



**Wanyoike & another v Mentor Sacco Society Limited (Petition
E006 of 2021) [2022] KEELRC 13182 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13182 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E006 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

RACHEAL MUTHONI WANYOIKE 1ST PETITIONER

KENNETH MAINA KUNGU 2ND PETITIONER

AND

MENTOR SACCO SOCIETY LIMITED RESPONDENT

JUDGMENT

1. This matter is originated by way of a Petition dated May 16, 2021. It does not disclose any issue in dispute on its face.

The respondent in a replying affidavit sworn on December 10, 2021 rubbishes the Petition and prays that it be dismissed with costs.

2. The Petition and the petitioners case is that vide letters of May 10, 2021 and April 19, 2021 and April 30, 2021 the respondent suspended their services and employment on grounds of marital status. They indeed are man and wife.

The petitioners further case is that they have worked as registry attendant and internal auditor for the respondent respectively for a cumulative period of 15 years.

Their further case;

3. That the respondent through its Chief Executive Officer Mrs. Joyce Waceke Ndegwa has since April 2021 when the 1st petitioner returned to work after her maternity leave been pushing the 2nd petitioner to either dissolve his marriage with the 1st petitioner or force her to resign from employment of the respondent citing unspecified possible conflict of interest.

3. That the petitioners have declined the invitation of the respondents and have instead sought for clarification on the specific provision of the respondent's bylaws, Human Resource Policy



Manual or Code of Conduct on conflict of interests that they are in violate of but their appeals have been declined without explanation.

3. The petitioners posit that the provisions of clauses 16.5 and 68.1 of the Human Resource Policy manual and the respondents By-laws do not explicitly prohibit marriage between employees or director and if at all, this would not apply retro-actively. They many event been complaint by describing their marital status since, 2019.

4.9. That the conduct on the part of the Respondents is unconstitutional as it violates a multiplicity of constitutional values, principles and norms. In particular article 45 (1) and (2) of the Constitution of Kenya which both the Sacco and state are enjoined to protect, respect, observe promote, and fulfill provides;

- (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state.
- (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”

4. This is unconstituted and injurious to the fundamental rights and freedoms of the Petitioners as set out. This is as follows;

5.8. The foregoing acts on the part of the Respondent is a gross violation of articles 27, 41 and 232 of the Constitution of the Republic of Kenya.

5.9. There is real and present danger that the respondent, in dismissing the Petitioner from his employment violation of articles 27, 41 and 232 of the Constitution of the Republic of Kenya.

They pray as follows;

- a. A declaration that the suspension, dismissal or any form of disciplinary/administrative action against the petitioner’s and Administrative action based on their marital status is discriminative hence unconstitutional and null and void.
- b. An order for the respondent to be pay the petitioner’s one month salary in lieu of notice.
- c. The respondent be condemned to pay a 12 month’s salary in compensation for unfair termination of the petitioners.
- d. An order of payment to the petitioners the five months salary in damages for unfair dismissal.
- e. An order for payment of statutory entitlements or terminal benefits under the law.
- f. Payment for annual leave which was earned but not taken.
- g. An order for payment of actual pecuniary loss suffered as a result of termination from the date of termination, to the date of payment;
- h. General damaged for discrimination.
- i. In the alternative, an order directing the respondent to reinstate the Petitioners on enhanced terms.
- j. Costs and interests of this suit at court’s rate.
- k. Any other relief that this honourable court deems fit and just to grant.



5. The Respondent in toto does not take issue with her process of suspending and undertaking disciplinary issues against the petitioners on grounds of their marriage. It is her position that this is proper and procedural and should be left to proceed to its natural conclusion.

The respondent ultimately posits and avers that the petitioners had not met the threshold required to satisfy this court on their claim of discrimination as per article 37 of the Constitution of Kenya, 2010.

The issues for determination therefore are;

1. Whether the petitioners rights under article 27, 41 and 45 were violated.
2. Whether the petitioners are entitled to the relief sought.
3. Who bears the costs of this Appeal.
6. The petitioners in their undated written submissions bring out a case of discrimination and cites various authorities in such support. It is their reliance and submission on section 5 of the Employment Act, 2007 which provides as follows;

“(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

7. He further seeks to rely on the authority of Magare Gikenyi J. Benjamin v County Government of Nakuru & 4 others (2020) eKLR where the court observed thus;

The claimant submitted that his rights were violated when the respondents stopped the payment of his salary together with two of his colleagues and who undertaking study at Moi University but their salaries were reinstated. In the affidavit of the 5th respondent dated April 29, 2019 he avers that there were two doctors Dr Wanini Mary Gathogo and Dr Humphrey Hinga Mwaura whose salary had been stopped and who reported to the 4th respondent to clarify the same and upon confirmation that they were still undertaking study at Moi University the remittance of salary was resumed.

By letter dated October 3, 2018 the Dean School of Medicine, Moi University wrote to the 4th respondent on the status of study for Dr Gathogo, Dr Mwaura and the claimant. Despite the confirmation that the claimant was still undertaking his studies with his two colleagues, his salary was not reinstated with the others. Such amounted to different treatment and discrimination contrary to section 27 of the Constitution.

8. In this they foment a case of discrimination as per article 27 of the Constitution.

The respondent's written submissions dated December 10, 2021 submit a case of non-discrimination of the petitioners. On this she seeks to rely on the authority of Rose Wangui Mambo & 2 others v Limuru County Club & 17 others (2014) eKLR addressed itself to this aspect and in borrowing from the case of Peter K. Waweru v Republic (2006) eKLR defined discrimination as follows;

“...Discrimination means affording different treatment to different persons attribute wholly or mainly to their descriptions by ...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to



persons of their race, age, sex... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”

9. It is their further submissions that their action at suspending the petitioners did not in any way violate the rights under section 27, 41 and 45 of the *Constitution*.

The petitioner’s case overwhelms that of the respondents on a preponderance of evidence. It is clear from the onset that the petitioner’s suspension was based on some amorphous provisions of the 16 and 10.9 of the Code of Conduct and HR Policy manual respectively which are not specific on intent. All disciplinary action on the part of the Petitioners on grounds of their marital status emanating from these provisions amounted to discrimination and I find as such.

10. The 2nd issue for determination is whether the petitioners are entitled to the relief sought. They are.

It is notable from these proceedings that there was no termination of employment of the petitioners, or at all. On the onset of suspension and in a bid to pre-empt any further disciplinary action, the petitioners moved to court seeking interlocutory orders of injunction against the respondents. These were granted and therefore all is at bay. This must therefore be heard in the award of relief sought.

I am therefore inclined to allow the petition and award relief as follows;

- i. That a declaration be and is hereby issued that the suspension, disciplinary action and or any administrative action against the petitioners based on their marital status is discriminative and therefore unconstitutional, null and void.
- ii. That the suspension of the petitioners be and is hereby vacated.
- iii. That each party shall bear their costs of the Petition.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Mr.Kiroko Ndegwa instructed by Triple N W & Company Advocates for the Petitioner/Respondents.

Mr.Kihara holding brief for Mr.Juma instructed by Chege Kibathi Advocates for the Respondent.

