



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 168 OF 2016

DADSON MAINA AND 33 OTHERS.....CLAIMANTS

-VERSUS-

THE BOARD OF MANAGEMENT,

NYERI PRIMARY SCHOOL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th May, 2017)

JUDGMENT

The claimants are employed by the respondent and they serve in various capacities. They filed the memorandum of claim on 04.08.2016 through EKN LLP Advocates. They prayed for judgment against the respondent for:

- a) A declaration that the respondent's conduct herein and in particular the wilful failure, refusal, delay and neglect to implement the DPM Circulars of 1st June, 2011 and 25th June, 2012 respectively as issued by the Ministry of State for Public Service to raise or reflect on the salaries of the employees herein, claimants, is unconscionable and amounts to flagrant breach and anticipatory breach of the employment agreement in terms of stated circulars.
- b) An order of specific performance do issue to compel the respondent within such duration as the Honourable Court deems just to specifically perform their obligations under the stated circulars of 1st June, 2011 and 25th June 2012 and in particular to pay the employees amounts owing and outstanding.
- c) An order to issue directing the respondent to pay overtime dues and arrears thereof.
- d) The respondent to pay the claimants the sum of Kshs.9,634,098 .00 being the sum of monies to be paid by the respondent to the employees jointly and severally as staged payments aforesaid to date plus interest thereon at court rates from the date of the circulars.
- e) General damages for breach of contract.
- f) Costs of the proceedings.
- g) Any other or further relief the honourable court may deem fit to grant in the circumstances.

The claimants' case is that they hold employment in the respondent's non – teaching service in various

job groups being B, C, D, E, F, and G. The claimants' claim is that they serve on permanent and pensionable terms of employment and they are entitled to the same terms and conditions of service as per their counterparts in the civil service, the respondent's school being a public school. Thus, the claimants state that Government Circulars on terms and conditions of service that apply to the civil servants also apply to the claimants accordingly.

The claimants' case is that the Ministry of State for Public Service in Kenya through a circular dated 25.06.2012 ordered the re-alignment of salary structure for public servants effective 01.07.2012 forthwith. The claimants' case is that the respondent implemented the circular on 01.01.2013 but has neglected to implement the circular fully. The claimants claim commuter allowance being phase 1 effective 01.07.2010 per Circular dated 17.08.2010; and phase 2 on commuter allowance effective 01.07.2011 per the circular dated 27.06.2011.

The claimants also claim salary arrears per circular dated 01.07.2012 which awarded salary increments and respondent partially implemented the increment leaving behind arrears for of 6 months. They also claim outstanding annual leave allowance per circular of 02.11.2006 and the arrears as accrued be paid accordingly. The claimants claim for payment of medical certificate fee reimbursement for past 3 years for workers handling food and which the respondent agreed to pay effective 2016 but has not implemented the same as affected workers continued to meet the cost. Finally the claimants claimed basic salary arrears in view of the circulars and for the period 01.07.2012 to December 2012.

The claims for each claimant are set out in the memorandum of claims as liquidated damages or dues flowing from the prayer for specific performance of the contract of employment in compliance with the circulars of 01.06.2011 and 25.06.2016.

The respondent opposed the suit by filing a notice of preliminary objection on 20.09.2016 through P. Gisemba, Litigation Counsel, for the Attorney General. The respondent opposed the suit upon the following grounds:

- a) That the Directorate of Personnel Management (DPM) circulars upon which the claimants have based their claim did not apply to them since they are not civil servants.
- b) That the claimants were employed under the 4th Schedule, Part 1 section 13 of the Basic Education Act upon such terms and conditions of service as the County Education Board may determine.

The respondent prayed that the claimant's suit be dismissed with costs.

As the respondent did not file a response and relied upon the preliminary objection alone, parties opted and the court directed filing of final submissions based on the material on record.

The 1st issue for determination is whether the government circulars as issued by the Directorate of Personnel Management (DPM) applied to the claimants because the claimants were not civil servants. Article 260 of the Constitution on interpretation does not define "**civil servant**". Instead, the Article defines "**public office**" to mean an office in the national government or the public service, if the remuneration and benefits of the office are payable directly from the consolidated or directly out of the money provided by Parliament. The Article then defines "**public service**" to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. The Article defines "**state organ**" to mean a commission, office, agency or other body established under the Constitution. The Concise Oxford English Dictionary defines "**Civil Service**" as the permanent professional branches of state administration, excluding military, judicial branch and elected politicians. The court finds that the phrase "**civil service**" is included in the constitutional definition of public service and "**civil service**" does not import any special legal meaning other than the literal dictionary definition and the phrase not having been used in the constitutional or statutory provisions, the submission that was placed on it for the respondent to define the scope of the circulars will collapse. The court returns that the circulars referred and applied to public service and there were no reasons to exclude the claimants in their application as the

claimants served and were emplaced on the Job Group establishment as was envisaged in the circulars.

