew the letters of appointment and advertised the positions. All the casuals who had been employed together with other Kenyans applied for the advertised positions. That 18 people on the initial list of casuals were unsuccessful and were dropped after failing to meet both academic and experience benchmarks. It avers that the 17 employees whose benefits this suit is instituted are those who were unsuccessful in the interviews.

The respondent avers that it is unaware of the internal memo referred to by the Claimant. It avers that it took part in the conciliation process but the parties could not agree as stated in the Conciliator's letter and Certificate dated 4th December 2014. It avers that the grievants were terminated while on probation under Section 42 of the Employment Act. As such it did not violate any provisions of the Constitution and the Employment Act or any other agreement.

Claimant's case

DAMARIS MUTHONI WAMBUGU, CW1, testified on her behalf and on behalf of all the other grievants. She testified that they joined the union when they were employed and union dues were deducted from their salaries.

She testified that she was initially employed as a casual for 6 months. That they were all engaged at different times but on permanent terms. She testified there was an advertisement for jobs which they applied for and were issued with letters. That they were called for a meeting and told to return the appointment letters.

She testified that while working as a casual she was not asked for any documents. However, when she was engaged as a permanent employee she was asked to submit her documents and each of the grievants submitted his or her documents. She testified that they were placed in different departments according to their qualifications. She testified that in the last meeting they attended they were informed that their employment had been terminated.

She testified that she was terminated on 4th December 2012 but does not know the reason for termination. That they were not given any letters of termination. That she was not informed that there was no work for her and was not issued with any letter stating that her job no longer existed.

She stated that until her termination, there was a vacancy and there was no reason for her to reapply for her job as she was still in employment. She testified that 54 persons had been recruited but only 17 were terminated.

In cross-examination, she testified that the letters of engagement

issued to the 54 employees did not indicate that they had been employed on permanent and pensionable terms. Further that the Claimant's CBA provided that they could not be terminated without a letter of termination.

She testified that at the date of their termination, the probationary

6 months had not lapsed. That she was not paid her salary for the month of December 2012. That she was not aware that they had been told to apply for the jobs afresh because there had been complaints after they were engaged. She further testified that she was not aware that they had been irregularly engaged. It was her testimony that they were not interviewed for the positions. That they were just asked to submit their curriculum vitae.

She stated that there were advertisements for various positions but they were not required to apply for the positions because they were already at work. She testified that the other persons who were retained did not attend any interview.

In re-examination, she testified that deductions for retirement benefits were made from her salary. She testified that her payslip indicates that she would retire in May 2033 and it was her expectation that she would work until her retirement.

Respondent's Case

HENRY OMUKAMANI WANYONDI, RW1, testified that he was employed in the defunct Municipal Council of Kiambu as a Town Clerk from 2010 to 2013.

He testified that he employed the grievants who were casuals serving

in different positions from January to June 2012. That as per the regulations, no one was to serve as a casual for more than 6 months. That in July 2012, the Council decided to employ the grievants permanently. That the casuals who were not issued with appointment letters raised complaints with the Ministry of Local Government and other public institutions including the Office of the Ombudsman.

He testified that the grievants filed Petition 387 of 2012 in which they challenged the issuance of appointment letters which excluded them. He testified that in order to bring the matter to a close, they were advised by the Ministry to advertise the positions afresh which they did on 30th August 2012. He testified that he advised the complainants and all other employees who had been retained should apply for the advertised positions.

He testified that the respondent analysed the applications on the criteria set out in the advertisement and the employees who did not meet the

threshold of employment were relieved of their duties and expunged from the payroll. He testified that the grievants had not completed the 6 months' probation period provided under the Employment Act and the CBA negotiated by the employer, therefore the employer was entitled to relieve them of their duties

without notice.

He testified that payslips do not make the grievants permanent employees. That setting out retirement age does not guarantee that one is a permanent and pensionable employee. He further testified that the deduction of NSSF and NHIF did not make the grievants permanent and pensionable employees. He stated that the grievants did not present themselves for interview because they did not meet the threshold.

