



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO.5 OF 2019

PAUL KIMETO CHERUIYOT.....PETITIONER

VERSUS

H.E. THE GOVERNOR NAROK COUNTY.....1<sup>ST</sup> RESPONDENT

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAROK.....2<sup>ND</sup> RESPONDENT

COUNTY GOVERNMENT OF NAROK.....3<sup>RD</sup> RESPONDENT

NAROK COUNTY PUBLIC SERVICE BOARD.....4<sup>TH</sup> RESPONDENT

JUDGEMENT

The petitioner is seeking the following orders;

- a. A declaration that the decision made by the respondents to reduce the petitioner's salary is a violation of Article 10, 41 and 47 of the constitution.
- b. This court is pleased to order the respondents to pay the petitioner his salary arrears dating back from March, 2018 of Ksh.292, 300.
- c. This court is pleased to order the respondents to reinstate the petitioner's proper salary of Ksh.86, 480.
- d. The respondents be restrained either by themselves or their servants, agents, officer or any other person whosoever from downgrading and slashing, reducing or in any way diminishing the petitioner's remuneration.
- e. This court be pleased to order for compensation and general damages to issue for violation of the petitioner's rights.
- f. The petitioner be paid costs of this petition.

**The petition.**

The petition is that the petitioner was serving as a Coordinator of Early Childhood Development Education within the Narok County Government from 20<sup>th</sup> June, 2017 and issued with a letter of appointment. He was placed at Job group N earning a gross salary of Ksh.86, 480 per month up to February, 2018.

In March, 2018 the petitioner's salary was reduced to a gross of Ksh.57, 250 which is lower than the initial salary payable. The reduction was done without explanation and in violation of the constitution. such amounted to malice and ill will on the part of the respondents.

On 15<sup>th</sup> October, 2018 the petitioner wrote to the secretary, Narok County Government Public Service Board, the 4<sup>th</sup> respondent requesting for an explanation or reasons as to why his salary had been reduced but there was no response. On 8<sup>th</sup> November, 2018 the petitioner wrote a demand through his advocates seeking for reasons for the reduction of salary and the payment of arrears without response hence this petition.

The petition is premised on the provisions of article 3, 20, 21, 41, 50, 47, 232, 258, 259 of the constitution and section 17, 10, 13 of the

Employment Act and ILO Convention 100 on Equal Remuneration.

The rights violated by the respondents are that they reduced the petitioner's salary from Ksh.86, 480 to Ksh.57, 250 without justification; there was no notice or reasons given for such action; and the respondents have since refused and neglected to pay the due salary and the arrears.

The petition is supported by the affidavit of the petitioner.

**Respondents' response.**

In response, the respondents filed the Replying Affidavit sworn by Zipporah Sinyoyia Gad the Chief Executive Officer of the Narok County Public Service Board, the 4<sup>th</sup> respondent with authority and competence to reply hereto and avers that the petition contains gross misstatements of facts and is misleading and is without merit and should be dismissed.

Ms Gad also avers in response that career development within the national and county government is guided by Schemes of Service that provide for grading structures to facilitate the retention of suitable and qualified personnel. The schemes of service provide for defines duties and responsibilities at all levels; standards for advancement to higher grades on the basis of qualifications for orderly career planning and management of employees.

The petition revolves around the career development of the petitioner from the point of his entry in the teaching service both with Teachers Service Commission (TSC) and at the 3<sup>rd</sup> respondent's employment to date.

The petitioner's career was guided by 4 schemes of service that is the TSC Revised Scheme of Service for Non-graduate Teachers, 2007, the TSC Revised Scheme of Service for Graduate Teachers, 2007, the Scheme of Service for National Human Resource Planning and Development Personnel, 2012 and the Draft Scheme of Service for Early Childhood Development and Education (ECDE) Teachers, 2017.