The court has considered the cited constitutional definitions. The Fourth Schedule to the Constitution on distribution of functions between the national government and county government at paragraph 16 vests in the national government universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education schools. The court finds that institutions established by the national government to undertake such functions as vested are clearly part of public services and they include public primary schools such as the one managed by the respondent. The court finds that the persons employed by the respondent clearly hold a public office and are public officers within the constitutional definition of public service; the court holds that such employees are clearly in the service of the Government department responsible for the vested constitutional functions and in this case, the Ministry of Education.

The court has considered the designation and emplacement of the claimants into Job Groups. In absence of any other material on record, the court finds that the Job Groups applicable to the claimants and as applied to them can only mean and refer to the Job Groups as was implemented and invoked by the Government in the circulars as relied upon by the claimants. The claimants serve in the public school clearly established under the state department responsible for education and there is no reason to doubt that the claimants serve as part of the public service. In the findings of the court, the phrase “**civil service**” as applied in the circulars could only be interpreted to mean public service as envisaged by the Constitution. While the circular of 25.06.2012 referred to re-alignment of salary structure for civil servants, at paragraph 1 it specifically stated that it was meant to restore harmony and equity in the public service remuneration structure and banding system. The respondent has not showed that there existed a separate system and establishment upon which the claimants would be designated and emplaced in Job Groups and remuneration structure other than as was pleaded for the claimants. In the conclusive consideration, the court returns that the circulars applied to the claimants.

In any event, the court has considered that the circulars did not specifically exclude the claimants and further the respondent has not disputed the claimants’ case that the respondent had already partially implemented the circulars.

The court has further considered section 28 (1) of the Basic Education Act, 2013 which provides that the Cabinet Secretary shall implement the right of every child to free and compulsory basic education and the court returns that the realisation of the provision must be embedded on the foundational position that the finances (including remuneration to the claimants who serve in a public school) would therefore be provided out of public funds provided by Parliament so that the claimants are clearly part of the public service within the constitutional definition. Thus section 88 (2) (a) of the Act states that the annual estimates (to be prepared by the Cabinet Secretary) shall make provision for the financial year and shall provide for the payment of salaries, allowances and other charges in respect of the staff of the department, and, (b), provision for the payment of pensions, gratuity and other charges in respect of retirement benefits which are payable out of the funds of the department. Thus the court returns that the claimants were clearly part of the public service as per the constitutional provisions and are entitled to full enjoyment of the provisions of the applicable circulars.

While making that finding the court returns and holds that remuneration, service benefits and pensions or gratuities or other retirement benefits for the non-teaching staff employed by pre-primary, primary or secondary school Board of Management are payable out of funds provided by the Parliament and the persons so employed are clearly public officers being part of the public service as defined in the Constitution.

The **2nd issue** for determination is whether the claimants were employed under the 4th Schedule, Part 1 section 13 of the Basic Education Act upon such terms and conditions of service as the County Education Board may determine. The functions of the County Education Board are set out in section 18 of the Basic Education Act, 2013 and do not include employing the respondent’s staff such as the claimants. The 4th Schedule to the Act provides for the Conduct of Business and Affairs of the Board of Management such as the respondent. Section 13 of the 4th Schedule provides that a Board of Management such as the

respondent, may, upon such terms and conditions of service as the County Education Board may determine, employ such staff or hire the services of such consultants or experts as may be necessary for the performance of its functions. The marginal note reads, “**Appointment of staff of the Board of Management.**” The court has considered the provision. The court returns that the section provides for employment of persons to serve the board, not the staff employed by the board to serve the institution the board is established to manage. The court considers that a clear distinction must be drawn between the staff of the board and the staff of the institution the board manages, such as the claimants in the present case. The court returns that section 13 relates to such staff and persons including experts that the board may employ or contract to assist the board to discharge its functions; and under the section the County Education Board will determine such persons’ remuneration.

On the other hand, the court has considered the provisions of the Basic Education Act and returns that the Board of Management of a basic education institution such as the respondent may employ staff to serve the institution, in this case the respondent’s school, under section 59 (p) of the Act. The section provides that the Board of Management will recruit, employ and remunerate such number of non-teaching staff as may be required by the institution in accordance with the Act.

The court has considered Article 41 of the Constitution that every person has the right to fair labour practices and every worker has the right to fair remuneration and to reasonable working conditions. The court has further considered its obligation and the obligation of every employer to promote equality of opportunity in employment in order to eliminate discrimination in employment and, to strive to eliminate discrimination in any employment policy or practice, as provided in section 5 of the Employment Act, 2007. The court finds that the persons employed by the Board of Management under section 59 (p) are public officers and are part of the public service paid out of funds provided by the Parliament within the framework of free basic education. There would be no reason to impose upon such public officers such disadvantageous terms and conditions of service including disadvantageous remuneration and other benefits compared to other public officers serving elsewhere in the national government or the county governments and at levels similar to such officers. This court holds that to confer such variant and disadvantageous terms would be in contravention of the cited provisions of Article 41 and section 5 of the Employment Act, 2007.

