

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1157 OF 2015

(Before Hon. Justice Mathews N. Nduma)

WACUKA BARBARA WANJIKU.....1ST CLAIMANT
MWANAISHA KITANG’U KANOTI.....2ND CLAIMANT
GEORGIADIS GITONGA MWAMBIA.....3RD CLAIMANT
ALVIN CHEPTOO KOGO.....4TH CLAIMANT
AKOTH LILIAN AGENG’O.....5TH CLAIMANT
AGGREY ODHIAMBO OJWANG.....6TH CLAIMANT
HELLEN WANGARI MWANGI.....7TH CLAIMANT
CATHERINE MUKIRI.....8TH CLAIMANT
SHADRACK MURUNGA WERUNGA.....9TH CLAIMANT
NICHOLUS KIAMBI IRERI.....10TH CLAIMANT
FRIDAH KAGWIRIA KUNGANIA.....11TH CLAIMANT
FASCOLYNE CHERUTICH.....12TH CLAIMANT
CHRISTOPHER KITHEKA.....13TH CLAIMANT
ESTHER WAIRIMU GICHACHE.....14TH CLAIMANT
GRACE MUCHIRI.....15TH CLAIMANT
JUDITH CHEPKEMOI.....16TH CLAIMANT
JOEL KATHEKA MUTISYA.....17TH CLAIMANT
SUSAN NKATHA MUKINDIA.....18TH CLAIMANT

VERSUS

NAIROBI CITY COUNTY PUBLIC

SERVICE BOARD.....RESPONDENT

J U D G E M E N T

1. The Claimants, except the 5th, 10th, 13th, 14th, 16th, and 18th Claimants who have since withdrawn their respective claims seek the following prayers:-

(1) A declaration that the Claimants are employees of the Respondent on permanent and pensionable terms from **25th May 2014** for 1st – 5th and 7th – 20th Claimants and **17th December 2014** for 6th Claimant when their contracts expired.

(2) An order that the Respondent does issue the Claimants with Employment letters from the dates of expiry of their contracts.

(3) An order that the Respondent does pay the each of Claimants allowances in arrears from the date of expiry of their contract at Kshs.27,000 per month.

(4) A declaration that the Respondent has violated the Claimant's rights to fair labour practices, freedom from psychological torture and freedom from inhuman and degrading treatment and its duties under Sections 9, 10, 18 and 20 of the Employment Act.

(5) Damages for violation of human rights and statutory duties in (4) above.

(6) An order that the Respondent does remit all unremitted NSSF and NHIF contributions.

(7) Costs of the suit.

(8) Interested on (3), (5) and (6) above until payment in full.

(9) Any other relief as the court may deem fit.

2. The suit is undefended, the Claimant having been served with summonses to enter appearance and the statement of claim but only entered appearance through Musyoki Mogaka & Company Advocates on 7th September, 2015 and did not file any Memorandum of Response subsequently.

3. The matter proceeded to formal proof on 15th February, 2017 and CW1 Georgiadis Gitonga testified under oath. CW1 adopted his witness statement filed on 8th October, 2016 as his evidence in chief.

4. CW1 also relied on the statement of claim and all attachments thereto and on a supplementary bundle of documents filed on 10th August, 2016.

5. The Claimants filed written submissions in support of their case, and pray the court to allow the suit as prayed.

6. The only issue for determination is whether the Claimants have proved their case on a balance of probabilities and be granted the reliefs sought.

7. On **24th January 2014** before their 3 year contracts expired, the National Government through the Ministry of health directed the Respondent through its Governor and County Secretary to absorb the Claimants into its regular establishment on permanent and pensionable terms once their contracts expired. See letters dated **7th August 2014** and **24th January 2014** marked **Appendix 3** in the Statement of Claim.

8. The Respondent ignored the two letters and refused to absorb them into permanent and pensionable terms as directed. As a result, the Claimants felt cheated and they commenced industrial actions including strikes and go-slows aimed at getting the Respondent to absorb them as directed. The industrial actions resulted into Return to Work Formula and written commitments by the Respondent that it would honour its part of the bargain. See **Appendix 4** which is copies of the Return to Work Formula and

written commitments.

9. During the pendency of this suit, the Respondent purported to issue the claimants with Letters of Employment dated 15th February 2016 with a commencement date of 1st July 2015 (See Appendix 1 to the supplementary bundle). The 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 11th, 12th, 15th and 17th claimants contracts expired on 25th May 2014. They were supposed to be employed on permanent and pensionable basis from that date 26th May 2014 and not the 1st of July 2015 unilaterally fixed by the Respondent. Likewise for 6th Claimant his contract expired on 16th December 2014 and his employment in permanent and pensionable terms was to commence on 17th December 2014.

