



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1503 OF 2013**

*(Before Hon. Justice Mathews N. Nduma)*

**1. ALIVIDZA AKATSA GEORGIANNA**

**2. DANIEL KINGORI MATHENGE**

**3. FAITH WANJIKU NJERI**

**4. SAMUEL MBURU MACHUA.....CLAIMANTS**

**=VERSUS=**

**THE INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION.....RESPONDENT**

**JUDGMENT**

1. The 1<sup>st</sup> to 4<sup>th</sup> Claimants were employed by the Respondent as casuals on the following dates.

i) 1<sup>st</sup> Claimant – August 2011

ii) 2<sup>nd</sup> Claimant - February 2011

iii) 3<sup>rd</sup> Claimant – February 2011

iv) 4<sup>th</sup> Claimant- January 2012

2. The Claimants were given staff identification cards. The first Claimant is identified as an Administrative officer. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants as Website Administrators and 4<sup>th</sup> Claimant as GIS Analyst.

3. It is the Claimants' case that they have continuously worked in those positions doing the tasks set out in their testimony before court, but have never been recognized as permanent staff. As a consequence thereof, they have been treated differently in that they are not entitled to any of the benefits earned by their counterparts. They earn much less salary than what is attributed to their positions and earned by their equivalents. They have never been on annual leave.

4. That this treatment by the respondent violates their right to decent employment and to be treated equally and fairly. That this conduct by the respondent violates Section 37 of the Employment Act, 2007 which mandates employer to convert employees who have served for more than three months to permanent and pensionable employees or in the least put them on fixed term contracts with appropriate benefits. That the conduct by the respondent amounts to unfair labour practice in contravention of Article 41 of the Constitution.

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Claimants have been getting wages ranging from Kshs. 25,461 to Kshs 32,024 per month. The 4<sup>th</sup> Claimant has been paid a salary wage of Kshs 17,650 to Kshs. 22,498 per month.

6. The Claimants pray for the following reliefs:-

**i) The 1<sup>st</sup> Claimant be reinstated to employment.**

**ii) The Claimants be appointed on permanent terms in job grades as particularized in paragraph 14 of the memorandum of claim.**

**iii) The Claimants be paid salary arrears and allowances as particularized in paragraph 19 of the memorandum of claim**

**iv) The respondent be directed to issue written contracts of employment to the Claimants in accordance with the requirements of the Employment Act, 2007.**

**v) Interest and costs.**

7. All the Claimants filed verifying affidavits to the claim. A letter of demand specifying respective claims of each Claimant written by Mutimu Konyala & Co. Advocates dated 4/9/13 was produced. Same was acknowledged by Director Legal & Public Services Mr. M.C Tororey on 11/9/2013 who promised to look to the demands. The dispute was not resolved hence the suit.

8. Claimants rely on IEBC Human Resources and Administration Policies and Procedures Manual dated October 2010 as a guide to the respective positions, grades and requisite salary demanded by the Claimants.

9. The Claimants have produced their certificates to show that they are duly qualified to be employed in the positions they hold on permanent basis.

10. The employment of the 1<sup>st</sup> Claimant was terminated as at the time of filing suit. The 4<sup>th</sup> Claimant has also since left employment and therefore has abandoned the prayer to be placed on permanent terms.

11. The 4<sup>th</sup> Claimant therefore prays to be paid the arrear salary. The 1<sup>st</sup> Claimant seeks reinstate to the job.

12. A letter by Immaculate Kassait to the Chief Executive Officer dated 13/5/2013, recommended the 1<sup>st</sup> Claimant employed in the directorate of Voter Registration and Electoral Operations be retained on two years contract starting from April 2013. The letter states that the 1<sup>st</sup> Claimant had been working long before and after the 2013 General Elections. Her Job descriptions was attached to the letter.

13. Again on 3/12/2012, Immaculate Kassait had written a memo requesting payment of temporary staff. The Claimants are in the list of the said staff.

