



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 45 of 2012

PAUL NJOROGE MWANGI..... PETITIONER

VERSUS

THE PERMANENT SECRETARY

MINISTRY OF PROVINCIAL ADMINISTRATION AND

INTERNAL SECURITY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT

JUDGMENT

Introduction

1. This matter concerns the labour rights of a government officer previously employed as an Assistant Chief under the 2nd Respondent, in charge of Nachu, Karai Location, Kikuyu Davison within Kiambu County with a two-part claim that consists two distinct claims. The first one concerns the 1st petitioner and is related to his employment in the Ministry of Internal Security (Provincial Administration) represented by the Attorney General the 2nd Respondent. The second one, which affects both parties, relates to abuse of human rights to employment and unfair termination.

2. The petitioner was at the time material to this case employed by the Provincial Administration. In 1990 he was appointed as an Assistant Chief by the 1st Respondent.

Case against Provincial Administration

3. By a Petition to the High Court, Constitutional Rights Division Petition No. 5010 of 2012 the petitioner moved the court for the following orders:

- i. *This court do find that the human rights of the petitioner as envisaged in article 28, 41(1) and 47(1) of the Constitution were abused;*
- ii. *Order that the petitioner be paid his full benefits of his employment from 1991 to 1995 and other benefits due since his interdiction.*
- iii. *Costs of the suit with interest*

4. The petition was supported by the affidavit of the petitioner Paul Njoroge Mwangi, in which

he deponed that he was an employee of the 2nd respondent as an Assistant Chief in Nachu, Karai Division in Kiambu having previously worked with the Forestry Department since 1st May 1976. On 9th November 1990 he was appointed in the Provincial Administration but was interdicted on 27th November 1990 subsequent to criminal charges against him at the Resident Magistrate Court in Kiambu in Criminal Case No. 5414 of 1990 whereupon he was convicted and sentenced to one year imprisonment for alleged theft of government funds at the District Commissioners' Treasury in Kiambu. He appealed against the conviction and sentence and the conviction was quashed and set aside in High Court Case No. 142 of 1996. He further depones that he tried to engage with the Public Service Commission (PSC) to review his dismissal for reinstatement or alternatively pay his salary up to the time of dismissal effective 21st September 1995 and general damages. The PSC did not reinstate him or pay him terminal dues.

5. It was the Petitioner's case that his human rights were breached by the respondents by refusing to acknowledge that he was acquitted by the High Court after his conviction was quashed, that the respondents refusal to reinstate him or pay him his terminal dues for wrongful termination, being subjected to inhuman treatment, failing to apply fair labour practices and failing to make fair administrative action was contrary to the Constitution.

6. When the matter came up for hearing at the High Court Human Rights Division, the matter was referred to the Industrial Court, on the basis that the main claim was based on fair labour practices and claim for wrongful termination and demand for damages for inhuman treatment.

The Petition

7. The Petitioner seeks the following reliefs in the claim filed on 5th November 2012:-

a) *The Petitioner having worked for the Government of Kenya in the Ministry of Internal Security since 1st May 1996 to 9th November 1990 prays the Court for an Order that the Respondents do pay his full benefits as:*

(1)Half salary from 1991 to 1995

(2)Full monthly payment for April 1996

(3)Annual salary increments since 1991 until the suit is determined

(4)General salary increments for the civil service since 1991

(5)House allowance since 1991

(6)Annual leave or payment in lieu

(7)Medical allowance

(8)Medical claims

(9)Pension dues.

b) *Any other order and or directions that this court may deem fit to grant.*

Petitioners' Case

8. The petition was heard on 23rd January 2013. He gave oral submissions in Court and testified that he was wrongly, unfairly and illegally terminated from his employment with provincial Administration. He stated that before starting work with Provincial Administration he started work with the Government of Kenya at the Forestry Department on 1st May 1976 then appointed as Assistant Chief

by the 2nd respondent. That without any reasonable cause he was arrested and charged with a criminal offence at Kiambu Magistrate's Court, was convicted but the High Court set aside the conviction and sentence. That while attending the hearing and serving the sentence and appeal, he was interdicted and was put on half pay where he gave his wife the Powers of Attorney to access his Account to be able to support his family which was otherwise left destitute due to the arrest and stay in custody. That upon release he tried to argue his case for reinstatement and or setting aside the decision to dismiss him but was on three occasions dismissed despite his appeals.

9. That on 2nd July 2003, the 1st respondent wrote to him about his dismissal with effect from 21st September 1995. On 13th September 2004 the 1st respondent communicated its decision dismissing his appeal and again on 14th September 2005 they communicated their decision disallowed an application for review of the decision to dismiss the Petitioner.