These schemes of service provide that the entry level into the scheme of service for non-graduate teachers is job group „F? and one can be appointed to grade P2 teacher and the teacher must be holder of a Ps Teachers? Certificate or its approved equivalent; a P2 teacher may be promoted to the grade P1 under job group „G? if he is the grade P2 teacher for a minimum period of 3 years and has passed the Teacher's Proficiency Examination III and has demonstrated merit and ability in performance as a teacher; one may be directly appointed to the grade P1 teacher under job group „G? if they have a Kenya Certificate of Secondary Education (KCSE) mean grade C (plain) or other recognised equivalent qualifications and be in possession of the P1 Teachers? Certificate of its approved equivalent; promotions may be gradual from job group „H? to „N? after every 3 years upon meeting the minimum requirements as outlined in the Scheme of Service for a non-graduate teacher and with each promotion a teacher would get a new designation;

- i. Approved Teacher IV – Job Group „H?;
- ii. Approved/Ordinary Diploma Teacher III – Job Group „J?;
- iii. Approved/Ordinary Diploma Teacher II – Job Group „K?;
- iv. Approved/Ordinary Diploma Teacher I – Job Group „L?;
- v. Senior Approved/Ordinary Diploma Teacher III – Job Group „M?;
- vi. Principal Approved/Ordinary Diploma Teacher III – Job Group „N?;

There is also direct appointment in the grade of P2 Teacher Job Group „F?, P1 Teacher Job Group „G? and Ordinary Diploma Teacher Job Group „J? provided a candidate has the minimum basic qualifications prescribed for the grade in the Scheme of Service for non-graduate teachers.

The qualifications and other conditions in the Scheme of Service for non-graduate Teachers are basic requirements and the fulfilment of which entitles a teacher for consideration for appointment or promotion and advancement from one grade to the other depends on the existence of a vacancy in the authorised establishment, merit and ability in work performance and with consultation with TSC and the Ministry of Education.

Ms Gad also avers in response that the entry level into the Scheme of Service for Graduate Teachers is job Group „J? where one is appointed as untrained graduate teacher with the requirement for a KCSE mean grade C+ or its equivalent and be a holder of a Bachelor's Degree from a recognised university with at least 2 teaching subjects in the curriculum offered in public education institution. One may be promoted after 3 years of service to a higher grade upon meeting the basic minimum requirements for each grade depending on availability of vacancy, ability, merit and work performance and completion of postgraduate training from a recognised Teachers Training Institution in the case of Untrained Graduate Teachers. With each promotion, a teacher is given a new designation as follows;

- i. Graduate Teacher II – Job Group „K?;
- ii. Graduate Teacher I – Job Group „L?;
- iii. Senior Graduate Teacher II – Job Group „M?;

- iv. Principal Graduate Teacher II – Job Group „N?;
- v. Principal Graduate Teacher I – Job Group „P?;
- vi. Senior Graduate Teacher – Job Group „Q?;
- vii. Chief Principal Graduate Teacher – Job Group „R?;

Ms Gad also avers that under the National Human Resource Planning and Development Personnel it regulates the grading of all public servants both at the national and county governments who perform human resource management duties. This scheme of service provides that for a public servant to qualify for appointment to Job Group „N? he must among other things be a holder of a Certificate in Management Course lasting not less than four weeks from a recognised institution. The draft Scheme of Service for ECDE Teachers contains these schemes and establishes 6 grades of Assistant ECDE Teachers cadre all within job group „F? to „L?, 6 grades of ECDE Diploma Teachers cadre all within job group „H? to „N? and 7 Graduate ECDE Teachers cadre all within job group „K? to „R?. under this scheme of service, direct appointment is made in the grade of Assistant ECDE Teacher III job group „F?, Assistant ECDE Teacher II job group „G?, ECEE Teacher iii job group „H? and Graduate ECDE Teacher III Job group „K? and provided the candidate has the basic minimum qualifications for the grade.

Any appointment made outside the schemes of service must be in consultation with TSC and the Ministry of Education and of the County Executive member for Education and the relevant County Public Service Board and the candidate must be in possession of the necessary qualifications and experience.

In this case, before August, 2014 the petitioner was an employee of the TSC serving as P1 teacher job group „G? at Ngosauni Primary School in Narok County and earning Ksh.32, 767 per month. In the course of the year, the petitioner together with other teachers within Narok County were identified for secondment and on 19<sup>th</sup> August, 2014 the petitioner was offered a secondment position at the 3<sup>rd</sup> respondent as an Assistant Director in the Department of Social Services for a period of 3 years.

