



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 32 OF 2016

IN THE MATTER OF A PETITION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF ARTICLES 41 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT AND THE JUDICIAL SERVICE ACT

AND

IN THE MATTER OF THE HUMAN RESOURCES POLICY OF THE JUDICIARY

BETWEEN

JAMES ANG'AWA ATANDA	1ST PETITIONER
ONYANGO GRACE MBONE	2ND PETITIONER
SUSAN WAMBUI KAMAU	3RD PETITIONER
CAROLYN NYAKIAMBORI MAKANA	4TH PETITIONER
CHRISTINE ADHIAMBO OKENO	5TH PETITIONER
SHARON SISIMWO TUGEE	6TH PETITIONER
FREDRICK MBEYA ODHIAMBO	7TH PETITIONER
EDWIN ONYONO	8TH PETITIONER
LEONARD OMOGO	9TH PETITIONER
SHERWIN NJOROGE	10TH PETITIONER
MALUKU SCHOLASTICA KIDI	11TH PETITIONER

v

THE JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The facts presented in this Petition are not in dispute. What is disputed is whether certain actions taken by the Judicial Service Commission (Respondent) violated the Petitioners constitutional, statutory and contractual rights.
2. The 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners were severally offered appointments on 13 June 2012 as *Legal Researchers*.
3. The offer letters set out the terms and conditions of service. These initial offers did not provide for the duration of the contracts save to provide that the contracts were on **probationary terms**.
4. The 8th, 9th, 10th and 11th Petitioners on the other hand were offered employment through letters dated 24 March 2014. These contracts expressly provided the duration of the contracts as 2 years, with a probationary period of 6 months (depending on date of reporting these contracts were to lapse around May 2016).

1st to 7th Petitioners

5. On 5 December 2013, the Respondent met and decided to alter and/or vary the contracts of the 1st to 7th Petitioners by providing that each of the Petitioners contract would be for a fixed term of 3 years effective 9 July 2012 (*1st Variation*).
6. The Respondent informed the 1st to 7th Petitioners of the variation/alteration of the tenure of the contracts through letters dated 30 January 2014 and referenced *Addendum – Offer of Appointment*. Save for the variation of the duration of the contracts, the Petitioners were advised that the other terms and conditions of service remained the same, though it turns out that responsibility and risk allowances they had been enjoying were reduced and/or withdrawn respectively (with the variations the contracts were to expire around July 2015 depending on date of reporting).
7. On 28 May 2015 (just around the period the varied contracts were to lapse), the Respondent wrote to each of the Petitioners informing them that after a meeting held on 30 April 2015, it had been decided that the contracts be extended for a further period of 6 months. This was to enable the Respondent to *deliberate on the long term contracts*.
8. Come 14 December 2015, the Respondent informed the Petitioners that its Human Resource Management Committee had resolved that the contracts be extended up to 31 March 2016. A similar reason was given for the extension.
9. A further extension was granted by the Respondent through letters dated 30 March 2016 addressed to the Petitioners. The extension was up to 30 June 2016 and the reason given was that the Respondent needed the time to conclude deliberations on *long term contracts*.

8th to 11th Petitioners

10. On 20 April 2016 (before lapse of the contracts of these Petitioners), the Respondent informed them that it had revised their terms and conditions of service for all *Legal Researchers and Law Clerks* with effect from 1 April 2016 (Respondent informed the Petitioners through letters of 9 May 2016 that the revised terms would be effective 1 July 2016 - *2nd Variation*).
11. The revised terms included re-designation of the *Legal Researchers* as *Law Clerk* equivalent to position of Resident Magistrate, non-renewable 2 year contracts, and reduction in remuneration.
12. Upon receipt of the letter advising on revision of terms and conditions of service effective 1 July 2016, the Petitioners wrote to the Chief Registrar on 10 May 2016 decrying among others the unilateral decisions taken in respect of the revision of the contracts (unilateral revision of terms and conditions of service including reduction of remuneration).
13. Despite the reservations by the Petitioners, the Respondent offered each of the Petitioners new contracts (dated 28 June 2016 and effective 1 July 2016) and which contracts embodied the revisions early indicated. These new and revised contracts indicated that they were for a non-renewable duration of 2 years and made reference to a probationary period.
14. The Petitioners accepted the contracts in spite of the misgivings expressed in their letter of 10 May 2016 and eventually moved Court on 13 September 2016 alleging violation of their constitutional and contractual rights.
15. Together with the Petition was a motion under certificate of urgency which motion was abandoned after Court directed that the Petition be heard on an accelerated basis.

