



**Kigumba v Wanjohi & another (Petition E070 of 2020)
[2023] KEELRC 1414 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1414 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E070 OF 2020
NZIOKI WA MAKAU, J
MAY 23, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 10, 20, 22, 23, 27,
28, 35, 41, 50, 159 AND 258 OF THE CONSTITUTION OF KENYA 2010**

AND

**PURSUANT TO RULES 4, 5, 8, 9, 10, 11, 13 AND 14 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES 2013 AND ALL
OTHER ENABLING PROVISIONS OF THE LAW TO BE CANVASSED**

BETWEEN

TIEGO GREGORY KIGUMBA PETITIONER

AND

ROSE WANJOHI 1ST RESPONDENT

ROYAL MEDIA SERVICES LTD 2ND RESPONDENT

JUDGMENT

1. The Petitioner sued the 1st and 2nd Respondents through his petition which was dated 26th October 2020 and filed on 28th October 2020. In the Petition he seeks various declarations which appear later in the Judgment.
2. It was confirmed vide evidence tendered in the Petition that the Petitioner was employed by the 2nd Respondent as a Radio Presenter Maragoli (Vuuka FM) through the letter of employment dated 3rd August 2011, which appointment he took on 5th August 2011. The letter of appointment is filed as document No. 2 in the Petitioners list of documents which appears at pages 34 and 44 respectively of the petition bundle. By 18th June 2012 he had been promoted to the position of Head of Radio



– Vuuka FM a position to which he was confirmed on 17th October 2012. Copies of these letters of promotion are filed at pages 51 and 52 of the bundle. As provided in paragraphs 3 and 21 of the appointment letter, the Petitioner could only retire on attaining the age of 50 years (optional) and 60 years (mandatory). When he was being confirmed, the Petitioner's salary was adjusted upwards from Kshs. 40,000/- a month to Kshs. 70,000/- a month. By a letter dated 7th March 2018 (filed at page 53 of the bundle) while appreciating the "exemplary performance and positive attitude to work" the 2nd Respondent changed the Petitioner's salary upwards from Kshs. 70,000/- per month to Kshs. 110,000/- per month effective from 15th March 2018. The Petitioner submits that by a letter dated 20th March 2020, without prior notice and without being granted any right of hearing, the 1st Respondent reduced the Petitioner's gross salary by 30% to Kshs. 77,000/- monthly and blamed the effect of corona virus for the salary cut. Three months later, by a letter dated 22nd June 2020 titled Notice Of Intention To Declare Redundancy authored by the 1st Respondent, (filed at page 55 of the bundle) even though the letter indicated that the redundancy was to be effective from 22nd July 2020, the last paragraph read- "In the meantime, you are hereby sent on terminal leave with effect from 22nd June 2020." The Petitioner submits that by this obviously capricious conduct of the two Respondents, he was dismissed from his employment to which he had been employed on permanent terms and expected to retire at age 60 prompting this Petition in which he has alleged violation of his constitutional and legal rights as particularized in the petition. The remedies sought by the Petitioner are principally-

- (a) Declaration of the salary cut and redundancy as unlawful and unconstitutional.
- (b) A declaration that the Respondents violated his constitutional rights by denying the right to human dignity, non-discrimination, fair administrative action, social justice, equity and fair labour practices.
- (c) Recovery of Kshs. 6 million or more for subjecting him to discrimination; and
- (d) Recovery of Kshs. 31,680,000/- expected loss of salary for 24 years he would have worked to retirement age. He further prays for costs of the petition.

3. The Petitioner submits that the issues for determination are as follows:-

1. Whether the salary deduction effected on the Petitioners pay by the letter dated 27th March 2020 was lawful.
2. Whether the notice dated 22nd June 2020 declaring the Petitioner was lawful.
3. Whether the two letters referred to above violated the Petitioner's right to human dignity, non-discrimination, fair administrative action, social justice, equity and fair labour practices.
4. Whether the petitioner is entitled to compensation for discrimination and if so whether the amount is Kshs. 6 million as pleaded or less or more.
5. Whether the Petitioner is entitled to Kshs. 31,680,000/- loss of expected salary for the 24 years he was to work until retirement at age 60.