Upon cross-examination, he testified that he did sign the appointment

letters issued to the grievants in which he congratulated them for their appointment. He denied writing any internal memo to the grievants. He stated that he followed due process but did not issue a notice of termination as he did not think the grievants deserved a termination notice.

He testified that complaints were raised by other casuals on their exclusion. He testified that it was not his mistake that persons who did not meet qualifications were employed. He testified that CW1 did not meet the set qualifications.

He testified that the employment of the new staff took effect from 1st December 2012. That in November, 2012, the 54 employees were still on the payroll. He stated that the recruitment process was competitive.

He stated that Petition 387 of 2012 was in relation to all employees employed from 2010. That the Petition was dismissed for want of prosecution.

He testified that the grievants were absorbed from their casual positions to the payroll and they were not required to apply to become casuals. That their terms of employment were converted based on the law. He testified that the grievants can access their pension contribution through LAPRUST.

Respondent's Submissions

The Respondent submits that the corporate personality of a Union can only occur upon a successful registration and issuance of a Certificate by the Registrar of Trade Unions as stated in **Kenya National Union of Nurses v Attorney General Acting 7 Another [2012] eKLR**. It submits that the Claimant did not prove that it is a duly registered trade Union.

It submits that if the Claimant is the Trade Union a copy of the registration certificate should have been produced. It is therefore its submission that the claim is incompetent, null and void and should

be dismissed with costs.

It confirms that the grievants were employed by the Respondent but the offer was subject to 6 months' probationary period in accordance with section 42 of the employment act. It submits that it is incumbent upon the Claimant to have produced the CBA to corroborate the statement that the grievants could not be employed in probationary terms. It is its submission that the grievants were not permanent employees of the Respondent.

The respondent submits that the 17 employees on whose behalf this suit was instituted were unsuccessful during the interviews and having applied for the jobs and attended the interviews, they are estopped from claiming that their employment was unfairly terminated.

It submits that by virtue of the Grievants applying for the advertised positions, they essentially accepted the termination by conduct and waived any other right they were entitled to. It submits that it was not bound to employ the grievants after interviews. It relies on the case of **748 Air Services Limited v Theuri Munyi [2017] eKLR** where the Court of Appeal cited the case of **McIlKenny v Chief Constable of West Midlands [1980] ALL ER 227** on the doctrine of estoppel.

It submits that the Claimant is not entitled to the reliefs sought since it has not proved its case. It submits that while CW1 testified that her age of retirement was to be the year 2033, there is no guarantee that the grievants would have remained in the Respondent's employment until retirement. It urges the Court to be persuaded by the authority of **Benson Githinji v Attorney General & 4 Others** where the Court held that for a court to find that a claimant is entitled to the salary he expected to earn for the years taken away before attaining the age of retirement, the court must strive to achieve the delicate balance between the need for national economic development and protection of the dignity and economic wellbeing of an individual employee.

It submits that reinstatement is a lawful remedy under Section 12(3) of the Employment and Labour Relations Court Act. That Section 49(4) of the Employment Act sets out the 13 factors to be considered before the Court grants reinstatement. It relies on the case of **Kenya Airways Limited v Aviation & Allied Workers union Kenya & 3 Others [2014] eKLR** where the Court held that the remedy of reinstatement should not be given except in exceptional circumstances.

It further submits that the prayer for reinstatement should fail as

similar posts do not exist with the Respondent, and that the grievants had only worked for less than 3 months. Further that it has been 7 years

since their termination.

In conclusion, the respondent submits that it has demonstrated that there were valid reasons for termination of the employment of the grievants and that they were aware of the reasons as they applied to be interviewed for the advertised jobs.