Petitioners' case

16. The 1st to 7th Petitioners contend that the variation of their contracts from open ended contracts to fixed term contracts (*1st Variation*) which were made unilaterally violated their rights to fair labour practices, fair administrative action, equal treatment of the law and legitimate expectation(s).
17. The Petitioners equally contend the revision of their contracts effective 1 July 2016 (*2nd Variation(s)*) violated their rights fair labour practices, fair administrative action, equal treatment of the law and legitimate expectation because the variations were unilateral.
18. All the Petitioners also challenged the probation period set out under the contracts dated 28 June 2016 and re-designation as *Law*

Clerk(s).

Respondent's case

19. The Respondent's case is contained in a replying affidavit filed in Court on 30 September 2016 and sworn by its Secretary.

20. It was asserted therein that the 1st to 7th Petitioners were initially on probationary and not open ended contracts and the same were varied to 3 year contracts to lapse around July 2015, which the Petitioners accepted without objections.

21. Regarding the 8th to 11th Petitioners it was contended that they were on 2 year contracts which lapsed and were extended until 30 June 2016 when fresh contracts were issued.

22. According to the Respondent, the fresh contracts were distinct and separate from the initial contracts and therefore the question of revision did not arise.

23. The Respondent admitted that an employer could not unilaterally vary an employment contract but in case of such unilateral variation, the same would amount to constructive dismissal and the employee had two options, accept the varied contract or treat the contract as terminated and sue for constructive dismissal.

24. In the view of the Respondent, the Petitioners acquiesced to the variations if any and waived the right to claim unfair termination.

25. The Respondent denied that the contracts carried any expectation of renewal.

26. The Respondent also contended that the Petition was presented as a representative suit without conforming to applicable procedures or authority.

27. The Petitioners filed their written submissions on 19 October 2016 while the Respondent filed its submissions on 25 October 2016. The submissions were highlighted on 25 October 2016 and 21 November 2016.

28. The Court has given due consideration to the material placed before it and has extracted the issues as arising for determination from the written submissions as, *locus of the Petitioners, whether the Petition raised/disclosed constitutional dispute(s) or issues, whether the Respondent violated the Petitioners right to fair administrative action, whether the Respondent violated the Petitioners right to fair labour practices, whether the Respondent violated the Petitioners right to equal treatment and whether the Respondent violated the Petitioners right to legitimate expectation.*

Locus

29. The Respondent, in the replying affidavit and written submissions contended that the Petitioners filed the Petition as a representative suit without evidence that the 1st Petitioner had the authority of the other Petitioners and therefore the Petition was irredeemably defective. Article 22(2) of the Constitution and paragraph 6 of the supporting affidavit were cited.

30. However, a perusal of the Petition does not reflect the submissions by the Respondent. All the Petitioners presented a joint Petition in their individual capacities and not on behalf of any other person(s). Such a step is contemplated under Article 22(1) and failure to file written authority is not fatal.

Whether the Petition raised/disclosed constitutional dispute(s) or issues.

31. The Respondent went to some length in its submissions to advance the position that the dispute(s) presented in the Petition revolved around private law rights and interests and therefore the Petitioners should have approached the Court in the ordinary way.

32. However, in the view of the Court, a determination whether an ordinary suit should have been the proper mode in the circumstances presented here cannot be made at the preliminary stage and in any case, a positive answer to any of the substantive issues posed by the Petitioners will dispose of the objection raised by the Respondent that the Petition as presented did not raise any constitutional issue/dispute.

33. Before examining the substance of the parties' cases and submissions, the Court has formed the view that it is imperative to outline the law on variation of employment contracts as it is possible that a verdict may be returned without reaching the constitutional issues posed.