The secondment of the petitioner was unilateral by the County Secretary without the approval of the 4<sup>th</sup> respondent and in contravention of section B.25 of the County Public Service Human resource Manual, 2013. The secondment letter designated him to job group „P? which grading was erroneous because at the time the petitioner had not met the prescribed minimum requirement deserving such placement and he only obtained his Bachelor's degree in Education in the year 2013. The petitioner only qualified for promotion from job group „G? to either job group „J? or „K? and it was irregular to instantly promote him to job group „P? skipping 4 grades which would have required him to accumulate at least 12 years of experience upon graduation.

In the secondment letter, the County Secretary also unilaterally awarded the petitioner a similar pay to that which he received from the TSC but also provided that he would be paid a monthly top-up of Ksh.30, 000.

Ms Gad also avers in defence that, The County Secretary without consulting the respondents unilaterally changed the terms of secondment by a purported letter dated 22<sup>nd</sup> October, 2014 and irregularly increased the top up benefits to Ksh.65, 000.

The anomaly in the petitioner's designation under job group „N? was reflected in all his salary slips in the period he was on secondment. He ought to have been in job group „G?.

By letter dated 20<sup>th</sup> June, 2017 the 4<sup>th</sup> respondent issued the petitioner with letter of appointment as an ECDE Coordinator at job group „N? with a monthly salary of Ksh.48,190.

The 4<sup>th</sup> respondent received complaints from employees on disparities in grading, qualifications and remuneration. The common grievances were that certain officers who had been wrongly graded and were earning salaries that were disproportionate compared to similar officers undertaking identical tasks and who were of similar experience. In effort to restore parity it became apparent that the petitioner was one of the employees who had been erroneously graded in job group „N? for he did not possess the necessary qualifications to entitle him to that grade. The petitioner had only 4 years post-graduate experience for the years he worked at Ngosuauni School together with the 3 years he was on secondment at 3<sup>rd</sup> respondent; he had not served under job grades K, L, and M for which he was required to have served cumulatively for 9 years before qualifying for consideration and promotion to job group „N?; and he was not a holder of Certificate in Management to entitle him for appointment to job group „N?.

Pursuant to the provisions of section 60 (d) of the County Government Act the 4<sup>th</sup> respondent reviewed the petitioner's appointment and resolved to regularise his grading to bring parity and equity among the 3<sup>rd</sup> respondent's employees and match the petitioner appropriately to a job group that was equal to his qualifications and experience.

The 4<sup>th</sup> respondent's decision was communicated to the petitioner by letter dated 14<sup>th</sup> February, 2018. In this letter the petitioner was informed of the anomaly in his grading, the remedial measure taken and was advised to collect a revised appointment letter. In this regard the petitioner's basic salary was revised to ksh.44, 750 so as to march the basic salary applicable to employees at job group „K? in accordance with section E.3 of the County Public Service Human Resource Manual, 2013 and the salary structure for Public Servants as revised in 2017.

Ms Gad also avers that despite the petitioner being notified of the reasons for the revision of his salary vide letter dated 14<sup>th</sup> February, 2018 he elected to feign knowledge and demanded further explanations through his letter dated 15<sup>th</sup> October, 2018 and there was a response dated 23<sup>rd</sup> November, 2018 reiterating the contents of letter referenced.

The petitioner was aggrieved by the decision of the 4<sup>th</sup> respondent and should not have invoked the court jurisdiction but apply the appeal process available under section 77(2) (b) of the County Government Act read together with section k.10 of the Human Resource Policies and Procedures Manual for the Public Service, 2016 that mandates that any public officer aggrieved by the decision of the 4<sup>th</sup> respondent may appeal to the Public Service Commission (PSC). Where the petitioner filed an appeal and was dissatisfied, there is the right to a review application which he failed to exhaust before moving the court as herein.

The petitioner in his affidavit alleges that on Lenah Rinka Napukweyok has undergone a similar career progression as he has but this is not true on the grounds that she was identified for secondment as an Assistant Director, Early Childhood Development by the then County secretary and just like the petitioner she was irregularly graded to job group „P? from 1<sup>st</sup> July, 2014 and then she displayed exemplary deduction and skill in executing her duties and this performance taken into account when she was approved for permanent employment, she was redeployed to the position of Deputy Sub-County Administrator and retained at job group „P? for the reasons that the Salary and Remuneration Commission (SRC) Circular Guideline dated 29<sup>th</sup> July, 2013 had issued a guideline to the effect that all Deputy Sub-County Administrators should be at entry to that position and earning a basic salary of Ksh.77,527 and or maximum of ksh.103,893 based on experience and capped at job group „P?.

