



REPUBLIC OF KENYA



**Osimbo v Kenya Post Office Savings Bank & 7 others (Petition 16 of 2020)
[2022] KEELRC 4045 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4045 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 16 OF 2020
CN BAARI, J
SEPTEMBER 29, 2022**

BETWEEN

GABRIEL OMOLLO OSIMBO PETITIONER

AND

KENYA POST OFFICE SAVINGS BANK 1ST RESPONDENT

SIMON P. NJOROGE 2ND RESPONDENT

ISAAC KOECH 3RD RESPONDENT

GODREY K. NGUGI 4TH RESPONDENT

PETER M. KARANJA 5TH RESPONDENT

THOMAS K. BETT 6TH RESPONDENT

SYLVESTER I. J. OBUON 7TH RESPONDENT

ANNE W. KARANJA 8TH RESPONDENT

JUDGMENT

1. Mr Gabriel Omollo Osimbo, the petitioner herein, lodged a petition dated November 4, 2020, seeking the following reliefs:

As against the 1st Respondent

- a. Payment of Kshs 2,993,889.00 for his half basic salaries withheld by the 1st respondent during the 3 interdictions as at April 2020, which continue to accrue at the rate of Kshs 65,163 pending the determination of the petition.
- b. Declaration that the interdictions of February 7, 2012, February 5, 2014, and June 6, 2017, and the subsequent demotion from grade PB 6.2 to grad PB 8 on May 23, 2012 was unlawful and the



interdiction of June 6, 2017 and the demotion from grade PB6.2 to grade PB 8 be lifted and reinstated unconditionally.

- c. Payment as per December, 2017 gross salary of Kshs 113,160 paid from May 23, 2012 monthly to date for unlawful demotion by 3 grades from grade PB 6.2 to grade PB 8 *vide* office letter Ref: KPSB/HR/53/PF:0862/2012 dated May 23, 2012.
- d. The claimant/petitioner be reinstated unconditionally to his former grade PB6.2 with all his dues and benefits i.e the yearly increment also be reinstated and paid from May 23, 2012, to date.

As against the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th respondents

- e. General damages for causing the claimants/petitioner to be unlawfully interdicted, mental torture and tarnishing the claimant/respondent's reputation.
 - f. Be restrained from harassing and intimidating the claimant/petitioner while carrying out his mandate.
2. The petition is premised on the following grounds:

- i. That the petitioner was an employee of the 1st respondent deployed in the department of operations.
- ii. It is the petitioner's case that his duties included extracting daily branch reports for verification against the branch cash certificates, confirming daily cash balances in the vaults and ATM's against transactions for accuracy and authenticity, money grams, verifying that cash certificate agrees with cash reported in various branches, liaise with regional accountants to confirm that bank transactions are genuine, report any variance/differences arising in the cash compliance template investigate and document in consultation with branch managers, report any variance/differences and other respondent, by 11.00am on each working day.
- iii. The petitioner aver that on February 7, 2012, February 5, 2014 and June 6, 2017, he was unlawfully interdicted by the 1st, 2nd, 3rd and 4th respondent as a result of carrying out his mandate by protecting the 1st respondent against fraudulent transactions which were being perfected by the respondents in collusion with the cashiers and branch managers. He avers that the respondents colluded to harass, intimidate and unlawfully interdicted him on the aforementioned dates.
- iv. The petitioner avers that his interdiction was unlawful as the respondents did not adhere to the 1st respondent's disciplinary procedures.
- v. The petitioner avers that during the 3 instances of interdiction, he was not paid his half basic salaries which amounted to Kshs 2,993,889, as at April 2020.
- vi. The petitioner avers that he exposed fraudulent transactions whereby the bank lost Kshs 7,006,256 in Busia branch as per his Busia theft report of January 19, 2011 and January 28, 2011, in which the respondents protected and never took any action against the cashier involved despite the reports.
- vii. The petitioner avers that he was unlawfully demoted from grade PB6.2 to grade PB 8 *vide* office letter Ref:KPSB/HR/53/PF:0862/2012 dated May 23, 2012.
- viii. The petitioner states that the 1st respondent stopped paying him his half basic salaries and full house allowance of Kshs 65,163/= from January 1, 2018, to date contrary to the 1st respondent's code of conduct and CBA.