10. A pertinent issue as to the employment on permanent and pensionable terms is the job group in which the Claimants ought to have been absconded into. The letters of employment issued to the claimants on 15th February 2016 show that they are employed as Community Health Assistants III. The Scheme of Service for Community Health Services Personnel dated November 2013 at Appendix 5 of the Supplementary bundle has guidelines. The Claimants were appointed on 26th May 2011. By the time the purported letters of appointment on 15th February 2016 were issued, they had served for four years in the position of Community Health Extension Workers. Accordingly, they should have been employed at job group H Community Health Assistant II. They have the requisite diplomas/degrees for that position exhibited at Appendix 6 of the Supplementary Bundle.

11. In **Murang'a County Public Service Board –vs- Grace N. Makori & 78 Others** [2015] eKLR, which case has similar facts to this case, the Court of Appeal agreed with the superior court that the Appellant ought to have employed the Respondents on permanent and pensionable basis as from the date of expiry of their contracts and directed the Appellant to pay the salaries in arrears as from that date. The Claimants herein urge this honourable court to follow the Court of Appeal's decision and order that Respondent to issue to the Claimants letters of appointment from the date of expiry of their contracts and not the 1ST July 2015, the date the respondent unilaterally and arbitrarily fixed.

12. Accordingly, the Claimants pray that prayers 1 & 2 of the Statement of Claim be allowed as prayed and they be placed in the correct job group, i.e community Health Assistants II.

13. Since they were employed to date, they have worked diligently, effectively and with a lot of perseverance as Community Health Extension Workers primarily engaged in disease prevention activities such as fight against cholera and polio, campaigns on importance of exclusive breastfeeding, proper nutrition and hygiene.

14. Before the issuance of the purported letters of appointment on 15th February 2016, the Respondent was not paying the Claimants any allowance. It was only paying a 'special salary' (see Appendix 2 to the Statement of Claim). The special salary' was not a consolidated salary neither did the Respondent house the Claimants. They are therefore entitled to a house allowance.

15. Further, the purported letters of appointment dated 15th February 2016 and the payslips (of July 2016) issued pursuant to that letter gave the Claimants the following allowances.

Item	Type of allowance	Document	Amount (Kshs)
1	House allowance	Appointment letter	5,000.00
		Payslip	6,168.00
2	Health workers extraneous allowance	Appointment letter	Nil
		Payslip	15,000.00

3.	Commuter allowance	Appointment letter and payslip	4,000.00

(See Appendices 1 and 4 in the Supplementary Bundle). The correct figure for the house allowance is as shown by the payslips Kshs.6,168.00. Further, though the purported Appointment letters do not mention the health workers extraneous allowance, the same is being paid to the Claimants and so it is their entitlement.

16. The claimants contend that they are still doing the same duties and jobs as they were doing before the issuance of the purported letters of appointment- community health workers. That is why even though the purported letters of appointment don't mention health workers extraneous allowance, the same is paid to the Claimants as reflected in the payslips. Accordingly, they are entitled to these allowances as from the expiry of their contracts and commencement of their employment in permanent and pensionable terms in May and December 2014 to date.

a) House allowance @ 6,168 per month

- From 27th May, 2014 to 1st July 2015 for each of the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 11th, 12th, 15th and 17th claimants

6,168 x 13 months and 3 days=80,800.00

- For 6th claimant from 17th December 2014 to 1st July 2015

6,168 x 6 months and 15 days =40,088.00

b) Commuter allowance @ 4,000/- pm

- From 27th May, 2014 to 1st July 2015 for each of the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 11th, 12th, 15th and 17th claimants

4,000 x 13 months and 3 days = 52,400

- For 6th Claimant from 17th December 2014 to 1st July 2015

4,000 x 6 months and 15 days =26,000

c) Extraneous allowance @ 15,000 per month from 1st June 2014 to 1st July 2015

- From 27th May 2014 to 1st July 2015 for each of the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 11th, 12th, 15th and 17th claimants

15,000 x 13 months and 3 days = 196,500.00

- For 6th claimant from 17th December 2014 to 1st July 2015

15,000 x 6 months and 15 days =97,500.00

Prayers 4 & 5

a) A declaration that the Respondent has violated the Claimant's rights to fair labour practices, freedom from psychological torture and freedom from inhuman and degrading

treatment and its duties under Sections 9, 10, 18 and 20 of the Employment Act.

b) Damages for the violation of human rights and statutory duties.

17. The refusal to absorb the Claimants as directed, consult with them, inform them when they were to be absorbed, refusing to talk to them as the employer and unilaterally deciding to employ them as from 1st July 2015 making them lose allowances for over one year, caused the Claimants immense psychological torture as for over two years, they did not know their fate. The Claimants aver that this constitutes gross violation of their right to fair labour practices and freedom from psychological torture enshrined under Articles 29(9) and 41 of the Constitution.

18. In further violation of their rights to fair labour practices despite the pendency of this suit, the Respondent refused to pay their salaries from July 2015 until this court intervened and issued an order directing that they be paid their salaries going forward. Even with the intervention, their salaries were paid in October 2015 See Appendices 2 and 3 of the Supplementary bundle of documents.