Determination

The grievants herein were employed, on 5th July 2012 and 1st August 2012, by the defunct Kiambu Municipal Council in various positions including Revenue Clerks III and IV, labourers I, firemen III *inter alia* until their termination on 4th December 2012. The issues for determination are:

1. Whether the Claimant has the *locus standi* to institute the suit
2. Whether the grievants were unfairly terminated.
3. Whether there grievants are entitled to the reliefs sought.

Whether the Claimant has the locus standi to institute the suit

The Respondent avers that the Claimant has no *locus standi* to represent the grievants. It further avers that the grievants are not members of the Claimant thus it lacks capacity to institute the suit. CW1 testified that they are members of the Claimant Union to whom they reported the dispute. CW1's payslip for the month of November 2012 indicates that Union dues were deducted from her salary.

Article 41(2)(c) of the Constitution and section 4 of the Labour Relations Act provide for the right to join a trade union. Section 48 (3) of the Labour Relations Act provides that signing of Form S, is proof of membership of a union. It is this membership that grants the Claimant the right to institute a suit on behalf of the grievants. From the payslips, it is evident that the grievants were members of the union. It is thus my finding that the Claimant had *locus standi* to institute this suit.

Whether the grievants were unfairly terminated

The respondent admitted having terminated the employment of the grievants verbally and without notice. According to RW1 they were not entitled to notice as they were on probation.

CW1 testified that she was originally engaged as a casual employee and was issued with a letter of appointment on 1st July 2012, with some of the grievants while others were issued with letters of appointment on 1st August 2012.

The letters have been exhibited at pages 3 to 19 of the claimant's bundle of documents. None of the letters states that they were engaged on probationary terms of employment. A probationary contract is defined in Section 2 of the Employment Act as –

“probationary contract” means a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period;

The letters of engagement of the grievants do not state that they are on probationary contracts. The letters also do not provide for the notice for termination. The grievants were thus entitled to notice as provided in Section 35 of the Employment Act for persons earning salary at monthly intervals which is one month's notice or pay in lieu thereof.

On the validity of grounds for termination, there is no evidence that the respondent was compelled by any person or statutory body to withdraw the employment of the grievants and to carry out fresh recruitments. There is further no evidence that fresh interviews were held and the grievants did not qualify. In fact, the letters between the Respondent and Office of the Ombudsman indicate that there was a complaint of nepotism and discrimination in the employment of staff. The letter dated 10th October 2013 addressed to the Commission of Administrative Justice stated thus:

“That the allegations of nepotism and discrimination as alleged by the complainants are not true.

That the said allegations of nepotism and discrimination were recanted by the complainants vide letter dated 7th September, 2012 to the Permanent Secretary, Ministry of Local Government...

That the complainants were given a fair and equal opportunity to apply for employment and their application considered on merit alongside other applicants...”

Further the advertisement for vacancies was for 24 positions which included positions for Revenue Officer II and III, Labourer I and Fireman III which are some of the positions held by the grievants. The grievants held the following positions: -