The court should not issue the orders sought by the petitioner for the reasons that he has committed perjury by misleading the court that he was not aware of the reasons that informed the revision of his salary. It is in the interests of justice that the instant petition be dismissed with costs to the respondents.

Both parties agreed to address the instant petition by way of written submissions.

The petitioner submitted that he is the coordinator of ECDE of the 3<sup>rd</sup> respondent upon appointment on 20<sup>th</sup> July, 2017 under job group N and was receiving a gross salary of Ksh.86, 480 until February, 2018 which was reduced to Ksh.57, 250 which reduction was without explanation in violation of his constitutional rights and the provisions of the Employment Act.

On 15<sup>th</sup> October, 2018 the petitioner wrote to the respondents requesting for an explanation or reasons as to why there was a reduction of his salary but there was none. The claimant then wrote seeking for the payment of his salary arrears following the reduction and to be restored back to a salary of ksh.86, 480 which has not been done.

The petitioner also submitted that the respondents have relied on the provisions of section 77 of the County Government Act which law is not couched in mandatory terms and an aggrieved employee of the 4<sup>th</sup> respondent *may* file an appeal with the PSC or move the court as the petitioner has done in this case. In the case of **Abdikadir Suleiman versus County Government of Isiolo [2015] eKLR** the jurisdiction of this court is not ousted and retains the power to hear and determine employment and labour relations disputes as donated by the constitution at Article 162(2)(a) of the Constitution, 2010 read together with section 12 of the Employment and Labour Relations Court Act, 2011. The PSC does not have jurisdiction to address constitutional relief as herein sought.

The petitioner also submitted that the decision to reduce the petitioner's salary without reason and or explanation was unlawful and in breach of his constitutional and statutory rights. In the case of **Esther Mbuya Musau versus National Bank of Kenya Limited [2015] eKLR** the court held that the employment contract is founded on special circumstances regulated by statute and anchored under article 41 of the Constitution unlike other contract based on the law of contract.

The petitioner's salary was based on his employment contract and before its reduction he ought to have been given notice and hearing. The respondents violated the petitioner's rights to fair labour practices under Article 41 of the constitution by reducing his salary without any explanations. Section 10(5) of the Employment Act, an employer has no right to change terms of service without prior consultation as held in the case of **Benjamin Nzamba Killei versus Denis Mathew t/a Matbronze [2018] eKLR**. Unilateral variation of employment terms amounts to breach of contract or a repudiation as held in **Maxwell Miyare & 7 others versus Judicial Service Commission [2017] eKLR**.

Article 50 of the constitution provides for the right to a hearing and for the subject person to be allowed time to give a defence. In this case the petitioner was not issued with notice with regard to the changed terms of service for him to defend himself. The defence that by letter dated 14<sup>th</sup> February, 2018 the petitioner was advised on his reduction of salary but there was no service of such letter to the petitioner to enable him defend his employment. The attached letter dated 14<sup>th</sup> February, 2018 is not signed by the petitioner. Even where such letter may have been delivered to him it was in breach of the rules of natural justice and there was no fair hearing before it issued.

The actions of the respondents are contrary to section 12 of the County Government Act and section 17 of the County Assembly Act. there was no meeting of the 4<sup>th</sup> respondent to hear the petitioner or a committee appointed to assign duty with regard to his revised terms of service. No minutes have been filed in this regard.

The petitioner also submitted that the respondents violated the provisions of article 47 of the constitution that every person has the right to be subjected to an administrative action that is lawful and procedurally fair. The petitioner was never notified of any allegations against him warranting the reduction of his salary. In the case of **Republic versus Chuka University ex parte Kennedy Omondi Waringa & 16 others [2018] eKLR** that a fair opportunity should see to it that a party should be given an opportunity before an adverse decision is taken.

The respondents are in violation of article 41 of the constitution read together with section 10, 13, and 17 of the Employment Act with regard to failure to accord the petitioner fair labour practices and the provisions of having employment particulars set out in the employment contract respected; any change to the employment contract should be with notice and the employer should pay the entire amount of wages earned by the employee in respect of work done by the employee in pursuance of the contract of employment.

The orders sought in the petition should issue with costs.