10. That as a result of his interdiction, arrest and conviction and sentence for one year, he was unable to support his family and or pay for their medical needs resulting in the death of his daughter at Kenyatta National Hospital. Since He has been unable to support his family or take his children to school and they are all destitute and this has caused him untold suffering, indignity and poor health. That is despite serving the respondents diligently for many years and giving his youthful years to the service of the Government of Kenya and thus holds both the 1st and 2nd Respondents liable in damages.

Interdiction for gross misconduct

11. The Petitioner submitted that following his arrest, he was interdicted from November 27th 1990 and was on half pay. On 21st September 1995 petitioner was suspended without pay after the Magistrate's Court convicted him to one year imprisonment. A letter of dismissal was also issued effective the same date.

12. The Petitioner submitted that his dismissal was based on the wrongful charge which has since been set aside by the High Court Criminal Appeal No. 142 of 1996. That the 1st Respondent was misinformed that the Petitioner was working with the District Treasurer, Kiambu which information was wrong and hence the basis of the arrest and conviction was based on wrong grounds and the decision to dismiss the Petitioner not founded on any good reasons and or grounds or any gross misconduct as alleged.

Respondents' Case

The respondents were served and a return of service filed but failed to enter appearance or respond to the petitioner as filed.

Determination

I have considered the pleadings, depositions and submissions made by the Petitioner. Several issues were raised in both the pleadings and oral submissions.

13. The Industrial Court as constituted under the ***Industrial Court Act, 2011*** is competent to interpret the Constitution and enforce fundamental rights and freedoms in matters arising from disputes falling within the provisions of **Section 12** of the ***Industrial Court Act, 2011***. (See ***United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012 (Unreported), George Onyango v Board of Directors of Numerical Machining Complex Ltd & 2 others, Petition No. 417 of 2012***).

14. This matter arose prior to the establishment of the Industrial Court as currently constituted. The judges of the Industrial Court were appointed on the 12th of July 2012 as evidenced by a **Gazette Notice No. 9797**. By instituting this matter before the High Court Human Rights Division the Petitioner was right as indeed his main claim was that his rights under Article 41 on fair labour practices were violated.

Therefore the eventual transfer of this matter to the Industrial Court once operational made this Court properly seized of this matter.

Issues for Determination

15. I have framed two key issues for determination as follows;

a) Whether the dismissal of the petitioner from the Provincial Administration was in breach of petitioner's rights under the Constitution or other relevant laws

b) Whether the Respondents breached the Petitioner's fair labour practices under the Constitution or any other laws hence liable for wrongful dismissal.

Whether there was a violation of the Petitioner's rights

16. Unlike the former Constitution which did not recognize and protect the rights of employees, the Constitution now has explicit provisions which provide a foundation for the rights of employees and employers. The preamble and the provisions on national values and principles contained in **Article 19** lays emphasis on dignity, human rights and social justice for all persons. In giving effect to the provisions of the Constitution and the Bill of Rights, the place of workers enjoying fair labour practices must be articulated as required by **Articles 41**.

17. The Constitution also provides a window for enforcement and enrichment of the rights and freedoms at work through the application of international law principles, treaties and conventions Kenya has ratified. This is through the provisions of **Article 2(5) and (6)**. **Article 1** of the *ILO Convention on the*

18.

19. **Sections 2** of the *Employment Act (No. 11 of 2007)* and the *Labour Relations Act* define who an employee is as well as who an employer is and further goes in outlining how an employer to to treat an employee in the event of termination. The employer must give the employee the reasons for termination even in cases of gross misconduct that result in summary dismissal or otherwise. The two pieces of legislation outline what is articulated under **Articles 19 and 41 of the Constitution** in ensuring that whatever administrative action is taken by a public officer, the same does not defeat fair administration of justice that is equitable and just particularly with regard to citizens exercising their social/economic rights and in this case in achieving fair labour practices.

20. the *Employment Act 2007* was enacted prior to the promulgation of the Constitution and was intended to ameliorate the provisions of the former Constitution which were limited in this respect (see ***Duncan Otieno Waga v Attorney General Nairobi Petition No. 94 of 2011 (Unreported)***). These statutes are not exhaustive or conclusive of the rights of workers provided in the Constitution but merely elucidate the rights due to them in certain respects. These statutes are also part of the measures taken by the State to ensure that the rights of workers are realized.