The law on variation of employment contracts

The common law

34. A long chain of authorities on the common law suggest that for a variation of an employment contract to be lawful, there should be mutual agreement between the employer and the employee (or their representatives where there is organised labour).

35. The authorities also envisage that an employee's consent to the variation may be express or implied and can be inferred from conduct such as by remaining at work after revised terms have been imposed (see *Harlow v Artemis Ltd* (2008) IRLR 629; *Wandsworth B.C. v D'Silva* (1998) IRLR 193 and *Airlie v City of Edinburgh* (1996) IRLR 516).

36. The authorities further show that a unilateral variation of an employment contract without consent of the employee would amount to breach of contract or repudiation (*Rigby v Ferodo Ltd* (1987) IRLR 516, *Security and Facilities Division v Hayes* (2001) IRLR 81 and where the employee accepts the repudiation that would amount to constructive dismissal.

37. And as to the options available to the employee, the Employment Appeal Tribunal (UK) held in *Hogg v Dover College* (1990) ICR 39 that where an employer fundamentally varies a contract and the employee continues to serve, the employee may be taken to be serving a fresh contract and it is open to such an employee to bring an action for breach of contract in respect to the earlier contract while serving the new contract (see also *Alcan Extrusions v Yates & others* (1996) IRLR 327.

Statutory law

38. The principal legal architectural framework for employment contracts in Kenya is the Employment Act, 2007. This Act has fundamentally shifted the parameters within which the employment relationship is based.

39. It has codified some of the common law principles and outlined new protective rights particularly to employees.

40. Although predating the Constitution, 2010, the declared purpose of the Act was *to assert and define the fundamental rights and basic conditions of service of employees* and therefore in a certain respect, it sets out the contours of the right to fair labour practices envisaged under Article 41 of the Constitution.

41. Part III of the Employment Act, 2007 has tried to provide for the essentials (*essentialia*) of an employment contract and of particular interest in the instant case are section 10(2) which provide

A written contract of service shall state—

(a) the name, age, permanent address and sex of the employee;

(b) the name of the employer;

(c) the job description of the employment;

(d) the date of commencement of the employment;

(e) the form and duration of the contract;

42. And section 10(5) which is to the effect that

Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

43. The Employment Act, 2007 appears to contemplate consultations between an employer and employee where the essentialia of an employment contract are being altered.

44. The *essentialia* of a contract in this respect would include duration of contract, job description, identity of the employer, place and hours of work and remuneration among others.

Constitution

45. The cornerstone or fulcrum upon which the employment relationship turns in this country has been set out in Article 41 of the Constitution and it is not lawful labour practices or legal labour practices. It is *fair* labour practices.

46. *Fair labour practice* has not been defined expressly either in the Constitution or statute.

47. In such a case, in my view, it is the responsibility of Parliament to give the right content in the first instance and failing that, it is for this Court as a specialist Court to set out its contours, scope, limits and nature of the right on a case by case basis.

48. Although the primary statutes governing the employment and labour relations in this country predate the Constitution of Kenya, 2010, there are prescriptions scattered over the statutes which in one way or the other prescribe or direct as to what may comprise the content of fair labour practice(s) would be.

49. These prescriptive statutory rights and duties would include sections 9, 10, 11, 12, 13, 26 – 34, 35, 41, 43 and 45 of the Employment Act, 2007. These provisions serve as a beacon to the Court when called upon to determine what constitutes fair labour practice, and whether there has been an unfair labour practice.

50. In short, the jurisprudence on what practice would amount to an unfair labour practice goes further and or beyond what is legal or lawful.

51. The Court will now turn to an examination of the Issues as presented by the Petitioners and because the background facts are not in

dispute will only make reference to the facts as may be germane for determination of the issues.

Whether the Respondent violated the Petitioners right to fair administrative action

52. The place of the right to fair administrative action within the employment relationship has not been analysed in depth in this jurisdiction.

53. The Court of Appeal, High Court and some benches of this Court has held that the right applies within the employment relationship (see *Judicial Service Commission v Gladys Boss Shollei & Ar* (2014) eKLR and *County Government of Nyeri & Ar v Cecilia Wangeci Ndungu* (2015) eKLR. Most of these decisions relate to employment underpinned by public law and not to ordinary employees.