The respondent submitted that before August, 2014 the petitioner was employed by the TSC serving as P1 teacher job group G at Ngosuni Primary School in Narok County earning a gross salary of Ksh.32,767 and was then on secondment vide letter dated 19<sup>th</sup> August, 2014 for 3 years. The secondment was irregular and further the petitioner was erroneously placed at job group „P? contrary to County Public Service Human Resource Manual, 2013 and the scheme of service for teachers. The petitioner was also unilaterally awarded a salary higher than appropriate for his qualification. The respondents regularised these disparities with a review and issued communication to the petitioner vide letter dated 14<sup>th</sup> February, 2018.

The respondents also submitted that the petition herein is filed prematurely and contrary to section 77 of the County Government Act which provides the procedure applicable with regard to decisions of the 4<sup>th</sup> respondent and ought to have filed an appeal with the PSC. The petition that there are constitutional rights violations and hence the PSC has no jurisdiction to hear the same is misguided as the sole issue in dispute relates to alleged employment terms and reduced salary and payment of salary arrears following a decision of the 4<sup>th</sup> respondent and from such decision, under the provisions of section 77(2) County Government Act the petitioner ought to have moved to the PSC and by filing this petition it was premature.

The respondents also submitted that the petitioner has prematurely invoked the court's jurisdiction and its impact on the instant petitioner. Where there is a clear procure for the redress of a particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be followed as held in **Speaker of the National Assembly versus James Njenga Karume [1992] eKLR**, the petitioner cannot be found to rely on the case of **Abdikadir Suleiman versus County Government of Isiolo [2015] eKLR** following Court of Appeal judgement in **Secretary, County Public Service Board & Another versus Hulbhai Gedi Abdile [2017] eKLR** that the provisions of section 77(2) of the County Government Act should apply before an officer employed by the entity such as 4<sup>th</sup> respondent files suit in court. the import of the Court of Appeal judgement is that the invocation of the court jurisdiction where there is alternative remedy should follow; section 77 of the County Government Act be store upon the PSC original jurisdiction to hear appeals from decision of the County Public Service Board relating to employment of county employees; and there was affirmation that it did not matter whether the appeal to the PSC was on the merits of the decision of the Board on the issues of natural justice. The position by the Court of Appeal has been upheld in several cases in **James Tinai Murete & others versus County Government of Kajiado & 22 others [2015] eKLR**; **James Akelerio Alias Muguu & another versus Moses Kasaine Lenolkilal & 3 others [2014] eKLR**; **David Baariu Mwirabua & 2 others versus Governor Meru County & another [2019] eKLR**.

The petitioners claims can well be advanced in an appeal with the PSC and addressed under section 77 (2) of the County Government Act. The law is couched in mandatory terms as held in **James Akelerio Alias Muguu & another versus Moses Kasaine Lenolkilal & 3 others [2014]** that *the PSC shall entertain appeal* from decisions of the Board.

The respondents also submitted that the 4<sup>th</sup> respondent was entitled to take the decision it did against the petitioner pursuant to section 59 of the County Government Act with regard to recruitment, appointments and disciplinary control over person holding office within the 3<sup>rd</sup> respondent. In this regard the 4<sup>th</sup> respondent in performance of its statutory duties addressed the grading, job requirements and addressed the irregularities existing and issued the petitioner with communication. In **Daniel Ngariba Marwa & 32 others versus County Government of Migori & another** the court held that under section 59 of the County Government Act the duty to abolish, appoint, retain or discipline county employees vests in the County Public Service Board.

The 4<sup>th</sup> respondent's decision to review the petitioner's grading was reasonable in the circumstances with the net effect to restore order within the 3<sup>rd</sup> respondent's public service.

The orders sought in the petition should not issue as the 4<sup>th</sup> respondent acted within the law. the petitioner was correctly graded and his salary was matched to that job group. Under job group K a public servant such as the petitioner is entitled to basic salary of Ksh.44,750. The changes contemplated under section 10(5) of the Employment Act are not similar to the mandate of the 4<sup>th</sup> respondent under section 59 of the County Government Act. The 4<sup>th</sup> respondent acted with regard to documents submitted by the petitioner during his employment.

The petition is without merit and should be dismissed with costs to the respondents.