21. Employment is not just a source of livelihood but something that defines our self-worth or dignity. In ***Foley v Interactive Data Corp (1988) Cal. Rptr. 211*** it was held that,

A man or a woman usually does not enter into employment solely for the money; a job is status, reputation, a way of defining one's self worth and worth in a community. It is also essential to financial security, offering assurance of future income needed to repay present debts and meet future obligations. Without a secure job, a worker frequently cannot obtain a retirement pension, and often lacks access to affordable medical insurance. In short, "in a modern economy employment is central to one's existence and dignity."

This sentiment is consistent with the right to dignity guaranteed by **Article 28 of the Constitution**. The

Petitioner had served the Government of Kenya since 1976 and been appointed as an Assistant Chief in 1990 and barely a few months later he was accused of having committed gross misconduct allegedly due to missing funds at the District Treasury in Kiambu District Commissioner's office. This was despite the fact that he was not based at the District Commissioner's office or part of the treasury or in any way directly involved in holding finances. Further, his area of operation in Nachu location and Kiambu District Commissioner's office are apparently different and far apart. Hence it was most negligent of the respondents to cause and lay such charges of gross misconduct and cause the Petitioner to be arrested, charged, detained and eventually dismissed from his employment. The charges against the Petitioner could thus only be framed up charges. This thus amounts to a violation of his human rights and his dismissal was an abuse to fair labour practices in the circumstances.

22. The letter dated 7th June 2000 by the Kiambu District Commissioner asking the Petitioner to report about his conviction and if he had appealed against the conviction is one indication that the respondents were at all material times aware of the circumstances of his arrest and conviction and the circumstances surround his arrest. I find that even though the petitioner did reply with a detailed explanation about his appeal and subsequent acquittal and setting aside of the conviction, the respondents still went ahead and dismissed him. there was no consideration of his defence at all.

23. In the particular circumstances of this case and taking all factors into account, I find that the 1st respondent's decision to terminate the Petitioner was not objective and reasonable noting that they were keen to interdict the Petitioner and despite him being discharged by the Court and sharing this outcome through his various appeals. I also find that the petitioner's rights protected under the Employment Act and the Constitution were infringed when he was terminated without due regard to the charges against him being set aside by the High Court upon appeal. The 1st respondent had a duty, upon laying claims against their own employee, particularly the allegation of loss of public funds, to follow up and ensure that those funds were recovered and if these allegations were false then not make the Petitioner pay for the wrongs committed by others. This duty rested on the 1st respondent at all material times. Equally, the 2nd respondent, had the duty and responsibility where a public servant like the Petitioner was wrongly charged and eventually set free upon appeal to advise and cause the 1st respondent to reinstate or compensate the Petitioner. The two respondents failed in their duties despite the petitioner having brought his case to their attention. In light of the responsibility cast on the respondents or the person exercising this power under the Constitution and in ensuring fair labour practices, the 2nd respondent must consider all government agencies undertake reasonable practices at the work place that protects the rights of all employees within their administration. Further authority for this course is to be found in **section 7(1)** of the **Sixth Schedule** to the Constitution which requires that all law existing prior to the effective date of the Constitution must be construed with the necessary **"alterations, adaptations, qualifications and exceptions to bring it into conformity with this Constitution."** I therefore find and hold that the petitioner's rights were violated in this regard.

24. As stated above, the Petitioner's claims were in two parts, first based on his employment status and the second part based on his human rights as an employee.

25. The first part being based on his termination from employment as of 14th September 2005, when his appeal was confirmed as disallowed and hence effectively terminated without any other recourse to the 1st respondent internal procedures. This then fell under the employment laws as before the Employment Act, 2007 and thus the Petitioner's employment relationship with the 1st respondent was governed by the law applicable at the time of the termination of the Claimant's services, the Employment Act; Cap 226. This law was repealed by the Employment Act, 2007. A pertinent question to the determination of the Petitioner's claim for unfair termination regarding his Petition filed on 5th November 2012 is therefore whether the limitation provisions in section 90 of the Employment Act, 2007 is applicable to contracts of service terminated before its commencement, in other words if the Employment Act, 2007 extinguished the Petitioner's right to bring the Petition. My reading of the Employment Act 2007 has not found any provision in the Act which states that it shall have retrospective application. The only respect in which the Employment Act, 2007 applies to contracts of service entered into before its commencement in 2008 is its amendment of the terms of such contracts which were still subsisting to be construed as if they were made in accordance with it. Section 93 of the Employment Act,

2007 sets out the transitional provisions relating to continuance of valid contracts of service and foreign contracts of service entered into before its commencement. At the time the contract of service in contention was terminated, the Employment Act, 2007 was not in place. In answering the question it should be noted that the employment/contractual relationship had ended on in 1995 and despite several appeals, all were dismissed as of 14th September 2005, dates way before the operational date for the Employment Act, 22nd August 2007. The termination of the Petitioner was therefore a date before the commencement of the Employment Act, 2007. In this regard the continuance, application and interpretation of the contract in accordance to the provisions of the Employment Act, 2007 does not arise. Any disputes on limitation from such contract must be determined on the basis of the repealed Employment Act, Cap. 226 and the Limitation of Actions Act.

