



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 37 OF 2020

(Originally Kisii ELRC Petition No. 2 of 2019)

IN THE MATTER OF: ARTICLES 22, 23, 27, 28, 32, 41, 162 AND 165 OF THE CONSTITUTION

AND

IN THE MATTER OF: CONTRAVENTION AND VIOLATION OF ARTICLES 27, 28 AND 32 OF THE CONSTITUTION

BETWEEN

CHRISTOPHER MUKENYA NYONGESA....PETITIONER

V

BLISS HEALTHCARE LIMITED.....RESPONDENT

JUDGMENT

1. Christopher Mukenya Nyongesa (the Petitioner) was summarily dismissed through a letter dated 24 July 2019. He filed this Petition against Bliss Healthcare Ltd (the Respondent) on 7 October 2019, alleging a violation of his constitutional rights.

2. The Petitioner sought the following remedies:

- i. A declaration that the Respondent (sic) was discriminated.
- ii. A declaration that the Respondent violated the Petitioner's rights under Article 27(4), (5) and 28.
- iii. One month's salary in lieu of notice of termination of Kshs 42,000.00.
- iv. Severance pay calculated at 15 days for every completed year of service being $(15/30 \times 42,000 \times 41/2) =$ of Kshs 94,000.00.
- v. Twelve months compensation for unfair termination $12 \times 42,000 =$ Kshs 504,000
- vi. Unpaid 18 leave days amounting to Kshs 25,200/-.
- vii. Punitive damages for discrimination on the basis of religion.
- viii. Interest on (3), (4), (5) and (6) at court rates from the date of filing the claim until payment in full.
- ix. The Respondent to be ordered to issue a certificate of service under section 51 of the Employment Act.
- x. Any other orders and/or reliefs as the Court deems fit.
- xi. Costs of this Petition.

3. Upon service of the Petition, the Respondent filed a replying affidavit sworn by its General Manager and Grounds of Opposition on 22 July 2020 contending:

i. THAT the Petition herein is fatally and incurably defective as it offends both the mandatory provisions of Order 2 Rule 16 of the Civil Procedure Rules, 2010 and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 and it, therefore, ought to be dismissed.

ii. THAT the Petition is frivolous, an abuse of the court process and is devoid of merit and ought to be dismissed since the Petitioner is seeking to enforce private contractual rights flowing from a contract of employment.

iii. THAT the Petition is frivolous, an abuse of the court process and is devoid of merit and ought to be dismissed since there has been no demonstration of violation of any fundamental freedom and/or right as envisaged under the Bill of Rights enshrined under the Constitution of Kenya, 2010.

4. The Petitioner filed a Supplementary Affidavit on 22 October 2020, and on 24 November 2020, the Court directed that both the Objections and the Petition be taken together.

5. Instead of filing submissions as directed, the parties filed a consent in the following terms:

i. By consent, the directions issued on 24th November 2020 be and hereby vacated.

ii. By consent, parties to produce and call evidence (viva voce evidence), including witnesses and

iii. By further consent, the date issued by this Honourable Court for judgment i.e. 3rd March 2021, be a mention date for directions on the hearing of the Petition.

6. The Court has considered the material placed before it and come to the conclusion that the consent should not be adopted as an order of the Court, and further that the Petition be struck out for the following reasons.

7. One, the Petition does not raise any constitutional questions but is rather a private law claim, as can be seen from the reliefs sought therein (see *Uhuru Muigai Kenyatta v Nairobi Star Publication Ltd* (2013) eKLR citing *Minister of Home Affairs v Bickle & Ors* (1985) L.R.C. Cost. 755 where the Court stated

It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all..... Courts will not normally consider a constitutional question unless the existence of a remedy depends on it, if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the declaration of rights).

8. Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 also contemplates raising allegations of constitutional violations in a Statement of Claim. This should be seen within the context of disputed facts, which require proof and interrogation.

9. The Petitioner, therefore, invoked the Constitution needlessly.

10. Two, the cause of action advanced by the Petitioner accrued with his summary dismissal on 24 July 2019, and he is still well within the limitation time prescribed by section 90 of the Employment Act, 2007 if he desires to commence an action in the normal way.

Conclusion and Orders

11. For the above reasons, the Petition is struck out with no order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 3rd day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner Kiroga Kuria & Co. Advocates

For Respondent KRK Advocates

Court Assistant

Chrispo Aura