



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E009 OF 2020

IN THE MATTER OF ARTICLES 1, 2, 19, 28 AND 41 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLES 19,25,27,28 AND 41 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 35,36,45,47 OF THE EMPLOYMENT ACT, 2007

SOS.....PETITIONER

VERSUS

CWRL.....1ST RESPONDENT

DH.....2ND RESPONDENT

CABINET SECRETARY INTERIOR AND COORDINATION

NATIONAL GOVERNMENT..... 3RD RESPONDENT

THE INSPECTOR GENERAL OF POLICE....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

1. The Petition was filed on 22/7/2020 and amended on 27/1/2021 seeking an order in the following terms: -

- i. A finding and a declaration that the Petitioner was an employee of the 1st Respondent, notwithstanding the 1st Respondent failing, neglecting and or refusal to issue the petitioner with a contract in writing as required under Section 9 of the Employment Act.
- ii. That the Respondent failure, refusal, neglecting to issue the petitioner with a contract of service in writing is a contravention of Article 41 of the Constitution, Article, 3 of International Labour Organization Convention (C064- Contracts of Employment (*Indigenous Workers*) Convention, 1939 (No. 64) and Section 9 of the Employment Act and is liable in damages thereof.
- iii. That the manner and basis of removal from his employment with the 1st Respondent offends Articles 19, 25, 27, 28 and 41 of the Constitution and amounts to Unfair Dismissal within the meaning of Section 45 of the Employment Act.
- iv. That the 1st Respondent failed, neglected and or refused to provide a safe working environment for its employee which it was the 1st Respondent duty to do so thereby by its acts and omission and or commission exposed the Petitioner to sexual harassment, violation of the Petitioner’s person and exposure to degrading, dehumanizing treatment in violation of Article 28 of the Constitution.

v. A finding and a holding that the 2nd Respondent did sexually harass and or physically abuse the person of the Petitioner including but not limited to subjection the Petitioner to torture, degrading, dehumanizing and indecent treatment, and is liable in damages thereof.

vi. A finding and a holding that the conduct of 3rd and 4th Respondents allowing, and or failing to prevent deportation of 2nd Respondent without him first facing trial here in Kenya is a denial of justice contrary to Article 48 of the Constitution of Kenya, 2010 on the part of the petitioner and should be liable therefore.

vii. Costs of this Petition and interest thereon.

FACTS OF THE PETITION

2. That the Petitioner was employed by the respondent on or about the 1st of October, 2019 as a waiter at a monthly salary of Kshs. 12,000. That the petitioner worked continuously until the 2nd February, 2020 when he was locked out of the work place by the 1st respondent.
3. That the petitioner testified that he had an oral contract of employment.
4. That the petitioner was enrolled with National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) by the 1st respondent and was issued with Food Handling Certificate by the Nairobi City County (**Public Health Department**) pursuant to a letter of request by the 1st respondent to have the petitioner examined.
5. That the 2nd Respondent, in the course of employment pursued the petitioner severally seeking to have anal sex with him but the petitioner ignored him upon which the 2nd respondent threatened the petitioner with dire consequences.
6. That on or about October, 2019, whilst on duty at around 8pm, the 2nd respondent attacked the petitioner and hit him on his head with a metallic cooking spoon. The petitioner suffered acute pain. Later the petitioner experienced scary dreams at night about the sexual overture and attack by the 2nd respondent.
7. That on another occasion, the 2nd petitioner attacked the petitioner with kicks without any provocation. The petitioner suffered pain and injury at the pelvis and struggled to shield his private parts from the kicks by the 2nd respondent.
8. That again on 1st February, 2020, whilst at work, the 2nd respondent attacked the petitioner with a wire rod. The 2nd respondent cornered the petitioner and ordered him to lean against a bench to whip him or get thrown out of the compound dead.
9. That the petitioner obeyed the orders of the 2nd respondent and the 2nd respondent whipped him twice as the petitioner pleaded with him not to break his backbone.
10. That on the 2nd February, 2020, the petitioner reported the assault by the 2nd respondent at Kileleshwa Police Station under Occurrence Book (OB) number 32 of 2/2/2020 and proceeded to seek medical attention at Kawangware Health Centre near his residence.
11. That the assailants including the 2nd respondent were arrested and locked up at Kileleshwa Police Station on 2nd February, 2020 only to be curiously released from custody without being charged before a Court of Law contrary to the petitioner's Legitimate expectation that persons who commit a crime should be charged and prosecuted.
12. That after reporting the matter at Kileleshwa Police Station the Petitioner proceeded to work but was locked out and told that he no longer worked for the 1st respondent any more.
13. That on 7/2/2020 the petitioner collected a P3 form and was examined by a Government Doctor at Nairobi area.
14. The facts set out in the petition are reiterated in a supporting affidavit of **Victor Kage Imbwenye** who deposes that he worked for the 1st respondent as a waiter and knew the petitioner between November, 2019 and February, 2020 when the petitioner worked with him as a waiter. That the 1st respondent employed six (6) waiters including the petitioner and himself.
15. That he witnessed the 2nd respondent physically assaulting the petitioner on three occasions. That on the first occasion the 2nd respondent hit the petitioner with a metallic cooking/serving spoon in the kitchen. That the incident followed an ice cube scooped by the petitioner falling down and the 2nd respondent sprang and hit the petitioner on the head while shouting in a language the witness did not understand.
16. The petitioner appeared to suffer a lot of pain and was unable to work. The petitioner was dizzy and produced a buzzing sound accompanied with heavy sweating. That the incident occurred around 8 p.m in the evening.
17. The second incident involved the 2nd respondent attacking the petitioner with kicks while the petitioner was parking his bicycle. That the petitioner limped off while holding his hip and went to the gents to change into the working uniform.

18. The petitioner pleaded with the 2nd respondent to stop assaulting him or he would occasion him severe or fatal injuries.
19. The third incident happened at the entrance of the 1st respondent's restaurant. The witness saw the 2nd respondent holding a black electric cable. That he heard the sound of a whip followed by loud laughter. The witness saw the petitioner lying down writhing in pain. The witness used his phone to record the incident and shared the contents with the petitioner.
20. The witness recorded a statement at Kilimani Police Station and submitted the video to the police.
21. The witness stated that he is aware of other two colleagues who were assaulted on diverse dates by the 2nd respondent but were prevailed upon to abandon their claim.
22. That the petitioner was hounded and harassed out of employment.
23. The Supporting Affidavit is dated 16th February, 2020 and sworn on the same date.
24. The petitioner filed a supporting affidavit sworn on 16th July, 2020 reiterating all the facts of heinous assault and sexual advances directed to him by the 2nd respondent from the 2nd week when he started working for the 1st respondent.
25. Attached also to the petition is a Certificate of Electronic record pursuant to Section 106 B (4) of the Evidence Act Cap. 80 Laws of Kenya which was downloaded on 9/7/2020. The video is titled "**Employer Brutality Restaurant Chef canes Waiter.**" The video was availed on You tube <https://www.Youtube.com>.
26. On the same day the petitioner downloaded another video titled:-

“DCI Arrests four Chinese Nationals at Chez Wou Restaurant in Kileleshwa for canning a Kenyan Waiter.

The video was also availed on You Tube on <https://whow.Youtube.com>.

27. The petitioner swore an affidavit filed before Court attesting that he transcribed the video records into a compact disc using HP computer S.N. 00186,1531, 533, 816. The Certificate filed before Court is dated 16th July, 2020.
28. Also produced by the petitioner is a copy of the Occurrence Book (OB) Number 32 from Kileleshwa Police Station dated 2/2/2020 and copies of National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) cards for the petitioner.
29. The petitioner also attached to the petition medical reports from Kawangware Health Centre dated 3/2/2020 where he testified he was attended to for the injuries suffered after the assault on 2/2/2020.
30. The petitioner lays the legal foundation of the amended petition to include violation of Articles 2, 19, 20, 21, 28, 29, 30 41, (2) (b), 47 and Sections 35, 36 & 45, of the Employment Act, 2007 and seeks remedies for the violation of the petitioner's human rights and fundamental freedoms as extensively set out in the amended petition and supporting affidavit and for compensation in terms of Section 49 of the Employment Act, 2007.
31. In particular it is alleged that the 1st, 3rd, 4th & 5th respondents violated the rights of the petitioner by allowing and or not preventing deportation of the 2nd respondent and other assailants before facing justice before the Kenyan Courts. That this amounted to condonation of the injustices meted on the petitioner by the 2nd respondent and was a denial of justice to the petitioner in violation of Article 48 of the Constitution.
32. That the 1st respondent compounded the violations of the petitioner by the 2nd respondent by not creating a favourable working environment for the petitioner but as a matter of fact condoned; concealed; failed to stop and finally victimized the petitioner for daring to report the inhumane treatment meted on him by a senior manager of the 1st respondent.
33. That the Kenyan criminal justice system failed the petitioner even after the incidents in question were highly published in both regular and social media.
34. That the respondents therefore jointly and separately contributed to the blatant infringement of the human rights and fundamental freedoms guaranteed in the Constitution in Articles 27(5) 28, 29(c) (d) (e) (f); 30(1), 41(2) (b) and 47(1) of the Constitution, 2010 wherefore the petitioner be awarded the remedies set out in the petition.

Replying Affidavit by the 3rd 4th & 5th Respondents

35. The 1st and 2nd respondents did not file any replying affidavit and therefore all allegations of fact made against them by the petitioner are not contradicted.
36. Only the 3rd, 4th & 5th respondents filed a replying affidavit sworn to by Corporal Noah Kiplagat on 16th November, 2020 in which he deposes that he is a Director of Criminal Investigations (DCI) officer attached to the Directorate of Criminal Investigation Kilimani sub-

County, conversant with the facts in this matter and therefore competent to swear this affidavit.

37. That on 2nd February, 2020 a report was made at Kileleshwa Police station by the petitioner vide OB No. 32/2/2020 wherein he alleged that he was assaulted by the owners of the 1st respondent.

38. That Director of Criminal Investigations took up the matter and commenced investigations and during investigations, it was established that other offences not limited to assault might have been committed by the suspects.

39. That on 9th February, 2020, four suspects including the 2nd respondent were arrested and the office of Director of Criminal Investigations sought 21 days' custodial orders vide Milimani Law Courts Misc. Application No. 439 of 2020 to detain the four suspects to enable Director of Criminal Investigations complete investigations and the Court ordered that the four be remanded at Kilimani Police Station for 15 days.

40. That in the course of investigations, the four suspects filed for revision of the orders of detention at the High Court vide Criminal Revision No. 22/2020 dated 26th February, 2020.

41. That the High Court ruled that the four suspects be repatriated to their country of origin.

42. That in obedience of the Court Order, the four suspects including the 2nd respondent were escorted to the Deputy Director, Immigration Services at Jomo Kenyatta International Airport for repatriation as directed by the Court.

43. That the said deportation was lawfully done therefore pursuant to a Court order and in pursuance of the 3rd and 5th respondent's Constitutional and Statutory mandates aimed at ensuring service to the populace.

44. That the petition is misconceived and does not disclose any cause of action against the 3rd to 5th respondents within the meaning of Article 162(2) of the Constitution of Kenya, 2010 read with Section 12 of the Employment and Labour Relations Court Act, 2011 and the Employment Act, No. 11 of 2011.

45. That the petition does not disclose any employment dispute between the petitioner and the 3rd, 4th and 5th respondents.

46. That there is no nexus established between the complaint made before Court with the 3rd to 5th respondents.

45. That the petition raises no Constitutional issue, for determination and amounts to abuse of Court process.

47. That the same be dismissed with costs.

Determination

48. The petitioner and the 3rd to 5th respondents filed written submissions and the issues for determination are as follows: -

(i) Whether there is a cause of action disclosed against the 1st and 2nd Respondents.

(ii) Whether there is a cause of action disclosed against the 3rd to 5th respondents.

(iii) Whether the petition has merit.

(iv) What reliefs are available to the petitioner?

49. The 1st and 2nd respondents did not file any response to the amended petition. The petitioner has pleaded that the 1st respondent was his employer and the 2nd respondent his senior colleague at work.

50. The pleadings in paragraphs 3 and 4 of the petition on the status and domicile of the 1st and 2nd respondents having not been controverted leaves Court with no choice but to make a finding of fact that the 1st respondent was the employer of the petitioner and the 2nd respondent a senior colleague of the petitioner.

51. The testimony by the Petitioner set out in the petition and supporting affidavits is not controverted. This being the case, the petitioner has established a lawful cause of action against the 1st and 2nd respondents. The only issue left is to determine if the petitioner has proved the case against the 1st and 2nd respondents on a balance of probabilities and what reliefs are available to the petitioner against the 1st and 2nd respondents.

52. The case against the 3rd to 5th respondents is different. It is founded on allegations of omission by the state agencies to ensure that the proprietors of the 1st respondent and the perpetrators of alleged human rights and fundamental freedom violations were not deported out of the jurisdiction of Kenyan Courts before they faced criminal prosecution with regard to the criminal offences reported to the police by the petitioner.

53. The respondent has in the replying affidavit placed the blame for the premature deportation at the door step of the High Court, which Court curtailed ongoing investigations of the offenders by ordering the 3rd respondent to deport the offenders before completion of investigations despite the 4th and 5th respondents having secured orders from the magistrate Court to have the offenders placed in remand custody for a period of 15 days to allow investigations to be completed. The respondents therefore state that no cause of action based on alleged omission has been established by the petitioner against the 3rd to 5th respondents, who are part of the Executive and their lawful actions to ensure that the petitioner received justice were curtailed by a lawful Court order which they were bound to obey.

54. The petitioner did not file a supplementary affidavit to deny that indeed upon the petitioner filing a complaint of sexual harassment and assault vide Occurrence Book (OB) No. 32/2/2020 at Kilimani Police Station, the 4th and 5th respondents took all necessary steps to get the offenders arrested, charged and detained in custody pending completion of investigations. The petitioner has not disputed the fact attested to by the respondents that it is the High Court that ordered deportation of the culprits before the case against the offender could be prosecuted to finality.

55. This Court finds that the Petitioner has not established any cause of action against the 3rd to 5th respondents having not enjoined the judiciary to the suit. There is no evidence adduced by the petitioner to prove any case of violation of human rights and fundamental freedoms of the petitioner by the 3rd to 5th respondents.

56. The Court therefore dismisses the suit as against the 3rd to 5th respondents with no order as to costs.

57. As regards the 1st and 2nd respondents the evidence adduced by the petitioner is overwhelming as regards the devious atrocities committed repeatedly by the 2nd respondent against the petitioner. It goes without saying that the 1st respondent not only fostered an enabling environment for the inhumane, cruel and demeaning assaults on the petitioner to take place continuously but the 1st respondent had the audacity to summarily dismiss the petitioner, without following due process for daring report to the police despicable violations of his human rights and fundamental freedoms chronolized in this suit.

58. The Court firstly finds that the summary dismissal of the petitioner was in violation of Section 36, 43 and 45 of the Employment Act and the claimant is entitled to compensation for the unlawful and unfair summary dismissal.

59. Furthermore, the 1st and 2nd respondent are guilty of perpetuating the egregious atrocities against the petitioner in violation of Section 27, 28, 29(a) (c) (d) (e) and (f); 30(1) 41(2) (b) and 47(1) of the Constitution of Kenya, 2010 in that the claimant was not only sexually molested, and physically assaulted continuously in the course of duty, he was subject to psychological torture by the 2nd respondent, kept in confinement whilst being whipped and was treated and punished in a cruel, inhuman and degrading manner. The petitioner was in addition cajoled to engage in anal sex with the 2nd respondent and was threatened, verbally abused and given corporal punishment upon resisting the advances by the 2nd respondent. The Petitioner testified that he suffered nightmares and hallucinations due to this physical and psychological assault on his person by the 2nd respondent which was condoned and not stopped by the 1st respondent.

60. The 1st respondent is vicariously liable for all the treatment meted on the petitioner by the 2nd respondent as per the **Salmon Test** which provides: -

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master or (b) a wrongful and an authorised mode of doing some act authorized by the master.” Salmon on Torts 1st edition page 83.”

61. It is the Court’s finding that the 1st and 2nd respondents used unlawful and unconstitutional methods of punishing staff, including the petitioner which mandate was given to the 2nd respondent by the 1st respondent.

62. In **Teachers Service Commission –vs- WJ and 5 others (2020) eKLR** the Court of Appeal relying on the case of **Lister –vs- Hasley Hall Limited** held that “if there is a close connection between the unauthorized conduct and the employment, that act or omission will be deemed to have been committed during the cause of employment and vicarious liability will lie against the employer.

63. The present case falls within this category of conducts and omissions authorized or otherwise which are so closely connected to the employment that they are deemed to attract vicarious liability against the 1st respondent.

64. It is the Court’s finding and declaration that the 1st and 2nd respondents violated the petitioner’s human rights and fundamental freedoms under Article 27(5); 28, 29(c) (d) (e) and (f) 30(1) 41(2) (b) and 47(1).

65. In **NML –vs- Peter Petrausch [2015] eKLR**, Hon. Rika, J. awarded the claimant Kshs. 1,200,000 in general damages for sexual harassment. In **JWN –vs- Securex Agencies (K) Limited [2018] eKLR** the Court considered the claimant’s humiliation, hurt feelings, loss of self-respect, loss of dignity, loss of self-esteem, confidence and the subsequent vulnerability at work and family levels to award Kshs. 1,000,000 in general damages. In the Teachers Service Commission case (supra) the Court of Appeal upheld the trial Court’s award of General damages of Kshs. 2,000,000 and Kshs. 3,000,000 to the 1st and 2nd respondents respectively.

66. The petitioner has submitted that an award of Kshs. 5,000,000 in general damages would suffice in the present case for the extreme human rights and fundamental freedoms, violations, articulated by the petitioner as set out herein before in the judgment.

67. The petitioner suffered extreme cruelty, humiliation, psychological trauma; pain and suffering; loss of self-esteem as a result of the

continuous sexual harassment, corporal punishment; verbal abuse and confinement whilst being humiliated in front of co-workers. The petitioner had hallucinations and nightmares as a result thereof. He suffered extreme indignity and loss of self-esteem at the hands of the 1st and 2nd respondents. The Court awards the claimant General damages in the sum of Kshs. 3,000,000 for these human rights and fundamental freedom violations.

68. With respect to the unlawful loss of employment the claimant had served the respondent for about three (3) months. The respondents summarily dismissed the petitioner from employment for no valid reason, without notice and without payment of compensation for reporting the human rights and fundamental freedoms violations that were meted on him by the 2nd respondent from the second week of his employment to the time of dismissal. As was stated in **Fredrick Saundu Amolo –vs – Principal Namanga Mixed days Secondary School and 12 others [2014] eKLR**, this summary dismissal did not meet the requirements of substantive and procedural fairness in violation of Sections 36,41 and 45 of the Employment Act, 2007.

69. The claimant lost prospects of employment and lost his source of legitimate income as a result of the indignity meted on him by the respondents and for exercising his right to report the employer to the police. The petitioner did not contribute to the loss of his employment. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act, 2007.

70. Considering all these factors above, and the fact that the Court has also awarded the claimant damages for the human rights and fundamental freedom violations meted on him by the respondents, the Court awards the claimant the equivalent of six (6) months' salary in compensation in the sum of Kshs. 12,000 x 6) – Kshs. 72,000.

71. In the final analysis, judgment is entered in favour of the petitioner against the 1st and 2nd respondents jointly and severally as follows: -

- a. General damages in the sum of Kshs. 3,000,000 for violation of the Petitioner's human rights and fundamental freedom under Article 27(5) 29(c) (d) (e) and (f) 30(1) 41(2) (b) and 47(1).
- b. Kshs. 72,000 in compensation for the unlawful and unfair summary dismissal.
- c. Total award Kshs. 3,072,000
- d. Interest at Court rates from date of Judgment till payment in full.
- e. Costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Musyoki Mogaka & Co. Advocates for the Petitioner

Abdullah and Associates for the 1st and 2nd respondents.

Senior State Court – Mercy Kinyua for 3rd to 5th Respondeds

Ekale – Court Assistant.