On the petition and responses by the respondents, the issues which emerge for determination can be summarised as follows;

**Whether the petition herein is premature pursuant to the provisions of section 77 of the County Government Act, 2012;**

**Whether there are constitutional rights violations; Whether the remedies sought should issue; and Who should pay costs.**

The question of the petition being premature and that under section 77 of the County Government Act the petitioner ought to have filed an appeal to the PSC has been gone into extensively by the respondent. this was also subject of application dated 23<sup>rd</sup> April, 2019 and the ruling delivered on 8<sup>th</sup> July, 2019. It is important for the court to therefore address the same as a substantive issue.

The core of the petition herein is that the petitioners rights right under the constitution have been violated by the respondent by the reduction of his salary and is therefore claiming for reinstatement of his due salary and the payment of the arrears and further that the respondent should be restrained from downgrading, reducing or in any manner diminishing his remuneration. That for the violations the court should make an ward of compensation and general damages.

It is common cause that the petitioner was employed by the 4<sup>th</sup> respondent and has remained in the service of the 3<sup>rd</sup> respondent. He is currently serving as Early Childhood Development and Education (ECDE) Coordinator JG „N? with effect from 20<sup>th</sup> June, 2017 vide letter of equal date.

There exists an employment relationship between the parties. The dispute between the parties relates to employment terms and conditions.

Article 162 (2) (a) and (3) as read with Article 165(5) and (6) of the Constitution, 2010; and section 12 of the Employment and Labour Relations Act, 2011 and section 87 of the Employment Act, 2007 confer the court with original jurisdiction to hear and determine employment and labour relations disputes within the Republic of Kenya.

In my humble view, the court jurisdiction to hear and determine employment and labour relations disputes and for connected purposes is constitutional and statutory.

Further, Section 87 of the Employment Act, 2007 provides as follows;

*87. Complaint and jurisdiction in cases of dispute between employers and employees*

*(1) Subject to the provisions of this Act whenever—*

*(a) an employer or employee neglects or refuses to fulfil a contract of service; or*

*(b) any question, difference or dispute arises as to the rights or liabilities of either party; or*

*(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.*

***(2) No court other than the Industrial Court [Employment and Labour Relations Court] shall determine any complaint or suit referred to in subsection (1).***

The constitutional and statutory jurisdiction of the court cannot be removed and conferred to a tribunal or other quasi-judicial body. Where a claim/dispute/suit/matter relates to *employment and labour relations and for connected purposes* the original forum to adjudication is with the court unless the parties opt to apply the provisions of section 15 of the Employment and Labour Relations Court Act, 2011 and make reference to alternative disputes resolution mechanisms.

In my humble view, there is a deliberate application by Parliament in enacting the County Government Act. The application of the word(s) *may* with regard to section 77(2) of the County Government Act makes the provisions non-mandatory.

In this case, the petitioner is before the right forum to urge his employment and labour relations claims. such right cannot be denied of him.

With regard to alleged violation of constitutional rights, as set out in the case **Anarita Karimi Njeru versus Republic No.1 (1979) I KLR, 54** and which was echoed in the case of **Mumo Matemo versus Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR** that;

*if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.*

Though the petitioner has relied on various constitutional provisions in this petition, there is no material violation addressed with a reasonable degree of precision for the court to discern any violation of a constitutional nature. It is not necessary to file a petition and merely cite the constitution and several of its articles, the complaints with regard to particular violations must be addressed with precision. Where a memorandum of Claim is filed and urged in the context of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 any rights violations can adequately be addressed unlike a situation where issues are conflated and attended to under a petition. A Memorandum of Claim should have been adequate.

The court finds no constitutional violations.

On the substantive issues addressed by the petitioner, his entry into the service of the respondents was through secondment vide letter dated 20<sup>th</sup> June, 2014. By letter dated 19<sup>th</sup> August, 2014 the respondent through Seki Lenku, County Secretary wrote to the petitioner as follows;

**Re: Secondment to Narok County Government**

*I am pleased to inform you that subject to your acceptance of the terms of this letter, you have been identified for Secondment in the service of the Narok County Government. You will serve as an Ag. Assistant Director, J/G 'P' in the Department of Social Services.*

...

*While in the service of the Narok County Government, you will be paid all salary and benefits equivalent to what you were getting from your former employer (Teachers Service Commission). Besides, you will also be paid a monthly top up of ... this initial period of secondment with be for three (3) years and in accordance with the regulations of service governing secondment, commencing*

from the date of reporting.