14. The Claimants pray that the claims be granted. The Claimants rely on various bundles of documents they filed before court on various dates reflected on the bundles. The Claimants rely also on their written statements as filed on various dates as their testimony in chief. The four (4) also testified in court under oath before Nzioki wa Makau J.

### **Response**

15. Peter Mulele testified as RW1 for the Respondent. He adopted his written statement filed on 19/7/2017 as his evidence in chief. RW1 admitted that the respondent employed casuals on a regular basis depending on dictates of work. That some continued for lengthy period whereas others would be laid off and recalled.

16. RW1 testified with regard to the Claimants as follows:-

i) The first Claimant was employed as a casual in the Department of Voter Registration and Electoral Operations. That she did clerical work. That she was not employed as an Administrative Officer. That such a position does not exist in the IEBC establishment. That IEBC did not issue her with an identity card. That her testimony in this respect is false.

That the casuals including the 1<sup>st</sup> Claimant were paid depending on number of days worked and since they were casuals, they were not on the pay roll.

The 1<sup>st</sup> Claimant did not apply to be considered for employment in any permanent position. Such posts are regularly advertised and filled by candidates who meet criteria. The 1<sup>st</sup> Claimant seeks to circumvent the recruitment procedure and vetting for suitability. The 1<sup>st</sup> Claimant cannot appoint herself into a position without applying for it. The HR manual provides that all positions are to be filled in competitively. The Claimant has never applied to go on leave. The Claimant wage was paid on basis of days worked and she chose not to go on leave. HR manual provides for mandatory leave and that payment will not be made in lieu.

### **ii) 2<sup>nd</sup> Claimant**

RW1 testified that he was also employed as a casual and was paid on the basis of number of days worked and signed for. 2<sup>nd</sup> Claimant worked in the communications Department. His work was entry of data. He was given these tasks whenever work arose. The Claimant was never employed as a communication officer. The position of communication officer was competitively filled on 21/3/2012 following interviews done whilst the 2<sup>nd</sup> Claimant worked as a casual.

The 2<sup>nd</sup> Claimant did not apply for the position. The 2<sup>nd</sup> Claimant has never been issued a staff identification card. Casuals are also not given letters of appointment. The 2<sup>nd</sup> Claimant worked in the department that generated staff identification badges. If any badges have been produced by the Claimants, they must have been falsely acquired by them.

### **iii) 3<sup>rd</sup> Claimant**

The 3<sup>rd</sup> Claimant was employed as a casual in the Department of Communication Officers, communication officer (printing) and communication officer (Electronic) and worked under their supervisor just like the 2<sup>nd</sup> Claimant. Similarly she has never applied to be employed as a communication officer nor has she been employed as one. She was paid according to days worked. She did not apply for leave and was not issued any identification card.

### **iv) 4<sup>th</sup> Claimant**

The 4<sup>th</sup> Claimant was employed as a casual in the Department of Voter Registration and Electoral Operations just like the 1<sup>st</sup> Claimant. He worked under the supervision of the Director, Voter Registration and Electoral Operation and other managers. He did clerical work which included data entry. He was paid on the basis of days worked. This depended on availability of work. It is not true that the 4<sup>th</sup> Claimant worked as a Geographical Intervention System Analyst and does not possess qualifications to work in such a position. The 4<sup>th</sup> Claimant was not issued any staff identification card. If he has one, it was falsely acquired. The 4<sup>th</sup> Claimant never applied for leave. He never applied for any permanent position and cannot be placed in one therefore while circumventing the recruitment process.

17. RW1 prays that the claims by the four Claimants be dismissed with costs.

### **Determination**

18. The issues for determination are follows:-

- i) Are the four (4) Claimants entitled to be placed in the permanent positions they claim and paid arrears salary in respect thereof.
- ii) What other reliefs if any are the claimants entitled to.