54. However, I have my misgivings as to whether such variation constituted administrative action.

55. The misgivings in my view arise because clear lines have not or may not be easily drawn in situations where an employer is acting as an employer, and situations where the action of the employer amounts to exercise of administrative power or function.

56. To dramatise the controversy or difficulty, one may ask, if a general worker or herds boy in the village allows the cattle to graze and destroy the neighbours crops and the employer fires him through the phone, can he challenge the decision as being against his right to fair administrative action?

57. In the present proceedings, the Petitioners contend that the variation of the initial contracts from open ended to fixed term contracts constituted administrative action and therefore should have met the test set out in Article 47 of the Constitution and the Fair Administrative Action Act, 2015.

58. Section 2 of the Fair Administrative Action provides that

The Act applies to all state and non-state agencies, including any person

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

59. In my view and taking comfort in the persuasive Constitutional Court of South African case of *Chirwa v Transnet Ltd & Ors* (2008) 2 BLLR 97 (CC), applying the right to fair administrative action to ordinary employment relationships would lead to absurd results, and because of the conclusion on other issues, which conclusion will become clear in due course, I am of the opinion that this is not a suitable case to give detailed reasons for my misgivings save to say that the Respondent was not *exercising administrative authority or performing a judicial or quasi-judicial function* in the case of the Petitioners.

Whether the Respondent violated the Petitioners right to fair labour practices

60. As already adverted to, the fulcrum upon which the employment relationship should be measured is the right to fair labour practices.

61. One of the primary employment statutes (Employment Act, 2007) require a written contract of service to have certain particulars. These particulars form the *essentia* of the employment contract and include name of employer, job description, date of commencement and duration of the contract, and remuneration.

62. Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an *essentia* of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.

63. The contracts issued to the 1st to 7th Petitioners were poorly drafted as apart from referring to an indeterminate period of probation contrary to the provision of section 42(2) of the Employment Act, 2007 that probation should not be for more than 6 months, the duration of the contracts were not set out.

64. But of more relevance is that the Respondent did not deny that it unilaterally varied the contracts of the 1st to 7th Petitioners (dated 13 June 2012) by converting them from contracts of an indefinite duration to fixed term contracts of 3 years through the letters of 30 January 2014.

65. The Variation of the 1st to 7th Petitioners contracts (from open ended contracts to contracts of a definite duration of 3 years also included reduction of responsibility allowance from Kshs 25,000/- to Kshs 10,000/- per month and withdrawal of risk allowance.

66. The Respondent also did not suggest that the variation(s) involved consultations with these Petitioners.

67. The decision by the Respondent in regard to the contracts of the 1st to 7th Petitioners (*1st Variation(s)*) as conveyed through letters of 30

January 2014 were therefore not only unlawful for being unilateral but also for lack of consultation and therefore amounted to a violation of the right to fair labour practices as it took away vested rights and entitlements.

68. The Respondent in effect repudiated the initial contracts and because of the fundamental nature of the variations, these Petitioners were being put on new contracts which they accepted, but that does not derogate from the position that legally the Respondent's unilateral action amounted to unfair labour practice.

69. Therefore, the contention by the Respondent that the Petitioners in effect had only 2 options, viz, treat the contract(s) as coming to an end and claim constructive dismissal or decide to stay and be bound by the new contract is not supported by persuasive case law, for the employee can take up the new contract but still claim breach of contract (the options are more than 2, see *Hogg v Dover College*, supra).

70. This approach is the more logical and fair one because inevitably, the bargaining power between the employer and employee can never be the same.

71. The 8th to 11th Petitioners were on contracts of a definite duration, which expired around May 2016, and in so far as the contracts expired, were extended pending formal contracts/renewal and they eventually were offered new contracts (*2nd Variation(s)* with revised terms and conditions of service, these new contracts were distinct and separate from the initial contracts (1st to 7th Petitioners were also serving new distinct contracts).

72. The Court in this regard cannot find the *2nd Variation(s)* a violation of the right to fair labour practices in respect of the Petitioners.