While an employee of this County, you will be bound by the unified terms and conditions of service for the Narok County Government Officers in conjunction with the Public Service Regulations 1984 as may be revised from time to time.

... [Underline added]

What is clear to the court, the petitioner was on secondment with the respondents being an employee of the TSC which regulated his employment. The secondment was for a period of 3 years and by the letter of secondment dated 20<sup>th</sup> June, 2014 thus ending on 19<sup>th</sup> June, 2017.

In this regard, secondment is a legitimate mode of sourcing for employees for the specified function. In **David Barasa versus British Peace Support Team & Another [2016] eKLR** that;

*A Secondment in its nature is where a principal employer with the consent of the employee concerned, second the employee to another department/agency or as the executing authority determines, accepting the employee in the same service for a particular service or for a period of time. Such an employee remains subject to the terms and conditions of any contract entered into with his consent including that of the principal employer as well as the rules and regulations of the employer where he is so placed.*

In addressing a similar matter with regard to the secondment of an employee, the court in the case of **Naim Bilal Yaseen versus Judicial Service Commission [2017] eKLR** relied on the case of **Public Service Commission versus County Government of Bomet et al [2016] eKLR** and held that;

*Secondment of public officers though not specifically addressed under the Employment Act, 2007 is given meaning under articles 187(2) read together with 189(1)(b) of the constitution, on the transfer of functions from the various levels of Government recognising the responsibility to assist, support and consult and, as appropriate, implement the legislation of the other level of government; and to this end, the 6<sup>th</sup> schedule at section 15, the transfer of National functions to County governments. I find The County Government Act is one such legislation to this end.*

In the petitioner's case, the principal employer was the TSC. As correctly submitted by the respondents, the TSC and Ministry of Education with policy guidelines from the PSC has elaborate and detailed schemes of service for teachers, for national human resource planning and development personnel and a scheme of service for ECDE and which schemes of service make provision to entry level into the service for non-graduate teachers from job grade „F? and a clear path career progressing based on number of years of service and upon meeting the minimum requirements for each grade upwards. Each grade progression is also premised on availability of vacancy and based on work performance and result.

The petitioner does not challenge the fact that he was a career teacher and the principal employer was the TSC. with the letter of secondment he was placed with the respondents and made provision that his secondment was conditional that *you will be bound by the unified terms and conditions of service for the Narok County Government Officers in conjunction with the Public Service Regulations 1984 revised from time to time.*

His secondment was for a fixed duration. There was specific terms of secondment.

The respondents' case is that the petitioner was secured into the service by the then County Secretary, Seki Lenku irregularly and placed at a grade and salary which were erroneous. This led to complaints by other employees which followed a revision of terms and conditions to address the disparities and bring equity. The rationale for such equity is because;

- a) Before seeking secondment of a staff, one must establish that the capacity for which the secondment is sought is lacking and thus necessary to source by secondment;
- b) All secondments are for a temporary period and must be approved by the placement employer/beneficiary;
- c) The seconded staff remains an employee of the parent Department; and
- d) Recruitment of a seconded staff permanently must follow the normal recruitment process.

Fundamentally for the respondents, the 4<sup>th</sup> respondent remains the sole employer within the County Government of Narok for all employees in the public service of the respondents and in this case this was not done as the then County Secretary, Seki Lenku acted unilaterally and without consulting with the 4<sup>th</sup> respondent in its statutory role. All the letter of appointment/secondment are executed by the County Secretary, Seki Lenku (Mr) without reference to any other person/agency/authority or the County Public Service Board, the 4<sup>th</sup> respondent as evidenced by his letters to the petitioner dated 19<sup>th</sup> August, 2014 on secondment to 3<sup>rd</sup> respondent and 22<sup>nd</sup> October, 2014 on secondment to the 3<sup>rd</sup> respondent. these letters are different from one dated 20<sup>th</sup> June, 2017 executed by Zipporah Sintoyia Gad, Secretary/CEO Narok County Public Service Board which is in accordance with section 44 and 56(2) of the County Government Act.

In **Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another [2013] eKLR** the Court held that the recruitment of employees undertaken outside established policy guidelines and regulations is unlawful.