4. The Petitioner submits that it is acknowledged that due to corona virus impact in the early months of the year 2020, employers went through hard economic times forcing them to cut down the expenditure on personal emoluments and even staff establishment. But such action would only be justified if taken within the parameters of the Constitution and other laws which contains provisions which guarantees individual rights and protection of workers. It is all to do with the procedure and this is all that the courts of law shall examine to confirm if they were followed as to justify the actions taken. It cannot be disputed that both letters to the Petitioner dated 27th March 2020 and 22nd June 2020 had



- adverse effect on the Petitioner in which case certain procedure was to be followed in arriving at and communicating the decisions contained in the letters. Firstly, Article 41 of the [Constitution](#) which has been reproduced in the petition provides for fair labour practices. Fair labour practices entails the right to fair remuneration and reasonable working conditions. The Petitioner cites the decision in [George Onyango Akuti v Security Services Kenya Ltd](#) [2013] eKLR where the court held- "An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the [Employment Act](#). The reasons can be various based either on failure to comply with statute or the terms of the actual employment contract"
5. The Petitioner submits that section 10(5) of the [Employment Act](#) does not permit an employer changing the terms of an employment contract to the disadvantage of the employee without prior discussion and consent and that this Honourable Court has previously pronounced itself on the issue of an employer reducing the salary of an employee without discussion or notice as unlawful and unconstitutional. He cited the case of [Jackline Wakesho v Aroma Café](#) [2014] eKLR, where the Court held- "Consequently, the court finds in favour of the claimant by holding that the reduction of the salary from Kshs. 15000 to Kshs. 10000 per month was unlawful for want of express consent from the employee. A written contract cannot be amended by assumptions on the part of any party to the contract". He submits that it is suffice to state that whatever reasons the Respondents had, the merit of the decision to unilaterally and suddenly to deduct the Petitioners' salary by 30% was far reaching and unlawful. There was no explanation for settling on 30% deduction of which this information should have been passed over to the petitioner as of right under the right of access to information guaranteed by Article 35 of the [Constitution](#).
 6. The Petitioner submits that under Article 47(1) of the [Constitution](#), the Petitioner was entitled to the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He submits that it has already been demonstrated above that the decision to reduce the Petitioners salary was unilateral and unlawful. The Petitioner submits that the next question is whether the notice of redundancy dated 22nd June 2020 was "lawful, reasonable and procedurally fair"? He submits that the answer to this question is in the negative for the following reasons –
 - (a) Whereas the document dated 22nd June 2020 was expressed to be a redundancy notice, the same did not comply with section 40 of the [Employment Act](#) as it was never copied to the Petitioners' trade union or labour officer. The notice was instead copied to personal file, payroll and head of department. Further, the notice purported to send the petitioner on terminal leave at the end of which the employment would come to an end. This is not provided for in the law.
 - (b) As to whether the decisions in the two letters were reasonable, the answer is in the negative. If one engages in what is against the law as the respondents have done, that cannot be said to be reasonable.
 - (c) Procedural fairness requires that one who is taking administrative action adheres to the procedures that exists in law.
 7. The Petitioner submits that he has demonstrated that the procedure for reduction of salary of his and declaring him redundant was never followed. Additionally, given that the two decisions were going to affect the Petitioner adversely, he was entitled to a hearing before the decisions could be made as provided in section 4 of the [Fair Administrative Action Act](#) which did not happen. As to whether the Petitioner's right to human dignity, non-discrimination, fair administrative action, social justice, equity and fair labour practices were violated, he submitted that equality and freedom from discrimination is guaranteed by Article 27 of the [Constitution](#) while human dignity is guaranteed by Article 28 of the



Constitution. The Petitioner submits that every person is bound by Article 10 of the Constitution on national values and principles of governance which provides for human dignity, equity, social justice, equality and non-discrimination amongst others. Articles 41 and 47 guarantees fair labour practices and fair administrative action respectively. He submits that the Respondents were in violation of this right. The Petitioner submits that reduction of salary and redundancy targeted him alone out of a total of fourteen radio stations run by the Respondents. He submits that the letters served on him have no indication that other employees were identified for the same action. He submits the action of the Respondents sending the Petitioner on terminal leave on the same date and through the same redundancy notice amounts to summary dismissal of the Petitioner in the most demeaning manner that negates elements of social justice, equity and human dignity and is actually contemptuous. As to whether the Petitioner entitled to compensation for being subjected to indignity and social injustice and non-discrimination, he submits that Article 23(3)(e) of the Constitution empowers the court to grant the remedy of compensation where there is proof of violation of the rights and freedoms of an individual and that the only question therefore is the quantum. He submits that he has sought an award of Kshs. 6 million. In the case of Edward Akong'o Oyugi & 2 others v Attorney General [2019] eKLR the court awarded damages ranging from Kshs. 6 million to Kshs. 10 million. The Petitioner submits that his claim for 6 million is reasonable.