- ix. The petitioner aver that the respondents are responsible for his unlawful interdictions and the subsequent demotion by 3 grades by flouting, the 1st respondent's code of conduct and the CBA.
3. The 1st respondent replied to the petition vide a replying affidavit sworn by one Mary Chemeli on June 13, 2022. The 2nd to the 8th respondents did not reply nor participate in the petition.
4. The 1st respondent's case is that:
- i. It employed the petitioner as a clerical officer sometime in the year 1992 *vide* a letter of offer of appointment dated the March 11, 1992. It is the 1st respondent's position that the petitioner rose through the ranks over the years to the position of a CRO/cashier as at the time of his termination on the December 27, 2017
 - ii. The petitioner is no-longer an employee of the 1st respondent having been terminated on the December 27, 2017, after a lawful and due disciplinary process was undertaken against him and was found to have incurred operational shortages and had failed to adhere to the laid down operational procedures on regularizing irregular loss of the customer's funds.
 - iii. The petitioner was interdicted from duty on the June 6, 2017, for failure to comply with the 1st respondent's code of conduct by involving himself in acts of operational irregularities and occasioning shortages on numerous occasions as highlighted in the letter dated the April 12, 2017, and warning letter on even dates and addressed to the petitioner.
 - iv. The petitioner did not attempt to regularize the shortages highlighted in the letter dated the April 12, 2017, a fact which the petitioner admitted in his letter dated May 21, 2017, when responding to the warning letter of April 12, 2017.
 - v. The 1st respondent avers that the petitioner acknowledged that there were outstanding shortages and requested the 1st respondent's officers to allow him more time to settle the shortages.
 - vi. The petitioner was issued with a letter of interdiction from duty on June 6, 2017 in compliance with part vi of the Postbank code of conduct for amongst others; failing and/or ignoring to respond to the show cause letters issued to him, insubordination and continuing to incur operational shortages despite warning letters addressed to him on the same.
 - vii. The procedure of conducting investigation is well articulated in the 1st respondent's code of conduct, and which was duly complied with by the 1st respondent's senior officers, when making the decisions to interdict the petitioner.
 - viii. The 1st respondent conducted investigation and the report tendered on June 28, 2017, recommending that disciplinary action should be taken against the petitioner in accordance with the existing Post-Bank code of conduct.
 - ix. On July 17, 2017, a report on the inquiry into the petitioner's conduct was tendered to the managing director of the 1st respondent. It is the respondent's further assertion that the report recommended the review of the petitioner's interdiction and surcharge for the outstanding shortage of Kshs 39,000/-, and that he be financially counselled.



- x. The petitioner was summoned to appear before the staff disciplinary committee to answer to the allegations of serious breaches of the terms and conditions of the code of conduct on the September 5, 2017. The respondent avers that the invitation was made in compliance with the provisions of the *Employment Act* and the Post-bank code of conduct.
 - xi. The staff disciplinary committee held a meeting on October 17, 2017, when the petitioner tendered his written submissions in response to the allegations levelled against him. The respondent further avers that the committee did not make their findings on account of a court order that restricted internal handling of the case.
 - xii. The 1st respondent states that the petitioner wrote her a demand letter dated December 13, 2017, requesting for the decision of the committee. The respondent further avers that the letter was responded to by the 1st respondent's managing director intimating to the petitioner that the case was still under consideration and that an advise on the decision taken would be sent to the petitioner.
 - xiii. The petitioner was issued with an invitation letter dated December 27, 2017, inviting him for a hearing, and that a final determination was reached on his case. The respondent avers that it is on this date that the committee made its findings and ordered the immediate termination of the petitioner after according the petitioner the right to be heard.
 - xiv. The 1st respondent states that the petitioner was duly paid his wages as per the CBA in force at the time contrary to his assertion that he was never paid. The respondent further states that the petitioner's allegations that his half salary for the time he was interdicted has not been paid, is false and misleading to this honourable court as the petitioner was paid his full dues.
 - xv. The respondent's further case is that the petitioner's allegations in the entire petition is misconceived and was brought as an afterthought and without any cogent reasons but to waste this honourable court's time.
 - xvi. The petitioner's employment was terminated on December 27, 2017, and his request that the court to orders the 1st respondent to pay him his half salary from the January 1, 2018, to date is misplaced, as the petitioner is no longer an employee of the 1st respondent.
 - xvii. The 1st respondent asserts that the petition lacks merit as the petitioner was lawfully interdicted and subsequently terminated.
5. Parties sought to canvass the petition through written submissions. submissions were filed for both parties.

The Petitioner's Submissions

6. The petitioner submitted that the respondents conspired to unlawfully interdict him. He further submits that the respondents unfairly demoted him by three grades without adhering to the 1st respondent's disciplinary procedures.



7. The petitioner submitted that the staff disciplinary committee that deliberated on his case, did not deliver to him their recommendations and verdict through his branch manager as required under the 1st respondent's code of conduct.
8. It is the petitioner's further submission that the letter terminating his services was not conveyed to him through his branch manager but instead, was sent to the 4th respondent who was based in Nakuru.
9. The petitioner submits that for reason that he still has a staff employment card issued to him by the 1st respondent, means that he is still their staff serving under interdiction.

The 1st Respondent's Submissions

10. It is submitted for the 1st respondent that this court has a constitutional mandate to hear and determine all employment and labour relations disputes. They had reliance in [*Daniel N Mugendi v Kenyatta University & 3 others* \[2013\] eKLR](#) where the court opined:

“.....[the Employment and Labour Relations Court has] jurisdiction to enforce labour rights in article 41 and the jurisdiction to interpret the [*Constitution*](#) and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the [*Constitution*](#) within the matter before it.”
11. The respondent submits that the petitioner has not disclosed the rights and fundamental freedoms the respondents have infringed on or threatened, and neither has he set out the manner in which his rights have been infringed upon. They sought to rely on the holding in [*Anarita Karimi Njeru v Republic* \[1979\] eKLR](#); where the court stated:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the [*Constitution*](#), it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
12. It is further submitted that under the 1st respondent's code of conduct, an interdiction is a preliminary step taken by the 1st respondent to correct any anomaly that may be realized in the cause of any employee's conduct and is usually not an ultimate determination and does not include any form of punishment as stipulated under clause 11.1 of part xi of the 1st respondent's code of conduct. They sought to rely on *Evans Rees and others v Richard Alfred Crane* (1994) 2WLR as cited with authority in the case of [*Nancy Mokokha Barasa v Judicial Service Commission and 9 others* \[2012\] eKLR](#).

Analysis and Determination

13. Upon careful consideration of the petition, the reply by the 1st respondent, and the submissions by both parties, the issues that fall for determination are: -



- i. Whether the petitioner's interdiction and subsequent termination violated his constitutional rights.
- ii. Whether the petitioner is entitled to the reliefs sought.

Whether The Petitioner's Dismissal Violated His Constitutional Rights.

14. The petitioner's case is fashioned in the form of a constitutional petition whose purpose would ordinarily be to challenge specific violation (s) of fundamental rights and freedoms protected under the *Constitution*. Such a suit, would of necessity be expected to expressly state the articles/provisions of the *Constitution* said to have been violated/breached, and upon which the reliefs sought are premised.
15. It is now settled that this court is vested with jurisdiction to hear and determine all employment related disputes, including those relating to fundamental rights and freedoms and with respect to interpretation of the *Constitution*.
16. In *International Centre for Insect Physiology and Ecology (ICPE) v Nancy Minally* [2018] eKLR the Court of Appeal held;

“There cannot be any argument that the ELRC clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of *United States International University (USIU) v Attorney General* [2012] eKLR which was upheld by this Court in *Daniel N Mugendi v Kenyatta University & 3 others*.”
17. The petitioner's contention is that the respondents interdicted him on three different occasions without adhering to the 1st respondents code of conduct and the collective bargaining agreement (CBA) in force at the time of his interdiction. He cites clauses 8.1, 8.1.1, 8.1.2, 8.2 and 37 (i)(ii) (iii) and clause 38(a) of the CBA as the provisions that were infringed upon.
18. The petitioner has through attachments to his petition produced various letters of show cause, warnings and a myriad other exchanges between him and his employer, the 1st respondent on various issues ranging from requests to investigate officers of the 1st respondent to loss of money by the bank through theft by servant. The many letters by the petitioner to his superiors in my view, portray a man constantly looking for trouble.
19. The petitioner through his petition and submissions, has not made mention of a single article of the *Constitution* or provision of statute, said to have been violated through the acts or omissions of the respondents. Instead, his petition is premised on the provisions of his employer's code of conduct and the collective bargaining agreement applicable at his then place of work contrary to the holding in *Anarita Karimi Njeru v Republic* [1979] eKLR; where the court opined that a person claiming constitutional infringement must give sufficient notice of the violation and allow the adversary to adequately prepare her case.
20. In the case of *Trusted Society of Human Rights Alliance v Attorney General and 2 others* [2012] eKLR the court stated as follows: -

“45 We point out that *Anarita Karimi Njeru* was decided under the old Constitution. The decision in the case now must be reconciled and be brought into consonance with the new Constitution. In our view, the present petition with regard to admissibility of petitions seeking to enforce the Constitution must begin



with the provisions of article 159 on the exercise of judicial authority. Among other things, this article stipulates that; (a) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.

46. We do not purport to overrule *Anarita Karimi Njeri* as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violation and allow the adversary to adequately prepare her case and to save the court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself of the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violations alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

21. Enlightened by the decision in *Trusted Society of Human Rights Alliance* (supra), I have made effort to analyze the petitioner’s case and try to deduce the possible constitutional or even statutory violations resulting from the handling of the disciplinary case against the petitioner all through to the point of his termination, in a bid to fulfil the expectation of article 159 of the Constitution.
22. In my analysis, it is not disputed that the petitioner was issued with various show letters and allowed to respond to the charges leveled against. Further, the evidence before this court show that the petitioner was invited for a disciplinary hearing which he did attend prior to his subsequent termination. This confirms that the respondents adhered to the provisions of article 47 of the Constitution on fair administrative action and section 41 of the Employment Act, 2007.
23. The clauses of the 1st respondent’s code of conduct and the CBA, said to have been infringed, relate to lack of communication on the progress of the disciplinary case against the petitioner. On the question of delay of the disciplinary process and the continued interdiction of the petitioner, evidence before court show that the petitioner wrote to the 1st respondent inquiring on the progress of his case, and which inquiry elicited a response and subsequently a final decision on the matter.
24. To this end and taking into consideration the evidence before court, I find no violations and/or infringement of the petitioner’s rights and fundamental freedoms, be they constitutional, statutory or both.

Whether The Petitioner Is Entitled To The Reliefs Sought.

25. The petitioner has sought various reliefs, including payment of the half salaries withheld in the period he was on interdiction, reinstatement and damages.



26. Salaries withheld when an employee is on interdiction is only recoverable once they are cleared of the charges leveled against them. For reason that the petitioner was found culpable of the charges against him, and was thus not reinstated back to the service of the 1st respondent, the salaries withheld are not recoverable and the claim fails and is dismissed.
27. The rest of the reliefs are only tenable upon a finding of violation of the petitioner's fundamental rights and freedom, and based on the court's finding on the first issue in this petition, the entire petition fails and is hereby dismissed.
28. In conclusion, I find the petition to be lacking in merit, and is hereby dismissed in its entirety.
29. I make no orders as to costs.
30. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Achieng h/b for Mr. Nyanga for the Petitioner

Ms. Cheruiyot present for the Respondents

Christine Omollo- C/A