In the case of **Nicholas Muturi Okemwa & 8 others versus Judicial Service Commission [2016] eKLR** the court held that;

*... the Respondent [as the employer] was not only mandated but was in fact obligated to right the wrongs that had occurred [in unlawful employment and irregular appointment]. More importantly, a court of law cannot confirm actions taken illegally (see **Saunders v Edwards [1987] WLR 1116**).*

The phase of the petitioner's secondment with the respondent is not specifically gone into in terms of any malpractice by him or the acting officer, the County Secretary. The respondents only went into the background. This shall not be gone into by this court save to add that Article 226(5) of the Constitution, 2010 provides as follows:

***If the holder of an office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.***

In addition Section 202 of the Public Finance Management Act provides that:

***(1) A public officer is personally liable for any loss sustained by the national government that is attributable to-***

***(a) The fraudulent or corrupt conduct, or negligence of the officer;***

***or***

***(b) The officer's having done any act prohibited by section 196,197 and 198***

***(2) The National Treasury may, by civil proceedings brought in a court of competent jurisdiction, recover damages from a public officer for any loss for which the officer is liable under subsection (1).***

The Petitioner's case is pegged on the events after February, 2018 when the petitioner's salary is said to have reduced from Ksh.86, 480 to Ksh.57, 250 per month. The petitioner is claiming for the reinstatement of his earlier salary and payment of the arrears from the reduced salary.

What the respondents seem to have done to address the lapses done in the secondment of the petitioner was to offer him employment vide letter dated 20<sup>th</sup> June, 2017. With the secondment term ending on 19<sup>th</sup> June, 2017 the offer for employment was available to the respondents.

The petitioner has challenged the reduction of his salary and pursuant to section 10(5), 13 and 17 of the Employment Act, 2007.

However, the petitioner cannot be found to rely on section 10(5) of the Employment Act, 2007 which forbids the employer from revising the contract of employment without notice to the subject employee as upon the lapse of his secondment, by letter dated 20<sup>th</sup> June, 2017 the petitioner was appointed by the respondents and issued with letter to this effect and to which he accepted and accorded such acceptance with his signature on 22<sup>nd</sup> June, 2017. The petitioner has attached this letter to his affidavit dated 8<sup>th</sup> February, 2019 as annexure "PKC1" and the letter is similar to the respondents response and Affidavit of 23<sup>rd</sup> April, 2019 by Ms Gad as annexure "?ZSG-5".

The letter dated 20<sup>th</sup> June, 2017 is *Appointment Letter* in the position of *Early Childhood Development Education (ECDE) Coordinator JG 'N' with effect from 20<sup>th</sup> June, 2017. This letter confirms your appointment by the NCPSB as an employee of the Narok County Government.*

The petitioner was appointed by the respondents effective 20<sup>th</sup> June, 2017 upon the lapse of his secondment. This was not continuous employment. Even where the petitioner remained in the service of the respondents, the parties retained the liberty to regulate employment terms and conditions of service in writing as required under section 10(3)(c) that;

***(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;***

This freedom of contracting is what is protected under Article 41 of the Constitution, 2010 where fair labour relations are secured. For the petitioner, he gave his consent to the appointment by the respondents upon the offer for *appointment* on 22<sup>nd</sup> June, 2017. He cannot turn around and be found to state that this was not notice and he was not given the reasons for his appointment and that he should be paid under his secondment terms as such term and period lapsed and a new offer made and he well accepted.

For the petitioner, To seek to be reinstated back to his previous position would amount to a request to revert to the secondment terms and effectively to the principal employer the TSC.

The application of section 13 and 17 of the Employment Act, 2007 by the petitioner is erroneous in the context of his letter of appointment and his acceptance thereof. Nothing owes and is payable to him from the respondents as by the letter of appointment, his employment was secured under the set out terms and conditions. The salary paid from March, 2019 vide the payment statements as required under section 17 and 19 of the Employment Act, 2007 is commensurate with the offer in the letter of appointment.

The petition must fail in its entirety.

The petitioner continues in the service of the respondents. With the petition dismissed, he shall pay the respondent 50% of their costs.

**Accordingly, the petition herein is dismissed in its entirety. Costs to the respondents at 50%.**

**Dated and delivered electronically this 4<sup>th</sup> June, 2020 at 0900 hours**

**M. MBARU**

**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 15<sup>th</sup> March, 2020 the Order herein shall be delivered to the parties via emails. this 4<sup>th</sup> June, 2020 at 0900 hours

**M. MBARU**

**JUDGE**