73. For clarity the Court would observe that the Respondent did not repudiate the contracts of the Petitioners (*2nd Variation(s)*) but the parties entered into new contracts after expiry of initial contracts. The said *variations* were properly not variations but offer(s) for new contracts with new terms and conditions of service.

74. In regards to the probationary period in the contracts of 28 June 2016, the Court is of the view that it was not proper and/or fair to put the Petitioners on fresh probation when they had satisfactorily served out the initial contracts, which contracts had been renewed, extended (or been entered into afresh).

Whether the Respondent violated the Petitioners right to dignity

75. The Petitioners did not submit on this issue and therefore the Court will not examine it.

Whether the Respondent violated the Petitioners right to legitimate expectation.

76. The Petitioners asserted that they had *legitimate expectation(s)* that the contracts would be renewed on better or similar terms and conditions as the then existing contracts including on remuneration and that the expectation(s) was founded upon representations made by the Respondent that they were considering putting them on long term contracts.

77. The Petitioners sought to rely on a South African decision, *South Africa Democratic Teachers Union & Ar v Education Labour Relations Council* Case No. JR 2575/09, but after perusing the decision, it is doubtful whether it supports the Petitioners case.

78. This doubt arises because the case turned on an interpretation of a particular statutory framework (section 186(1) of the South African Labour Relations Act) which expressly provides that a dismissal occurs when an employer refuses to renew a fixed term contract when an employee reasonably expected a renewal.

79. Further, the legal principle within that framework is one of *reasonable expectation* and not *legitimate expectation*.

80. The Petitioners did not attempt to draw any lines between the statutory concept of *reasonable expectation* as obtains in South Africa and *legitimate expectation* as understood in this jurisdiction. The Court has also noted that the Petitioners case was anchored on *legitimate* as opposed to *reasonable expectation* while submissions appeared to treat the two as similar.

81. In Kenya, the principle of legitimate expectation was discussed at length by the Supreme Court in *Communications Commission of Kenya & 5 Ors v Royal Media Services Ltd & 5 Ors* (2014) eKLR wherein the Supreme Court summarised the ingredients of legitimate expectation thus

The emerging principles may be succinctly set out as follows:

there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which it was competent and lawful for the decision-maker to make; and there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

82. In my view, the mere fact that the Petitioners were alerted that the Respondent was holding deliberations on the nature of new terms and conditions of employment including long term contracts was not sufficient to create legitimate expectation of *long term contracts* or amount to an *express, clear and unambiguous promise given by a public authority*.

Appropriate remedies/Orders

83. The Petitioners sought some 7 substantive orders which included preserving the initial contracts and the terms embodied thereon.

84. A remedy(ies) imposing terms and conditions of the contracts *ante* the variations/revisions would not be appropriate or fair as it may implicate other legal contests such as servitude and freedom of contract.

85. But because the Court has come to the conclusion that the unilateral variation of the 1st to 7th Petitioners contracts from open ended to fixed term contracts was unlawful and amounted to an unfair labour practice, despite the fact that they continue to offer services albeit under new contracts and considering that these Petitioners were occasioned legal injuries including in terms of remuneration, such injuries ought to be remedied in terms of Article 23 of the Constitution and section 12(3) of the Employment and Labour Relations Court Act, the Court is of the view and orders that

(a) A declaration is hereby issued that the unilateral variation of the 1st to 7th Petitioners contracts of employment from open ended contracts to 3 year contracts was in violation of the right to fair labour practices as enshrined in Article 41 of the Constitution.

(b) the 1st to 7th Petitioners be awarded Kshs 750,000/- each as damages for unfair labour practice(s)/breach of contract(s).

86. The Court finds no merit in the cases of the 8th to 11th Petitioners and orders the same dismissed.

87. Because of the ongoing employment relationship between the parties, each party to bear own costs.

Delivered, dated and signed in Nakuru on this 24th day of February 2017.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Ongoya instructed by Ongoya & Wambola Advocates

For Respondent Mr. Wakwaya instructed by Rachier & Amollo Advocates

Court Assistants Nixon/Daisy