



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA
AT NYERI

PETITION NO. 8 OF 2018

(Formerly Nairobi ELRC Petition No. 74 of 2018)

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOM AS ENSHRINED UNDER ARTICLES 3, 10, 19,
20, 21, 22, 23, 28, 29, 41, 47, 258 AND 259 OF THE CONSTITUTION
OF THE REPUBLIC OF KENYA**

BETWEEN

ELIJAH MURIITHI MUCHIRI.....1ST PETITIONER
JAMES NDIRITU KABABU.....2ND PETITIONER
JECINTA WANJUGU WACHURA.....3RD PETITIONER
ASKA MORAA OYARO.....4TH PETITIONER
JACOB MAKOKHA MUTHEE.....5TH PETITIONER
ANN WAITHIRA MAINA.....6TH PETITIONER
LUCY WAMBUI NDUNGU.....7TH PETITIONER
MARY WAMBUI NGATIA.....8TH PETITIONER
JULIAH WANGUI NGARI.....9TH PETITIONER
SOLOMON KARANJA MINAL.....10TH PETITIONER
JOSEPH NDUNGU NYARUAL.....11TH PETITIONER
CATHERINE NYAWIRA MUTURI.....12TH PETITIONER
SABINA NYAMBURA MUIRURI.....13TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF LAIKIPIA.....1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD, LAIKIPIA.....2ND RESPONDENT

JUDGMENT

1. The Petitioners assert that they were employees of the 1st Respondent from 7th January 2014 as casual workers save for the 10th Petitioner who was employed on 27th June 2002 by the defunct Municipal Council of Nanyuki as a general worker. The Petitioners have sought through the Petition before me for declaration that they were employed on permanent basis by the Respondents by operation of law and as provided for under the Constitution; a declaration that the constitutional rights of the Petitioners as provided for under Articles 27, 28, 29, 41 and 47 of the Constitution have been violated by the Respondents; general damages for each of the violations of their constitutional rights; arrears of their entitlement to house allowance, leave allowance, payment for working on public holidays since their employment; and reinstatement to their former positions on permanent basis. The facts of the case are that save for the 10th Petitioner the Petitioners were engaged as casual workers from 7th January 2014 till 19th July and 25th July 2018. The 10th Petitioner was engaged by the defunct Municipal Council of Nanyuki in June 2002 as a general worker. His claim is therefore different from his co-petitioners. They assert that they were not casual employees as their wages were not paid at the end of the day in terms of Section 18(2)(d) of the Employment Act but assert that they were paid a salary at the end of the month. The Petitioners were hired for a daily wage of Kshs. 432.40 and were earning Kshs. 571.45 at the time of the termination. The Respondents assert the Petitioners were save for the 10th Petitioner entitled to pay every day and therefore were not entitled to a monthly salary. The Respondents assert that the casual employees were not entitled to the benefits they seek in the Petition.

2. The 1st Petitioner Elijah Muriithi Muchiri testified on behalf of the Petitioners and stated that he was presently a motorcycle rider. He testified that he was employed as a casual worker and that if one missed work they would not get pay for that day. He stated that the 10th Petitioner had been employed long before they were engaged and that the 10th Petitioner was a general worker. He testified that he did not know the terms of employment of the 10th Petitioner. The Respondents did not call any witness and the parties were to file submissions.

3. The Petitioners submitted that they were employed for more than 5 years as casuals and that the evidence they had placed before the court remained as uncontroverted and that the court should find in favour of the Petitioners. The Petitioners submit that they were not given any notice of the intended termination and that the emotional rollercoaster they had been subjected to by the Respondent's failure to formally confirm their employment violated the provision of Article 29(d) of the Constitution in that the Petitioners did not know if they would be in employment at the end of each month. The Petitioners submitted that the Respondent had no justification for the unceremonious termination of their services as no reasonable reason was given for the termination. The Petitioners submitted that they were model employees who did not have any disciplinary issues and that it was inhumane for the 10th Petitioner to be dismissed on 19th July 2018 only for the Respondents to purport to reinstate him on 30th August 2018 ostensibly as his termination was a mistake. The Petitioners submitted that the Respondents were subjecting them to mental torture and anguish by firing and hiring them when they feel like it. The Petitioners submitted that the court should find that they had satisfied the grant of the declarations sought. They placed reliance on the cases of **Nanyuki Water & Sewerage Company Limited v Benson Mwititi Ntiritu & 4 Others [2018] eKLR** and **Kenya County Government Workers' Union v County Government of Nyeri & Another [2015] eKLR**. The Petitioners submitted that they were entitled to the grant of damages which they assessed at Kshs. 1,000,000/- each.