To answer the 2nd issue for determination, the court returns that the claimants were not employed under the 4th Schedule, Part 1 section 13 of the Basic Education Act, 2013 and upon such terms and conditions of service as the County Education Board may determine. It is the finding of the court that the claimants were employed by the respondent under section 59 (p) of the Act and paid out of the funds of the Department of Education as established and provided for under section 86 of the Act as read with section 88 2(a) and (b) of the Act. The determination of the levels of pay, in absence of a specific provision in that regard, is fixed and reviewed in accordance with the constitutional and statutory provisions applicable to the rest of the public service and communicated from time to time like in the circulars the claimants have relied upon.

The 3rd issue for determination is whether the claimants are entitled to the remedies as prayed for. The court makes findings as follows:

a) The court returns that the claimants are entitled to the declaration that the respondent’s conduct herein and in particular the wilful failure, refusal, delay and neglect to implement the DPM Circulars of 1st June, 2011 and 25th June, 2012 respectively as issued by the Ministry of State for Public Service to raise or reflect on the salaries of the employees herein, the claimants, is unconscionable and amounts to flagrant breach and anticipatory breach of the employment agreement in terms of stated circulars.

b) The court returns that the claimants are entitled to an order of specific performance to issue to compel the respondent within such duration as the Honourable Court deems just and to specifically perform their obligations under the stated circulars of 1st June, 2011 and 25th June 2012 and in particular to pay the employees amounts owing and outstanding. In that regard and taking into

account the government's financial year and budgetary process, all outstanding dues be paid not later than 15.12.2017 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

c) The claimants are entitled to the order to issue directing the respondent to pay overdue dues and arrears thereof.

d) The claimants are entitled to the respondent to pay the claimants the sum of Kshs.9,634,098.00 being the sum of monies to be paid by the respondent to the employees jointly and severally as staged payments aforesaid by 15.12.2017 failing interest at court rates to be payable there on from the date of the judgment till the date of full payment.

e) As claimants made no submissions on general damages for breach of contract, the prayer is deemed abandoned.

f) The respondent to pay the claimants' costs of the suit.

While making the findings the court returns that the respondent did not file a response to dispute any of the facts as pleaded for the claimants and the respondent is deemed to have admitted all the facts of the case. The court has further considered that there is no material on record that suggest that the circulars did not apply to the claimants as the respondent did not urge and demonstrate alternative applicable terms and conditions of service; or rebut the claimants' case that in fact, the respondent had partially implemented the terms of the circulars.

Further, the court has considered the nationwide consequences of this judgment and the likely multiplicity of similar suits across the country. In the circumstances, the claimants will serve this judgment upon the Cabinet Secretary responsible for Education and implementation of the Basic Education Act, 2013 with a view of noting and instituting appropriate executive and governance measures which will hopefully avert multiplicity of similar suits across the country. In that regard the claimants will serve this judgment upon the Cabinet Secretary within 7 days from the date of this judgment.

In conclusion, judgment is hereby entered for the claimants against the respondent for:

a) The declaration that the respondent's conduct herein and in particular the wilful failure, refusal, delay and neglect to implement the DPM Circulars of 1st June, 2011 and 25th June, 2012 respectively as issued by the Ministry of State for Public Service to raise or reflect on the salaries of the employees herein, the claimants, is unconscionable and amounts to flagrant breach and anticipatory breach of the employment agreement in terms of stated circulars.

b) The order of specific performance hereby issued compelling the respondent by 15.12.2017 to specifically perform their obligations under the stated circulars of 1st June, 2011 and 25th June 2012 and in particular to pay the employees amounts owing and outstanding - failing interest at court rates to be payable thereon from the date of this judgment till full payment.

c) The respondent to pay overdue dues and arrears thereof as per order (b).

d) The respondent to pay the claimants the sum of Kshs.9,634,098 .00 being the sum of monies to be paid by the respondent to the employees jointly and severally as staged payments aforesaid by 15.12.2017 failing interest at court rates to be payable there on from the date of the judgment till the date of full payment.

e) The claimants to serve this judgment, within 7 days from the date of this judgment, upon the Cabinet Secretary responsible for Education and implementation of the Basic Education Act, 2013 with a view of the Cabinet Secretary noting and instituting appropriate executive and governance measures aimed at averting multiplicity of similar suits across the country.

f) The respondent to pay the claimants' costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 5th May, 2017**.

BYRAM ONGAYA

JUDGE