### **Issue I & II**

19. The four (4) Claimants have each worked for the respondent for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month. They have been doing work of a continuous nature and which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to that equivalent of three months. As a matter of fact each one of them has worked for the respondent for several years. There is no evidence rebutting their testimony that the service they rendered to the respondent was continuous.

20. Consequently in terms of Section 37 (1) of the Employment Act 2007 the four (4) Claimants are deemed to be employees whose wages are paid monthly and are protected as permanent employees under the provisions of part V & VI the Employment Act, 2007.

21. The Claimants were therefore entitled to at least 21 leave days for each completed year of service and are entitled to be given letters of employment stipulating their terms and conditions of service in the respective positions they worked.

22. It is not enough for the respondent to say that they do not have established positions as demanded by the Claimants. It is also not sufficient for the respondents to say that the Claimants are not entitled to the positions they seek. Fact of the matter is that the respondents have admitted the capacity in which they employed the Claimants. The court has established that failure by the respondent to provide letters of appointment to the respective positions they worked is contrary to law.

23. Accordingly, the court directs the respondent to provide the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Claimants with letters of appointment in respect of positions they have continuously served in for considerable periods.

24. The Claimants have enjoyed pay at the level of service they have been providing and in the court's view they cannot be heard to say that they were under paid. They have not provided evidence that persons doing similar work as themselves were paid more remuneration than that they got.

25. It is however proved that since they were considered casuals, they did not go on annual leave. The court therefore find that the Claimants are entitled to be paid in lieu of 21 leave days for each completed year of service from the date they started working for the respondent.

26. The 4<sup>th</sup> Claimant has since left the employment of the respondent. There is no claim for compensation for unlawful termination of employment. The Claimant is therefore only entitled to be paid in lieu of leave days not taken.

27. With respect to the 1<sup>st</sup> Claimant, it is not clear the circumstances in which she stopped working. The particulars of unlawful or unfair termination of her employment have not been pleaded nor was there sufficient evidence to show that the Claimant was unlawfully and unfairly terminated from employment. The prayer for reinstatement of the 1<sup>st</sup> Claimant is unsupported by tangible evidence. The court does

not grant the same therefore. The 1<sup>st</sup> Claimant is however entitled for payment in lieu of 21 leave days for every completed year of service.

28. For the avoidance of doubt, the claims for payment of basic salary, house allowance, transport allowance as claimed in respect of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants have not been proved on a balance of probabilities. The Claimants should continue to provide services at the levels they have been employed and they must be given appointment letters in those respective positions from the date they first started serving the respondent.

29. For the Claimants who have left the employment of the respondent, the respondent should provide respective claimants with certificates of service recognizing the continuous service, (not as casuals) they gave the respondent to enable them advance their careers elsewhere.

30. Payment in lieu of leave should be calculated at one month's salary for each completed year of service.

31. The rest of the claims are disallowed.

32. In the final analysis judgment is entered in favour of the Claimants as against the respondent as follows:

- a) The Claimants are declared permanent employees in terms of Section 37 (1) of the Employment Act, 2007 from the date of employment in the respective positions they served the respondent.
- b) Each Claimant to be paid a month's salary in lieu of leave days not taken for each completed year of service.
- c) The Claimants who have since left the employment of the respondent to be provided with certificates of service recognizing their employment in a permanent capacity for the period served.
- d) The payment in (b) above to be computed and paid within 30 days of this judgment. The amount to be paid with interest at court rates from date of filing suit till payment in full.
- e) The respondent to pay the costs of the suit.

33. For avoidance of doubt, all the Claims for under payment are dismissed.

**Dated and Signed in Kisumu this 31<sup>st</sup> day of July, 2018.**

**Mathews N. Nduma**

**Judge**

**Delivered and Signed in Nairobi this 10<sup>th</sup>..day of ...August, 2018**

**Maureen Onyango**

**Judge**

**Appearances:**

Mr. Kang'atta for Claimants

M/s Wahura for Respondent

Anne Njung'e: Court Clerk