19. Before the purported Appointment letters were issued in February 2016, the claimants were reporting to work every day from Monday to Friday without fail and worked diligently but the Respondent was paying them what it called a 'Special Salary' as and when it deemed fit not at the end of every month as required by Section 18(2)(c) of the Employment Act. Sometimes the Claimants were going for several months without salaries which were only paid if the claimants went on a strike or go-slow or storm the Respondent's offices to demand for them. The letter dated **16th December 2014** in **Appendix 4** of the Statement of Claim clearly shows how irregularly the salaries were paid. Failure by the Respondent to pay their salaries on time caused them additional torture since they all rent houses in Nairobi, some have children who attend school, they have to report to work on a daily basis without fail and had, and still have, many other financial commitments to enable them survive. The failure also caused them untold ridicule by the people they interacted with on financial aspects like landlords, schools and even families and friend because they had to explain why they do not have money to honour their obligations whilst they are employed by a County Government. The failure constitutes inhuman and degrading treatment prohibited by **Article 26(f)** of the Constitution.

20. To date, the Respondent has not honoured its statutory obligations regarding NSSF and NHIF as in law required as it has not been remitting the deducted statutory deductions in time or at all. As a consequence, the Claimants lack social security offered by NSSF and access to health services offered by NHIF by virtue of member contributions. This amounts to unfair labour practices and inhuman and degrading treatment considering that the Respondent does not even pay salaries in time making it hard for the Claimants to even access medical services. See **Appendix 5** being copies of the Claimants' NSSF and NHIF Records.

21. In May 2015, the Respondent absorbed all other Economic Stimulus Program workers who were employed together with the Claimants in 2011 in the same position as Community Health Extension Workers into permanent and pensionable terms and issued them with Letters of Appointment for new positions which show movement in job group from 'G' to 'H' and increased benefits such as house allowance (Kshs.5,000.00), Commuter Allowance (Kshs.4,000), Health Risk Allowance (Kshs.3,000) and Extraneous Allowance (Kshs.15,000.00). The respondent treated the claimants differently from their colleagues in a manner that was disadvantageous to the claimants.

22. The Claimants were placed on probation in total disregard of their previous 4 years service from 2011, were not given letters of appointment, were not given pay slips and were not paid regularly at the end of every month. This served to further subjugate the rights of the Claimants.

23. The Respondent treated the Claimants differently from their counterparts who were all absorbed in May 2015 under the Economic Stimulus Programme as Community Health Extension Workers into permanent and pensionable terms and were issued letters of appointment which show movement from job group 'G' to 'H' and benefits eg. House allowance Kshs.5,000, Commuter Allowance Kshs.4,000, Health Risk Allowance Kshs.3,000 and Extraneous Allowance Kshs.15,000.

24. The Claimants seek damages for the discrimination which violated their statutory and constitutional right to equal treatment and human dignity.

25. The Claimant rely on the cases of **VMK Vs CUEA [2013] eKLR** in which this court awarded Kshs.5 million for discrimination and violation of the right to human dignity.

26. **Nasibo Dabaso Jillo Vs Commander Kenya Army & another [2015] eKLR** in which this court awarded the Claimant Kshs.3 million for discrimination and **Joseph Makau Munyao & 4 others Vs Kenya Ports Authority & Another [2016] eKLR** in which the court awarded Kshs.800,000 for unfair labour practices.

27. Considering the facts of this case and the law, the court awards each of the Claimants Kshs.1 million for the violation of human rights and subjection to unfair labour practices set out in this case, and proved by the Claimants on a balance of probabilities.

NSSF & NHIF Dues

28. The Claimants have also proved that the Respondent has not been remitting their NSSF and NHIF dues and directs the Respondent to honour their contractual and statutory obligations in this respect.

29. In the final analysis, judgment is entered in favour of the Claimants as against the Respondent as follows –

- a. A declaration is made that the Claimants are employees of the Respondent on permanent and pensionable terms from 25th May 2014 for 1st to 4th and 7th to 9th and 11th, 12th and 14th to 15th, 17th 19th to 20th and from 17th December 2016 for 6th Claimant.
- b. The Respondent is directed to issue the Claimants with letters of appointment from the dates of expiry of their respective contracts aforesaid.
- c. The Respondent to pay each of the Claimants allowances in arrears from the date of expiry of their contract at Kshs.27,000 per month.
- d. The Respondent has violated the Claimant's rights to fair labour practice, to human dignity and to equal treatment before the law in violation of the constitution of Kenya 2010 and the Employment Act, 2007 and each of the Claimants is awarded Kshs.1,000,000 for the violation.
- e. The Respondent to remit all deducted NSSF and NHIF dues on behalf of each Claimant.
- f. The award in (c) to be paid with interest at court rates from date of filing suit till payment in full.
- g. The award in (d) to be paid with interest at court rates from date of Judgment till payment in full.
- h. The Respondent to pay the costs of the suit in respect of each claimant.
- i. The judgment be implemented within 30 days.

Dated and Signed in Kisumu this 18th day of December, 2017

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 19th day of January, 2018

Maureen Onyango

Judge

Appearances

M/s. Wamucii for Claimant

Musyoki Mogaka & co. Advocates for Respondent

Anne Njung'e – Court Clerk