8. The Petitioner claimed Kshs. 31,368,000/- in loss of expected income. He was aged 36 years when he was unlawfully dismissed and or unfairly terminated and was expecting to work and retire at age 60. An award of 12 months compensation for the unlawful termination at Kshs. 110,000/- per month totalling to Kshs. 1,320,000/- under this head is claimed. The Petitioner submits that his claim be allowed having discharged the burden of proof.
9. The Petition asserts various constitutional imperatives were flouted by the Respondents to the detriment of the Petitioner. He asserts there was discrimination and unfair labour practices meted out. Other than asserting there was discrimination, the Petitioner did not adduce evidence to show that he was the only one who was targeted for removal by the Respondents. The Petitioner admits that the salary cut by the 2nd Respondent was at the height of the Covid pandemic and that the said deduction was attributed to this sole cause. The Court therefore declines to issue a declaration of the salary cut was unlawful and unconstitutional. The Petitioner subsequently lost his position on account of the reason stated to be redundancy. He thus seeks a declaration that the redundancy was unconstitutional.
10. Section 40 of the Employment Act makes provision on the issue of redundancy. In declaring a redundancy, an employer is required to do the following:-

40.

- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions —
 - (a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
 - (b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;



- (c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- (d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- (e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- (f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable. (emphasis supplied)

11. The 2nd Respondent did not suffer insolvency and as such subsection (2) did not apply. Granted that section 40 required the Petitioner to be notified alongside his union as well as the Labour Officer. The redundancy notice served was only addressed to the Petitioner. No letter was served on the Labour Office as required by law setting out the extent of the redundancy. The second aspect is that the employer must pay leave in cash, severance pay calculated as per provisions of subsection (1)(g) of section 40. In addition, the employer must give notice of at least one month or pay one month salary in lieu of such notice. This is in addition to the other payments due an employee. When reflected against what happened to the Petitioner, is this breach by the Respondents one that rises to the constitutional threshold? I think not. I thus decline to issue a declaration that the Respondents violated the Petitioner's constitutional rights by denying him the right to human dignity, non-discrimination, fair administrative action, social justice, equity and fair labour practices.
12. Having found that his termination was contra statute, what remedies can the Petitioner be entitled to? He seeks recovery of Kshs. 6 million or more for subjecting him to discrimination and recovery of Kshs. 31,680,000/- for the expected loss of salary for 24 years he would have worked to retirement age. He further prays for costs of the petition. Firstly, future salaries are as was held in the case of *D.K. Njagi Marete v Teachers Service Commission* [2013] eKLR, by Rika J.

an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.
13. This Court is in agreement that it would be injudicious to found an award of damages upon sanguine assessments of prospects as in this case. The Petitioner is able bodied, capable of attracting employment. He has not demonstrated how he is entitled to receive a salary from the 2nd Respondent from now till the age of retirement almost a quarter century away. Seasons change and he should not hang his hopes on the 2nd Respondent meeting his financial obligations as would an employer to whom the employee is beholden. This claim for future salaries must fail and I dismiss it.
14. In as far as the Court can discern, the only issue that rises to the constitutional threshold in this case is the matter of fair labour practices or the lack thereof. However, this could easily have been articulated



as an ordinary claim since Article 41 of the Constitution finds expression in the labour laws of the land and the Employment Act in particular offers sufficient relief for the injury suffered by the Petitioner. The Petitioner is entitled to the relief under section 40 as read with section 49 of the Employment Act in relation to the redundancy meted out. He will also be entitled to costs of this suit though it is amply clear that that this was not a constitutional petition strictu sensu but an ordinary claim disguised as one.

15. In the final analysis I enter judgment for the Petitioner against the Respondents jointly and severally for:-
- a. One month's salary as notice – Kshs. 110,000/-
 - b. Three month's salary compensation in terms of section 49 of the Employment Act – Kshs. 330,000/-
 - c. Costs of the suit.
 - d. Interest on the sum in a) and b) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2023

NZIOKI WA MAKAU

JUDGE