26. Under the Employment Act [as repealed] and under the Trade Disputes Act [repealed] and the Limitations of Actions Act, the applicant's claim being based on a contract of employment and or a labour relations claim had a period of six [6] years to lodge his claim in the High Court or in the subordinate courts. Where the law prescribes a specific procedure for parties to follow, which goes without saying, that procedure becomes applicable unless there is a lacuna. The law is intended to keep administration of justice and by prescribing the procedure on how a party is to access justice, these procedure are part of such administration of justice. Without reasonable grounds, this court will not read the law otherwise. The specific provision of Section 4(1)(a) of the Limitations of Actions Act and Section 90 of the Employment Act expressed in mandatory terms. For the Court to go against these provisions there must be overwhelming reasons. This does not stand out as one such case.

27. The first part of the petition must therefore fail. Save for legal dues to any pensionable employee that may due and owing particularly that of gratuity and pension.

28. The Second part of the petitioner is based on the human rights of the petitioner as envisaged in article 28, 41(1) and 47(1) of the Constitution which were violated. Where an employee without good cause is caused to be arrested and charged with criminal charges that are dismissed after due process, that employee is entitled to challenge the lawfulness and fairness of such charges and subsequent consequences of such false charges. This is what is envisaged under Articles 19, 27 and 28 of the Constitution as read together with Articles 41 and 47. The respondents having failed and neglecting to follow due diligence to ascertain the truth as regards charges levelled against the Petitioner by the 1st respondent caused him to suffer inhuman and degrading treatment, that affected his employment status, his income and care to himself and his family. This should not be let to be. Constitutional rights are due to all irrespective of economic, social or other status. If these constitutional rights are abuse and or violated by any private or public persons, the 2nd respondent should be the first to ensure due compliance and protection. This was not done in this case.

29. In summary, I find that the petitioner's rights guaranteed under **28, 41(1) and 47(1) of the Constitution** were violated by the Respondents by causing him to lose his employment over criminal allegations and charges that were unfounded and which were dismissed on appeal. That this action was taken without due consideration and by not taking into account the possibility of reasonable review of his case and appeals by use of 1st respondent internal disciplinary process. As a consequence of this failure to reasonably address the Petitioner's case, the 1st respondent caused him to be terminated and refused to have him reinstated which was in violation of fair labour practices as under Article 41 or the Constitution.

Reliefs

The Petitioner has prayed for "*Order that the petitioner be paid his full benefits of his employment from 1991 to 1995 and other benefits due since his interdiction*" despite the fact that the respondents did not appear or offer a defence, as part one of the Petition has been outlined above, I will decline this prayer save the granting of all the pension due to the Petitioner from the 1st respondent that is payable to date. I am satisfied that this amount is due to him. I will award any unpaid salary to the petitioner from 1991 to 1995 the period he was paid half of his salary this being due and owing to date.

30. I am not persuaded to reinstate the petitioner to the Provincial Administration due to his age and

I do not think it would be in the interest of the Administration and the petitioner to reinstate him after such a long absence.

31. The petitioner, upon the wrongful termination is entitled to be paid his gratuity and receive his pension. I direct that the 1st respondent do ensure that the same is calculated and paid within 60 days from the date hereof.

32. The next question is whether the petitioner is entitled to an award of general damages for breach of his rights. Taking all factors into account, doing the best I can in the circumstances, I think an award of Kshs. 500,000 would be an appropriate award for general damages.

Conclusion

33. In view of the foregoing, I make the following orders against both respondents jointly and severally:

- a) The petitioner is awarded unpaid salary from 1991 to 1995, half salary not remitted to him within 60 days from the date hereof.
- b) I direct that the 1st respondent do ensure that the gratuity and pension is calculated and paid within 60 days from the date hereof.
- c) Parties shall take a mention date to confirm compliance with a) and b) above
- d) That the petitioner shall be paid Kshs.500, 000/- as compensation by the respondents.
- e) The petitioners' costs of the suit shall be borne by the respondents.

DATED and DELIVERED at NAIROBI this 30th day of April 2013

M.W. Mbaru
JUDGE