4. The Respondents submitted that the 10th Petitioner was mistakenly issued with a notice of termination of employment and upon realization of the mistake made, the Respondents rescinded the letter and advised him to report back to work on 1st September 2018. The Respondents submitted that the 10th Petitioner had declined to report to work and that equity should frown upon his refusal to resume work means he absconded from work. The Respondents submitted that the other Petitioners were casual employees who were engaged on a daily basis but due to effective and timely payments by the Finance and Planning Department the said pay would be remitted at the end of the month. The Respondents submitted that the Petitioners were aware that they were not entitled to any benefits as casual employees and that there was no undertaking by the Respondents or assurances given that the Petitioners would be engaged as permanent employees. The Respondents submitted that there was no discrimination and that the Petitioners had failed to adduce any evidence of the discrimination alleged or the psychological trauma and torture alleged to have been suffered. The Respondents submitted that no complaint was raised for the alleged atrocities they claim the Respondents committed. The Respondents assert that the Petition was not the proper way to deal with the issues of employment that emerge from the pleadings and that Section 77 of the County Governments Act is applicable. The Respondents thus submit the Petitioners should have preferred an appeal to the Public Service Commission as provided for under the Act. The Respondents relied on the case of **Ulrich Krueger v Director of Public Prosecutions & 3 Others [2018] eKLR** where the learned judge held:-

In the circumstances of this case I find that the Petitioner has met the conditions for the grant of an order barring the 2nd Respondent from investigating the contract entered between him and the Interested Party over the sale of his boat. That is the only order I grant. The other prayers sought by the Petitioner are in the realm of his civil dispute with the Interested Party. Those orders cannot be granted in this petition. He will have to pursue the procedures provided by the law for settling such disputes. The Respondents submit that the pleadings vis-à-vis the evidence tendered in court do not raise any issues of contravention of the Constitution of Kenya or the violation of the constitutional rights of the Petitioners. The Respondents submit the Petitioners have not adduced any evidence to show how they arrived at a valuation of Kshs. 1,000,000/- as damages and any justifications for the same. The Respondents submitted that the burden of proof lay on the Petitioners and that they had failed to prove. The Respondents urged the dismissal of the Petition with costs.

5. The 10th Petitioner stood distinct from the other Petitioners and his claim was markedly different since he was employed in the era of the defunct local authorities. He nevertheless had been issued with a letter of dismissal but this was recanted vide the letter dated 30th August 2018. As such he is not a party who can assert the same distress as the remaining Petitioners do. Regarding the other Petitioners, the issues raised are germane to the employment and labour relations under the rubric of the Employment Act and the overarching provisions of the Constitution of Kenya 2010. The Petitioners assert that they were subjected to ignominy and that the Respondents breached a slew of constitutional provisions ranging from Articles 27 – right to equality and freedom from discrimination, 28 – right to human dignity, 29 – right to freedom and security of the person, 41 – right to fair labour practices and 47 – right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. As can be seen from the plain reading of the rights enumerated in the Constitution of Kenya and which the Petitioners assert were breached, the Petitioners had a burden to show that the Respondents have abridged the Constitution by acting contrary to the provisions of the law said to be infringed. It is not enough to throw Articles of the Constitution of Kenya around and assert these have been breached. It would be incumbent upon the Petitioners to show how their rights to equality and freedom from discrimination were impacted, how their right to human dignity was infringed, how their right to freedom and security of the person was curtailed, how the right to fair labour practices was derogated from and how their right to administrative action that is

expeditious, efficient, lawful, reasonable and procedurally fair was denigrated from. In the suit before me, the Petitioners woefully failed to meet the high bar that is set to prove the Respondents abridged the supreme law of the land. It was telling that none of the particulars of the infringement was laid before the court and only issues of rejection of claims or the sudden and abrupt dismissal were raised. Given that these were matters within the purview of a claim under Employment Law, that would have been the appropriate forum to seek redress. I agree with the decision in **Ulrich Krueger v Director of Public Prosecutions & 3 Others**(*Supra*) where the learned judge held that:-

The other prayers sought by the Petitioner are in the realm of his civil dispute with the Interested Party. Those orders cannot be granted in this petition. He will have to pursue the procedures provided by the law for settling such disputes.

The Petitioners were casual employees and though they received pay at the end of the month, their emoluments were in the nature of wages. Their pleadings brought this out clearly that they were earning a daily wage which was paid monthly and that they were anxious from month to month since their services could be terminated at short notice. That actually did happen in July 2018. They were duly notified of the intention to dismiss them. Upon dismissal, they had the option to seek reprieve from this court as they were casual employees. The claim should have been filed as a memorandum of claim laying down the infarctions alleged against the Respondents. I do not agree with the Respondents that they should have sought the interposition of the Public Service Commission. A matter involving the County employees requires that they seek redress against the decision in terms of Section 77 of the County Governments Act. Strictly speaking, casual employees do not enjoy the same safeguards as the 10th Petitioner who was entitled to seek redress under Section 77. The recourse for the balance of the Petitioners was this court as they exercised their right. In the Petition they unfortunately did not demonstrate the Respondents as having infringed the Constitution of Kenya as alleged in the Petition and as such the Petition flops. I dismiss it but make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 17th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar