



Wanjiku & 10 others v Chief Registrar of the Judiciary & another (Cause 912 of 2014) [2017] KEELRC 1696 (KLR) (21 February 2017) (Judgment)

Agnes wanjiku & 10 others v Chief Registrar of the Judiciary & another [2017] eKLR

Neutral citation: [2017] KEELRC 1696 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 912 OF 2014

HS WASILWA, J

FEBRUARY 21, 2017

BETWEEN

- AGNES WANJIKU 1ST CLAIMANT
- , BENJAMIN MWANGI 2ND CLAIMANT
- BRIDGIT KASEMBELI 3RD CLAIMANT
- CAROLINE WANGUI 4TH CLAIMANT
- EDWIN WAITHAKA 5TH CLAIMANT
- GODFREY BWIRE 6TH CLAIMANT
- JACOB KIPKIRUI 7TH CLAIMANT
- LOYCE JUM 8TH CLAIMANT
- , KENNETH KIBIRU 9TH CLAIMANT
- PAUL MUNDIA 10TH CLAIMANT
- VICTOR ODUNDO 11TH CLAIMANT

AND

- CHIEF REGISTRAR OF THE JUDICIARY 1ST RESPONDENT
- THE JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

Court rejects unfair termination claim due to lack of an employer - employee relationship

The claimants alleged unlawful termination by the respondents, claiming that they served as interns to the registries of the Industrial Court and Employment and Labour Relations Court for two years. The claimants'



argument of unlawful termination was dismissed by the court. The dismissal hinged on the fact that proper hiring procedures outlined by the Judicial Service Commission were not followed in their case.

Reported by Kimurgo Daisy, Nyakundi Brian, and John Ribia

Labour Law – employment – internships – interns of court registries - interns who were allowed to continue working and receive daily allowances after their internship ended - whether the act of allowing interns to continue working after their internship and receiving daily allowances constituted formal employment - whether Court Registry interns, who were allowed to continue working and receive daily allowances after their internship ended, could be considered permanent and pensionable employees of the Judiciary Service Commission, despite the absence of a competitive recruitment process - Constitution of Kenya, articles 41, and 172; Employment Act (Cap. 226) sections 2, and 37.

Labour Law – employment – termination – unfair termination of interns - whether interns could claim unfair termination - whether one could claim unfair termination where the relationship of employer, employee did not exist - Employment Act (Cap. 226) sections 2, and 37.

Brief facts

The claimants initially joined the respondent's as student interns. The internship was for a period of time. Upon completion of the internship, the students were released from their internship. However, they were allowed to hold fort and were paid some daily allowances of up to Kshs. 1,000 per day. The payments were however subject to statutory deductions. They were later transferred to the Industrial Court where their daily allowance was set at Kshs. 450 per day, exclusive of an amount of Ksh.50.00 which was explained as tax. The claimants throughout this time were invited to attend trainings on Transformation of the Judiciary. There was however no substantive appointment letter issued to the claimants to convert them from student interns to employees.

Upon release from their positions, the claimants filed the instant suit where they sought for their relationship with the respondents after the expiry of the initial period of internship to be deemed as employment. The claimants sought to be reinstated and for the respondent be ordered to convert the Claimants employment to permanent and pensionable contracts without any loss of privileges, benefits and promotions.

The respondents contended that they had a policy governing the employment of all staff in the judiciary and at no time were the claimants' employees of the respondents. Moreover, that while some of the claimants joined as interns, others joined them on temporary terms.

Issues

- i. Whether allowing interns to continue working after their internship and receiving daily allowances constituted formal employment.
- ii. Whether Court Registry interns, who were allowed to continue working and receive daily allowances after their internship ended, could be considered permanent and pensionable employees of the Judiciary Service Commission, despite the absence of a competitive recruitment process.
- iii. Whether one could claim unfair termination where the relationship of employer, employee did not exist.

Held

1. The Judicial Service Commission was the employer of all staff in the Judiciary. The Judicial Service Commission received its mandate from article 172 of the Constitution and had duties and responsibility including appointing, receiving complaints against, investigating and removing from office or otherwise discipline Registrars, Magistrates and other Judicial Officers and other staff of the Judiciary.
2. Appointments and recruitments made without following policy guidelines were unlawful. The claimants served the Judiciary but their entry was premised on helping the defunct Industrial Court transit to the Employment and Labour Relations Court. No advertisements for the jobs were



made. They didn't go through a competitive recruitment process. That could not be deemed as an appointment.

3. The employee- employer relationship did not exist between the claimants and respondents and therefore they could not allege unfair termination.

Petition dismissed; each party was to bear their costs.

Citations

Cases

Kenya

1. *County Government Workers Union v County Government of Nyeri & another* Petition No 10 of 2015; [2015] eKLR - (Explained)
2. *Oduor, Maurice Okech v Chequered Flag Limited* Cause 12 of 2011; [2011] eKLR - (Mentioned)
3. *Okemwa & 8 others v Judicial Service Commission* Cause 16 of 2014; [2016] KEELRC 244 (KLR) - (Explained)
4. *Onyango, George Akuti v G4S Security Services Kenya Ltd* Cause 107 of 2013; [2013] eKLR - (Explained)
5. *Trusted Society of Human Rights Alliance v Nakuru Water & Sanitation Services Company & another* Petition 5 of 2013 - (Explained)
6. *Wambugu, Peter Kariuki & 16 others v Kenya Agricultural Research Institute* Petition 2 of 2013; [2013] KEELRC 373 (KLR) - (Explained)

United Kingdom

Sander v Edwards [1987] 1 WLR 1116 (13 March 1987) - (Explained)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 41,172 - (Interpreted)
2. Employment Act, 2007 (Act No 11 of 2007) sections 2, 37- (Interpreted)

Advocates

Kilonzo h/b for *Issa* for Respondent

JUDGMENT

1. The statement of claim dated May 30, 2014, filed through the firm of Onyony & Company Advocates cites the following as issues in dispute;
 1. Unfair, unlawful and wrongful termination of the claimants;
 2. Employ of discriminative employment policy and practices by the respondents against the claimants;
 3. Unlawful and illegal withholding or non-payment of the claimants' salaries total to Kshs 484,000.00 as at May 2014.
2. This was also followed by an amended memorandum of claim raising the following issues in dispute;
 1. Unfair, unlawful and wrongful summary dismissal of the claimants;
 2. Employ of discriminative employment policy and practices by the respondent against the claimants;
 3. Unlawful and illegal withholding of the claimants salaries totaling to Kshs 231,000.00;



4. Unfair labour practices by the respondents contrary to article 41 of the [*Constitution of Kenya, 2010*](#);
 5. Non-payment of the claimants' terminal dues and benefits.
3. The claimants' case is that the claimants had been in continuous and uninterrupted employees with the respondents for about two years since 2012. They served as court clerks to the judges of the superior courts, registry clerks in the superior courts and secretaries to judges of the superior courts. The claimants also claim and aver that during their employment they received training to enhance their performance as judicial staff.
 4. They aver that they were engaged with the 2nd respondent as clerical, secretarial and support staff in the various divisions of the High Court, the Supreme Court of Kenya, the Chief Magistrates Court between the months of August 2012 and November 2012.
 5. The claimants further contend and submit that they were to be paid a facilitation amount of Ksh 1,000.00 per day on commencement of employment. The claimants were subsequently and through a meeting transferred to the Industrial Court by Mr Jackson Ngila, Executive Officer on or around November, 2012 on directions from the Registrar, High Court of Kenya. The transfer brought a worrisome state of affairs as the claimants pay in the new station was Ksh.450.00 exclusive of an amount of Ksh 50.00 which was explained as tax. No explanation was made on their balance of pay of Ksh 500.00.
 6. Later and in the course of time the claimants in their employment undertook and were invited to attend and participate in various workshops and trainings organized by the respondents all geared at boosting service delivery by Judiciary Staff with a view to enhancing the delivery of justice. These trainings were meant and intended for permanent, pensionable and term contract employees but also involved the claimants.
 7. The claimants further aver and submit that at the judicial workshop they were encouraged to enhance their academic prowess and professionalism leading to their enrolment for further academic programmes, some at universities. They were issued with certificates of participation for these trainings.
 8. The claimants further contend and submit that the action of termination of employment by the respondents is also a violation and transgression of paragraph 3.2.1: KRA 4 on philosophy and culture of Judicial Transformation Framework which provides as follows:-

“A progressive philosophy requires imaginative jurisprudence from the Bench, and a responsive staff from the Registry. In this Framework, accountability, integrity, openness, results and humility are values that will undergird the decision design of the Judiciary and inform the daily conduct of its staff”.
 9. This also is a violation of paragraph 3.2.3.: KRA 6 on organization structure providing as follows:-

“Every staff recruited, from judges and magistrates to judicial staff, will undergo a formal induction process and will have formal job descriptions. A continuous learning and training programmes will be institutionalized at Judicial Training Institute”.
 10. The claimants observe breach on the part of the respondents as they have not to date issued formal contracts or formalized their job descriptions despite attendance and participation in numerous trainings and workshops. The reference to themselves as student clerks and casuals is also a violation of employment and labour law and fair labour practices by the respondents.



11. The claimants further case is that the respondents knowingly caused the claimants to formulate reasonable expectation for long term employment and pensionable services through encouraging and facilitating the claimants participation in trainings and workshop intended for permanent and pensionable staff as well as retention for 2 years while performing similar value work as the permanent employees.
12. The claimants finally aver and submit that they have suffered loss and pray and seek relief as follows;
 1. That the respondents be ordered to release the claimants salaries withheld for the months of April and May 2012 totaling 231,000.00;
 2. That the Respondents be ordered to release underpayments of the claimants' salaries totaling Kshs 12,122,991.00;
 3. Service/Gratuity pay of Kshs 980,889.03 as tabulated under paragraph 59;
 4. That the respondents be ordered to make payments for the unlawful deductions as tabulated at paragraph 60 totaling Kshs 990,000.00;
 5. That the respondents be ordered to convert the claimants employment to permanent and pensionable contracts without any loss of privileges, benefits and promotions;
 6. That the respondents be restrained and prohibited from employing any replacement labour and/or employees in the same position to perform similar duties as the claimants until this suit is heard and finally determined;
 7. That the claimants be reinstated to their appointed place of work;
 8. That a declaration that the service of the termination letter dated May 1, 2014 on May 26, 2014 was unlawful and the claimants are entitled to damages ;
 9. Payment of one month's salary in lieu of notice;
 10. Issuance of claimants with Certificate of Service;
 11. Constitutional damages for unfair labour practices;
 12. In the alternative and without prejudice to the above the respondents be ordered to pay compensation for premature and unlawful summary dismissal payment in full amount of salary until their retirement age of 60 years as tabulated in paragraph 58 totaling kshs 96,096,000;
 13. General damages and costs of this suit; and
 14. Any other relief that this honourable court may deem just and fit to grant.
13. The respondents on the other hand filed their response to the amended memorandum of claim dated June 24, 2014, on the subject. On July 7, 2014, they also filed witness statements both dated July 4, 2014 by the Registrar of the High Court and also the Registrar of the Judicial Service Commission.
14. They state that the Judiciary has a Scheme of Service and a Human Resource Policy governing the employment of all members of staff. That at no time were the claimants ever appointed or employed to work in the Judiciary as no resolution was passed by the 2nd respondent to that effect.
15. In relation to the claimants' engagement they aver and submit that:



1. The 1st claimant, Agnes Wanjiku applied for internship in the Judiciary and by letter dated October 9, 2012, was offered attachment in the Secretarial Pool at Milimani Law Courts. The duration of attachment was three (3) months with no pay. The claimant was issued with a recommendation letter dated January 23, 2013, and a release letter dated October 30, 2013. She was officially released from her duties with effect from November 7, 2013. However they state, she continued to work at the Judiciary without any authorization.
 2. The 2nd claimant Benjamin Mwangi applied for practical attachment to the Judiciary and by letter dated August 13, 2012, he was offered attachment at the High Court Civil Archives at the Supreme Court. The duration of attachment was three (3) months with no pay.
 3. The 3rd and 4th claimants, Bridgit Kasembeli and Caroline Wangui were Secretaries on attachment and reported to the Judiciary on September 29, 2012.
 4. The 5th claimant, Edwin Waithaka was appointed as a student clerk on temporary terms for a period on one (1) year by a letter of appointment dated November 30, 2012. The claimant was to be paid Kshs 1,000.00 per day excluding weekends.
 5. The 6th claimant Godfrey Bwire applied for attachment to the Judiciary and his application was received on July 11, 2012. The claimant was offered attachment on August 16, 2012, at the Milimani Chief Magistrates Court. He was issued with a recommendation letter dated August 27, 2013, which indicated that he had worked at the Industrial Court as a Clerk on temporary basis from September 2012, to August 31, 2013.
 6. The 7th claimant, Jacob Kipkirui was on practical attachment at the High Court Criminal and traffic registries for a duration of eight (8) weeks with effect from September 3, 2012. He was issued with a recommendation letter dated August 27, 2013, which indicated that he had worked at the Industrial Court as a Clerk on temporary basis from September 2012 to August 31, 2013.
 7. The 8th claimant Loise Juma was a student on practical attachment as a Secretary. She reported on February 21, 2013.
 8. The 9th claimant, Kenneth Kibiro worked at the Industrial Court as a Clerk on temporary basis from September 2012, to 3August 1, 2012. He was issued with a recommendation letter dated August 27, 2013, which indicated that he had worked at the Industrial Court as a Clerk on temporary basis from September, 2012.
 9. The 10th claimant, Paul Mundia applied for practical attachment to the Judiciary and by letter dated August 13, 2012, he was offered attachment at the High Court Civil Archives at he the Supreme Court. The duration of the attachment was three (3) months with no pay. He was issued with a recommendation letter dated August 27, 2013, which indicated that they had worked at the Industrial Court as Clerk on temporary basis from September 2012 to 31.8.2013.
 10. The 11th claimant, Victor Odundo was offered practical attachment by a notification memorandum dated October 22, 2012. The Claimant was attached at the High Court Family Division for a duration of three (3) months.
16. The respondents admit that they confirmed that the claimants were students on attachment and were available for one (1) year and could be placed on contract employment however, after the end of the attachment period none of them was placed on contract employment.



17. The respondents further state that the claimants were paid allowances on various months as they were on temporary engagement but owing to the fact that they were not employees, no statutory deductions or payments could be effected to both the HNIF and NSSF.
18. They further contend that participation in the Judicial Transformation Workshops does not confirm that they were employees or change their status from being interns or students on attachment. They deny that they violated the claimants' reasonable expectation for long term permanent employment.
19. It is the respondents' contention that they lawfully released the claimants from the judiciary and that the 2nd respondent acted within its mandate in so doing. They pray for the claim to be dismissed with costs.

Submissions

20. The claimants submit that they were terminated without following the laid down procedure of termination of an employee set out in article 41 of the [Constitution of Kenya 2010](#) and the [Employment Act 2007](#). They are of the view that the Judicial Service Act does not in any way govern employer/employee relationship.
21. It is the claimants position that the 2nd respondent regularly employed them on casual basis for more than three (3) months hence the relationship automatically converted to a permanent status by virtue of section 37 of the [Employment Act 2007](#). They Rely on the case of County Government Workers Union v County Government of Nyeri & another Petition No 10 of 2015 where it was held:

“A casual employee is defined under section 2 of the Employment Act, 2007 to mean a person the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time. The court has considered the material on record and finds that the petitioners were not casual workers because they were engaged for a longer period than twenty four hours at a time. They served for many days without any break in their service. Each of the petitioners served for more than three continuous months and the Respondent was required to reduce their contract of service in writing as provided for in section 9(1) of the Act.”

22. The claimants submit that there was an employment relationship in existence and the respondents are estopped from denying it. They rely on the case of [Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute](#) [2013]eKLR where it was stated:

“Petitioners have submitted that the minimum terms of service under the Act applied to their service. Under section 10(7) of the Act, it is the burden of the respondent to prove or disapprove the terms of employment in absence of the written terms. It is the finding of the court that the respondents has failed to discharge that burden,, It is the further finding of the court that the respondent has failed to discharge that burden. It is the further finding of the court that an employer subjects the employee to unfair labour practices as protected in article 41(1) of the Constitution of the employer, like in this case, by omission or action fails to uphold the statutory provisions that protect the employee. The court also finds that casual employment does not exist merely because the agreement between the parties states that they are in such arrangement; casual employment is a state of existence to be deciphered from the facts of individual cases as weighed against the cited statutory definition of casual employee.”



23. Having submitted that they were employees they state that they are entitled to all rights and benefits appurtenant to such status. The respondents ought to have followed the process encapsulated in the [Employment Act, 2007](#).
24. They finally submit that since it is not denied that due process was not followed, the claim be allowed as drawn.
25. The respondents submit that the 1st respondent is not a necessary party to the suit as she is the Secretary of the 2nd respondent and as such there is no basis in law to enjoin her in her individual capacity to these proceedings.
26. The respondents further submit that the claimants were never appointed or employed to work in the Judiciary as required by the Third Schedule of the Judicial Service Act and in particular Part III of the Schedule.
27. They submit that the claimants individually applied for attachment and were subsequently offered three (3) months unpaid attachment opportunity as part of their course work. There was as such never an employer-employee relationship between the claimants and the 2nd respondent. They cite the case of [Maurice Oduor Okech v Chequered Flag Limited](#) [2013] eKLR where it was held:
- “In determining the existence of an employment relationship the court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the [Employment Act, 2007](#), actually exists.”
28. It is the respondents’ submission that the claimants did not qualify as casual employees either. The claimants were engaged on attachment/internship and at the end of the three (3) months the Registrar of the High Court opted to extend their internship which decision was communicated to them on 30th November, 2012, and would be entitled to a daily allowance of Kshs. 1000 per day. The terms of extension were very clear and they never at one point misrepresented the facts about the positions to the claimants.
29. The respondent goes on to submit that the fact that the claimants received an allowance did not mean that they were receiving a daily wage as there was no employment relationship. They cite section 2 of the [Employment Act, 2007](#), which defines remuneration as:
- “The total value of all payments in money or in kind, made or owing to an employee arising from the employee of that employee.”
30. The respondents submit that the claimants were never discriminated against as alleged. They state that the fact that the claimants did the same work as clerks on permanent contract but were not discriminated by being subjected to payment disparity. They state that this argument does not fly as they were never employees.
31. It is the respondents’ submission that the claimants were never unlawfully terminated because such can only happen where an employment relationship exists and in this case there is none. They rely on the case of [George Onyango Akuti v G4S Security Services Kenya Limited](#) [2013] eKLR where it was stated:
- “An unfair termination could be because no notice was given by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of



the Act. The reasons can be various based on failure to comply with statute or the terms of the actual employment contract.”

32. The respondents finally submit that the claimants are not entitled to damages as they are only payable where there has been unlawful termination of an employment relationship as was stated in the case of *Maurice Oduor Okech v Chequered Flag Limited* [2013] eKLR.
33. I have considered the evidence and submissions of both parties. I note that the claimants initially joined the respondent’s as student interns. The internship was for a period of time as exhibited from the documents on record. Upon completion of the internship, the students were released from their internship.
34. However, they were allowed to hold fort and were paid some daily allowances of upto 1,000/= per day.
35. These payments were however subject to statutory deductions. There was however no substantive appointment letter issued to the claimants to convert them from student interns to employees.
36. It is true that the claimants kept serving the courts and were occasionally invited to take part in training programmes to improve their skills. The question then is how this court views their relationship with the Judiciary.
37. In the case of *Nicholas Okemwa & 8 others v Judicial Service Commission* eKLR [2016] Hon J Ndolo examined issues of employment of staff in the Judiciary and noted that there are procedures.
38. The Judicial Service Commission is the employer of all staff in the Judiciary. The Judicial Service Commission receives its mandate from article 172 of the *Constitution* and has duties and responsibility including:-
 - “Appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates and other Judicial Officers and other staff of the Judiciary, in a manner prescribed by an Act of Parliament”.
39. Article 172(2) of the Constitution states that:
 - “(2) In the performance of its functions, the Commission shall be guided by the following:-
 - (a) competitiveness and transparent process of appointment of judicial officers and other staff of the judiciary; and
 - (b) the promotion of gender equality.
40. In the case of alleged “appointments” of the claimants herein the Judicial Service Commission was never involved. The claimants never went through any competitive process of recruitment and their serving within the Judiciary cannot be equated to any appointment.
41. They were however informed they will do some casual jobs to help in retrieving some documents from the archives and later were asked to serve in registry and in court.
42. In the case of *Trusted Society of Human Rights Alliance v Nakuru Water & Sanitation Services Company & another* [2013] eKLR Hon J Ongaya considered appointments made without following due process and held that a recruitment undertaken outside established policy guidelines and regulations were unlawful.



43. The claimants indeed served the Judiciary but their entry was premised on helping the defunct Industrial Court transit to the Employment & Labour Relations Court. No advertisements for the jobs were made. They didn't go through a competitive recruitment process.
44. This court cannot term that an appointment. This principle was also cited by Ndolo J citing *Sander v Edwards* [1981] WLR 116. In Sander case (*supra*) Birnghm LJ noted as follows:
- “the courts are to adopt a programmatic approach to these problems seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or contenance a nefarious object or object which it is bond to condemn ---- where issues of illegality are raised, the courts have to steer a middle course between two unacceptable positions ----- on the one hand, it is unacceptable that any court should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits -----.”
45. Based on the above argument and the law, it is my finding that the relationship of employer employee did not exist between the claimants and respondents and therefore they cannot allege unfair termination.
46. It is therefore my finding that the claimants are not entitled to the reliefs sought and accordingly dismiss their claims. Given the intricate nature of the claim, each party will bear its own costs.

READ IN OPEN COURT THIS 21ST DAY OF FEBRUARY, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo holding brief for Issa for Respondent – Present

Claimants- Absent