Position No. of Grievants

Revenue Clerk IV 1

Revenues Clerk III 3

Clerical Officer I 1

Copy Typist 1

Fireman III 2

Labourer I 8

The positions advertised were as follows –

	POST	SALARY SCALE	VACANCIES	
1.	Works Officer III	10	1 post	<p>From the advert, it is clear that the positions held by the grievants cannot be accounted for in the advert. The court further notes that the respondents have not stated the qualifications required for the positions which the grievants did not possess or give names and qualifications of the persons who replaced them.</p> <p>I thus find no valid reason for the termination.</p> <p>While it is evident that there was a complaint on the employment of the grievants, the Respondent did not prove that there was a requirement that the grievants were expected to reapply for the advertised positions. In the letter withdrawing their complaint dated 7th September 2012, the complainants stated that they had applied for employment. These complainants are not the grievants in this suit.</p> <p>It is my finding that there was no valid reason for termination of the grievants.</p> <p>In Evans Kiage Onchwari v Hotel Ambassadeur Nairobi [2016] Eklr, Ndolo J. held:</p> <p><i>“To this extent I agree with the holding by Lenaola J. in Samuel G. Momanyi v the Attorney General & Another [2012] eKLR that Section 45(3) of the Employment Act is unconstitutional. I venture to add that Section 42(1) would also be unconstitutional. I say so because even assuming that an employee is found unsuitable within the probation period, the rights secured under Article 41 must still be respected. Parties to an employment contract in whatever form are no longer allowed to walk out at will.”</i></p> <p>In respect of procedure, CW1 testified that they were verbally informed that their jobs had been terminated. RW1 testified that he did not find it necessary to issue a notice of termination to the grievants for reason that they were on probation and in his opinion, they were not entitled to notice. Even if the grievants were on probation which I have already found they were not, under Section 42(4) of the Employment Act, the grievants were entitled to a minimum of 7 days’ notice. The section provides:</p>
2.	Draughtsman	10	1 post	
3.	Internal Auditor	10	1 post	
4.	Assistant Works Officer	11	1 post	
5.	Senior Secretary I	11	1 post	
6.	Computer Operations Supervisor	12	2 posts	
7.	Development Control Assistant III	12	1 post	
8.	Protocol	12	1 post	
9.	Nurse	12	1 post	
10.	Senior Technical Supervisor	13	1 post	
11.	Copy Typist II	14	3 posts	
12.	Accounts Clerk	14	1 post	
13.	Social Worker II	14	1 post	
14.	Plant Operator	15	1 post	
15.	Senior Driver III	15	3 posts	
16.	Revenue Clerk III	15	10 posts	
17.	Clerical Officer III	15	1 post	
18.	Revenue Clerk II	15	1 post	
19.	Artisan	15	1 post	
20.	Audit Clerk III	15	1 post	
21.	Labourer I	16	1 posts	
22.	Sergeant	16	15 posts	
23.	Fireman III	16	4 posts	
24.	Revenue Clerk IV	16	1 post	

(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days’ notice of termination of the contract, or by payment, by the employer to the employee, of seven days’ wages in lieu of notice.

I therefore find the termination of the grievants both substantively and procedurally unfair.

Whether the Grievants are entitled to the reliefs sought

The Claimant prays that this Court does find that the Respondent

violated the Constitution, the Employment Act and the CBA. From the evidence on record, I find that the termination of the grievants was in violation of the Employment Act. The averment that the respondent violated the CBA has not been proved as no copy of the CBA was availed to the court. I also decline to declare a violation of the Constitution as the Employment Act provides adequate remedies for the grievants.

Reinstatement

The Claimant seeks that this Court orders reinstatement of the grievants. The grievants were terminated in 2012. Section 12 (3) (c) of the Employment and Labour Relations Court Act provides that an order for reinstatement is to be made only within 3 years of dismissal. Consequently, this remedy is no longer available to the grievants as it is more than 3 years since their employment was terminated.

Since the remedy of reinstatement is no longer available to the grievants, I will instead award them the alternative remedy of compensation, having found their termination unfair. They are in addition entitled to pay in lieu of notice which RW1 admitted they were not given.

Outstanding Salary

The Claimant seeks that the grievants be paid all their salaries for the period they have been subjected to unemployment. Section 49 of the Employment Act provides for the remedies that are available in instances of unfair termination. The Act does not provide for payment of salaries for the entire period that an employee was out of employment.

CW1 testified that she was not paid her salary for the month of December 2012. The grievants were terminated on 4th December 2012. They are therefore entitled to 4 days' pay in the month of December, 2012.

Conclusion

I thus enter judgment for the claimant against the respondent and award each of the grievants the following –

1. Four days' salary for December 2012.
2. One month's salary in lieu of notice.
3. Three months' salary as compensation for unfair termination.

The claimant shall tabulate the award for each grievant within 30 days and forward the tabulation to the respondent for confirmation for purposes of preparation of a decree.

The respondent shall pay the claimant's costs. Interest shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE